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In-house Counsel's Obligations

Under Certain Provisions of the Code of Ethics of Advocates

By André Laurin *

HIGHLIGHTS

- **the Code also applies to in-house counsel;**
- **non-compliance may result in disciplinary sanctions;**
- **failure to comply with the standards established by the Code could constitute civil wrongs or "faults" resulting in contractual liability (towards the employer) and even extracontractual liability (towards third parties with whom the lawyer negotiates on behalf of the organization);**
- **concept of client: difference between the representative of the client or in-house counsel's superior on the one hand and the entity itself on the other (3.05.17 and 3.05.18 - 2nd paragraph);**
- **obligation of loyalty (3.00.01, 3.06.01 to 3.06.10 and also 3.02.01 to 3.02.11);**
  - concept: "acting in the best interests";
  - accessory obligations: confidentiality, avoidance of conflicts of interest, commitment, candour and prohibition against using the employer's assets and its information;
  - in-house counsel faces many potential and very probable situations of conflicts of interest and of loyalties

- **obligation of independence (3.00.01, 3.05.17, 3.06.05);**
  - concept: ability to exercise independent judgement on the basis of reasonable criteria;
  - accessory obligations:
    - impartiality (as opposed to deferential accommodation);
    - rigor (as opposed to carelessness);
    - good faith, avoidance of abuse of rights and compliance with legislative and regulatory prohibitions;
  - overlap with the concept of the obligation of loyalty;

- **obligation to "notify" the appropriate hierarchical authority (3.05.18);**
  - "in the performance of his professional services";
  - "which, in the advocate's opinion, may be a breach of the law by the client ";
    - objective criteria (necessity of diligent and prudent assessment using reasonable criteria) and subjective criteria (the lawyer's opinion);
  - two types of breaches with distinct characteristics;
  - non-rigid process: obligation to "notify" the appropriate hierarchical authority;
  - notification of client (internal and not external, subject to exceptions);
- **derogatory acts and other precisions;**
  - ambiguous roles (4.01.00.01) and derogatory acts (4.01.00.02, 4.02.01 and 4.02.02);
  - concepts of complicity, inducement and assistance, "aiding and abetting" (in common law) and specific derogatory acts (4.02.01 d), e), f) and g));
  - obligation to cease acting for client despite possible negative personal consequences.

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LAVERY, DE BILLY

BARRISTERS AND SOLICITORS

Preliminary comments

The Code of ethics of advocates (R.R.Q., 1981, c. B-1, r.1) (the "Code") applies to all lawyers inscribed on the Roll of the Order of Advocates "regardless of the context or manner in which he engages in his professional activities or the nature of his contractual relationship with the client" (article 1.00.01). Therefore, the Code applies to in-house counsel.

This article highlights certain provisions of the Code and is intended to provide **food for thought** to in-house counsel regarding those provisions of particular interest for him. This author does not attempt to address all possible issues and his comments reflect only his own opinions and not those of the Syndic of the Barreau or anyone else, whose opinions may differ.

It should be borne in mind that non-compliance by in-house counsel with the provisions of the Code may lead to complaints being filed against him. If found guilty, **disciplinary sanctions** may go as far as ordering him struck from the Roll pursuant to the powers vested in the Barreau du Québec by the *Professional Code* (R.S.Q., c. C-26) as provided for in articles 55.1, 87, 116 and 156.

Moreover, as the Code establishes standards for practicing the profession, non-compliance with those standards may constitute a **civil wrong or "fault"** that could render in-house counsel extra-contractually liable vis-à-vis third parties or contractually liable towards the client-employer.

After a brief consideration of in-house counsel's professional circumstances, this article discusses the relevant concepts in the following order:

- the identity of the client (3.05.17 and 3.05.18(2));
- the obligation of loyalty (3.00.01, 3.06.01 to 3.06.10 and also 3.02.01 to 3.02.11);
- the obligation of independence (3.00.01, 3.05.17, 3.06.05 and the provisions cited in relation to the obligation of loyalty);
- the obligation of disclosure to the appropriate hierarchical authority (3.05.18);
- certain derogatory acts (4.02.01 (d), (e), (f) and (g)).

