The Unwelcome Watchdog

by Neil Robertson, Q.C.



It is said that dogs are man's best friend, but their bark, perhaps deterring wrongdoers and protecting the master's person and property, is not always welcomed as a warning. The barking dog may just as often be heard as an undesirable annoyance.

This article considers the situation city attorneys and city solicitors face when those with authority to instruct counsel seek legal support for questionable activity or to discourage reporting of illegal or unethical conduct in local government. The article discusses the duties of lawyers in general, the special role of public counsel, and whether counsel should try to serve as the "corporate conscience."

Duty to the Client

Lawyers have three basic duties to clients: competence, confidentiality, and loyalty.

Competence requires that lawyers take on only that work which they have the skill and time to perform effectively. Competence also requires that lawyers keep learning throughout their careers to maintain and enhance their legal skills and knowledge.

Confidentiality requires the lawyer to hold in confidence any communications with the client for the purpose of providing legal advice or representation. The lawyer cannot divulge these communications except upon the direction of the client or the court. Legal privilege is near absolute, admitting only a few exceptions. One exception is the crime-fraud exception, which in Canada may only be applied by the court. This may be a heavy burden to bear when the lawyer is aware of undetected wrongdoing, but that personal cost is justified by the imperative of assuring the public's expectation of confidentiality.

Loyalty requires that the lawyer act in the best interests of the client, avoiding any conflict of interest and placing the client's interests ahead of personal interests. While the client is entitled to zealous representation, the client is not entitled to direct the lawyer beyond proper instructions. The lawyer must remain mindful of his or her other duties, and decline any instruction that would take him or her outside the limits of the law or professional ethics.

The Role of General Counsel

General counsel, whether corporate or public, should have two functions: a service role; and a guardian, or watchdog, role. In-house counsel may also perform non-legal duties, in which case they must carefully delineate their legal and non-legal work.

The service role involves providing legal advice, services and representation, as instructed by the client or its authorized representative. In providing legal services in a corporate or public service setting, counsel must clearly identify and distinguish between the client and persons with the authority to instruct counsel.

The guardian, or watchdog, role involves monitoring legal compliance and reporting non-compliance to the proper authority within the corporation or public service. If reports of unlawful activity are not acted upon, counsel must move up the chain to the highest authority. Even if no action is taken, counsel may not usually report outside of the organization, except to the auditor, who is normally engaged by the highest authority and to whom in-house counsel should be both required and authorized to speak frankly. Ethical organizations welcome the watchdog role and expect counsel to report ethical, as well as legal, violations.

A prime duty of any lawyer is to protect the client. Unlawful or unethical activity within or by the organization is not only wrong, but puts the organization at risk of serious harm. When an organization acts improperly, it is rarely for the benefit of the organization, although it might be presented as such. More usually, such improper action is taken at the behest and for the benefit of an individual or clique in temporary control of the organization, which put their short-term personal interests ahead of the long-term good of the organization. In these cases, counsel may find a conflict between their duty to protect the client and the right of those in authority to instruct counsel.

Codes of Professional Conduct

A review of the Canadian Bar Association's *Code of Professional Conduct*[1] and the American Bar Association's *Model Rules of Professional Conduct*[2] reveal relatively few provisions specifically directed to in-house counsel in public or corporate practice. This is, perhaps, not surprising, given the dominance of lawyers in private practice. Still, these codes do provide guidance. In-house counsel may, by virtue of their special role and the protection offered by legal privilege, be more aware of their client's business, including corporate wrong doing, than other employees. But the ethical restraints placed on lawyers to respect legal privilege will also limit the ability of in-house counsel to disclose corporate wrongdoing outside the organization. If internal reporting does not produce change, the last resort for in-house counsel may be to resign.

Challenges of Corporate and Public Practice

Corporate and public practice can present some particular challenges to in-house counsel. In-house counsel may have only one client, which is also their employer. This exclusive relationship has both advantages and potential pitfalls. Some of the pitfalls have ethical implications.

