302 Against the Advice of Counsel- Truth or Consequences

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Catherine Landman
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Faculty Biographies

Cynthia A. Boeh

Cynthia A. Boeh is the first general counsel for Yanmar America Corporation and the only in-house attorney for the global $5 billion dollar Yanmar organization located in Buffalo Grove, Illinois. Her breadth of expertise and responsibility includes leadership roles in domestic and international litigation as well as almost every aspect of corporate law. Ms. Boeh continues to draw on her experience to provide sound business and legal advice for Yanmar's domestic and overseas operations.

Prior to joining Yanmar, Ms. Boeh's practiced in both the law firm and in-house arenas including at Robins, Kaplan, Miller & Ciresi and forming her own firm of Adamson & Adamson, as well as senior attorney in-house for St. Paul Co's.

She is a member of and frequent speaker for ACC, the ABA, past chair of the economics and management subcommittee of the section of litigation, and Minority Corporate Counsel Association.

Ms. Boeh received B.A. magna cum laude from Mankato State University and graduated cum laude from the University of Minnesota Law School.

Catherine Landman

Catherine R. Landman is the senior vice president and general counsel at The Pampered Chef, a direct seller of quality kitchen tools located in Addison, Illinois. Ms. Landman joined The Pampered Chef when the company's legal department was created. As the company's chief legal officer, she is responsible for managing the myriad of legal issues facing the company and its subsidiaries in the United States, Canada, Germany, and the United Kingdom.

Prior to joining The Pampered Chef, Ms. Landman worked as in-house counsel for Mary Kay Inc. and National Car Rental. She started her legal career at the Minneapolis law firm of Dorsey & Whitney.

Ms. Landman holds a B.S.F.S. from Georgetown University and a J.D. from the University of Wisconsin.

Alan K. Tse

Alan K. Tse is general counsel of LG Electronics MobileComm U.S.A., Inc., one of the nation's largest cell phone manufacturers with annual sales of over $3.5 Billion. He is responsible for all legal matters for LG's cell phone business in North America.

Prior to LG, Mr. Tse was the vice president and general counsel of Ligos Corporation, a venture capital backed video compression software company based in Silicon Valley. Prior to Ligos, Mr. Tse was the vice president of strategic development and general counsel of Centerpoint Broadband Technologies, Inc., where Mr. Tse helped raised over $200 million dollars of venture capital and reached a valuation of over $1 billion. Mr. Tse started his career as a business and technology associate at Brobeck Phleger and Harrison LLP in their Silicon Valley office representing technology companies and venture capitalists.

Mr. Tse is also the co-founder and serves on the board of the Asian American Legal Foundation. Mr. Tse was recently named one of the "Best Lawyers under 40" by the National Asian Pacific ABA and is a frequent speaker at various continuing legal education conferences on the roles and responsibilities of the general counsel.

Mr. Tse holds a B.A. from the University of California at Berkeley and he graduated cum laude from Harvard Law School.

Generally--

- In-house counsel:
  - holds both a position of lawyer but also as employee
  - must act at all times in the best interests of the client organization as a whole
  - act first and foremost for the organization for which they work and not for any one individual

"The General Counsel has one foot planted firmly in the shifting treacherous terrain of the law, and the other planted just as firmly in the oozing swamp of business."
-Timothy Terrell, Professor of Law, Emory University

Lawyer Independence--

- Employed legal professionals are typically obliged to maintain a certain independence from the politics and operations of the corporation because they are required to comply with the ethical obligations of their profession
- Very often there are competing and conflicting duties and in-house loyalties to contend with

Issues--

- Is corporate counsel or outside counsel more likely to have the independence to tell management or the board of directors what they may not want to hear?
  - *Both* lawyers are in the first instance officers of the court and bound by their Rules of Conduct to maintain their independence even in the case of contrary instructions

Issues--

- How does corporate counsel deal with a major problem where he knows that an officer, employee or other person associated with the corporation is engaged in an action that is a violation of a legal obligation of the corporation?
  - According to the Model Rules, counsel must give due consideration to the seriousness of the violation, the potential consequences, the scope and nature of how he can represent the situation, and the level of responsibility of the perpetrator in the organization. The action to be taken must minimize disruption while bringing settlement to the situation.
  - Such action may include:
    - Asking for reconsideration of the matter by the employee or officer involved;
    - Escalating the matter to the appropriately responsible officer;
    - If necessary advising that an outside legal opinion be sought to present to the appropriate authority in the organization

Opinion Shopping--

- In-house counsel:
  - must state their views unequivocally particularly where they have another view from the one obtained
  - should record all advice given, particularly if that advice is being ignored by the client
  - must endeavor to obtain the best available advice in the circumstances and inform the client of all advice obtained, at the same time stating their own view
  - must not assist a breach or the concealment of a breach of the law

Conflicts of Interest--

- In-house counsel:
  - must avoid if possible; they are illegal by statute in certain jurisdictions, compromise the independence of counsel and could impinge on client's privilege
  - when faced with an unavoidable conflict, must be conscious of the conflict throughout their dealings, declare it openly and clarify the capacity in which they are acting

Common Ethical Dilemmas--

- Simultaneous Representation of Clients
  - Inadvertent conflicts
  - Joint representation
  - Unauthorized practice of law
- Representing Conflicting Interest
- Third Party payment of legal fees
- Lawyer self-interest
  - Confidentiality
  - Control

Lawyer Self-Interest--

- Control: The attorney should not allow the company's position and payment of fees affect his representation
- Conflicts: The lawyer must not allow his own financial interest, or otherwise, affect his ability to represent the company
  - The attorney should not allow the fact, that the attorney can be fired at any time, stop him from taking an adverse stand on issues such as sexual harassment, etc.