1. Professional context: the difficulties facing in-house counsel

In-house counsel's unique circumstances and the ability to comply with his ethical obligations are subject to various constraints not faced by external counsel or not experienced to the same degree. For example:

- in-house counsel is an employee most often evaluated by a non-lawyer who also determines his remuneration;
- in-house counsel is often the only lawyer in the organization;
- in some circumstances the organizational hierarchy makes it difficult to reconcile in-house counsel's duty of loyalty to the client (the legal entity) with loyalty to his immediate superior;
- some executives place greater emphasis on achieving business results than on legal compliance; they want counsel to endorse the means used to achieve the objectives and, above all, not to put obstacles in the way of doing so;
- the role as of the organization's moral conscience is not always appreciated;
- daily involvement in team work and the fulfillment of various roles can blur the line of demarcation between the role of legal counsel and that of business adviser;
- more generally, the role of in-house counsel is too often misunderstood.

Many of these constraints were the subject of an interesting analysis by E. Norman Veasey, former chief justice of the Supreme Court of Delaware, and Christine T. Di Guglielmo in an article published in 2006[1] that cites a number of other relevant U.S. texts on the topic.

[1] "The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation", The Business Lawyer, vol. 62, November 2006, p. 1.

2. Who is the client?

In-house counsel's client is the **employer**, not his immediate hierarchical superior. In most cases, that employer is a legal person controlled by shareholders, members or partners, or some other kind of organization, and the management of the employer, or the supervision of that management, is usually assumed by a board of directors. Article 3.05.17 of the Code clearly recognizes the distinction between the employer and the employer's representative:

> *"3.05.17 If an advocate notices, in his dealings with an individual representing the client, that the respective interests of the client and such individual may differ, he shall inform the individual of his duty of loyalty towards the client."*

Thus, in-house counsel must consider the duties and obligations toward the client stipulated in articles 3.00.01 to 3.08.08 of the Code in light of this distinction.

However, it can happen that the **client/employer asks** in-house counsel to represent or advise another employee. In such a case, in-house counsel must take certain precautions and clearly establish the applicable parameters. In that situation, in-house counsel's duties and obligations of loyalty would be owed to the other employee rather than to the employer.

In-house counsel may also frequently be in a situation where he is acting as counsel to several entities in the same group of companies. Counsel is then in a situation similar to an external lawyer serving several clients. Such a situation demands prudence and discernment to avoid conflicts of interest and of loyalties, as will be discussed below.

In-house counsel must also **be careful** to avoid putting himself in a situation where a work colleague **reveals** that he or she has committed illegal activities or been involved in questionable practices. Counsel must then avoid letting the colleague believe that those revelations are protected by professional secrecy.

Moreover, it is most likely that he must disclose the contents of those revelations, unless the client/employer has mandated him to receive and keep them confidential or to protect the anonymity of the author of the revelations.

3. The obligation of loyalty

In-house counsel's obligation of loyalty is set forth in various articles of the *Code*, primarily in articles 3.00.01 and 3.06.01 to 3.06.10, but also in articles 3.02.01 and 3.02.11.

An **employee's** obligation of loyalty is defined in the first paragraph of article 2088 of the *Civil Code of Québec*:

> *"**2088.** The employee is bound not only to carry on his work with prudence and diligence, but also to act faithfully and honestly and not to use any confidential information he may obtain in carrying on or in the course of his work."*

The basic principle underlying the obligation of loyalty is that the employee **must always act in the client's best interests**.

In the case of in-house counsel, that basic obligation is also manifested in the following **accessory or corollary** obligations:

- the obligation of confidentiality and protection of information received while acting in his professional capacity;
- the obligation to avoid conflicts between the client's interests, on the one hand, and his or those of third parties, on the other hand, which is supplemented by the duties of commitment and candour toward the client;
- the obligation to use the property and information belonging to the client solely for the client's purposes and benefit.

Some of the provisions cited above have little relevance to in-house counsel but most of them are pertinent.

The obligation of loyalty is **limited** by the obligation of loyalty to other persons and the prohibitions against being a party to certain derogatory acts such as a breach of the law or engaging in a questionable practice or being a party to a breach of contractual undertakings or being complicit therein.