To be effective, counsel must always maintain a professional relationship with the client. The lawyer-client relationship, like other professional relationships, should not become dependent or servile. The seminal case recognizing the application of solicitor-client privilege to lawyers employed by a government is the 1972 judgment of Lord Denning of the English Court of Appeal in *Alfred Crompton v. Custom and Excise Commissioners.*[3] It is interesting to note that the trial judge had declined to recognize the existence of privilege, in part because of his conclusion that the employment relationship excluded the independence necessary to the solicitor-client relationship. Lord Denning rejected this traditional view, observing that times had changed from when lawyers were almost entirely engaged in private practice. He concluded that a professional relationship remained possible for employed lawyers, as long as they were mindful of the primacy of their professional duty:

> They are, no doubt, servants or agents of the employer. For that reason, the judge thought that they were in a different position from other legal advisors who are in private practice. I do not think that this is correct. They are regarded by the law as in every respect in the same position as those who practice on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges.[4]

In-house counsel may have only one client, which is also their employer. This exclusive relationship has both advantages and potential pitfalls.

The concern expressed by the lower court was not entirely misplaced: there are potential dangers for in-house counsel that can erode or impair the necessary professional relationship that should prevail. In-house counsel may over-identify with the client, reducing the opportunity to provide the objective advice to which the client is entitled, whether welcome or not. Counsel themselves may become too familiar and allow personal relationships to take priority over professional duty. Counsel who confuse personal with professional loyalty may provide over-zealous representation of their client in dealings with other lawyers or adjudicators. Lawyers who take on non-legal business responsibilities may find their time and attention diverted from their primary professional duty, or allow business considerations to cloud their professional judgment.

Long service in corporate or public practice has significant benefits, including development of expertise and knowledge of corporate history, but it may also have a downside. The old saying, that "familiarity breeds contempt" can work both ways. In-house counsel may become taken for granted and lose their ability to influence the organization, or, conversely, counsel may lose respect for the client or its officers. Either way, the professional relationship that should prevail may be impaired.

The client or those in authority may become complacent about legal cautions. As my principal and former City Solicitor, Leslie Shaw, once said to me, "It is both a blessing and a curse the City is challenged so rarely." The blessing was that we were not obliged to respond to as many legal challenges as we might otherwise have; the curse was that improper actions by civic officials were less likely to be revealed, publicly sanctioned, and corrected. Over time, some civic staff or elected officials might be encouraged to believe their lawyers' warnings were overstated. An absence of accountability encourages a sense of impunity. The lack of challenge encouraged those disposed to believe they could do whatever they wanted, however they wanted, rather than act in strict accordance with the law.

Elected officials and administrators who do not either understand or accept the traditional models and ethics may criticize in-house lawyers as obstructive, when the lawyer properly insists that government and business clients and their employees conform to the law. In-house counsel may be called upon

continued on page 16



Neil Robertson, Q.C. is an IMLA Local Government Fellow and IMLA Vice-President for Canada. He worked in the City Solicitor's Office of Regina, Saskatchewan for 25 years, including as City Solicitor, and is currently Legal Counsel to the Regina Police Service. This article is condensed from a paper available from the author at nrobertson@police.regina.sk.ca.

 continued from page 15

to serve as "enablers," finding creative ways to do whatever the corporate leaders want. (The term "enabler" is interesting, given its use in addiction counseling to describe those persons who unwittingly enable alcoholics and drug abusers to continue their self-destructive habits.) The lawyer who is pressed to be too creative or to acquiesce in unlawful or unethical corporate acts or omissions should read again the solemn oath he or she swore when called to the Bar.[5]

Political or administrative authorities who do not understand their role or that of a professional adviser may demand personal loyalty from employees, including counsel. Such expectations are incompatible with both the lawyer's oath and the duty of loyalty to the client. The exclusive employment relationship may create a sense of financial dependence in which the in-house counsel becomes afraid to provide frank advice or decline improper instructions from the client or its officers, for fear of losing one's only job and income, or jeopardizing other benefits.

If those with authority to instruct are themselves ethically challenged, they may seek legal cover for questionable activities. There will always be some lawyers who will provide the opinion sought, but you need not be one. Counsel who are insecure in their position may seek to curry favour by providing the opinions the client wants and doing whatever they instruct, rather than giving the opinion the client needs and deserves. A lawyer's duty is to provide professional services to the client, not to be a collaborator in corruption or a co-conspirator in wrongdoing.

