

Commentary on *THE SMELL TEST*

The Smell Test is a story about a skilled and highly ethical lawyer who for a few bad days (in Margaret Thatcher's memorable phrase) goes wobbly. As you read it, don't just tut-tut over Dwight Bentley's temporary weakness, while patting yourself on the back as an exemplar of professional morality. The fact is (and I know this, from painful experience), it can happen to *you*. Once you grant that premise, you'll find that the story contains some useful lessons.

The basic situation here — a superannuated underutilized partner of the law firm serving as its ethics guru — is a plausible one. It's prudent for the firm leadership (exemplified by Bill Price, the managing partner of Jenkins & Price) to have a wise individual review any questionable stuff the firm is asked to undertake. The arrangement works best when the reviewer isn't in the everyday line of fire and can be trusted not to let such pesky factors as making money get in the way of sound judgment.

Although this and the other stories in the book are set in the late '70's, the broader issue for lawyers addressed by *The Smell Test* — stated simplistically, the recurrent conflict between the almighty dollar and professionalism — is still very much with us today. In this regard, I call your attention to an excellent piece on professionalism by Charles MacCallum, present Chairman of the ABA's Business Law Section, which appeared in *Business Law Today* [add cite including title].)

As for the specific clash here between a gentleman of the old school and a Young Turk, this was a common occurrence in the '70's. Although it's less prevalent today — with so many of the old-timers having passed from the scene — my hunch is that in many smaller and mid-size firms which haven't yet fully subscribed to a "go-go" legal practice, the friction still exists.

There's also another, more timeless factor at work here. It's obvious from the start that a real edginess exists in the relationship between Dwight Bentley and Alex Gibson — a mutual distaste that extends well beyond their difference in age. Practicing law in a partnership format creates some singular kinds of relationships that I'll address more fully in the commentaries to the stories *Partnergate* and *On-the-Job Training*. Suffice to say here, you need to learn to co-exist with your partners and associates, but you're not required to be enamored of each one. Just make sure not to let any negative feelings you may harbor about a colleague get in the way of functioning together professionally.

The main point I'm trying to make in this story — a point that has implications not only for young or aspiring lawyers but also for seasoned veterans — is how, when faced with an insidious situation, any of us can temporarily lose our bearings.

Take Dwight Bentley at the beginning of the story. To be sure, he's aware that he's been shunted off to the side of the firm, exiled to an obscure floor, and even a source of mirth among the young partners. But he still knows that on matters of professional ethics, he's the guy that Bill Price (the managing partner) turns to for comfort and good judgment. And Dwight also knows from experience that when his judgment on a matter is negative, Bill Price doesn't override him — even if it means Jenkins & Price will be passing up some big fees. So in this respect Dwight is in a position of real power; and therefore, when he's called upon to act within his bailiwick, you'd expect him to call it as he sees it. Yet he doesn't do so — and *why* he doesn't is a central theme of the story. It's an important theme, because you don't want to let this kind of thing happen to *you*!

We view *The Smell Test* through the prism of a third person narrator, but with much of Dwight Bentley's thinking rendered in his own words (in italics). The narrator does not go inside the head of any of the other characters, so we only get to know them from the narrator's surface observations and Dwight's personal reactions and insights.

Let's begin by taking a look at Alex Gibson. Here he comes, barging into Dwight's office to obtain the Bentley imprimatur on the firm handling the proposed Breckenridge deal. How does Alex proceed with his task?

At the risk of oversimplifying the issue, there are two basic ways we lawyers can go about imparting intelligence, persuading others and exerting influence. We can communicate or we can dazzle.

I always thought of myself a communicator. I attempted to persuade others by the logic of my presentation, which I strived to make the listener understand. On the other hand, a dazzler — of which breed Alex is a prime example — puts on a bravura display of subject matter grasp, intended to intimidate the listener (who doesn't fully understand what's going on) to fall into step. We may not get inside Gibson's head, but we can draw a reasonable inference that this is just what Alex is trying to do with Dwight. And, at least for a

while, it works — a befuddled Dwight is swept along by the force of Gibson's presentation.

