Effective advocacy in investigations

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Every year lawyers and judges across Canada write articles and give presentations on best practices for advocacy during litigation. Varying forms of litigation advocacy are also on display daily in courtrooms across the country. There is, however, very little guidance available on advocacy for lawyers who defend clients in criminal or regulatory investigations, and much of that advocacy takes place behind the scenes in confidential communications between law enforcement or the regulator and the defence lawyer.

It is important for lawyers who find themselves with a client under a criminal or regulatory investigation to understand how advocacy in the investigation context differs from litigation advocacy. This article highlights several key differences between litigation advocacy and advocacy in investigations and sets out some best practices for counsel to consider in order to successfully defend clients subject to investigations.

Although the content of this article applies to both criminal and regulatory investigations, undertaken by both law enforcement agencies and regulatory bodies, for the sake of simplicity we refer to the investigatory body as the "regulator."

Know the facts, know the law

As with all advocacy, obtaining a thorough and comprehensive understanding of the relevant facts – both bad and good – is a critical first step in successfully representing the client. In a criminal prosecution after a charge has been laid, the relevant facts are determined by the charge. In a civil action, the relevant facts are determined by the statement of claim. However, the scope of relevance in an investigation could be significantly more expansive, depending instead on where the regulator is able to shine its light and the laws it is empowered to enforce. Being familiar with a regulator's home statute is thus critical. Until counsel confirms that the regulator's focus is on a specific issue, counsel should assume that the bad facts contained in any document that the regulator is likely to obtain are fair game.

The good facts are going to be those that exculpate or mitigate the client's liability for the offences or infractions arising out of the bad facts. The factual inquiry is thus intertwined with the legal inquiry: Where is the regulator likely to look? What are the bad facts that the regulator is going to learn when it looks there? How do those bad facts translate into regulatory exposure? What are the good facts that mitigate that exposure?

No right to know the case to be met or disclosure

In an investigation, there is generally no right to know the contours of the matters under investigation or the case against your client. Similarly, there is no right to obtain disclosure from the regulator of the inculpatory/exculpatory evidence in its possession. Sometimes the regulator may simply tell counsel that their client is being investigated for a violation of a certain rule without any further specificity. Other times, the regulator may advise counsel of the high-level allegations that precipitated the investigation.

In this context, counsel's goal should be to obtain as much information as possible from the regulator about the matters under investigation so that counsel can develop a defence strategy at an early stage. The information/document requests that a regulator initially serves on the client are a good starting point in understanding the scope of the regulator's investigation. Counsel should also probe the regulator to obtain any further information it is willing to provide about the matters under investigation. One way to do that is by negotiating down the scope of information and document requests with the regulator by pushing back on certain requests and asking the regulator to narrow other requests. In doing so, counsel can learn from the regulator's response what subjects are the focus of its investigation and what subjects are of lesser concern.

Compelled production of documents/testimony

An individual facing a criminal investigation or prosecution enjoys both a broad right to silence and a right against self-incrimination, with both rights enshrined in the *Canadian Charter of Rights and Freedoms*. However, these rights generally do not carry over from the criminal to the regulatory context. In addition, they are not shared by corporations.

In a criminal investigation, for example, it is unlikely that a corporation could lawfully seek to prevent or control its employees' ability to co-operate with law enforcement. Those employees would ultimately be compellable against the corporation at a trial in any event.

In the regulatory context, many regulators can and do compel production of information/documents and other co-operation from regulated entities during their investigations. For example, section 13 of the *Securities Act* empowers the enforcement staff of the Ontario Securities Commission (OSC) to summons and compel testimony or the production of documents. Such testimony/document requests generally are not subject to challenge in the courts unless they are obviously irrelevant to the investigation or outside the jurisdiction of the regulator.

As much as the turnover of documents or attendance at an interview may be dreaded by the client, both steps present critical advocacy opportunities, enabling counsel to shape the narrative in their client's favour.