Unsolicited opinions warning against actions or proposals that are unlawful or unethical may be ignored or met with hostility. An unstated policy of "don't ask, don't tell" may prevail, in which the client does not seek advice and the lawyer is not encouraged to provide it. All that is required is to turn a blind eye. But sins of omission are no less than those of commission. When I succeeded Mr. Shaw as the City Solicitor, he said to me, "You might get fired. But if you do, let it be for doing your job, not for not doing it."

Corporate Conscience

The lead editorial in one issue of *In-House Counsel* was titled "In-house counsel must act as the company moral compass."[6] Should in-house counsel presume to serve as the corporate conscience?

A lawyer's duty is to provide professional services to the client, not to be a collaborator in corruption or a co-conspirator in wrongdoing.

There are persuasive reasons not do so. First, general counsel may be no more (and perhaps less) qualified than other persons in the organization to provide ethical advice. May it not be a manifestation of ego and arrogance for lawyers to presume they are qualified to tell others what is ethically right and wrong, as opposed to lawful? Admission to the Bar does not make one a morally superior human being. Lawyers are employed to provide a specialized professional service: while they should have expertise in the law, ethics is a different, even if related, field. Second, ethical advice may be considered business or policy advice and, therefore, outside the scope of solicitor-client privilege, potentially imperiling the confidential relationship. Third, the lawyer's own position may be imperiled if the ethical advice is unwelcome. No one likes a "moral scold" or being told they are wrong, especially where the advice entails a moral judgment. And the only difference between the lauded corporate conscience and the derided moral scold may be whether the advice is welcomed or unwanted.

Socrates warned that the man who intends to speak out against injustice in the state must do so from a private, rather than public, position, if he is to survive even a short time. What ethical advantage is gained by the self-sacrifice of legal counsel? Enlightened self-interest is not synonymous with selfishness.

Certainly, if counsel is to have continued influence within the organization, counsel must tread a careful path to maintain credibility with, and the confidence of, the client and its officers. Is it not enough for lawyers to advise on the law only and limit any ethical role? Is it not enough to try to serve as a good example, rather than take on the perilous role of the corporate conscience?

Yet, despite these good reasons not to set oneself up as "the company moral compass," there may still be compelling reasons for general counsel to go beyond the provision of purely legal advice and try to serve as a moral restraint against public and corporate wrongdoing. Given the harm inflicted when government officials and powerful business corporations lose their moral sense, it seems evident that someone should. Of course, all corporate and public service leaders should promote and practice ethical behavior as a matter of course. But history and current experience inform us that this is not always the case. In an ethical organization, this may not be an issue. It is when things are going wrong that general counsel is challenged to act. If general counsel cannot step forward and speak out, then who else will or can? The saying attributed to Edmund Burke is apropos: "All that is necessary for the triumph of evil is that good men do nothing."

Should more be expected of public and corporate counsel than of those in private practice? Prosecutors are subject to more ethical restraints than defence counsel, based on their public function. The rationale for the "zealous advocate" model of practice seems more acceptable where the lawyer is required as an equalizer, championing the rights of the individual who might be in conflict with other individuals of equal status, or with more powerful institutions. The lawyer in public and corporate practice generally serves an organization that is part of the prevailing power structure (legal, political, economic, or some combination). In favouring a "moral agent" model of practice, public or corporate counsel may provide a further check against abuses of institutional power. Government departments and public agencies usually have significant institutional strengths which give them an advantage over the

individual. Further, they are established by legislation to serve some public purpose. As statutory creations that enjoy the benefit of the law, it does not seem unreasonable to expect their scrupulous adherence to the law.

Lawyers in corporate and public practice are in a unique position. Lawyers often have the most formal education of those within the organization. The development of critical faculties through education and the practice of law may make lawyers more likely to see error. In-house counsel are expected to provide advice to help managers and leaders fulfill their responsibilities, and this duty to advise comes without a responsibility to decide. This position can allow for a different and more detached perspective. The professional duties of, and the ethical restraints on, lawyers serve as both a sword and a shield for lawyers in their practice, which means of defence other employees do not possess. If counsel will not provide ethical advice, who else in the organization is better positioned or will do so?

The following words of President Lyndon Johnson are inscribed on the wall of the Presidential Library in Austin, Texas: "A President's hardest task is not to do what is right, but to know what is right."

