

THE USE OF LAW AS A MANAGEMENT "TOOL"

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The topic which I wish to present for discussion has, no doubt, occurred to all in this group. What contribution I may make is predicated upon observations gleaned from the operations of a large integrated petroleum company, an electric utility, a commercial bank, a department store, and a department of the U.S. Army. By far the most extensive observations were of the integrated petroleum company, whose practices will dominate this paper. It has seemed to me, for many years, that teachers of business law might profit from studies made of various companies, in the use that they make of the law. My studies have verified this belief. The names of the business units studied are not disclosed.

Assumptions

Since most of the members of The American Business Law Association are members of the faculties of collegiate schools of business administration I believe that it may very properly be assumed that the law relating to business is taught with the idea that it will be used by the graduates of these schools to assist in carrying out their future duties as business administrators.

The second assumption is that the overwhelming majority of the business personnel engaged in management activity are not trained professionally in law.

The third assumption, which is a corollary of the first, is that the law, in the sense that we are interested in it, is a "tool" of management.

The fourth assumption is that the term "management" involves all levels of personnel obligated to make a business decision. This range would comprehend the lowest echelon of supervisors, works managers, section and department heads, top executive personnel, and the board of directors of a corporation.

Rationalization and Conclusion

If our assumptions are true, then it follows that the law as a "tool" of management must be made available to management, it must be kept sharp and modern, and above all its functions, within the managerial process, must be known.

Verification of Assumptions and Conclusions

Empirical studies are the bases for this verification. Any other basis is open to question. Such studies give meaning to the law and fortify our understanding of its use.

1) The first assumption relates to the extent of the use of the law by business management. The extent of use varies from industry to industry. The general philosophy of management will also determine the use of the law, at least at the various levels of management.

In a vertically integrated petroleum company the legal problems with which management is concerned are extremely broad in scope. The Sales department has

the usual problems common to the law of Contracts and of Sales. This department is also vitally interested in the laws relating to trademarks and trade names, and labor relations legislation. The legal problems common to a Purchasing department are well known. The same may be said with regard to the tax staff. The legal problems become more varied, but nonetheless pressing, when departments such as Manufacturing, Claims, Production, Transportation, Industrial Relations, Crude Oil Purchasing, and Finance are studied.

It is true that basic legal concepts are frequently transferable from one area of the law to another. This does not completely solve the problem that faces management in various departments. It also is true that colleges of business administration cannot be expected to teach the law of Oil and Gas. It seems obvious that business management cannot rely entirely upon the classic areas of business law study to acquaint itself with the structure of its special legal problems.

For example, the Manufacturing department is confronted with problems relating to patents, labor relations agreements, contracts for construction and engineering, claims, joint facilities agreements, purchasing, operating agreements, and community police power activity. The Production department is constantly pressed by legal problems relating to oil and gas titles, labor relations, tax laws, proration, unitization, and waste disposal. The Transportation department has some legal problems similar to Production, but additionally is concerned with interstate commerce, condemnation, fast amortization, jointly owned facilities, and general real estate law. Industrial Relations finds itself loaded with tort and workmen's compensation claims. The Board of Directors, Finance, and Corporate Secretary are especially concerned with the law relating to Corporations. Wholly owned subsidiaries telescope many of these functions. In the latter instance management is faced with the problem of solving an infinite variety of legal issues which are a part of the warp and woof of business operations.

This cataloging of legal activities is, clearly, representative only of large vertically integrated companies. Banks, electric utilities, and department stores, among others, have their peculiar set of legal problems. But the significant conclusion which must be drawn from such realization is that business management must adapt itself to a large and increasing variety of legal problems, at all management levels.

Public policy statutes must not be ignored, and are becoming more rather than less significant in company operations. An almost complete lack of understanding of legislative intent was exhibited by management personnel interested in public policy statutes.

The general management philosophy varies from one of decentralized responsibility for management decisions to one of highly centralized responsibility. One company may have a regularly integrated law department, while another may not. It seems to make little difference to management which method is used. It is understood that one large petroleum company is shackled to a philosophy which, at least in practice, results in the centralization of responsibility for management decisions. Another large petroleum company has an apparently extensively decentralized operation. As a result of decentralization it becomes necessary to have high calibre personnel in all decision making positions. This personnel is, accordingly, charged with recognizing legal problems and solving them

(frequently with the advice of legal counsel) within the frame-work of the other problems involved in the decision.

This philosophy includes another very important management function, which is to administer the legal advice given by counsel. This function creates no new problems. It is merely an extension of the managerial process.

How we, as teachers of business law, can best solve the problems raised by such realizations, I do not attempt to answer.

2) The second assumption will certainly not give rise to dispute. One company has professionally educated legal talent on the Board of Directors, as Corporate Secretary, in Tax Staff, in Patents, and in Real Estate. Here and there in other departments may be found professionally educated legal personnel, but they usually are not giving professional advice. All other areas are served by lay personnel, many of whom are trained in the natural sciences.