My first question is directed to those of you who have been (or may in the future be) subjected to someone like Alex:

What should you do when you feel yourself being dazzled?

My advice is to risk the embarrassment of confessing that you're not as much on top of the subject as the dazzler, tell him to slow down and explain things, and – if you're likely to be called upon to decide or act on the basis of the information being imparted – make a real effort to understand what's being said. Don't remain silent, feel yourself getting lost, and then have to act on your flawed intelligence.

As to which kind of communicator you should be, that's a personal decision for you to make. Some of us do a bit of each, depending on the circumstances. One basic distinction here relates to whom you're dealing with. If it's a business client (and certainly if it's a partner), communicating should prevail. The client is ultimately calling the shots, so she should understand what she's doing. Talking over the client's head, making no effort to explain — with a baffled client across the desk, who's reluctant to ask questions for fear of seeming ignorant — is just no way to handle the relationship.

Here's a litmus test you can use. Assume you decide on the best course of action and try to persuade your client to accept it. She ends up agreeing to do so.

Would you be pleased at her acquiescence if you suspected she never really understood what you were talking about?

On the other hand, in haggling with an adversary, there's clearly more room for dazzle. (Your reply to the litmus test then can be — "Hell yes, I never meant for him to understand me anyhow!") As for dealings with regulators and judges, perhaps a little of each may be in order. I leave it to you to find the right groove.

Back to *The Smell Test*. Dwight finally jostles himself into action, asks some questions, draws some inferences, and then his nose — behaving like the proboscis every good lawyer should employ as his or her personal smell test — goes to work. He hones in on the heart of the matter — the unnecessary company named Panoply, the flow of funds, the non-disclosure to the public. Through the

obfuscation and haze, he sees this for what it is: a scheme to benefit Edwards personally, at the expense of the Excel stockholders, without telling them what's going on. Once he comes alive, Dwight performs precisely the way a savvy business lawyer should. And when Alex argues that each step of the proposed arrangement is "completely justifiable," Dwight's reply — "But that's just what you need a nose for" — is right on the money.

Dwight's anecdote about the shakedown by a corrupt state official derives, I'm embarrassed to say, from my own experience. I was the "young partner" who tried to come up with a way to accommodate a client who was being wronged. To my chagrin, one of my senior partners saw through the whole cabal in a minute and jolted me out of my phantasma. The experience was painful, but it seared a lesson into my brain that I never forgot.

By the way, the denouement of that incident occurred just about as Dwight relates it. The executives didn't like being shaken down, but needed to be told it was wrong by someone with moral authority in such matters — namely, their lawyers. The lesson is clear. No matter what those who are trying to get your ear might say or imply up front, don't be afraid to give your client (or your colleagues) your best and most objective advice — even if this means they have to pass up a seemingly golden opportunity to profit.

Well, Dwight's initial use of his sniffer concludes the good lawyering segment of *The Smell Test*. The rest is frankly something of a mess.

I cast Alex as a modern-day Satan, tempting Dwight away from his original negative conclusion by sowing seeds of doubt in his mind, to wit:

- Hey, Dwight, this is the "real world" of today, not your "happy antiquity".
- The client has already contacted another law firm that would have no trouble taking on the transaction — so our firm's prissiness won't thwart the deal from happening.
- That flashback of yours is distinguishable as a simplistic situation involving a bribe; the Breckenridge deal is complex with no bribe.
- And, bottom line, passing this one up means our firm will permanently lose a world-class client.

A more virile Dwight might have had no problem shaking off this assortment of temptations to eat the apple. This Dwight has more trouble doing so – the primary reason being that, in the particular situation, he's out of his comfort zone. Every lawyer, at one time or another, has to face this plight — where, due to unfamiliarity with the subject matter, you can't be as confident that the judgment you're bringing to bear on a thorny issue is entirely sound.

