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The Supreme Court (sort of) Thinks About Lawyers as Advisors

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Case commented on: *Wood v Schaeffer,* 2013 SCC 71

When police officers in Ontario kill or injure someone in the course of their duties, the Special Investigations Unit (SIU) investigates their conduct. The government created the civilian SIU to avoid the problems – both real and perceived – in the investigation of police officers by police officers. The creation of the SIU does not, however, eliminate the complexity of investigating alleged crimes by police. The Supreme Court of Canada addressed one of these complexities in its recent decision in *Wood v Schaeffer,* 2013 SCC 71: how does a police officer's regular duty to make notes during an investigation operate when the officer may him or herself become a subject of, or direct witness to, the matters investigated? In particular, what opportunity ought a police officer have to consult counsel when preparing notes in those circumstances?

The answer of Supreme Court majority is none: "the question presented is whether, under the scheme that Ontario has crafted, a police officer who witnessed or participated in an incident under investigation by the SIU is entitled to speak with a lawyer before preparing his or her notes concerning the incident. In my view, the answer is "no"" (para 4, Moldaver J). In dissenting reasons, LeBel, Cromwell and Fish JJ would have granted officers a limited opportunity to consult with counsel, to discuss their legal rights and obligations but not the specific content of the notes being prepared.

This post reviews the Supreme Court's decision with particular attention to the model of the lawyer as advisor assumed or reflected by the Court. It suggests that the Court struggles with the conceptual problem that underlies the lawyer as advisor, namely, the extent to which the role of the lawyer when advising clients is to dispassionately advise the client of how the law applies to their circumstances, is to assist clients to achieve the optimal position under the law, or is some uncertain combination of the two. The Court does not expressly address how the tension between advising and assisting clients ought to be resolved, but the tension seems to inform both the majority and dissenting views of the appropriate role for the lawyer. For the majority, the perception that lawyers assist clients to achieve the optimal position under the law – that they advise "clients of their public duties *and their private interests*" (para 75, emphasis in original) means that giving police access to counsel prior to preparing their notes will create a "threat to public confidence" in the investigatory process (para 83). For the dissent, the perception that lawyers will "encourage their clients to comply with the law" and "act as ethical agents as part of our justice system" (para 109) makes some consultation with counsel unproblematic.

This post further suggests that the role of the lawyer when advising clients is irreducibly complex. Lawyers must balance the obligation to provide legal advice to clients that reflects an objectively reasonable assessment of the law and its application to the client's circumstances, while simultaneously ensuring that clients enjoy the optimal position that the law provides them, given their objectives. How lawyers strike that balance depends on the context in which they are advising – the legal matters at issue

and the nature of the client in particular – but the dual orientation of their attention persists, even as its exact parameters remain necessarily imprecise.

The Decision

Regulations enacted pursuant to the *Police Services Act*, R.S.O. 1990, c. P.15 address the duties of police officers involved in incidents subject to investigation by the SIU. Under the applicable regulation, *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*, O. Reg. 267/10, police offers are "entitled to consult with legal counsel… and to have legal counsel… present during his or her interview with the SIU" (s. 7). An officer subject to an investigation, or an officer who has witnessed an incident, is also required to "complete in full the notes on the incident in accordance with his or her duty" (s. 9). If, however, the officer is the officer subject to investigation by the SIU, "no member of the police force shall provide copies of the notes at the request of the SIU".

The Supreme Court interpreted those regulations, and in particular whether s. 7 entitled police officers to counsel prior to their preparation of notes pursuant to s. 9, in the context of two specific investigations. In the Seguin investigation the police officer had shot a civilian who approached him with a knife. The Director of the SIU concluded that Seguin had acted with an "apprehension of imminent death or grievous bodily harm" and that the "lethal force used was not excessive" (para 13). The Director also, however, expressed concern with the fact that "all witness officers had been instructed not to write up their notes until they had spoken to counsel" (para 14). In the Schaeffer investigation Cst. Wood shot and killed Schaeffer during the course of investigating a reported theft. Sgt. Pullbrook was present at the shooting; afterwards they were both instructed not to speak with each other or to write any notes until they had spoken to counsel (para 16). They consulted counsel and their notes were reviewed by the lawyer prior to being submitted. Upon reviewing the notes and other information submitted (which presumably were only the notes of Sgt. Pullbrook since s. 9 of the Regulations would not require that Cst. Woods' notes be produced), the Director of the SIU determined that the information provided was not reliable to permit conclusions to be drawn as to what happened. The Director again expressed concern about the process through which the notes were prepared, noting that the "only version of the material events are association lawyer approved notes" which could not be relied upon (para 17).