The **moral obligation of loyalty** to his immediate hierarchical superior and work colleagues and the aversion to tattling complicate matters. Reconciling the obligation of loyalty to the client-employer with such moral obligation and aversion is achievable in part where there is no complicity, material breach of the law or other breach that would not have serious consequences. This will be dealt with in greater detail in the discussion of the obligation of disclosure set forth in article 3.05.18. It should be noted that assessment of a given situation may be facilitated by applying the criteria used in securities matters for determining the materiality of a fact or of a change.

In-house counsel acting for both a parent company and one of its subsidiaries may also face situations involving conflicts of interest and loyalties.

The case law provides many examples of conflicts of interest involving external law firms and many authorities have weighed in on the subject. Some of the judgements and published articles may be pertinent to the situation of in-house counsel. This article refers to only two such judgements. In *R. v. Neil* [2], Justice Binnie of the Supreme Court of Canada defines conflict of interest as:

> *"(...) substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person."* (para. 31) (emphasis added)

In that case, Justice Binnie applied the following "bright line test":

> *"The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — even if the two mandates are unrelated - unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other."* (emphasis added)

A decision recently issued on June 1, 2007 by the Supreme Court of Canada in *Strother* [3], a case on appeal from the British Columbia Court of Appeal, provides some direction for ascertaining a fiduciary's obligations in common law and, consequently, helps to circumscribe a lawyer's obligation of loyalty in civil law, specifically regarding the duties of commitment and candour.

In addition, the case law gives us an overall picture of the **ins and outs of the obligation of loyalty owed by an employee, by a co-contractant and by a corporate director** and can be very helpful in clarifying the parameters of in-house counsel's obligation of loyalty. These particulars were the subject of a presentation given in the fall of 2006 by the author and two of his colleagues, Guy Lemay and Élise Poisson of *Lavery, de Billy*, a copy of which can be obtained on request [4].

4. The obligation of independence

Articles 3.00.01, 3.05.17 and 3.06.05 are the main provisions of the Code pertaining to professional independence. Specifically, article 3.06.05, provides as follows:

> *"3.06.05 An advocate shall safeguard his professional independence regardless of the circumstances in which he engages in his professional activities. In particular, he must not let his professional judgment be subject to pressure exerted on him by anyone whomsoever."*

There is significant overlap of the **concept** of independence with the obligation of loyalty, **specifically** as regards conflicts of interest. It is therefore difficult to provide a proper picture of this concept without referring to conflicts of interest. Thus, the above-mentioned articles of the Code pertaining to the obligation of loyalty are just as relevant to a consideration of the obligation of independence.

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[2] [2002] 3 S.C.R. 631.

[3] *Strother v. 3464920 Canada Inc.*, 2007 SCC 24; 2005 BCCA 35 and 2005 BCCA 385.

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In relation to corporate governance, the Canadian Securities Administrators ("CSA") have examined this concept from the general perspective of the **ability to exercise independent judgement** in the reasonable opinion of the board of directors and have enunciated certain presumptions and specific criteria in relation to non-independence.

In the case of a lawyer, the approach to interpreting the obligation of independence should be practically the same. **The conflicts of interest** mentioned in the articles of the Code cited under the previous heading are the equivalent of the criteria and presumptions of non-independence used in corporate governance matters and described in Multilateral Instrument 52-110 Audit Committees adopted by the CSA.

At first glance, the independence of counsel may appear to present additional **difficulties** given the employer-employee relationship, the context in which the profession is practiced within the business and the subordination to the client's representatives that is inherent in the employer-employee relationship. The possibilities of losing his or her job or of diminishing or destroying one's prospects of salary increases or of career advancement create a significant context of vulnerability for in-house counsel. In comparison, the risk run by external counsel of potentially losing a client is usually less important than in-house counsel's risk of losing his job.

Functions other than those of a lawyer that may occupy in-house counsel can complicate the exercise of independent judgement. Combining several functions can adversely affect the practice of the profession according to the applicable rules of ethics. This reality is dealt with in articles 4.01.00.01 and 4.01.00.02.