And so, the doubts seep in to Dwight's brain. *Might the other firm understand the problem better? How will Bill Price react if I come out in the negative?* And so on. Try to picture yourself in the same predicament. I can envision myself there, and it's not a pretty sight. If and when this occurs, the important thing is to recognize what's happening and shake it off – but Dwight can't seem to do so.

Alex, no dummy, realizes he ought to give Dwight a little room to "sleep on it" in order to rescind that initial negative judgment. But far from taking the pressure off, Alex keeps it on with the following trifecta. He schedules the next session for 10 a.m. the following morning —not much time at all. He leaves a voluminous and complex file to be absorbed overnight, adding to Dwight's uncertainty. And he exits with that enigmatic line, "I help you, you help me at another time."

The ensuing scene between Dwight and his wife Helen, which serves to heighten the pressure he feels, is purely out of my imagination. I can't recall either of my two estimable wives getting involved in the substance of some determination I was being called upon to make. And I was always careful not to reveal any confidential client information, even to my wife. You'll note that Dwight, in discussing the matter with Helen, does not disclose the name of the client involved, and I'm sure he doesn't go too deeply into the details of the client's business plan.

The reason for this scene is that I wanted to introduce a character who could bypass the merits of what Dwight is examining and focus on the practicalities of the situation. And for this sort of role, a spouse like Helen is hardly an unfamiliar presence. Her role is especially germane when those practical considerations are unlikely to occur to someone like Dwight, whom Helen sees as being in a state of denial.

And so in she charges – the love of Dwight's life — and promptly performs a complete circuit of all Dwight's hot buttons:

- At 65, will he be retained by the firm, or canned like Mack (who, by the way, we'll get to meet in *Negotiating 101*).
- That "little monster" Gibson is going to hold Dwight's fate in his hands.
- Dwight won't be supported by his other partners, all of whom will make less money by his determination to turn down the Breckenridge business.
- How will the Bentleys survive without that J&P paycheck?
- What else can Dwight really do at his age to make money?
- And finally, the unkindest cut of all – the insinuation that maybe Dwight's nose isn't as trustworthy on this new stuff as it used to be on devious schemes of the old school.

Then — shades of Alex Gibson! — Helen pulls back to let Dwight sleep on it. But her parting remark — "friends know how to reciprocate" — puts Alex's "I help you, you help me at another time" into bold relief.

In the next scene, Dwight is alone, late at night, wrestling with his problem. For me, this is the most true-to-life scenario in the entire story.

Many hours of a lawyer's professional time are spent in the company of others – with clients, with partners and associates, with adversaries, with regulators or judges. But there's a big chunk of time when the lawyer is alone in his or her office (or at home, in a car, or on a plane) thinking through a problem. That's the way it should be. To be sure, you can't neglect the fruits of your give-and-take with others and should not ignore any decent advice you've received. But you also have to reserve some time to ponder the problem on your own – because in the last analysis, this is going to be *your* determination, not theirs.

There's a section in my book *Lawyering* (called "The Modes and Moods of the Reflective Process") that deals with how best to go about analyzing a problem. On certain issues, I concluded, you're probably better off commandeering another smart, knowledgeable lawyer in your firm or company to bounce the problem off. The interplay of two minds can often improve your chances of arriving at an intelligent solution. Also I found that the act of

articulating the problem to another lawyer helped me to analyze what was significant and what was not, to discover how much I knew about the problem and what I needed to find out, to ascertain what assumptions I was making, to see how differing alternatives could lead to different results, and so on.

For me, though, a lot of analytical time was best spent alone — where I could let my mind loose to dwell on an issue. As multiple matters compete for your attention, the luxury of uninterrupted reflective thought about a problem is greatly to be treasured. It's especially beneficial for (i) separating what is material from what isn't; (ii) grasping the real significance of an already known but previously unobtrusive fact; (iii) recognizing how the modification of a basic assumption can drastically alter your perception of the dynamics of a situation; and (iv) formulating a new and different course of action.

