ROLE OF IN-HOUSE COUNSEL
A brief perspective from an outsider

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Everything in this presentation is in your materials (including the ppt. slides and paper which includes cites)

Sit back and enjoy
US Supreme Court
Justice William O. Douglas

- In house counsel tend to be:
  - Obsequious
  - Giving advice their “boss” wishes to hear
- Outside counsel
  - Coldly objective
  - Brutally frank in their advice
The dichotomy

- “The only role a lawyer has in this company is to tell me how close to the edge I can go without falling off.”
- Lawyers are well trained and presumably in this day and age sensitive to moral, ethical and societal issues and standards but hold no monopoly on being able to tell right from wrong.
US Steel v. United States

- In house counsel “under the unnatural and remitting strain of having to exercise constant self-censorship in their normal in their normal working relations”
- This case had to do with privilege and although the court said that it’s comments were not based on any reservation as to the integrity of in-house counsel
- Overturned on appeal – the distinction between in-house and outside counsel was unsustainable.
Who is the client

- Organization is the client
- This is a legal fiction
- Individual members and organization are for the most part indistinguishable
- We are always in conflict
  - Work on pensions and benefits which not only the person giving instructions but us are beneficiaries
- Only an issue when their interests are in conflict and adverse
The Role of General Counsel

1977 Emory Law Journal

- Professor Timothy R. Terrell

- “The General Counsel has one foot planted firmly shifting treacherous terrain of the law, and the other planted just as firmly in the oozing swamp of business”
We are different from outside counsel

- We are employees. Our client pays us. Our masters may view us differently (team players, shared loyalties, etc.)
- We have one client. Our wage and career depend on others who control the organization. We know more about the organization than any outsider
- We have a different relationship. We are closer, different social structure, expected to make business and legal decisions.
The role of in-house counsel

- It is a relatively new profession. Realistically, only 3 or 4 decades old
- Technician vs. spiritual advisor
- Are you there to “do law”? 
- Are you “the conscience” of the firm?
- Are you there to do something more?
“Do Law”

- Why create a legal department?
  - For management to avoid direct dealings on legal matters
  - Save costs
  - Too simplistic
    - Trading fixed overhead for variable costs
    - Management cannot avoid “legal” but it’s life may be simplified
  - There is a deeper value proposition
Daniel J. DiLucchio
Altman Weil, Inc.

- “Benchmarking and Best Practices in Managing In-House Law Departments”, May 7, 2003
- Knowledge of business – adds 20-25% in value
  - In the military – highly specialized – probably higher
- Lower cost – most often 25-35% lower
- Early intervention/prevention law – conservative estimate of 10-15% in value
“Corporate Conscience”

- Maybe incorrectly assumes a close connection between legal and ethical responsibilities
- Begets all sorts of questions
  - Why a lawyer and not another professional (internal auditor/engineer)?
  - What special training does the lawyer have?
  - What authority are you giving to your “Conscience”?
  - Will they listen to the “Conscience”?
  - Who is the “conscience” for “The Conscience”? 
New Environment

- Legal has always been there
- Add value especially cost savings – focus on more business critical aspects or requiring specialized expertise
- Speed and agility
- Quality
- Added to the above
  - Governance & compliance
  - Ethics & gatekeeper of information and above systems – report up the ladder
  - Strategic, proactive & effective risk management
New environment cont’d

- Trends affecting us
  - More media and public scrutiny of organizations
  - Decline in public confidence in our institutions and how we run our organizations
  - Rapidly changing environment
    - New areas of law, regulation and liability
  - Forces lawyers into less traditional roles (public affairs, governmental relations, human resources, media, risk management, etc.)
JAG lawyers

- more than legal advisors
- soldiers, confidants, advisors, leaders, facilitators, problem solvers, trouble shooters, etc.
- A lot like the business environment
- Many hats, one head.
More on JAG lawyers – my guess

- Issues and challenges
  - Role in the chain of command – competing obligations & responsibility for different elements may rest with different people/departments
  - Resource challenges – demands for high quality legal services coupled with competing requests at the same time
  - Timeliness – need it all yesterday
  - Communication – universal challenge
Beware of the death of a thousand cuts

- Big decisions, crisis situations are easy, lots of people involved, high up participation
- It is the day-to-day you should worry about
  - People want short cuts
  - “just this one time”
  - “help me get around these stupid rules”
  - “I don’t want the whole thing”
    - Just a quickie document, opinion only on limited facts
- Silent killers – of your credibility, authority, reputation, etc.
What JAG lawyers and Canadian in-house counsel have in common

- The pay sucks?
- American Lawyer Media, Inc. compiled data (1993-2002)
- Average annual total compensation of the Chief Legal Officer - $3.1 million USD
- Poor kid – only $1.1 million was salary and bonus
- At least we have free medical – sort of.
Rudyard Kipling – “IF”