> *"4.01.00.01 An advocate who, in addition to his professional activities, engages in activities which do not constitute the practice of the profession of advocate, in particular in connection with a job, an office or the carrying on of an enterprise, shall, regardless of the circumstances, avoid allowing any ambiguity to arise or persist as to the capacity in which he is acting.*
>
> *4.01.00.02 An advocate shall ensure that none of the activities in which he engages in connection with an office or within an enterprise, and which do not constitute the practice of the profession of advocate, compromise compliance with the rules of professional conduct prescribed by this Code, including honour, dignity and integrity of the profession."*

Mtre Brigitte Deslandes and Mtre Jean Lanctôt rightly emphasize the following:

[Translation]

> *"The lawyer must be perceived as an independent person who can freely and impartially advise the client regarding its rights. Should the lawyer lose or compromise that freedom of judgement, the legal profession would cease to have any credibility. In this matter, there is no room for compromise."* [5]

To a certain extent, in-house counsel is the organization's **moral conscience**.

Should in-house counsel fail to protect his independence, he personally devalues the role and indirectly harms the company.

Advice and opinions given and measures recommended by in-house counsel must therefore be **uncomprimising and rigorous**, provided to the best of his knowledge and experience and formulated with a view to compliance with the law and the company's contractual undertakings. Only by proceeding in this manner can counsel comply with his obligations of loyalty and practice the profession properly.

No one is better placed than in-house counsel to **assess his independence**. Consequently, if in-house counsel thinks that he could be **influenced** to slant an opinion or advice, or recommend one measure over another because that opinion, advice or measure is more likely to favour his **personal interest** or that of a colleague or someone else, he must clearly question his ability to act independently and, in certain cases, obtain **confirmation from other counsel**, either internal or external, who are not susceptible to any influence due to their personal interests or a conflict of loyalties. The granting of stock options and certain securities transactions can be examples of delicate situations in relation to counsel's independence when he benefits from such options or transactions.

It is in counsel's interest to **protect himself** by contractual means and by corporate governance rules and policies, as well as to ensure that his employer and colleagues are aware of and understand his ethical obligations. Moreover, where in-house counsel also acts as corporate secretary of the company then, in that capacity, he should report to the chairman of the board rather than to the CEO. In-house counsel associations or groups could promote this awareness among in-house counsels' superiors within organizations. Such associations and groups could also seek to ensure that the obligations and the liability of in-house counsel towards shareholders or members and third parties are not unduly broadened. It should be noted that trends south of the border appear to support such a broadening.

The following list, which is by no means exhaustive, **suggests** more specific **precautionary measures**:

- allocate the various responsibilities separately among the positions of corporate secretary, legal adviser and other positions;
- where possible, entrust those various responsibilities to different individuals (corporate secretary, legal adviser);
- do not involve lawyers or persons other than those within the corporate secretariat or legal advice functions in meetings or discussions, unless they are then regarded as clients;
- keep files (in printed and electronic form) separately and with selective access;
- when participating in businesses meetings or strategic discussions, make a distinction between actions and communications that pertain to legal advice and those that pertain to other functions or activities;

[5] "Éthique, déontologie et pratique professionnelle", Collection de droit 2006-2007, vol. 1, Éd. Yvon Blais, p. 91.

- promote a context in which in-house counsel reports to the board regarding anything that pertains to the corporate secretariat and corporate governance matters (e.g. to the chairman of the board);
- clarify the role that in-house counsel plays as legal adviser and publicize the ethical rules to which he is subject;
- promote implementation of a whistleblowing policy and procedure;
- provide a flexible mechanism for handling conflicts between in-house counsel's ethical obligations and his obligation of loyalty to an immediate superior;
- obtain a contract of employment or a clear description of in-house counsel's responsibilities, duties and powers;
- ensure the board's support; and
- on occasion, seek support from external counsel.

In-house counsel associations and the Barreau may be interested in considering the possibility of adopting an approach similar to that applied in connections with the practice of the profession in a multi-disciplinary partnership or in a business corporation (contractual undertaking by the organization toward the Barreau to support compliance by in-house counsel with the rules of ethics).

