CAN TECHNOLOGICALLY-TRAINED LAWYERS HELP PREVENT ENVIRONMENTAL PROBLEMS?

Homer O. Blair

We know much more about environment and dangers to it and ourselves today than we did in the past. Also there are many more laws and regulations today than previously. Both our knowledge and our laws and regulations are on the increase.

In most organizations there is no one who understands both technology and law. Scientists and engineers know little, if anything, about the law. Lawyers usually know even less about technology. Neither group has any interest in the other's field. However there is a small, but growing, group of technolgically trained lawyers. Most of these people are patent lawyers. These lawyers could also be usefully employeed to assist organizations in preventing ecological disasters.

Could it not also be argued these lawyers have an ethical duty to save their employers, or their clients, from themselves by using their technological knowledge and their understanding of the law, and where the law is going, to prevent environmental problems from occurring?

HOB/Ruh/4-60

THE ROLE OF TECHNOLOGICALLY-TRAINED CORPORATE LAWYERS IN MANAGING RISK

1. INTRODUCTION
   - A. WE KNOW MUCH MORE ABOUT THE ENVIRONMENT AND DANGERS TO IT AND OURSELVES THAN WE DID IN THE PAST.
   - B. THERE ARE MANY MORE LAWS AND REGULATIONS TODAY THAN THERE WERE PREVIOUSLY.
   - C. BOTH WILL INCREASE IN FUTURE.

2. SCIENCE, TECHNOLOGY AND LAW
   - A. FEW UNDERSTAND BOTH TECHNOLOGY AND LAW.
   - B. SCIENTISTS AND ENGINEERS USUALLY KNOW NOTHING ABOUT LAW.
   - C. SCIENTISTS AND ENGINEERS USUALLY HAVE A LOW OPINION OF LAWYERS
   - D. LAWYERS USUALLY KNOW NOTHING ABOUT SCIENCE AND TECHNOLOGY AND HAVE NO INTEREST IN SCIENCE AND TECHNOLOGY.
     IF THEY DID THEY WOULD PROBABLY HAVE BECOME ENGINEERS OR SCIENTISTS
   - E. THUS IN THE ENVIRONMENTAL FIELD WE HAVE TWO BODIES OF KNOWLEDGE EACH OF WHICH IS COMPLEX.
   - F. NOT DIFFICULT TO BECOME REASONABLY COMPETENT IN MANY FIELDS.
     CHARLES I OF ENGLAND 1625-1649.
   - G. UNFORTUNATELY TECHNOLOGY IS QUITE DIFFERENT.
     NEED BACKGROUND IN MATHEMATICS, CHEMISTRY, PHYSICS, ETC. TO BE ABLE TO UNDERSTAND, MUCH LESS BE COMPETENT IN, ADVANCED ENVIRONMENTAL CHEMISTRY, COMPUTER ELECTRONICS, BIOTECHNOLOGY, ETC.
   - H. ALSO LAW REQUIRES CONSIDERABLE TIME AND BACKGROUND TO
     1. MASTER THE SUBJECT MATTER,
     2. UNDERSTAND THE RELATIONSHIP BETWEEN LEGISLATURES, COURTS AND EXECUTIVE BRANCHES
     3. BE ABLE TO FIND, READ AND UNDERSTAND THE LAW.
   - I. THUS SCIENTISTS MUST LEARN TO COMMUNICATE WITH LAWYERS AND LAWYERS MUST LEARN TO COMMUNICATE WITH SCIENTISTS.

3. PEOPLE WITH BOTH LEGAL AND TECHNOLOGICAL TRAINING
   - A. A MORE EFFICIENT WAY WOULD BE TO USE A SMALL GROUP OF PEOPLE WHO HAVE THE RATHER UNUSUAL COMBINATION OF

EDUCATION, AND OFTEN EXPERIENCE, IN BOTH TECHNOLOGY AND LAW.

