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Encountering and Responding to Ethical Dilemmas and Professional Challenges in the Role of In-House Counsel

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In recent years, corporations have increasingly established in-house legal departments to meet their need for legal services. The lawyers who assume the role of in-house counsel may encounter a variety of professional challenges in the course of performing their duties. The discussion below aims to discuss briefly some of the professional challenges and ethical dilemmas that may on occasion confront in-house counsel. The discussion concludes with some suggested strategies to respond to such challenges.

THE POSITION OF IN-HOUSE COUNSEL

Lawyers working as members of in-house legal departments are, practically speaking, in a unique position. They are employees of the corporation to which they provide legal services and, professionally speaking, they "reside" within the organization. In-house counsel are consulted on a broad range of issues, and often are asked for their views on business and other issues affecting the company that go beyond legal advice. In addition, relationships are naturally forged with various constituents in the corporate setting including officers, directors, shareholders and fellow employees and personal sentiments and loyalties can at times threaten to conflict with in-house counsel's professional duties.

As a matter of ethics, however, in-house counsel are governed by the same rules as outside counsel. The Law Society of Upper Canada's *Rules of Professional Conduct* (**"RPC"**) that govern the practice of law in Ontario, for example, make no distinction between the ethical duties of in-house and outside counsel. The courts have also made clear that in-house counsel and their client companies are regarded in law as being in every respect in the same position as outside counsel and their various clients: both types of counsel have the same duties and their respective clients enjoy the same privileges.

KNOWING THE CLIENT

For in-house counsel, the identity of the client is clear: the client is the corporation. Rule 2.02(1.1) of the RPC, for example, states:

Notwithstanding that the instructions may be received from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, in exercising his or her duties and in providing professional services, the lawyer shall act for the organization.

Practical realities, however, can present challenges in adhering to this rule. Officers or fellow employees who have received legal advice from in-house counsel, either in the context of conducting the company's affairs, or perhaps in the context of dealing with unrelated personal matters, can often assume that the lawyer is acting for them and protecting their interests in all cases. This can be fertile ground for misunderstandings and potential conflicts. An example given in the RPC commentary concerns a lawyer advising

about liability insurance for an officer of an organization. In such cases, the lawyer acting for the organization is advised to be alert to the prospect for conflicts of interest and the need to comply with the rules about the avoidance of conflicts of interest (Rule 2.04). The duty of loyalty is owed to the company, not any other person or entity, and this must at all times be made clear to those with whom in-house counsel deals.

IN-HOUSE LEGAL ADVICE VS. BUSINESS ADVICE

The privilege that attaches to communications between a lawyer and his or her client in the seeking and giving of legal advice applies with full force in the context of in-house counsel providing legal advice to the client company. The Supreme Court of Canada has repeatedly emphasized the importance of solicitor-client privilege to the proper functioning of the administration of justice and has elevated the privilege from a rule of evidence to the level of a fundamental substantive right. The privilege is jealously guarded and will only be set aside in exceptional circumstances.

Solicitor-client privilege, however, will not extend to communications: (1) where legal advice is not being sought or given; (2) where the communications are not intended to be confidential; or (3) where the communications have the purpose of furthering unlawful conduct. The first point is of critical importance for in-house counsel. Advice given on non-legal matters is not protected by the privilege even though the advice is given by a lawyer.

(For a more extended discussion about solicitor-client privilege, and a number of the issues discussed in this paper, see M. Jamal, *In-House Counsel and Solicitor-Client Privilege*, December 7, 2005, OBA Corporate Counsel Section.)

In the RPC commentary to Rule 2.01 “Competence”, it is noted that a lawyer’s view on non-legal matters such as business, policy, or social implications may be of “real benefit” to the client, but the lawyer is obliged to “clearly distinguish legal advice from other advice.”