5. The obligation of disclosure to the appropriate hierarchical authority

The obligation to disclose is set forth in article 3.05.18. This is a new provision of the Code. However, in the author's view, that obligation was previously implied as part of a lawyer's general obligations and, more specifically, the obligation of loyalty to the client. That article reads as follows:

> *"**3.05.18** An advocate shall notify the client of any fact learned by him in the performance of his professional services which, in the advocate's opinion, may be a breach of the law by the client.*
>
> *If the client is not a natural person, the advocate shall give such notification to the representative of the client with whom the advocate deals when providing his professional services. If the advocate later becomes aware that the client has not remedied the unlawful situation, he shall notify the appropriate hierarchical authority when the situation involves:*
>
> *(1) a material breach of securities law or any law for the protection of securityholders or members of a partnership or legal person; or*
>
> *(2) a breach of any other law, if it is likely to lead to serious consequences for the client."*
>
> (emphasis added)

The **addition** of a specific obligation of disclosure in the Code had several **objectives**:

- to provide lawyers with a firmer understanding that the obligation of disclosure is part of their obligations; (**information and publicity**)
- to circumscribe such obligation of disclosure by the criteria of materiality and serious consequences and the context of professional services, by establishing certain procedural elements (possibility of remedying, "appropriate" instead of "superior" hierarchical authority) and, by doing so, influence any future interpretation by the courts or quasi-judicial authorities; (**interpretation guide**)
- to avoid external interventions or, more specifically, the imposition of rules on lawyers in legislative or regulatory provisions the application of which would not be governed primarily by the Barreau, as had been done in the United States in the *Sarbanes-Oxley Act* (section 307), and thus maintain the self-regulatory approach (**preservation of self-regulation**).

The following paragraphs provide, in the form of questions and answers, examples and supplementary information, suggestions as to how the disclosure provision should be interpreted.

What is the appropriate hierarchical authority?

The person or committee **designated** for that purpose by the code of conduct or by any other policy or directive issued by the company's board of directors. In the absence of any such designation, counsel's **hierarchical superior**, including, as a last resort, the board of directors, going up the chain until the breach has been rectified or, if that is impossible, until other remedial or reparative measures have been taken.

Subject to the following remarks, it is clear that the "appropriate hierarchical authority" must be **internal** and does not in any way include government bodies or external regulatory authorities. **However**, it must be borne in mind that articles 3.06.01.01 to 3.06.01.05 create an exception if it is necessary to prevent "*an act of violence, including a suicide, where he has reasonable cause to believe that there is an imminent danger of death or serious bodily injury to a person or an identifiable group of persons*" (3.06.01.01). One example would be where in-house counsel is faced with his employer's liability for the pollutants it produces.

Moreover, despite opposition from the Barreau du Québec, the *Supplemental Pension Plans Act* (Québec) was amended to create an obligation of disclosure to the Régie in certain circumstances (see section 154.2). Similar provisions have been enacted in the legislation of other jurisdictions.

In addition, over and above the context of article 3.05.18, the following must always be borne in mind:

a) firstly, the **limits of the protection of professional secrecy** and the obligation of confidentiality, which have been dealt with in case law and extensively analyzed in "Éthique, déontologie et pratique professionnelle" [6].

b) secondly, the **risks of complicity**, of participating in an offence or a civil wrong or "fault", and the potential liability of in-house counsel that may result therefrom; and

c) thirdly, the obligation to **cease acting** in order to avoid committing a derogatory act (see the section in this article to that effect).

[6] Supra, note 5, Mtre Raymond Doray, partner in *Lavery, de Billy*, "Chapitre II - Les devoirs et les obligations de l'avocat ", p. 52 to 67.

What breaches should be disclosed?

By providing various examples, the following is an attempt to map out some parameters of the breaches contemplated:

a) "*a material breach of securities law or any law for the protection of securityholders or members of a partnership or legal person* "

Examples:

- false or incomplete information concerning a material fact in a prospectus or a continuous disclosure document,
- a non-compliant procedure for "notifying" shareholders or members,
- an attempt to evade applicable legislative provisions pertaining to public offerings,
- selective disclosure of material facts,
- an illegal transaction intended to deprive certain shareholders of their rights or to prefer certain shareholders over others.

b) "a breach of any other law, if it is likely to lead to serious consequences for the client "

Examples:

- a government official granting a building permit in contravention of the applicable municipal by-laws,
- an agreement with a company's competitors to not submit a price lower than that agreed upon,
- acts not in conformity with the conditions attached to a business license that would result in the loss of the rights granted thereunder if it was cancelled or,
- dumping or burying of contaminants in contravention of environmental rules that could cause serious damage to third parties.