Now let's return to Dwight Bentley, whose solo endeavor isn't going well at all. I think it's pretty obvious why this is so. Instead of focusing on the substantive problem he's been called upon to address, he's dwelling on the various permutations of Helen's reality check. Along the way, though, he touches on some important themes — in addition, of course, to the vital "trust your nose" advice — and these deserve a few words of elaboration.

First, there's the test Dwight propounds to determine whether considerations of personal interest are influencing one's judgment. Business lawyers need to be especially alert to the elements of self-interest that crop up all the time in their practice. We have to assess the motives and actions of those with whom we deal, because of the unescapable reality that the positions people take can be as dependent on factors personal to them as on the objective merits of their rationale. What makes this fertile ground for the bug of self-interest to flourish is that so few of the issues we consider in the course of counseling have objectively right answers; rather, most of them call for essentially subjective judgments on how to proceed.

So take some extra time to examine what might be going on at the subliminal level. Evaluate whether the reasons someone gives for pursuing a particular course of action appear to have intrinsic weight. Then ask yourself: what reason could he or she have for reaching this conclusion? A simple rule of thumb might be that the less persuasive the merits (from someone who's capable of worthier rationale), the more likely something else is at work.

What we may not always realize is how insinuating, how subtle the bug can be — to the point that it even affects our unaware self. And so we also

have to examine our own motives for coming out the way we do. Are there considerations of personal benefit to us, financial or otherwise? Are we bending things too much to arrive at the result the client wants to achieve? Are we seeking revenge or retribution? And finally – perhaps the most insidious of all – are we looking to protect our own tails?

On this latter point, what you have to watch out for are situations where the principal virtue of your advice is its consistency with past advice you've given on the situation, even though it might not represent the optimum approach under the new circumstances. In my book, *Advise and Invent*, I had this to say on the subject:

“Perhaps some of you are having trouble ascribing such dubious motives to yourself. If so, try this simple drill. Imagine that a client calls you to discuss an unpleasant situation that has arisen. The subject matter is ostensibly covered by an existing contract – a contract that you originally drafted and negotiated, but which you haven't reviewed in some time. The client is anxious to know whether he's protected by the agreement. He sets forth the facts; you promise to get back to him promptly with an answer. You hang up the phone and take out the contract, to check just how well you provided for the possibility of this particular contingency arising.

“Now, if you can't envision the way your heart begins to thump as you near the page containing the crucial language – if you can't feel the initial surge of relief upon discovering that the subject is indeed covered in the contract – if you can't experience the terrible sense of dismay when the provision appears to come out the wrong way – if you can't visualize the exhilaration of discovering other language, in a different part of the contract (to which you've turned in panic), fully supporting your position – then I suggest an immediate visit to your family doctor: you may well be brain dead!”

The real question is how to determine if self-interest has affected your judgment. Let me ask you:

Do you have a personal test for determining whether self-interest has entered into your determination; and if so, what is it?

Do you recall the test Dwight seeks to apply to purge the bias? It's not just how you would come out on the issue by pretending the bias doesn't exist; it's going further and assuming the consideration of personal interest runs in the *other*

direction — i.e. that your determination flies in the face of your self-interest — in which case, you know you're on sound ground. That's a test I feel has a lot of merit — especially since it's hard to fool your subconscious by pretending the personal interest doesn't exist.

The other subject touched on here is the significance of gut reactions. The tough case occurs when there's a serious conflict between your initial reaction to something and the second thoughts that follow in its wake. How about you:

Do you typically go with your gut or heed those nagging subsequent doubts?

The framework here is decision-making. At the heart of decision-making is the appreciation of significance – the ability to sort out what is significant from what is unimportant or irrelevant. You can't make good decisions by simply lining up the factors and striking an arithmetic balance – the weighing process is critical to sound judgment. Most bad decisions are the product of giving too much weight to a factor that didn't deserve it, or failing to appreciate the significance of a factor at the heart of things.