PRIVILEGE OVER INTERNAL CORPORATE INVESTIGATIONS

In-house counsel are frequently asked to become involved with internal corporate investigations concerning matters that may give rise to criminal or civil liability. Companies understandably would like to maintain privilege over the information gathered in such investigations so that the company in its discretion and on its own schedule can decide about disclosing the information to criminal investigators, regulatory authorities or a plaintiff bringing a civil action against the company. Maintaining privilege over such information can be a challenging task insofar as courts have ruled differently on the issue depending on the facts of a particular case.

From a review of the decided cases, it appears that whether privilege attaches to the information gathered in the course of an internal corporate investigation will turn on whether a sufficient connection can be established between the investigation and legal advice being sought or received. In one case, for example, where in-house counsel was asked by his superior to provide legal advice concerning an accident at the company, privilege was held to attach to the factual investigations of non-lawyers that were undertaken at the request of the in-house counsel to assist him in providing legal advice. In contrast, the court in another case ruled against the claim of privilege where in-house counsel had requested an external accounting firm to quantify a financial loss and identify improvements for the future where a possible fraud had arisen. The court was unable to conclude that the purpose of the request was related to the seeking or giving of legal advice, although the accountants’ report might facilitate the provision of legal advice in the future.

PRIVILEGE OVER CORPORATE BOARD MINUTES

Legal advice provided by in-house counsel to a company’s board of directors is privileged. Therefore, minutes of meetings of the corporation’s board that record such advice, or deal with actual or anticipated litigation against the company, are protected from

disclosure. It is important to note, however, that it is only the portion of the minutes recording the legal advice or dealing with the litigation that is protected. Other portions of board minutes relating to matters unconnected to legal matters are not protected by privilege.

Corporate board minutes often contain both privileged and non-privileged text. Courts have adopted the practice of allowing parties in litigation to “redact” the privileged portions of the minutes identifying the basis of the redaction, with the remainder of the minutes being disclosed. This allows a corporation to make disclosure of information without waiving privilege over portions of board minutes that are properly protected.

PRIVILEGE OVER INTERNAL CORPORATE MEMOS

Caution must be exercised to maintain privilege over internal corporate memoranda issued from in-house counsel. Solicitor-client privilege will apply only if a memorandum truly contains: (1) communication between a solicitor and the client; (2) communication involving the seeking or giving of legal advice; and (3) communication intended to be confidential between the parties. Even if privilege applies to a memorandum in the first instance, the privilege can be lost through the indiscriminate circulation of the document.

By way of example, in one case a memo sent by a bank’s general counsel to all of the bank’s branches was held to be non-privileged. The bank’s general counsel also performed several executive functions in the organization and it was not clear that he was acting in his capacity as general counsel in sending the communication. The court also noted that the memo reflected a statement of corporate policy, rather than the provision of legal advice. The memo was labelled a “head office circular” rather than coming from the bank’s legal department and, significantly, it was sent to every branch of the bank with no indication that its contents were intended to be confidential. Accordingly, the court ruled against the claim of privilege.

DIFFERENCES IN OTHER JURISDICTIONS

In-house counsel must be aware that the ethical principles and rules regarding privilege that apply in Ontario and other Canadian provinces do not uniformly apply in other jurisdictions. In the legal regimes of some countries, in-house counsel are deemed to be employees who are not subject to rules of professional legal ethics and discipline that apply to lawyers in private practice. Also, the laws of other countries do not uniformly recognize the legal professional privilege over lawyer-client communications that is so well-established in Canadian law.

DIFFERENT PRIVILEGES MAY APPLY

It is useful to recall that different privileges are available to protect the disclosure of corporation information and documents in the context of litigation. Three of the most common privileges are: (1) solicitor-client privilege; (2) litigation privilege; and (3) without prejudice privilege.

The basis on which solicitor-client privilege may be claimed and lost has been outlined above. Litigation privilege attaches to communications, even when a lawyer is not the sender or recipient, when the communications are sufficiently connected to existing or anticipated litigation. The third type of privilege attaches to communications made on a without prejudice basis for the purpose of settling a dispute with another party. One or more of these privileges may apply in the case of a single document to protect the document from disclosure in the context of litigation.