Family members of the individuals killed by the officers brought applications to court to clarify whether officers could be advised by counsel prior to the preparation of notes. As noted, the majority of the Supreme Court held that they could not. The Court started by noting that neither s. 10(b) of the *Charter* nor the common law right to silence or to counsel were at issue in this case. The only matter was "the regulation which governs these situations and which comprehensively sets out their rights and duties, including their entitlement to counsel" (para 31). In interpreting that regulation the Court noted the history of the development of the SIU and the regulations, concluding that the purpose of the creation of the SIU was to "create an independent and transparent investigative body for the purpose of maintaining public confidence in the police and the justice system as a whole" (para 44). In terms of s. 7 of the regulation, the majority rejected the position that the provision creates "a freestanding entitlement to consult with counsel at the note-making stage" (para 47). Allowing consultation at that point would erode public confidence in the SIU process; the legislative history is inconsistent with that perspective and, finally, "consulting with counsel at the note-making stage impinges on the ability of police officers to prepare accurate, detailed and comprehensive notes in accordance with their duty under s. 9 of the regulation" (para. 47).

With respect to maintaining public confidence, the majority suggested that a reasonable member of the public would question whether the assistance of counsel "at the note-making stage is sought by the officers to help them fulfill their duties as public officers, or if it instead sought, in their self-interest, to protect themselves and their colleagues" (para 50). The Court noted that lawyers have a duty to "prepare accurate, detailed and comprehensive notes as soon as practicable after an investigation" (para 57).

The majority rejected the idea that consulting with counsel would undermine the independence of the notes, since one can rely upon lawyers to act consistently with "the position of trust counsel rightly enjoy in our justice system" (para 71). At the same time, however, consultation with counsel

> [72] creates a real risk that *the focus* of an officer's notes will shift away from his or her *public duty* under s. 9, *i.e.* making accurate, detailed, and comprehensive notes, and move toward his or her *private interest. i.e.* justifying what has taken place – the net effect being a failure to comply with the requirements of the s. 9 duty.
>
> (Emphasis in original)

The majority noted that the sort of "wide-ranging conversation" that the officer would have with the lawyer would shift the focus to justifying the officer's conduct, and allow "some margin of error in your account so that later the SIU does not begin to doubt your credibility/reliability", as suggested by one public statement by a lawyer who has advised police in such cases (para 74).

This is not inherently improper; "Advising clients of their public duties *and their private interests* is the responsibility of competent counsel" (para 75). The problem is that that ordinary sort of counseling undermines the officer's ability to fulfill his or her duty to take notes, turning evidence into "a prepared statement designed, at least in part, to justify his and his partner's conduct, unlike a set of police notes that simply record the events in a straightforward fashion" (para 80). Notes ought not to be "lawyer-enhanced" (para 80).

The majority rejected the availability of even more limited consultation. Such limited consultation would be of little use (para 85) but, as well, "even the perfunctory consultation contemplated by the Court of Appeal is liable to cause an 'appearances problem'… Because the initial consultation is privileged, the public will have no way of knowing what was discussed" (para 83).

The dissent would have permitted a more limited consultation, in which the officer does not discuss the content of his or her notes, but does receive basic information about his or her rights and obligations during an SIU investigation. They interpreted the regulations differently from the majority but also viewed the role of the lawyer differently. They noted that "everyone is entitled to seek the advice of a lawyer" and that such advice "contributes to the maintenance of the rule of law" (para 103). That general freedom ought not to be "eliminated merely through a narrow reading of the regulation in the absence of clear legislative intent" (para 103).

Counsel can be expected to respect the boundaries on their advice. They "cannot place their clients' interests ahead of their duty to the public and the advice they provide must be confided within this boundary". Further, it "cannot be assumed that they will not be faithful to their ethical duties"; they "will know that they cannot give advice on the style or content of the notes" (para 104).

There is no reasonable basis for the public to be concerned about this sort of consultation with counsel. Indeed, the duties of lawyers to "the public and the court" include the duty "to encourage their clients to comply with the law" (para 109). While advice on the content of the notes might compromise the independence of the officer's recollection of the facts, the ability to speak with a lawyer need not be eliminated entirely (para 110).

Analysis

Neither the majority nor the dissent view lawyers as untrustworthy. They do not rest their judgments on the position that lawyers cannot be relied upon to respect the ethical boundaries of legal practice. Rather, the majority and the dissent disagree about the nature of the advice that a lawyer ought to provide. The suggestion of the dissent is that lawyers advising officers preparing notes in advance of an SIU investigation will not only decline from advising the officers as to the content of those notes (which is what the judgments require) but will additionally seek to encourage the officer to comply with the law.

The lawyer's advice will not assist the client in a way that changes how the client responds to the investigation, as a result of which the investigation will not be injured by the consultation.

The majority, by contrast, suggests that because it is in the nature of the lawyer's role to advise a client as to his or her private interests as well as her public duties, that even a more limited consultation will create a public appearance that the SIU process cannot be relied upon to fairly and impartially investigate police conduct. This suggestion is implicit in the judgment, but follows from the majority's description of the nature of the lawyer's role, and its further suggestion that the poor appearance created by a more limited consultation does not result from a failure of the "integrity of counsel or police officers" (para 83). In other words, even if we assume that lawyers and police are all honourable, any consultation will legitimately create the impression that the process has unfolded with the emphasis on matters beyond the public duties of the officers in question.