What other measures or analytical criteria should be applied?

The following are some **examples of serious consequences**:

- material adverse financial consequences; or
- possible loss of rights or privileges that would significantly affect the company's ability to operate; or
- major lawsuits being brought against the company or its directors or senior executives.

In every case, the seriousness of a possible consequence must be **assessed**. This assessment should be made in context, using judgement and reasonable criteria and, when in doubt, the advice of other counsel.

For example, **at first glance**, in the view of the author, non-compliance with a time limit for filing a report or a breach of a requirement as to form under the *Consumer Protection Act* or the *Charter of the French Language* **are not**, according to reasonable criteria, breaches likely to have serious consequences. For the purposes of reviewing financial statements, external auditors use the materiality level test. Obviously, the materiality level or seriousness will vary considerably from one company to another.

Does the obligation of disclosure to the appropriate hierarchical authority limit the extent of counsel's other obligations?

Absolutely not. Thus, such obligation of disclosure and compliance or non-compliance therewith do not in any way reduce:

- the lawyer's obligation to warn the client representative with whom he is dealing of any breach of a rule of law that he becomes aware of in rendering his services and that pertains to facts or issues that he must examine or consider in providing those services, and
- the prohibition against participating in a breach or assisting the client in committing a breach, failure to observe such prohibition constituting a derogatory act.

What can in-house counsel do to create an internal context favourable to compliance with professional rules of ethics?

An employee-lawyer's obligation of loyalty to his immediate superior or certain internal rules may conflict with the provisions of the Code, including article 3.05.18. Thus, in-house counsel's role and his **ethical obligations** must be properly **understood by the employer**. A clear contract of employment and implementation of good corporate governance practices should promote such an understanding. Other measures, such as those mentioned in section 4 above (*The obligation of independence*), should also be applied. Many companies have implemented an anonymous and confidential disclosure procedure, which to a certain extent can protect in-house counsel by avoiding putting him in a conflict of loyalties situation.

Disclosure to the appropriate hierarchical authority should only be made after **genuine efforts** have been made to help the offender to **rectify the situation or** to **prevent** such a situation from recurring. It is not about engaging in a witch-hunt.

Further clarification of article 3.05.18.

Article 3.05.18 has been the subject of comments and queries. The following discussion attempts to address the issues raised, at least in part.

The introductory wording of article 3.05.18 contains the words " ... any fact... which, in the advocate's opinion, may be a breach... ".

The use of the verb **"may" in the first paragraph** must not be interpreted as encompassing every improbable risk or possibility. In other words, the opinion must be a **conclusive opinion and** the risk or possibility must have been **reasonably assessed**, with emphasis on the word "opinion", which suggests that the lawyer has some latitude, rather than on the word "may". If questions arise, counsel must attempt to answer them and to reach a conclusion. Subjecting in-house counsel to a more onerous obligation would be excessive.

The phrase "in the advocate's opinion" has been viewed by some as a purely subjective standard, which they would like to see replaced by the phrase "the advocate knows". In our view, this is not correct and the phrase should be characterized as establishing a mixed subjective-objective standard. Indeed, as counsel must always act with skill, diligence and prudence (article 3.00.01), he cannot assess a potential breach otherwise than as a prudent and competent lawyer acting reasonably in a similar situation. However, the standard is not completely objective because at the end of the day it refers to the lawyer's opinion or, put another way, to the conclusion that he personally reaches.

In opting for a less precise **definition of the appropriate hierarchical authority and the disclosure process**, the Code refrained from imposing a procedure that would not correspond to the reality of each client and instead contemplated the likelihood that various procedures would be adopted depending on the type of breach and type of company. Thus, recourse to an "ombudsman" or an independent outside resource remains a possibility. It should be noted that in securities matters, a breach should ultimately be disclosed to the board or, at least, to the audit committee, given the rules of the CSA. Moreover, the appropriate hierarchical authority will not be external to the client unless the client itself so requires.

In passing, it should be noted that paragraph (1) of article 3.05.18 uses the same concept of "material breach" as section 307 of the *Sarbanes-Oxley Act* and that for such a breach the Code review committee did not retain the further qualification of "serious consequences" found in paragraph (2). This was done to avoid provoking intervention by the CSA, which, in certain respects, wished to adhere to the American model.