Some of the management personnel who do not have professional legal training have had some formal training in business law. Frequently this training was on a flimsy rule- memorizing basis, without adequate effort to develop a mature consciousness of basic legal concepts, legal analysis, legal synthesis, the preventive character of the law, and the variety of the law faced by management. Most of the management personnel had acquired a formal or informal knowledge of specific slivers of the law. These personnel had little or no concept of the broader aspects of the law, referred to earlier in this paragraph. Such a basic concept as the origin of the law with which they were concerned usually was not comprehended except by top management. And the reason for the law, which is the sine qua non of all comprehension, was almost totally lacking.

To be fair to all concerned it must be recognized that many companies, and departments of companies, have established procedures for acquainting the interested management with legal developments. This is done through a free flow of literature, meetings, attendance at institutes, and free contact with general legal counsel.

The fact that more education of an extensive and intensive nature, for management, is needed, is not open to serious question. One of the factors forcing this development is the present frenzied pursuit of diversity in products or services that is embraced by business enterprises. The managerial talent must be real talent, not pseudo-talent. These observations point up the need for properly trained management personnel. In the area of the law expansion of viewpoints is necessary. This expansion should not be confined to the regular college student. It should continue after college, through the medium of specialized business law courses which are comprehended within the educational area called "executive development".

3) The third assumption, that law is a "tool" of management, may, in the light of what has gone before, now require less extensive explanation.

The law represents a staff or advisory function in all business organization charts. Sometimes the law function is departmentalized, sometimes it is outside the organization, and sometimes it is principally integrated within operating or line departments. The way this staff function is handled varies from company to company. The function remains the same.

The "tool" concept may be simplified by drawing an analogy with the carpenter's use of the plumb. If the plumb is made available, its use understood, and its nature undisturbed, the carpenter will build a "true" structure. Obviously, the use of the plumb does not obviate the use of the square, or other tools. As a "tool" the law must be so used. It is not the alpha and omega of business decision. It must be recognized as being a "tool" which usually has alternate permissive uses, and that legal prohibitions represent the minority usage. For example, one need not contract away his obligations, under compulsion from the doctrine of implied warranties. The decision of what to do is dependent upon the combined viewpoints of Sales Products Development, Finance, and other interested areas. The product representations that are proposed are usually checked with technical personnel, to determine their truthfulness. Once these viewpoints are resolved, then, and only then, are we justified in calling on the law to advise of the alternate methods available to accomplish this decision. Finally, legal counsel is requested to prepare the warranty that will reflect our decision and protect our rights.

Management may wish to adopt a policy in the use of this "tool" which will provide a review of certain correspondence by legal counsel. This would be especially so in cases involving patent exploitation. Product warranty claims need not be turned over to legal counsel, but may very well be adjusted at the customer sales level. Some servicenter managers will practice preventive law by explaining product warranties to the customer. This is on the theory that most consumers do not read warranties, or if they do read them do not understand them.

Again, it may be that the management, in considering its legal rights, would decide that the legal right should not be pursued to the bitter end. Legal rights may be waived, except those involved in government contracts. Even in cases involving government contracts the option to waive certain legal rights is discretionary with the contracting officer.

The "tool" concept is applied in still another way. It may be that legal counsel has advised that little or no legal right is obtainable, if a certain action is taken. Nevertheless, management may take the action, just as though a legal right were obtainable. For example, Sales becomes interested in using a certain mark to identify the goods it has for sale. Legal advice indicates that a legally exclusive mark cannot be obtained. Sales may still proceed to use the mark. Possibly, the advantages of use may outweigh the disadvantages of not having an exclusive legal right to the use of the mark.

The use of law as a "tool" recognizes that neither the law, except when it is prohibitory, nor the legal adviser should dominate or make the management decision. Management alone is entitled to speak for the company, except where litigation exists or is in immediate prospect, as may be the case with labor arbitration. It has been a failing of some management personnel to allow the lawyer to carry the ball. Presumably, this places the "tool" in command of the craftsman, rather than the craftsman in command of the "tool."

4) The fourth assumption, which defines the term "management," finds support in management literature. Management literature recognizes various levels of management function. (Koontz and O'Donnell, Principles of Management, 1955, p. 40). Any person having control over personnel and required to make a

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4) The fourth assumption, which defines the term "management," finds support in management literature. Management literature recognizes various levels of management function. (Koontz and O'Donnell, Principles of Management, 1955, p. 40). Any person having control over personnel and required to make a

business decision is classified as management. This concept would include everyone from foreman to corporate director. The extent of function is one of delegation of responsibility. Within the span of this function, which may be broad or narrow, management is charged with the decision. The function may be on the departmental, sectional, sub-sectional, or top management level. The above is not intended to define the functions of management personnel. Many other functions than decision are involved, but decision is the only function of importance to us.

The conclusion that the law, utilized as a management "tool," must be kept modern, sharp, and available, and that its uses must be fully known, should not now be open to question. Business law teachers are charged with initiating the process which will, when based upon good scholarship, attain these ends. Earlier, I indicated that it was not within the scope of this paper to consider the methods which must be used to satisfy these objectives. I do firmly believe that all business law teaching should be approached with the realization that the law is a "tool" of business management.