

Resolving Conflicts Between Professional Legal Ethics and Corporate Strategy

Examining the Role of In-House Counsel



18 September 2012
Addressing Ghana Bar Association

World of Corporate Scandals

Decades of Accounting & Corporate Malpractice

“I take full responsibility for what happened at Enron. But saying that, I know in my mind that I did nothing criminal.”

Kenneth Lay, former CEO & Chairman of Enron

- **British scandals:** Polly Peck International; BCCI
- **US Scandals:** Enron, Tyco International, Adelphia Communications Corporation (ADALAC), WorldCom, Global Crossing (GBLXQ), ImClone Systems (IMCL), Sunbeam (SOC), Waste Management (WMI), Lehman Brothers, AIG

Contention of Today's Talk

It is **necessary and imperative** to ensure that **Corporate Ghana's rapid economic growth** within the last three decades and particularly under the 1992 Constitution is **strengthened**, and its corporate governance and culture structures **informed** by failures in North American, Western European, and Asian scandal implosions, by **examining the role of in-house counsel in corporate governance and ethics.**

Defining In-House Counsel

Legal Practitioner

- Rule 1(a) of L.I. 613
- A lawyer in practice “is a qualified person who holds himself out as ready to practice as a lawyer or *is employed in a whole-time occupation where he performs legal duties.*”

Role of Corporate Lawyer

- “to ensure the legality of commercial transactions, advising corporations on their legal rights and duties, including the duties and responsibilities of corporate officers.

Review of Literature:

- In-house counsel can be defined as a lawyer employed by a sole client-employer who is a corporate body or enterprise
- In-house counsel is an employee who primarily provides legal services to that particular corporate body under the laws of Ghana
- In-house counsel’s “client” as a practicing lawyer is the corporation or company that employs him and not executive officers or other officers of the corporation or firm

Impact of Context & Environment

- Companies Code, 1963 (Act 179)
- Corporate bodies have a form of governance, ethics and vision to achieve their goals
- Nature & extent of company's business determine substantive area of law that dictates relevant compliance and ethical strategies
- Governance includes internal (shareholders, directors, etc.) and external factors (consumer groups, clients, etc.)
- Corporate culture refers to beliefs, values & norms of behavior

WORLDWIDE EXAMPLES

Scandals at Enron, Tyco, WorldCom & AWB

Investigations: in-house-counsel supportively and intentionally helping managers engaged in self dealing and the misappropriation of company assets

Deception, destruction of information, false disclosure, failure to address misconduct

Ethical dilemma of balancing company (client) instructions with duty to Court and rule of law

Modern in-house counsel incorporates ethical and reputational considerations with legal advisory oversight, steering the client business organization, its executives and employees towards long-term wealth maximization and security for all shareholders. (Ben G. Pender II)

Relevant Legal Parameters

“Freedom, Justice, Probity, and Accountability”

Ghana’s 1992 Constitution



Duty of every citizen

“to uphold and defend this Constitution and the law”; and “to protect and preserve public property and expose and combat misuse and waste of public funds and property.

Duty of Government Office Holders

- Article 58 (1) and (2)
- Oath of Secrecy
- Constitutional Oaths

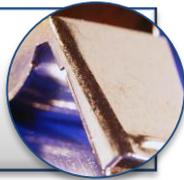
Professional Parameters



Duty of Legal Practitioners:

- Legal Professions Act 1960 (Act 32)
- Legal Profession (Professional Conduct & Etiquette) Rules 1969
- Every lawyer has copy of L.I. 613 as pocket guide
- Have protection under Article 191 of Constitution