- *If you can keep your head when all about you are losing theirs and blaming it on you*
If you can keep your head when all about you
Are losing theirs and blaming it on you,
If you can trust yourself when all men doubt you,
But make allowance for their doubting too;
If you can wait and not be tired by waiting,
Or being lied about, don't deal in lies,
Or being hated, don't give way to hating,
And yet don't look too good, nor talk too wise:

If you can dream - and not make dreams your master;
If you can think - and not make thoughts your aim;
If you can meet with Triumph and Disaster
And treat those two impostors just the same;
If you can bear to hear the truth you've spoken
Twisted by knaves to make a trap for fools,
Or watch the things you gave your life to,
broken,
And stoop and build 'em up with worn-out tools:

If you can make one heap of all your winnings
And risk it on one turn of pitch-and-toss,
And lose, and start again at your beginnings
And never breathe a word about your loss;
If you can force your heart and nerve and sinew
To serve your turn long after they are gone,
And so hold on when there is nothing in you
Except the Will which says to them: 'Hold on!'

If you can talk with crowds and keep your virtue,
'Or walk with Kings - nor lose the common touch,
if neither foes nor loving friends can hurt you,
If all men count with you, but none too much;
If you can fill the unforgiving minute
With sixty seconds' worth of distance run,
Yours is the Earth and everything that's in it,
And - which is more - you'll be a Man, my son!
What do we do?

- In-house counsel manage the internal and external legal environment
- not problem handlers, we are problem solvers
- need to partner with others especially non-legal personnel on whom part of your career depends
- Wendy’s – where’s the beef. Did you add value?
- Perform triage – lots of files and need to be on top of the key files and clearly focused on the key details
- Balancing of interests
  - What goes on back burner
  - What is of strategic importance
  - Manage the flavour of the month or a person’s pet peeve/issue
Learn to juggle

- Need for professional (i.e. legal/critical thinking) detachment
  - Primary duty to the law and the court
  - Duty to serve the organization not a specified group of officers, managers or employees
  - Still need to:
    - Understand operations
    - The “political” implications
    - Know your limitations (knowledge and experience)
    - What is legally correct
    - Confirm the facts
Same duties as always

- Loyalty
  - Duty of candor
  - Duty of commitment to the client’s cause
- Confidentiality
- Avoid conflict of interest
- Need to educate our co-workers about the difference between their role as leader, spokesperson, manager, employee, etc. and their separate duties as individuals and your role as counsel to the organization
A developing area

- When can a lawyer breach his/her duty of confidentiality, etc.?  
- Don’t know but be aware of these  
  - Real, imminent & identifiable threat of death or serious bodily harm (includes serious psychological harm)  
  - Dangerous environmental situation  
  - Huge fraud that would be financially devastating to many individuals
Privilege – an introduction

- Solicitor-client privilege developed in 16th Century
- Courtesy between lawyers
- Could not be called as a witness to discuss conversations between client and lawyer
- Became a rule of evidence
- Now a substantive right (*Solosky v. The Queen*)
Confidentiality vs. Privilege

- They may overlap
- Obligation of confidentiality likely wider than privilege
- Fee arrangements and name of client may not always be subject to privilege
Application to in-house counsel

- Same privileges as private practice lawyers
- Lord Denning in *Crompton Amusement Machines*
- "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…"
R. v. Shirose

- The solicitor-client relationship and hence privilege is not prevented from being formed because of the salaried employee relationship
- Communications extend to corporate employees
Formation of privilege

- Nature of the relationship
- The subject matter of advice
- Circumstances in which legal advice is sought and rendered
- Does NOT extent to purely business matters even if they are obtained from legal counsel
Special problems

- Justice Binnie in *R. v. Campbell* said that special problems arise out of the corporate context
- 3 key areas as to how this develops
  - In-house counsel involved in matters NOT of a legal nature
  - How they get to counsel – the “informality” of accessing legal counsel in the organization
Special problems cont’d

- Who is the client?
- The role the lawyer is playing is critical
- Being a lawyer not enough
- See OSC v. Greymac – President was a lawyer but that was not enough.
- See also Mutual Life v. Deputy AG of Canada
Mutual Life v. Deputy AG of Canada

- Privileged communications
  - Client to lawyer – seeking advice, instructions, providing information
  - Lawyer to client – same as above
  - Between lawyers – formulation of legal advice
  - Working papers
Government Lawyers

- Same as in-house corporate lawyers
- Warning “Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected.”
Government Lawyers cont’d

- Not a lot of legislative reinforcement
- FOIPOP (Nova Scotia) – sections 13, 14, 16
- Right not to reveal certain types of information like draft legislation
- s. 16 – information subject to solicitor-client privilege is protected from disclosure under the legislation
Government Lawyers cont’d