Without taking any position on the specific regulatory issue decided by the court, or the approach to the availability of counsel, in my view the majority's characterization of the role of the lawyer is more accurate and appropriate than that of the dissent. The task of advising clients is remarkably complicated. Lawyers do have a duty to provide their clients with advice that provides an objectively reasonable and honest assessment of the law. That duty arises from the law of negligence, which imposes liability on lawyers who provide advice that is objectively inadequate in the circumstances (see, e.g., *Alberta (WCB) v. Riggins* (1992) 95 DLR (4th) 279 (ABCA); *Confederation Life Insurance Co. v Shepherd, McKenzie, Plaxton, Little & Jenkins* (1992) OJ No 2595 (OCJ – Gen Div); *Lenz v Broadhurst Main* [2004] OJ No 288 (OSCJ)). It also arises from the various codes of conduct, that impose a duty on lawyers to provide honest and candid advice, even when that advice does not accord with what the client would like to hear (in Alberta see, e.g., Rule 2.02(2) of the Code of Professional Conduct, here).

At the same time, lawyers' advice exists to advance their clients' interests. Lawyers are neither judges nor police officers. As Kate Kruse has noted, a lawyer's advice may properly be directed to allowing a client to structure her "affairs in ways that resist or avoid unfair laws" (Katherine R. Kruse, "Beyond Cardboard Clients in Legal Ethics" (2011) 53 Ariz L Rev 493 at 520). It may be structured to allow a client to take advantage of lacunae or ambiguities in the laws, or the legitimate range of interpretations that the law permits. It may direct the client to structuring her affairs so that the law applies in the most advantageous way possible, even if that structure might stretch the ordinary understanding of the law. The approach of the Supreme Court to the General Anti-Avoidance Rule in the tax context, where taxpayers may engage in a transaction that technically works, unless an abuse of the legislation is "clear" (*Canada Trustco Mortgage Co v Canada* 2005 SCC 54 para 50), suggests this perspective on the intersection between the citizen and the law.

Knowing how to draw the line between the duty to provide objectively sufficient legal advice while seeking to advance client interests can be remarkably complicated, particularly when one takes into account the broad range of contexts in which lawyers advise clients. In the special and somewhat unusual context raised in *Wood v Schaeffer*, the public content of the duties being discharged by the clients, properly constrained the willingness of the courts to permit the police to take advantage of the advice of counsel. This was particularly so given the protection given to subject officers by the regulations, which ensure that their notes are not producible to the SIU in an investigation. But even in more garden-variety situations that arise in legal practice we might understand the balance between honest and reasonable assessments of the law, and assisting the client to achieve her goals in light of the law (through, despite or because of the law), to vary. Advice given to a detainee in a criminal case about what he might say to the police is less likely to focus on the boundaries of the law and is more likely to focus on minimizing the legal consequences to the client given his conduct. In an example given by Kate Kruse, a lawyer helping a family to secure the financial security of a disabled relative, might reasonably push the law to achieve the best possible outcome for that family. By contrast, advice given to a government minister about the requirements for compliance with a legal duty to which the minister is subject would more properly focus on providing an objectively reasonable interpretation of the legal duties to which the minister is subject. In each of these cases, the nature of the client, the nature of the legal problem and the circumstances of the advice, affect how the lawyer approaches her obligations to the law and to the client.

At the same time, however, a lawyer must always attempt to fulfill these duties. A lawyer advising a criminal accused cannot advise that accused to lie or to destroy evidence; the lawyer for the family of the disabled relative can only seek advantages that the law in some way provides (even if only through a technicality); and a lawyer advising a government minister ought to assist the minister to achieve the public policy goals of the administration. Lawyers who advise clients discharge a *sui generis* function, in which they do not act as advocates, but nor do they act as judges; they occupy a continually shifting middle ground, in which both functions have to be operative in determining what they should say and do on behalf of a client.

One point is certain, however: this function of the lawyer as advisor has not been sufficiently explored or understood. In part because lawyers are not generally liable to third parties for advice that injures those third parties (see, e.g., *Thompson v Merchant* 2010 SKQB 64), and in part because in general law societies have not paid significant attention to lawyer advising in disciplinary proceedings (this is not necessarily for bad reasons, but is observable nonetheless), the regulatory regime governing lawyer advising leaves many significant questions unanswered, including matters not addressed here. The fact that *Wood v Schaeffer* raises this issue, and the discussion of it in relation to the Edgar Schmidt lawsuit (see The Whistleblower; Legality of Legal Advising), will hopefully bring greater attention to it going forward. It is notable in this respect that the CBA Futures initiative has begun to engage with it, including in a recent twitter conversation (here). Hopefully that conversation will continue.

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