EXAMPLES: TOM FIELD
[redacted]
TOM BOHAN
~~PETER BROWN?~~
SCOTT EATON
JOE LAKSHMANAN

TOM McGARITY
JOHN ARNOLD
STEPHANIE
JOHN ROBERTS

REPORTERS AND MODERATORS
TERESA LOZINGER
DAVID MORGAN
KENT PATASHNICK

MANY OF US WERE PROFESSIONAL STUDENTS.

B. MOST OF THESE PEOPLE ARE PATENT LAWYERS, BUT A SIGNIFICANT NUMBER ARE NOT.

C. MARCH 1, 1988 12,623 REGISTERED TO PRACTICE BEFORE PATENT PART OF U.S. PATENT AND TRADEMARK OFFICE.

4. PATENT LAWYERS - A UNIQUE BREED

A. U.S. LAW PERMITS LAWYERS TO PRACTICE BEFORE ALL FEDERAL AGENCIES EXCEPT ONE.

B. PATENT PART OF U.S. PATENT AND TRADEMARK OFFICE.

1. PERMITTED TO SET ITS OWN REQUIREMENTS.

a. DIFFICULT 1-DAY EXAMINATION (29% PASSED LAST TIME)

b. MUST HAVE SCIENCE OR ENGINEERING DEGREE OR EQUIVALENT TO TAKE EXAM.

C c. I AM NOT AWARE OF ANY OTHER FIELD OF LAW IN THE UNITED STATES IN WHICH THERE IS AN EDUCATIONAL, EXPERIENCE OR EXAMINATION REQUIREMENT IN ADDITION TO THE LEGAL EDUCATION AND BAR EXAMINATIONS

D d. AS FAR AS I KNOW, THE U.S. IS THE ONLY COUNTRY WHICH REQUIRES THAT A PATENT PROFESSIONAL MUST BE BOTH TECHNOLOGICALLY AND LEGALLY TRAINED.

ECH
GREAT BRITAIN
GERMANY
JAPAN
SOVIET UNION

AW
MEXICO
ARGENTINA

L. IN THIS REGARD I'D LIKE TO CALL YOUR ATTENTION TO A MORE DETAILED PAPER MAKING THE SAME POINT BY DR. JOHN H. ROBERTS, A FRANKLIN PIERCE LAW STUDENT. THE PAPER ENTITLED "THE ROLE OF THE SCIENTIFICALLY
PAGE 3 AND TECHNOLOGICALLY LITERATE ATTORNEY IN THE APPLICATION OF PREVENTIVE LAW TO LOW ENTROPY CORPORATE DECISION MAKING AND LONG RANGE PLANNING" WILL BE PUBLISHED SHORTLY.

E. MANY SKILLED LAWYERS ARE NOT QUALIFIED TO BECOME PATENT LAWYERS BECAUSE THEY DON'T HAVE REQUISITE TECHNOLOGICAL BACKGROUND.

F. NEARLY ALL PATENT LAWYERS DO NOT START OUT TO BE LAWYERS, BUT PLANNED TO BE ENGINEERS OR SCIENTISTS.

G. NOT EASY FOR NON-TECHNICALLY TRAINED LAWYER TO UNDERSTAND CHEMISTRY OF ENVIRONMENTAL PROBLEM, MUCH LESS MAKE A POSITIVE SUGGESTION TOWARD A SOLUTION.

H. HOW CAN THE LAWYER SUGGEST POSSIBLE TECHNOLOGICAL ALTERNATIVES WHICH MAY RESULT IN IMPROVEMENT OR EVEN SOLUTION TO THE PROBLEM?

I. ANALAGOUS TO PATENT LAWYER HELPING SCIENTISTS OR ENGINEERS DESIGN PROCESS OR PRODUCT TO AVOID INFRINGING THE CLAIMS OF ISSUED PATENTS BELONGING TO OTHERS.