Both tasks can be hard. But, before people in authority can do what is right, they must first know what is right, and sometimes, that's not clear. The burden of decision-making can place serious pressure on a manager, board, council, or elected official. That pressure may cloud judgment or obscure the full implications of possible decisions. Mature decision-makers want the benefit of sound, objective advice. As long as the decision-maker and the professional adviser respect each other's different role and duty, advice on both the legal and ethical implications should ensure the final decision is better for being better informed.

The challenge for the lawyer is to be one of the influential few who support ethical behaviour in their organization. If ethical advice is provided, it should be offered with humility, not with the air of moral superiority. There may come a time when counsel must decide how hard to press unwelcome advice or whether to resist improper instructions. In that case, counsel must weigh the cost of following their conscience against the consequence of moral compromise.

The Consequence of Compromise

One would like to think that in-house counsel would never be pressured to provide support for questionable actions, especially in public practice. Unfortunately, with bad leadership, this can occur. Although respect for the law should be axiomatic and the public good should drive decision-making in government, these assume good leadership exists. If you have the misfortune of facing these pressures, you must weigh the consequence of compromise against the cost of commitment to your moral convictions.

The process of compromise can be insidious: people are rarely directly asked to do wrong. Instead, unethical leadership may seek to sway people over to their side through a process of corruption by co-option. Ethical awareness is required to recognize and resist these pressures from the start. An atmosphere of subtle intimidation may prevail, and pressure may be brought to bear on subordinates to gradually compromise their integrity. For example, employees may be asked to prepare or sign reports supporting forecasts or findings for which there is no real foundation. Staff may be asked to show their support for "the team" by attending politicized functions, or accepting benefits from, or providing preferential treatment to, private interests that have influence with the political or administrative leaders.

Once one begins to travel down this road, it may be difficult to stop. The consequence of continual ethical compromise can be the erosion of personal moral stature: simply, when you act in opposition to your personal values, you betray yourself. Most things we lose can be replaced. Self-respect, once lost, is hard to recover. Money, status, power, and popularity are all attractive and useful, but they can become prisons if valued too high. There are more important things.

French philosopher Jean-Paul Sartre famously wrote "I am condemned to be free." People have choices, even though none may be desirable. Doing nothing may itself be a decision. Ultimately, you may have to decide whether to bend or break; the choice might depend on your political adroitness or the elasticity of your ethics.

The Cost of Conscience

It is easy to do what you believe is right when there are no adverse consequences. But what about when doing what you believe is right may involve significant personal cost?

When I began my career, my father told me that life was not always fair. If I always expected justice, I would be disappointed. He added that this reality did not excuse contributing to injustice. We should seek justice, but accept that we will sometimes find and experience injustice. That seemed to me then, and now still, to be good advice.

There is a saying that "no good deed goes unpunished." There is sometimes a cost for keeping faith with your moral convictions. It is natural and desirable to avoid harm, when possible. But, in some situations, there may be no good outcome available. You must then choose from the possible alternatives, evaluating and accepting the cost of your choice. Even then, you may underestimate the cost of acting in accordance with your moral convictions. But there is also the peace of mind that comes from following your conscience, and, whatever the immediate cost, that can be a lasting reward.

If you are not prepared to accept the cost, then your personal values may be moral preferences, not convictions. The courage of our convictions entails acceptance of the consequences of acting in accordance with them. Jesuit philosopher Andrew Varga explained this necessity: "We must be willing to make sacrifices in leading a moral life, because the refusal to undergo hardship in the pursuit of moral values is an unethical decision, contradicting our commitment to morality."[7]

Notes

1. Code of Prof'l Conduct (2009). A copy is available online at http://www.cba.org/CBA/activities/pdf/codeofconduct06.pdf.
2. Model Rules of Prof'l Conduct