Whistleblower’s Act 2006

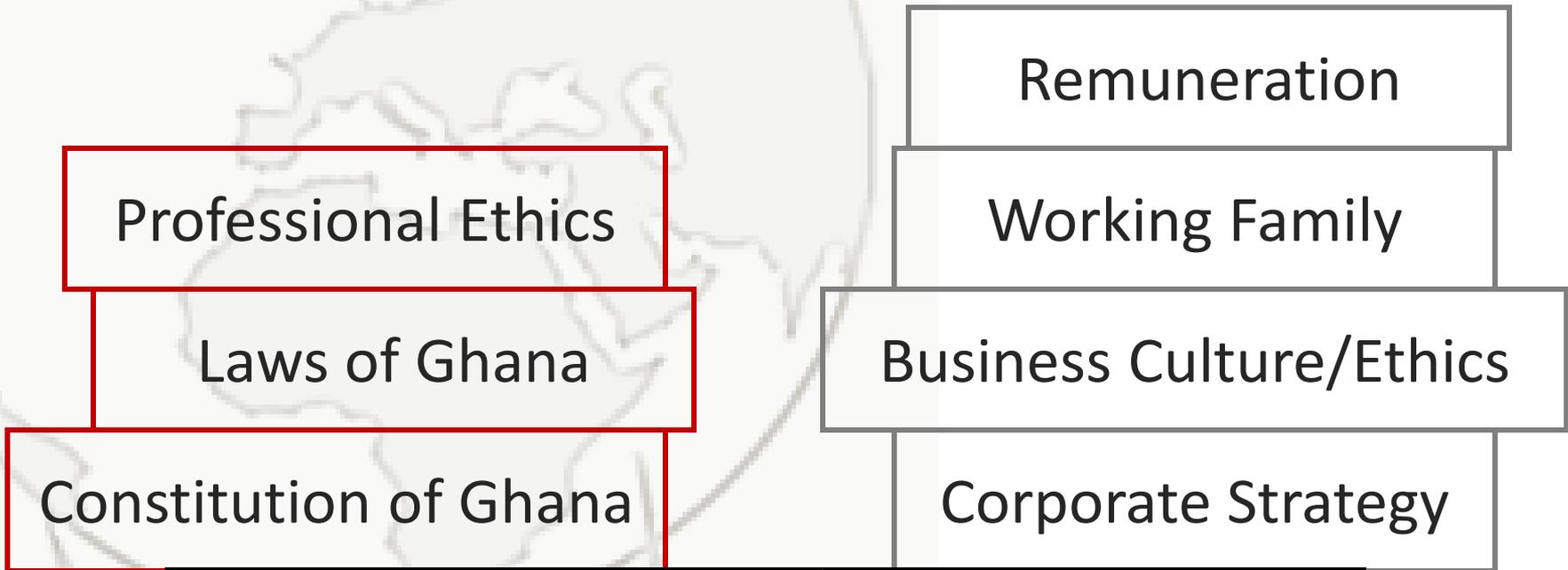


Empowers Every Ghanaian

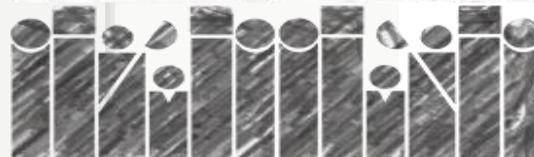
“to be the moral and ethical conscience of Corporate Ghana, the Republic of Ghana”

Reasonable cause to believe information disclosed and allegation of impropriety contained in it are substantially true

Dilemma Encountered



CULTURE OF SILENCE



Legal & Ethical Obligations

- Fundamental ethical rule is Rule 9(12) which states that: “No client is entitled to receive-and no lawyer shall render any service or advice involving disloyalty to the State or disrespect for the judicial office or the corruption of any person exercising a public or private trust or deception or betrayal of the public.”
- When lawyers internalize positive in-house corporate governance and culture that is consistent with Constitution and laws governing an enterprise, the likelihood of not calling attention to non compliance with rules and breach of ethics is minimal
- Any lawyer in doubt as to a likely conflict of interest is required to apply to General Legal Council in writing whether or not a profession or business conflicts or involves a serious risk of conflict with the duties of a person as a practicing lawyer.
- Whatever dilemmas in-house attorneys face as public officers from politicians and other executive officers is self inflicted – the Constitution is clear.
- The problem militating against enforcement of professional conduct and etiquette rules of legal profession is sociological and cultural world view of most Ghanaians: “don’t be one to blow the whistle” = culture of silence