J. PATENT LAWYER MAY NOT BE ABLE TO SAY WHETHER A SUGGESTED SOLUTION IS COMMERCIALLY FEASIBLE, HE CAN SUGGEST TECHNOLOGICAL ALTERNATIVES.

K. WORTHWHILE TO USE THESE TECHNOLOGICALLY-LITERATE LAWYERS IN ENVIRONMENTAL MATTERS, NOT ONLY IN ADVOCACY, BUT MORE IMPORTANTLY, IN AVOIDING ENVIRONMENTAL PROBLEMS BY GIVING APPROPRIATE ADVICE TO COMPANY.

L.

5. REACTIVE LAW

A. MOST LAWYERS PRACTICE "REACTIVE LAW"

B. WHEN CLIENT HAS A PROBLEM, LAWYER WILL DO HIS BEST TO SOLVE THE PROBLEM.

C. DIFFICULT FOR A LAWYER TO GO TO CLIENT AND INVESTIGATE CLIENT'S ACTIVITIES AT $100 PER HOUR.

6. PREVENTIVE LAW

15% A. MANY LAWYERS ARE EMPLOYEES OF CORPORATIONS.

B. THEY HAVE RESPONSIBILITY AND OBLIGATION OF PREVENTING PROBLEMS FROM ARISING.

C. /DISCUSS PATENT INFRINGEMENT INVESTIGATION7

1. STATE-OF-THE-ART SEARCH

a. NEED BOTH TECHNICAL LITERATURE SEARCH AND PATENT SEARCH.

2. PRELIMINARY INFRINGEMENT SEARCH.
   a. IDENTIFY PATENTS OF CONCERN.
3. NOT USEFUL TO ASK "HOW ELSE CAN YOU DO THIS?"
4. PATENT LAWYER MUST SUGGEST SPECIAL TECHNOLOGICAL SOLUTIONS WHICH WILL AVOID CLAIMS OF THE PATENT.

FPLC CLASSES

D. MUCH MORE USEFUL THAN ATTEMPTING TO MAKE CHANGES AFTER A FACTORY HAS BEEN BUILT AND PRODUCTS ARE OUT IN THE MARKET.

7. THE TECHNOLGICALLY LITERATE LAWYER
   A. CAN ANALAGIZE THAT A TECHNOLOGICALLY LITERATE ENVIRONMENTAL LAWYER SHOULD BE ABLE TO HELP HIS CLIENT OR EMPLOYER AVOID ECOLOGICAL DISASTERS.
   B. A COMPETENT LAWYER (& REDUCE)
      1. WILL KNOW PRESENT LAW IN FIELD OF EXPERTISE,
      2. CAN MAKE PREDICTIONS ON WHERE THE LAW IS GOING,
      3. WILL NOT HAVE TO RELY COMPLETELY ON SCIENTISTS AND ENGINEERS FOR TECHNOLOGICAL INPUT,
      4. CAN DETERMINE TECHNOLOGICAL SITUATION FOR HERSELF AND
      5. CAN SUGGEST SOLUTIONS FOR PROBLEMS THAT MAY ARISE AS PROCESS OR PRODUCT IS BEING DEVELOPED.

8. AN EXAMPLE
   A. /DISCUSS FERRICYANIDE PHOTOGRAPHIC DEVELOPER/
      1. NOT UNDULY DANGEROUS
      2. TRANSPARENT BOTTLE OPENED
      3. "BITTER ALMONDS" SMELL
      4. HYDROCYANIC ACID (PRUSSIC ACID)
      5. COMPANY DID NOT MANUFACTURE PRODUCT
      6. BUT HAD TRADEMARK ON BOTTLE
      7. OLD (1940) CHEMISTRY TEXTBOOK "THE FERRICYANIDE ION ... DECOMPOSES SLOWLY IN THE SUNLIGHT."
      8. SOLUTION: USE OPAQUE BOTTLE

9. A LAWYER'S DUTY AND ABA MODEL CODES
READ FROM ~~BOTTOM~~ OF P. ~~11 OF DRAFT~~ 13, TO END
BUT OMIT FIRST PARAGRAPH OF P. 14.

