What happens if you provide advice to senior management and they refuse to act on it?

Ethical Responsibilities

BY ERIC FINN

Earning the reputation as a trusted advisor is something many of us seek, and attaining that goal generally produces a feeling of great satisfaction. A trusted advisor, however, must keep in mind that the advice being provided to clients, employers, regulatory agencies, government departments or corporate management may not always be accepted. This has led many professionals to look closely at the constraints their employment contracts place on their ethical responsibilities.

Anecdotes about lawyers always make good fodder when discussing the application of ethical rules. But the time has come to take heed of the trend toward regulating all professionals who provide advice to senior management, as their decisions may affect innocent bystanders.

Beyond the Lawyer

Today, it is not just lawyers who find themselves in positions of trust or in the business of providing advice. Many of us face moral dilemmas while performing our job responsibilities. Appraisers, surveyors, planners and engineers are examples of other professionals who provide advice to senior management and may subsequently receive instructions that are contrary to that advice or, more importantly, contrary to the ethical principles of the profession.

Think of the engineer or building inspector who is required to certify the integrity of a building – knowing that shortcuts have been taken, and the building is not up to code. If a building

collapses, it is not only the building company investors who are harmed, but personal injuries are a strong likelihood as well. Criminal laws and ethical rules for the engineering profession are in place to regulate such activity. However, one could anticipate the possibility of regulatory reform which may require the engineer or building inspector to report the misfeasance to senior management and eventually withdraw from the activity and maybe even blow the whistle.

In-House Pitfalls

In-house professionals are just as subject to ethical pitfalls as the independent consultant retained for a specific project. The in-house professional is subject to constraints not only from the regulatory body of which he or she is a member, but also from their employment contract. In most instances, there is no conflict between the two. However, there are times when conflicts arise, and if this occurs, then an ethical pitfall is likely to be waiting in the wings.

A good example of this is the Bre-X situation where a geologist, on the instructions of senior management, falsified test results to show a valuable gold resource owned by the company in order to increase the value of the shares. Individuals flocked to invest in the company, only to lose their investment when evidence of the falsification was revealed. One cannot prevent fraud on the part of individuals but, by imposing regulations to report improprieties before they can harm innocent individuals, further improper conduct can be prevented. All of us involved in the right of way profession have ethical obligations to report misfeasance when it becomes apparent, even though, like lawyers, we may also be subject to other regulatory requirements.

We are also well aware of the role played by lawyers and accountants in the Enron disaster. In that situation, professionals were providing opinions on the viability of the company and encouraging investments when the asset worth could not support the liabilities.

In Chicago, there was recently a trial involving a Canadian, Conrad Black, relating to the activities of his company known as Hollinger International. Prior to the criminal charges, Mr. Black's most newsworthy activity was renouncing his Canadian citizenship to become a British Lord. He had built a financial empire in the media industry which had extended into the United States, listed its shares on the New York Stock Exchange and later became subject to the Securities Exchange Commission. The company, and Mr. Black in particular, eventually ran into difficulty for purportedly taking money out of the company to the detriment of shareholders.

"Many of us face moral dilemmas while performing our job responsibilities."

Charged along side Mr. Black were David Radler, former Chief Operating Officer (who agreed to testify against his co-defendants for a reduced sentence), Jack Boultbee, former Chief Financial Officer and Executive Vice President Peter Atkinson, a Canadian lawyer employed by Hollinger, and Mark Kipnis, another in-house lawyer. All of the accused, except Kipnis, were found to have received revenue from the illegal activities. Kipnis was dubbed "St. Mark" by the jury because he had received no financial gain, but was convicted for his role in the affair and sentenced to five years probation, six months house arrest and 275 hours of community service. Prison sentences for the other defendants ranged from 24 months to six and a half years for Black.

The criminal participation of Kipnis and Atkinson has led lawyers to look with a critical eye at the activities of in-house counsel and the constraints that their employment contracts place on their ethical responsibilities:

> *"…in-house counsel are often seen as the 'poor cousins' in their relationship with management. Still…the Kipnis case underlines the need for corporate house counsel to step up and take on a more meaningful role within the company despite the pressures."* [1]

It should be noted that government and agency in-house lawyers are under the same ethical constraints as those practicing in the corporate world.

"...IN-HOUSE COUNSEL MAY HAVE MORE INPUT IN THE DECISION-MAKING PROCESS THAN JUST THE PROVISION OF LEGAL ADVICE."