In short, the Code review committee therefore intentionally avoided a regulatory, hence rigid, formulation of procedures, in order to leave room for guidelines on ethical conduct. In so doing, the committee's intention was protect the civil law approach (codification of a general obligation, objective or result sought) and to avoid adopting an overly complicated formula that would not work in all contexts. Such guidelines could draw inspiration from section 2.02 of the *Rules of Professional Conduct* of the Law Society of Upper Canada and the accompanying commentary.

The law now provides some protection to whistleblowers (section 122 of the *Labour Standards Act* (Québec) and article 425.1 of the *Criminal Code of Canada*). But we must be realistic and note that the protection is neither watertight nor complete.

It is clear that in-house counsel is not in a disclosure context where management **asks** in-house counsel to **investigate** a possible breach or to defend the client who has committed a breach, unless after concluding that there has been a breach and providing his opinion to that effect, nothing is done to rectify the situation in the future.

Moreover, both in-house and external counsel, and hence the Barreau du Québec, must be especially **vigilant to block** legislative or regulatory attempts to enact **"noisy withdrawal"** provisions (mandatory reporting to regulatory authorities) which effectively would not allow the lawyer to offer the protection of professional secrecy and comply with the attorney-client privilege and his duty of loyalty to the client. In that respect, we should recall the aborted attempts by the SEC in the United States to introduce such provisions and, in Québec, the enactment of new section 154.2 of the *Supplemental Pension Plans Act* (Québec), despite opposition from the Barreau du Québec.

We must be just as vigilant to avoid leaving the task of defining lawyers' obligations up to the courts without providing them with guidance.

6. Specific derogatory acts

Article 4.02.01 of the Code specifically mentions certain derogatory acts, several of which should be noted here. They are set forth in paragraphs 4.02.01 d), e), f) and g).

> *"4.02.01 In addition... the following are derogatory to the dignity of the profession of advocate:*
>
> *...*
>
> *d) making or helping the client make a declaration de facto or de jure knowing it to be false;*
>
> *e) participating in the fabrication or preserving of evidence he knows to be false or which is manifestly false;*
>
> *f) concealing or knowingly omitting to reveal what the law obliges him to reveal or helping the client conceal or omit to reveal what the law obliges the client to reveal;*
>
> *g) helping the client to perform an act which he knows to be illegal or fraudulent or providing advice or encouragement inducing the client to perform such an act;... ".*
>
> (emphasis added)

In those paragraphs, the Code specifically identifies acts or behaviour related to **complicity** in the commission of an illegal or fraudulent act or to being a party in an offence. Certain laws create presumptions of complicity and of being a party to an offence, or of statutory liability, such as section 21(1) of the *Criminal Code of Canada* and sections 205 and 208 of the *Securities Act* (Québec). In the United States, some statutes also create the offences of complicity or being a party to an offence. In common law, there is an impressive body of case law on the concept of "**aiding and abetting**". Application of that concept is based on specific legislative provisions rather than on a general notion of complicity or contributory fault.

In-house counsel must be very aware of that legal environment because, increasingly, lawyers acting for shareholders and regulatory authorities do not hesitate to lay changes against in-house counsel or allege that they are liable for damages.

This comment is all the more meaningful when considering the situation of **counsel of reporting issuers** and paragraphs d) and f) in the context of the issuer's disclosure obligations.

It should also be noted that if in-house counsel is involved in drafting an agreement for an illegal object, he commits a derogatory act within the meaning of paragraph 4.02.01 g). Therefore, in such circumstances, counsel must **refuse to act** even if that decision potentially means losing his job.

To summarize, in-house counsel is asked to play a **crucial** role in society in general, and within the organization that employs him, in particular.

That role cannot be fully performed if in-house counsel is not prepared to comply with all the applicable rules of conduct set forth in the *Code* and to act, to a certain extent, as the company's moral conscience. No one should even consider becoming a surgeon if he can't stand the sight of blood, or a fireman if he is afraid of fire.

The role of in-house counsel is a stimulating one, but it is fraught with risks that, as suggested in this article, can be mitigated if the organization's executives have a full understanding of that role and if the parties are bound by a clear contract of employment and appropriate corporate governance rules, procedures and systems.

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