Whistleblowing--

- An in-house attorney addressing corporate wrongdoing should seek to resolve the issue internally, including redressing the issue up the chain of command of management
- If those steps do not result in appropriate action to resolve an issue of material impact on the entity, the attorney must take the matter to the board or an appropriate sub-group of the board or report it to the appropriate level of authority either in or outside the corporation
- If the attorney has not reported the matter appropriately and the matter subsequently becomes public, the in-house lawyer will probably be held culpable along with the other executives.
  - Example: The forced resignation in 1991 of Donald Feuerstein, the GC of Solomon Brothers Inc. in New York by the SEC was for not blowing the whistle on a US Treasury bond fraud.
- However, whistleblowing is in direct conflict with a lawyer's requirement to keep the actions of his client confidential, he/she must adhere to the Professional Rules.

Ethical Must Do's--

- In-house counsel should observe the rules of:
  - Courtesy and consideration
  - Fidelity and integrity
  - Confidentiality
  - Privacy; and
  - Must disclose any interest held by counsel which may affect one's judgment or integrity

Keep in mind--

- Remember acting as in-house counsel does not in any way diminish their professional responsibilities as members of the legal profession; their duties to court and client remain paramount

Against the Advice Of Counsel – TRUTH or CONSEQUENCES

Discussion Hypothetical

For more than 30 years, Company, a family-owned business, has manufactured and distributed electrical houseware products in Europe and North America. Company's headquarters is located in Big City, USA. Currently, Company operates three manufacturing facilities in the United States and one outside of Shanghai.

Recently, Company's sales have stalled and there is increasing pressure on the executive team to deliver results. Unlike the existing executive leadership team, Company's CEO is relatively new to the organization, having been hired by a search conducted by the Board of Directors only nine months ago. The Board has indicated to the new CEO that it is interested in finding an investor and a potential partner for the Company. Given increasing competition, an infusion of capital may enable Company to help it further expand its Shanghai manufacturing operations and close two of its US manufacturing facilities, thereby further reducing costs. In addition, several board members from the family face mounting pressure from other family members who also have a stake in the Company and want to cash out to make outside investments. The executive leadership team is well aware of the direction given the CEO by the Board of Directors as positive discussions have already taken place with several potential investors. Each member of the executive leadership team stands to financially benefit as a result of any investment deal.

Two months ago, the CEO hand-picked a new CFO, replacing the "retiring" CFO. Other executives at Company anticipate that within the next three to six months, the CEO will make additional changes on the executive leadership team.

Over the past two months, the Company has received an increasing number of consumer product complaints regarding Product A – one of Company's best selling products. Generally, consumers have reported the overheating of Product A after 10 minutes of use. Upon further investigation, the quality department concluded that the overheating likely resulted from a loose connection between the product and the cord. The quality team also noted that the products for which Company received complaints were manufactured only in the Shanghai facility.

The Director of Quality reported the product complaint issue to the Senior Vice President of Product Development and the Senior Vice President of Operations. These two officers decided that there was no need to report the issue to the legal department (who they believed would also require them to report the issue to regulators in the United States and Europe). Rather, they decided to continue to evaluate the manufacturing process in the Shanghai facility while they continued to manufacture products destined for Q4 holiday sales. Because the product team was also working on a re-design of the product that would likely correct the alleged problem and that was scheduled to launch in Q2 of the following year, they also decided there was no need to report the issue further. While he disagreed with the decision made by the two executives – one of which was his boss -- the Director of Quality Control did not feel comfortable raising the issue further with anyone else on the executive leadership team.

About a month later, another member of the quality department, assuming that the issue was already brought to the attention of the legal department, asked the attorney who manages product issues about what was the final resolution of the issue while they were both waiting in line at the Company's cafeteria. The attorney then reported the issue to the General Counsel.

Discussion Points:

- Who does the General Counsel/Legal Department represent?
- What are the first steps the General Counsel should take?
- How, if at all, would the General Counsel follow-up the upon learning of the decision made by the Senior Vice President of Product and the Senior Vice President of Operations?
- If the Senior Vice President of Product and the Senior Vice President of Operations decided not to take any action, how, if at all, would the General Counsel follow-up with the CEO?
- If the CEO decided not to take any action, how, if at all, would the General Counsel follow-up with the Board of Directors?
- Would any of the above responses be different if the Company was publicly-held?
- What processes/systems can be engaged to help keep the legal department “in the loop” about issues that should be brought to its attention?

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