IMPROPER CORPORATE CONDUCT

Probably the most difficult situation facing any in-house counsel is where the company, those who control it, or those who are in its

employ, exhibit an intention to act, or are currently acting, in a manner that is dishonest, fraudulent, criminal or otherwise illegal. In-house counsel is required by professional obligation RPC, Rule 2.02(5), (5.1) and (5.2) to take a number of steps to advise against and object to the improper conduct, progressing "up the ladder" to the chief legal officer, chief executive officer and, ultimately, the board of directors. If the corporation continues to pursue the improper course of conduct over in-house counsel's advice and objection, counsel is then ethically obliged to withdraw from the matter in accordance with Rule 2.09.

Even though in-house counsel are obliged to follow strict steps when faced with a corporate client that is exhibiting improper conduct, the commentary to RPC Rule 2.03 "Confidentiality" makes clear that "it does not follow that the lawyer should disclose to the appropriate authorities an employer's or client's proposed misconduct." Rather, the commentary observes that, subject to some narrow exceptions, the general rule requires that the lawyer hold the client's information in strict confidence.

STRATEGIES IN RESPONSE

The following are some strategies that in-house counsel may consider adopting to address the professional challenges discussed above.

 Keep the fact that the company is the client clearly in focus at all times. Duties of loyalty and confidentiality are owed to the company, not to officers, employees or any other persons. This fact may need to be plainly conveyed to individuals in the company from time to time. Make a clear distinction between legal and non-legal (e.g., business) advice, and identify this distinction to other individuals in the company where appropriate.

 In order to maintain privilege over documents, including documents generated during an internal corporate investigation, mark documents as appropriate with one or more of the following phrases: "Privileged and Confidential"; "Prepared for [or by] in-house counsel for the purpose of legal advice"; or "Prepared for [or by] in-house counsel for the purpose of preparing for litigation." If a file of documents is created during information-gathering steps, keep the file separate and label the file with the phrase or phrases that apply to help to maintain the privilege. Keep the file segregated and secure.

 If it is intended to maintain privilege over an internal corporate memorandum: (1) have it printed on legal department letterhead rather than general corporate letterhead; (2) mark the document "Privileged and Confidential" or "Solicitor-Client Communication", or with some similar phrase as noted above; (3) limit the distribution of the memorandum to only those who need to see it; and (4) consider the issues concerning lack of security that arise with the use of e-mail before choosing to transmit the memorandum electronically.

 When retaining an outside expert with the intention of maintaining privilege over the communications with the expert, prepare a retainer letter that clearly identifies that the expert is being retained to assist counsel to provide legal advice and/or prepare for litigation. The expert should mark the report with an appropriate heading noting the privilege and address the report to counsel's attention. Be aware that if the expert is called as a witness in a proceeding, the courts seem increasingly inclined to order broad disclosure. This means that the expert's entire file, including communications with the client and draft reports (electronic or otherwise), may become producible. Accordingly, communications with experts should be circumspect and conducted with care.

 Keep in mind that only those portions of minutes of board of directors meetings that relate to the seeking or giving of legal advice, or to actual or anticipated litigation, will be privileged and protected from disclosure.

 Be mindful that ethical principles and rules regarding privilege that apply in Ontario and other Canadian provinces do not necessarily apply in other jurisdictions. Communications with clients or their representatives in other jurisdictions may not be privileged or protected from disclosure.

 Be aware of your professional responsibilities should your client company, or those who control it or are in its employ, display an intention to act, or are currently acting, in a manner that is fraudulent, criminal or otherwise illegal. Be mindful as well that, even in such circumstances, your professional duty to maintain confidentiality will continue to apply subject to some narrow exceptions to this general rule.

CONCLUSION

The role of in-house counsel undoubtedly presents a variety of challenges. At the same time, it provides an opportunity for the lawyer to engage his or her skills in a professionally rewarding way. It is hoped that the discussion in this paper has achieved the objective of providing an outline albeit brief of some of the professional and ethical challenges that may on occasion confront in-house counsel, as well as some of the strategies that in-house counsel might consider adopting to address such challenges.

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