Regulations Enacted

Following pressure from consumers, many organizations have made a public commitment to ethical business practices by formulating codes of conduct and operating principles. Since the 2002 Sarbanes-Oxley Act[2], a U.S. publicly-held company is required to create its own code of ethics to deter wrongdoing and promote ethical behavior. In doing so, they must translate into action the concepts of personal and corporate accountability, corporate giving, corporate governance and whistle-blowing. The Act also allows the Securities Exchange Commission to make regulations dealing with the obligation of in-house counsel to report misconduct. The regulations, known as the up-the-ladder rules, require counsel to report misconduct to a higher level, even to the Board of Directors, if necessary. If action is not taken as a result of such reporting, counsel is required to make a "noisy withdrawal" by resigning and notifying the appropriate regulatory authority.

While this legislation is binding on lawyers, state bar associations are not required to incorporate similar regulations. In Canada, where similar legislation has not been enacted, the provincial regulatory agencies had to decide whether such control should be required. In the province of Ontario, the Law Society of Upper Canada has incorporated its own version of the up-the-ladder rules. The in-house counsel is required to report any knowledge of illegal activities to a higher level and if their advice is not followed, they are required to withdraw their services. However, the rules do not go so far as to require a noisy withdrawal in that there is no obligation to report such activities to any regulatory authority. In this regard, the Law Society is still upholding the confidentiality that arises out of the attorney-client relationship in the corporate environment.

Role as Gatekeeper

In the case of governmental department bureaucracy, it can be especially challenging to pinpoint which department is involved and to which client the ethical obligations may be owed. When applying the principles of up-the-ladder rules, the need to distinguish exactly which government department the lawyer owes an ethical duty becomes more crucial. A government lawyer who becomes aware of some impropriety has the duty to refuse to participate in the activity and report the malfeasance to senior officials within the appropriate department. If the senior official ultimately responsible for the activities of the department refuses to act, those reporting to that position should resign. But currently there does not appear to be an obligation on the government lawyer to resign once the impropriety has been properly reported "up-the-ladder."[3]

The imposition of the gatekeeper role on in-house counsel has led to some criticism. Some suggest that the role of counsel is to provide legal advice, and the decision whether to abide by such advice is a business decision over which the lawyer has little or no control. Those situations that have led to prosecutions would appear to indicate that in many cases, in-house counsel may have more input in the decision-making process than just the provision of legal advice. The prosecutions involving Conrad Black illustrate a situation where two senior counsel were involved in the activities that formed the basis of the prosecutions. On the other hand, it is also suggested that having the in-house counsel as the gatekeeper may inhibit senior executives from seeking legal advice before proceeding with some questionable activity. Unfortunately, this may be the inevitable result of imposing stricter regulations on corporate business so as to protect the innocent investor.

Our Ethical Responsibility

Nearly 70 years ago, IRWA recognized the responsibility of the right of way profession to the people and businesses of our country. Believing that we should encourage and foster the highest ethical standards, the IRWA Code of Ethics was proposed back in 1941. Today, it continues to provide guidance and inspiration, predicated upon basic principles of truth, honest, integrity, uprightness and justice.

Anyone who has examined the IRWA Ethical Rules will see that their application is very dependent on the specific situation giving rise to a complaint. Generally, several rules may apply to any particular set of facts. Having said that, there are some rules that have specific application to an in-house employee.

Ethical Rule 1 is a general provision requiring all members to conduct themselves in a manner that is not detrimental. Sub-rules 1.1(b) and (c) make specific reference to acting in a misleading or fraudulent manner and using or permitting the use of misleading information.

A whistle-blowing provision is found in sub-rule 1.6(g), which makes it a breach of the ethical rules to "fail to report any violations of the code of Ethics or Rules of Professional Conduct involving another member of the Association." At the same time, Rule 4 preserves the "members pledge to uphold the confidential nature of the right of way professional-client relationship." Sub-rules 4.1(b) and 4.2(b) provide the exception that confidential information may be released "when the member is legally required to do so by due process of law." Thus, if the whistle blowing requires the release of confidential information, such release can only be carried out where required by legislation, regulation or a court order. Remember the distinction between the Sarbanes-Oxley Act and Rules of Professional Conduct of the Law Society of Upper Canada, where the former requires a "noisy withdrawal" but the latter does not.