It's clear to me that one of the most important factors in any situation is your first reaction to it. Unless your instincts are really flawed, that initial response has to deserve a lot of weight. So, whatever happens, don't lose sight of your first uncluttered reaction. A lot of what ensues is rationalizing, sugaring over, self-interest and such.

Now, to be sure, if your track record of relying on that first instinct is bad, or you're in a learning process, or the issue isn't up your alley, then prudence may dictate that you rely on those sober second thoughts. But if you pride yourself on good instinctive judgment, and you're in your comfort zone, then go with your gut.

Dwight's problem, of course, stems from having convinced himself that he's out of his comfort zone. Now, try to put yourself in Dwight's shoes — but pretending you are Dwight Bentley and not yourself – and I ask you:

What might Dwight have decided to do here that would have helped him escape his quandary?

Well, I'll give you my reaction. It's understandable why Dwight didn't want to tell Bill Price he couldn't handle this – I would have felt the same way. But if I were Dwight, I would have cozied up to the notion of getting some help

from a savvy young associate who understood the business aspects of the deal better than I. The narrator tells us it was Dwight's pride, plus the fear that his judgment would be influenced by someone with his own agenda, that kept Dwight from moving in that direction. To my mind, though, that's a foolish pride, given the circumstances; and Dwight should be sharp enough to see through any associate who isn't giving him the straight scoop.

The next scene, with Lenny Tatum at the lobby newsstand, is intended to raise the stakes for Dwight – both in terms of letting him know his partners are aware of the deal, want it to happen, and assume that it will, and then in insinuating a tie-in between his decision and his future at the firm. These factors, sad to say, influence Dwight's conduct over the next few hours of his life.

I upped the pressure a little more when the first thing Dwight encounters in his office is a life insurance premium he needs to pay — an expense that exceeds his monthly budget and reminds him of his shaky personal financial condition. And this comes at a time when he still hasn't decided how to come out on the Breckenridge matter.

Dwight now reveals his edgy mental state by giving an unduly emphatic reading to an otherwise neutral note from Bill Price. Dwight – his lawyer's mind working overtime – uses this as a pretext to convert the task he's been given from one of approving the deal to not disapproving it. In effect, he creates a sort of rebuttable presumption in favor of the deal, which he then construes as setting a higher standard for him to go against the flow. It reminds me of the rule invoked for challenges of calls on the field in National Football League games – if the evidence of the camera review isn't conclusive the other way, the referee has to go with the original call made by the official. That may be okay for the NFL, but it's nonsense here.

And now here comes Alex with some more dazzle that he saved up from yesterday, designed to clinch approval from a bewildered Dwight. At least this time Dwight does ask some questions, but Alex parries these neatly, making an effort not to get Dwight's dander up, and skillfully defending the non-disclosure aspect that most bothers Dwight. And then Alex plays his trump card by identifying the other law firm and lawyer who are willing to handle the deal – not some fly-by-nighters, but a highly respected firm and individual partner.

It's all too much for Dwight, who succumbs to the pressure. Given a few band-aid changes, he doesn't feel "strongly negative enough to disapprove the

firm's taking on the business." It's lukewarm, it's back-handed, but Alex knows he's achieved his goal and treats it that way.

Alex Gibson may be brainy, but as is so often the case with people of his ilk, he lacks judgment. What he does next is just about the dumbest thing he could have said to someone of Dwight's proud character. Do you recall what it is? On his way out, Alex makes a definite link between Dwight's self-image of his decision ("I'm just doing my job") and Alex's role in the upcoming firm decision about whether to keep Dwight on ("and I'll do mine."). Well, all I can say is, thank God the Alex's of this world so often self-destruct — even if it takes a while for the demolition to occur.