continued on page 36

The Unwelcome Watchdog

cont'd. from page 17

(2010). A copy is available online at http://tinyurl.com/4omg5ch.
3. [1972] 2 All E.R. 353 (C.A.); *aff'd on other grounds*, [1973] 2 All E.R. 1169 (H.L.).
4. *Id.* at 376. (Quoted with approval in *R v. Campbell and Shirose* [1999] 1 S.C.R. 565, at para. 50).
5. For example, those called to the Bar in Alberta swear the following oath: "That I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, her heirs and successors according to the law. That I will as a Barrister and Solicitor conduct all causes and matters faithfully and to the best of my ability. I will not seek to destroy anyone's property. I will not promote suits upon frivolous pretences. I will not pervert the law to favor or prejudice anyone, but in all things will conduct myself truly and with integrity. I will uphold and maintain the Sovereign's interest and that of my fellow citizens according to the law in force in Alberta." The oath in Ontario is: "I accept the honour and privilege, duty and responsibility of practising law as a barrister and solicitor in the Province of Ontario. I shall protect and defend the rights and interests of such persons as may employ me. I shall conduct all cases faithfully and to the best of my ability. I shall neglect no one's interest and shall faithfully serve and diligently represent the best interests of my client. I shall not refuse causes of complaint reasonably founded, nor shall I promote suits upon frivolous pretences. I shall not pervert the law to favour or prejudice any one, but in all things I shall conduct myself honestly and with integrity and civility. I shall seek to ensure access to justice and access to legal services. I shall seek to improve the administration of justice. I shall champion the rule of law and safeguard the rights and freedoms of all persons. I shall strictly observe and uphold the ethical standards that govern my profession. All this I do swear or affirm to observe and perform to the best of my knowledge and ability." There is an optional oath of allegiance to the Sovereign. Law Society of Upper Canada, By-Law 4, Sections 22, 23(1) and 24 (optional), respectively.
6. Melissa Dunne, *In-house counsel must act as the company moral compass*, In-house Counsel (Spring 2009) at 6.
7. Andrew C. Varga, On Being Human 138 (Paulist Press 1978). ML

Federal

cont'd from page 18

WL 285683 (N.D. Fla. Jan. 31, 2011), was filed minutes after the President signed the bill into law, and included, as parties, 26 States' Attorney Generals or Governors.

Judge Vinson agreed that a person's private decision not to buy health insurance was economic "inactivity," and the reach of the Commerce Clause was limited to individuals and entities engaged in "activity." In every Supreme Court case decided thus far, he said, "Congress was not seeking to regulate under its commerce power something that could even arguably be said to be 'passive inactivity,'" and it was a "radical departure" to accept that it could. Further, because the Necessary and Proper Clause could not be utilized to "pass laws for the accomplishment of objects" that were not within Congress' enumerated powers, the individual mandate could not be otherwise authorized by an assertion of power under that clause. Severability "ultimately turn[ed] on the nature of the statute at issue," and, while a severability clause was included in an earlier version of the Act, it had not been carried forward. The court concluded that "the individual mandate was an essential and indispensable part of the health reform efforts, and that Congress did not believe other parts of the Act could (or it would want them to) survive independently. I must conclude that the individual mandate and the remaining provisions are all inextricably bound together in purpose and must stand or fall as a single unit."

On February 03, Virginia's Attorney General announced that he would seek an expedited review of the health care ruling by the U.S. Supreme Court, bypassing the Circuit Court of Appeals; the U.S. Department of Justice has likewise announced its intention to appeal Judge Vinson's decision to the Eleventh Circuit Court of Appeals. ML

Supreme Court

cont'd. from page 23

addicts, outer space, and the Due Process Clause have in common. He began with an outright rejection of any federal constitutional right to informational privacy. Pointing out that the employees' brief did not once identify the portion of the Constitution that gave rise to such right, he added that this approach "was refreshingly honest. One who asks us to invent a constitutional right out of whole cloth should spare himself and us the pretense of tying it to some words of the Constitution." In any event, the Due Process Clause, the likely choice, was inapposite as it protected those fundamental rights and liberties which were "deeply rooted in this Nation's history and tradition." The employees, he said, did not even attempt to argue that the claim at issue passed that test, "perhaps recognizing the farcical nature of a contention that a right deeply rooted in our history and tradition bars the Government from ensuring that the Hubble Telescope is not used by recovering drug addicts." ML

Inside Canada

cont'd. from page 28

of the SPP and pay the benefits until the dispute was decided. Because it was previously decided that the City could not do both things, "it would be an abuse of process to revisit that issue, and it [was] equally an abuse of process to attack that substantive conclusion by challenging the process used to decide it.... it offend[ed] the integrity of the administration of justice to attempt to litigate the process by which a decision was made, after the decision itself ha[d] been fully litigated." It was time for