Ethical Rule 6 deals specifically with the role of a member as an employee, and requires the maintenance of a professional relationship between the member and their employer. Sub-rule 6.1 covers the types of activities which may arise to cause a conflict between a member and their employer. For example, sub-rule 6.1(a) states that it is unethical to "conceal or knowingly fail to disclose that which he/she is required by law to reveal," and by sub-rule 6.1(e), it is unethical to "counsel or assist the client or employer in conduct that the member knows to be illegal or fraudulent." Sub-rule 6.1 states that it is unethical for a member to engage in a number of illegal or inappropriate activities. In many instances, refusing to be involved in such conduct may result in a withdrawal of services; however, nowhere in the Rules is there a requirement on the member to withdraw or resign from employment. Having said that, members regulated by other professional bodies would have to determine whether, like lawyers, the applicable law or ethical rules dictate resignation.

Lessons Learned

While earning the reputation as a trusted advisor is something many of us seek to attain, we must keep in mind that the advice being provided to clients, employers, regulatory agencies, government departments or corporate management may not always be accepted. Most often, the reason for not accepting the advice is based on genuine business grounds. Regardless of the reason, the refusal to accept advice may result in improprieties, illegal activities or conduct contrary to regulatory requirements. The trusted advisor is then faced with the ethical dilemma arising out of the relationship they have with those parties receiving the advice and refusing to act upon it. The actions required of the trusted advisor faced with this dilemma range from ceasing the offending activity, reporting it up-the-ladder, resigning one's position and, depending on the rules relating to confidentiality, advising the appropriate regulatory agency of the offensive conduct.

All of us involved in the right of way profession should be aware of these pitfalls. In particular, those involved as in-house advisors must take into account the additional layer of responsibility created by the employment relationship. ✪

AMERICAN RIGHT OF WAY ASSOCIATION NEWS Page Seven

Proposed Code of Ethics Of the American Right Of Way Association

Submitted by
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RECOGNIZING the importance, universality and responsibility of our profession to the people and business of our country, believing that we should encourage and foster high ethical standards in our profession, we do hereby adopt this Code of Ethics for our guidance and inspiration, predicated upon basic principles of truth, honesty, integrity, uprightness and justice.

IN PARTICULAR—

1. To show faith in the worthiness of our profession by industrious, honest and courteous practice to the end that we may merit a reputation for quality of service and fair dealings.

2. To add constantly to the knowledge of our profession by studying the view points of the ablest speakers and writers on the principles and practices involved therein, and sharing with our fellow members the lessons of our experiences.

3. To build an ever increasing confidence and good will with the public and our employers by poise and self restraint in all trying situations, restricting our criticism to constructive suggestion, and giving generous praise wherever it is due.

4. To ascertain and weigh the facts relative to real properties in making our appraisal thereof, always giving a considered and as nearly as possible, a scientific analysis of the market value thereof, using the best and most approved methods of arriving at a conclusion as to the just and fair market value of such properties.

5. To conduct ourselves in the most ethical and confident manner when acting or serving as an expert witness testifying as to the market value of real properties in an action or proceeding in any Court, thus placing ourselves above all suspicion or criticism.

6. To accept our full share of responsibilities in the progressive movement and the public service of the community, being ever mindful of our obligations to our state and our nation.

7. To strive to attain a symmetry of character, an attractiveness of personality, a buoyancy of wholesome optimism and a sincere appreciation of life's spiritual values that shall enrich all our human contacts, aiming toward that ideal, "The Practice of the Golden Rule."

PROPOSED AMENDMENT TO CONSTITUTION AND BY-LAWS TO BE VOTED ON OCTOBER 9th, 1941

Amendment to Article XII, Section 1 (d) be amended to read as follows: "Every person elected to associate membership shall, before becoming a member, pay an initiation fee and current dues the sum of $1.00 and shall pay the sum of $1.00 per calendar year thereafter for annual dues."

Gibby Rendered Hors de Combat

George Gibson (Genial Gibby) is convalescing at the Glendale Sanitarium from a recent appendectomy.

It seems that George was hunting deer in the fastnesses of his mountain estate and had shot one buck. He would have undoubtedly secured another, but an attack of appendicitis made it necessary for him to make a hurried trip to the hospital.

(After all, Gibby shouldn't protest about the high cost of operations, since his trip to the hospital only cost him **one buck.**)

If any of his friends are able to call upon him at the Glendale Sanitarium he will be delighted to have them do so.

We are sorry that our jovial Treasurer is laid up and hope that he will be back with us in the near future.

IRWA's Proposed Code of Ethics was first published in 1941.

[1] Law Times, "St. Mark's Martyrdom Cautionary Tale for In-house Counsel", May 12/19, 2008, p. 12.
[2] 116 Stat. 745.
[3] See: Rogers, B., "Crown Cautionary Tales", The National, April – May 2007, p. 54.