- Communications within government, even to another department, is not a waiver (*Halifax Shipyard v. Minister of Public Works and Government Services*)
- Same as corporate setting but be aware of idiosyncrasies unique to government
Quick case study

- **TD Bank v. Leigh Instruments**
  - Newspaper article – means of circulation and circulation unknown
  - Head office circular – from Senior VP who is also General Counsel, printed document circulated to branches, departments & divisions
  - Memo to credit division – contains legal advice
  - Photocopy of newsletter entitled “Banking Law Update” from Australian law firm, acquisition and circulation unknown
Let’s play *Privilege Survivor*

- Newspaper article and newsletter
  - Tried solicitor work product privilege
  - Answer – NO
  - Random nature of collection of material
  - In general file
  - Attacks suggestion they were product of lawyers’ skill, judgment and knowledge
Privilege Survivor – round 2

- Head office circular
  - Prepared by General Counsel
  - Answer – NO
  - Not acting in capacity of solicitor when made
  - Widely circulated in bank with no notation that it was confidential
  - Statement of corporate policy concerning business risks associated with comfort letters as the Senior VP in capacity as a business exec.
Privilege Survivor – Last chance

- Legal memo to credit division
  - Contains legal advice on comfort letters
  - Prepared by legal department
  - Answer – YES but a squeaker
  - Meets first 2 tests of (a) between solicitor and client and (b) seeking/giving of legal advice
  - Almost fails test No. 3 – re absence of confidentiality
    - Sent to 13 executives, not known if copied and further distributed, not marked confidential, can only find 2 of the 13 copies, concluded confidential but only after reviewing document
Practical Advice

- Disclaimer
  - I learned some of this doing the research
    - So do as I say, not as I have done in the past
  - Credit goes to Law Society of Manitoba
    - Excellent materials
    - Borrowed shamelessly but with much gratitude
Practical Advice cont’d

• Be clear you are acting as legal counsel
  • Clarify your role upon request of assignment
  • Try and note this on documents
  • Use different letterhead or other method to distinguish from operations, legal filing, etc.
  • Use outside counsel if you feel that your role (and privilege) could be challenged
**Practical Advice cont’d**

- **Corporate policies:** Communications are in writing and for the purpose of legal advice
  - Develop referral process – in writing is best
  - Lawyers who are in ops. – try not to give legal advice, use legal counsel
  - Communicate regularly the importance of confidentiality and privilege, file separation
  - Develop supporting policies and procedures
Practical Advice cont’d

- **Communications:**
  - Confirm legal advice requested, info needed, likely steps in process, issues re privilege
  - Mark documents: *privileged, confidential or prepared at the request of legal counsel for the purposes of providing legal advice*
  - Ensure communications demonstrate application of legal skill and advice
  - Communications are clear re for purposes of rendering legal advice
More Practical Advice

- **Office Procedures:**
  - Separate legal files especially from management, operational or non-legal files
  - In legal files try to only include documents
    - relevant to the legal issue
    - Supportive of the use of legal knowledge and skill
Avoid waiver

● Keep documents confidential, restrict circulation

● Limit communication with 3rd parties. Pay special attention to those who cannot be reasonably categorized as agents or employees of legal counsel or the org.

● Use non-disclosure agreements and include non-waiver of privilege clause
Avoiding waiver – part deux

- On regulatory filings be aware of right to file on confidential basis. Claim privilege clearly and as early as possible and be aware that waiver may extend to communications pertaining to the particular items disclosed

- Litigation
  - Avoid declaring “state of mind” in proceedings
  - Avoid pleading on “reliance upon legal advice”
  - Ensure witnesses understand implications of using privileged docs. at discovery, hearings, etc.

- Search and Seizure – claim privilege at outset, seal items pending determination of claim of privilege
Avoiding denial of privilege on grounds that communications not confidential

- Keep documents safe
  - Locked up or in secure restricted area
  - Limit access to those who need access
  - Note on documents that they are not to be copied, circulated or disclosed

- Be aware of technology – email
  - Avoid unauthorized or inadvertent release
  - Use passwords, encryption, etc.
Passing the “for litigation” test

- Information gathering should state on the face of documents it is for the purpose of litigation (avoid rubber stamp)
- Separate into specific matters
- Investigation for litigation should differ from internal corporate reports
- Avoid including in investigative reports information obtained as a result of other organizational purposes
- Consider use of outside counsel for investigative matters. Less easily attacked
When in doubt

- If concerns about splitting legal and other duties and aforementioned are impractical or have not been followed
- Make sure to advise others that privilege may NOT be effective
- Ensure they are not under assumption that communications are protected
Thank you
Have a safe trip home

Sorry I am missing the party but I have a duty to my client
And a cheque to earn