The next scene finds Dwight alone, musing on what just happened, when suddenly everything about his conduct becomes clear to him. He used the technical stuff as a crutch not to take a stand, he invented the rebuttable presumption to do the deal, he created a false distinction between approval and non-disapproval, he was influenced by what another firm would do. He uncovers his real but misguided motives – the fear of being forcibly retired, his anxiety over displeasing Helen. And he realizes he has flunked his own self-interest test. Then, aghast at the notion that his partners may assume he's approved the deal because of his own self-interest (in which assumption, they would be correct!), he decides he can't let that impression stand for even a moment, which leads directly into the disaster that follows.

I give Dwight a mixed report card here. I'm encouraged that he finally figured out what he was doing and why (although, lamentably, after the fact). But then for him to swing into immediate action to rectify it – that's very dangerous indeed. If and when that proverbial light bulb flashes over your head to signify a discovered personal error or omission, give yourself some time (perhaps with help from a trusted colleague or friend) to figure out what to do next. Your psyche may be too fragile at that moment to produce the kind of good practical judgment of which you're usually capable.

But Dwight is a man on a mission. He scurries over to Bill Price's office, confirms his non-disapproval of the deal, and tenders his resignation from the firm, confessing that he "no longer trusts his nose." Price reacts with some heat, telling Dwight he "wimped out." After recounting the vote of confidence Dwight has recently received from the Executive Committee, Price accepts Bentley's resignation on the spot (because "I can't depend on you to give me a forthright reaction to potential dangers"). A little hasty on Price's part, to be sure, but the

force and clarity of his reaction does serve (as it may have been intended) to bring Dwight to his senses.

Now Dwight is back in his office, wondering, "How could I have been so stupid?" How could he indeed? He violated his own valid precept of hearing what the other guy has to say before acting — not waiting for Price's reaction on the Breckenridge deal before blurting out his resignation. And now Dwight wakes up as to why he resigned — so that his partners wouldn't think the reason he blessed the deal was to keep himself from being forcibly retired (which is precisely why he did do it!) Pardon any immodesty, but I must say, the irony is delicious.

Well, fortunately Bill Price has cooled down and arrives to offer a reprieve — providing he can trust Dwight's sound judgment. The fact that Price still has confidence in him after his screw-up bolsters Dwight enough for him to reply, "I can try." And wisely, Bill doesn't press for a more definite response, but accepts this and treats the resignation as if it never happened. So Dwight is off the hook.

But not quite. Price now gives him the assignment to come up with a way to get the firm out of the Breckenridge deal that it's already working on — and without Bill's fingerprints appearing. (We'll run into that "no fingerprints" admonition in other stories — I'll save my comments on it for later.) So my final question to you is:

If you were Dwight, how would you handle this latest assignment from Price under all the circumstances?

In the story, Helen now rides to the rescue. Of course, she's not about to acknowledge how mistaken her prior judgment was, but she does turn on a dime and provides Dwight the clue as to what he should do. I suppose we should give thanks for the insights of the Helens of this world, even if they can't get it right the first time.

The Bentley we see the next day in his office is a different Dwight from the one we've been witnessing earlier. He looks younger, more self-assured; the voice is crisp, the lip-pursing and twitch are gone; he's back in control. He even decides to send some of that junk on the carpet off to central files.

And now Dwight, confronting Alex, takes the position that if Breckenridge refuses to inquire and disclose (as he knows they won't), there needs to be a reconfiguration of the deal (which he knows the client won't accept). Alex goes ballistic, but Dwight is now serene, knowing that Bill Price (this, after all, doesn't bear *his* fingerprints) will back him up.

So that's *The Smell Test* – a morality tale that ultimately comes out the right way, but only after some troublesome miscalculations and missteps. I'll close by repeating the lesson I've tried to get across here. You don't need to be old-fashioned, bereft of business, and shunted to an auxiliary floor to have this kind of situation – complete with considerations of personal interest – come knocking on your door. Let's just hope that when it happens, you're better prepared than Dwight Bentley.