A Lawyer's Duty and American Bar Association Model Codes

Lawyers are taught in law school that "a lawyer ordinarily has no duty to initiate investigations of a client's affairs."[2] This is normally the situation in private practice and lawyers usually do not go out of their way to check into their client's activities. However the lawyer employed by the corporation has a responsibility to handle the corporation's legal affairs and that responsibility must involve investigation of the employer's activities and doing the best the lawyer can to prevent problems from occurring. I think it may be argued that all lawyers have an obligation "to save" a client or employer from the client's or employer's actions by helping the client or employer avoid the expense and other disadvantages of a significant problem, such as an environmental problem.

If the lawyers had really dug into some of the initial indications that certain products tend to cause cancer, the corporations involved would have been much better off, to say nothing of many people who ~~might~~ have contracted cancer or other diseases because of exposure to the product involved.

Let's look at a few other portions of the American Bar

Association Model Code of Professional Responsibility and the Model Rules of Professional Conduct.

For instance the American Bar Association Model Code of Responsibility as of August 1983, provides, under Canon 2, Ethical Consideration EC2-7, that "few lawyers are willing and competent to deal with every kind of legal matter..." Unfortunately the legal profession has not yet started to utilize the concept of the medical internist whose job is to find the problem and then recommend that an expert in that particular field solve the problem. Under such a legal internist system, if a lawyer came across an environmental problem he might refer the client to an environmental legal expert, who might very well have ~~the~~ a technological background, rather than look up the law and try to solve the problem himself.

While lawyers usually learn primarily about advocacy in law school it is clear that a lawyer may also serve as an adviser. For example Canon 7 Ethical Consideration EC7-3 of the ABA Model Code provides "a lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different...[9]

a lawyer serving as an adviser primarily assists his client in determining the course of future conduct and relationships."

Footnote [9] states "...the counselor's obligation should extend to requiring him to inform and impress upon the client a just solution of the problem, considering all interests involved." Thode, The Ethical Standard for the Advocate, 39 Texas L.Rev575, 578-9 (1961).

In addition Ethical Consideration EC7-8 states "In assisting his client to reach a proper decision it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible."

The Model Rules of Professional Conduct of the American Bar Association which were adopted August 2, 1983, provide in rule 2.1 "In rendering advice, a lawyer may refer not only to law but to other considersations such as moral, economic, social and political factors, that may be relevent to the client's situation." Also under that rule a comment entitled "Offering Advice" provides, as stated above "A lawyer ordinarily has no duty to initiate investigation of a client's affairs...,"

However that same comment concludes with the statement "...but a laywer may initiate advice to a client when doing so appears to be in the client's interest."

The Technologically Literate Lawyer-An Activist View

Normally the Model Code of Professional Responsibility and Model Rules of Professional Conduct are regarded as setting limits for what a lawyer should not do and are usually not necessarily regarded as guidelines for how a lawyer should operate, although some of these portions of the code and rules are in that mode. However in view of the sometimes tremendous penalties involved for a environmental disaster which may often include bankruptcy, very large judgements, etc., a lawyer may have to take the initiative to investigate a client's activities and recommend action which "appears to be in the client's interest."

In saying this I fully realize that it may not be easy for a lawyer to convince a client of a particular course of action. However a skilled lawyer is trained to be able to convince. With the use of his/her convincing abilities, particularly when combined with ~~the~~ a useful technological background, and a substantial

amount of persistence, the lawyer may be able to succeed in preventing ~~his~~ the client from being in significant environmental trouble. In any event I believe that a lawyer has a duty to try.

FOOTNOTES

[1] 5 U.S.C. Section 500.35 U.S.C.Section 31.

[2] American Bar Association Model Rules of Professional Conduct (August 2, 1983) Rule 2.1 Comment

HOB/Ruh/4-61

10/13/88