Production of documents

Counsel should not just hand over a large volume of responsive documents to a regulator without substantive comment as they would to opposing counsel in litigation. A regulator that receives a large volume of documents without sufficient context can

misinterpret certain documents to the client's detriment or overlook important documents buried in the productions that are favourable to the client. Such interpretations can be difficult to reverse. In addition, if the regulator does not understand the documents properly, it could follow up with further burdensome requests for information and documents, potentially broadening the investigation in undesirable directions.

Instead, counsel should use the opportunity of the provision of information and documents to advocate for their client in the form of a substantive cover letter framing the material being produced in a positive light for their client. Counsel should explain what documents are being produced, set out how exactly the documents respond to the regulator's request, and provide the key highlights from the documents as they relate to the matters under investigation. In doing so, counsel should highlight the good documents and thoroughly explain how they prove the client did not commit the alleged violation under investigation. Counsel should also provide context for the bad documents to show why they are not as bad as they appear on their face or how the client has changed his or her practices since the period under investigation.

It is important to strike a delicate balance in the substantive cover letter. Too much argumentation or naked advocacy and the regulator will likely ignore it as partisan, while a mere summary of the contents of the production is a wasted opportunity to frame the documents in the most favourable manner possible for the client. Counsel's goal should be to advocate for their client but have the regulator still see him or her as an honest and trustworthy source of information. In other words: acknowledge the bad, but highlight the good.

Attendance at an examination

Similarly, with respect to compelled testimony, it is important for counsel to spend time before the examination preparing the client to respond to the regulator's questions. This preparation should involve ensuring that the client has reviewed all the relevant documentation to refresh his or her recollection of the facts and is confident about presenting a version of events as recalled. Co-operation with the regulator during an examination (instead of obstruction) will inure to the client's benefit. Counsel should stress to the client that, during the examination, he or she needs to convey a sense of wanting to be forthcoming with the regulator.

Regulators often ask a witness at the end of an examination whether there is anything the witness would like to add to the responses given during the examination. The client should be prepared to give a response to this question that highlights any key information relevant to his or her defence that was not covered during the examination.

Opportunity for written submissions during the investigation

After a regulator has reviewed any documents or testimony requested, in some cases it will issue a document to counsel stating its intention to bring an enforcement action against the client. This type of notification is commonly known in the United States (and sometimes in Canada) as a "Wells notice." The receipt of a Wells notice is usually

accompanied by an invitation from the regulator for the client to make written submissions to the regulator about why an enforcement action is not appropriate.

Many regulatory schemes do not formally provide for the subject of an investigation to make any submissions to the regulator before the regulator makes a decision on whether to proceed with an enforcement action. For this reason, and because many regulators either do not provide such a notice or do not do so in every case, counsel should not wait for a notice to think about providing written submissions. Even if there is no formal mechanism for doing so as there is in litigation, only rarely will a regulator refuse to consider a written submission. Counsel can then use the submission as an opportunity for advocacy on behalf of the client during the course of the investigation.

Absence of impartial decision-maker

Finally, there is generally no right in a regulatory investigation to an impartial decision-maker to resolve disputes or address concerns that arise during the course of the investigation. As examples, the investigative staff of a regulator may engage in an investigation that drags on for several years with no end in sight; or a client may perceive the investigative staff to be biased.

Practically speaking, there is a limit to what counsel can do during an investigation to address concerns of overreach or bias by investigative staff. Arguments that the regulator has exceeded its jurisdiction very rarely succeed, and so there is effectively no recourse to the courts during the investigation – no equivalent right to a speedy trial or any early-stage dismissal mechanism. There is also, in most cases, no recourse to the media, either because of the obligation of confidentiality imposed by many regulators during their investigations (e.g., OSC investigations), or because media attention regarding the fact of the investigation will be detrimental to the client.

In such cases, counsel may consider raising concerns to the regulator's investigative staff or their supervisors about their conduct of the investigation in a way that does not antagonize them. If counsel's concerns are not resolved during the investigation, counsel will typically have to wait until an enforcement action is commenced to seek a remedy for their client.

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