Restoring Our Noble Profession

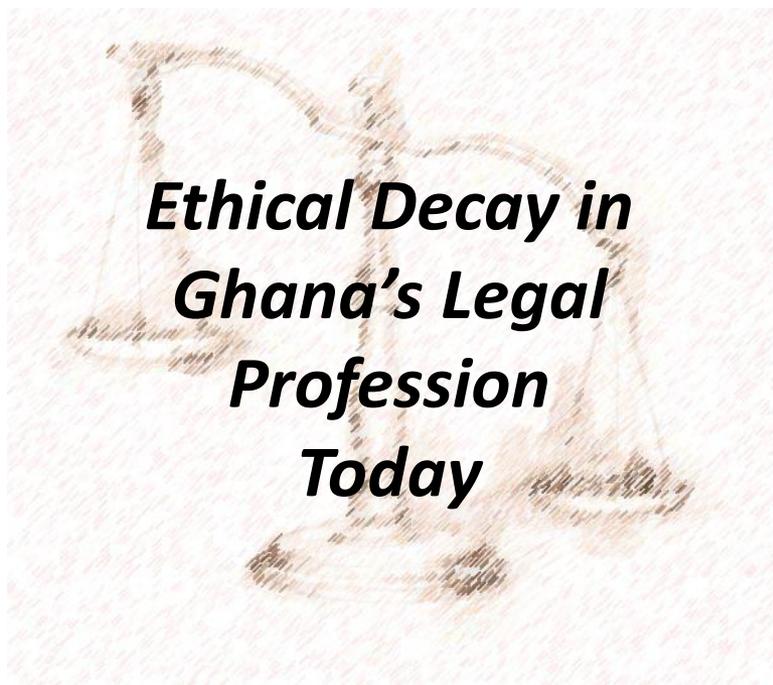
Moral Conscience

Gatekeeper

Self-Interest

DISCHARGE OF PROFESSIONAL DUTIES

- Challenge Ghanaian world view of not wanting to blow whistle
- Enforce legal professional conduct and etiquette rules
- Restore respect to Ghana's Judiciary and Courts



***Ethical Decay in
Ghana's Legal
Profession
Today***

For More Information

RELEVANT CASE REFERENCES

- *Northern Engineering Co. Ltd v Djokotoe* [1980] GLR 332
- *General Dynamics Corp. v Superior Court*, 876, P.2d 487 (Cal. 1994)
- *Amarfio v General Legal Council* [1991] 2 GLR 479
- *Nartey v Attorney-General and Adade* [1996-97] SCGLR 63
- *Watalah v Ghana Primewood Products Ltd* [1973] 2 GLR 126
- *Bella v Gambro* 584 N.E.2d 104 (Ill. 1991)
- *African Automobile Ltd v Ministry of Information and Attorney-General*, Suit No: HI/250/2010, 14 April 2010, Court of Appeal (Unreported)
- *Agyeman v Ghana Railway and Ports Authority* (1969) CC 60
- *African Automobile Ltd v Ministry of Employment Manpower & Development and Attorney-General*, Suit No: HI/249/2010, 24 February 2011, Court of Appeal (Unreported)

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For More Information

ABRIDGED REFERENCES

- Legal Profession Act, 1960 (Act 32 and its Legal Profession (Professional conduct and Etiquettes) Rules, 1969 (L.I. 613); Whistleblowers Act, 2006 (Act 720), the Companies Code, 1963 (Act 197).
- W. Mark Bennett, Ethical Conflicts Facing In-House Counsel: E-Discovery, The Attorney/Client Privilege, and the “Manager” Role, Strasburger Attorney-At-Law (November 10, 2010)
- Carl D. Liggio, The changing Role of Corporate Counsel, 46 EMORY L.J. 1201, 1203-7 (1997); Robert Eli Rosen, The Inside Counsel Movement, Professional Judgment and Organizational Representation, 64 IND. L.J. 479, 479 (1989).
- Richman, R. S. A., “A Cause Worth Quitting for? The Conflict Between Professional Ethics and Individual Rights in Discriminatory Treatment of Corporate Counsel.”, 75 IND. L.J. 963

BRIEF BIO

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