The background of the entire page is a repeating pattern of stylized, swirling shapes in shades of blue and green. These shapes resemble waves or eddies, creating a dynamic and textured visual effect. The colors transition from a light blue to a vibrant green, and the pattern is dense and covers the entire area.

WHICH WAY IS THE WIND BLOWING?

UNDERSTANDING THE MORAL COMPASS
OF IN-HOUSE LEGAL PRACTICE

An **L O D** In Collaboration Report by Steven Vaughan and Richard Moorhead

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FOREWORD

We work with hundreds of in-house lawyers and consultants across the world. Nowhere is ethics easy or simple. By its nature, ethics can often be tricky, marginal and fuzzy. But it's fundamental. And it can be too easy to move a discussion about ethics into the "too hard basket". This report is designed to bring it out of that basket and move it into the forefront of your mind.

Professors Steven Vaughan and Richard Moorhead don't shy away from asking the toughest questions - of the profession, of in-house lawyers and of you. How do you balance your professional duties and the commercial realities of business? How do you remain independent when your client is your employer? Are you allowed to challenge decision making in your organisation? Do you always "do the right thing"? These can be uncomfortable questions, no doubt. But they shouldn't be avoided, delayed or sugar-coated.

Showing ethical leadership in your organisation isn't just about ticking a box. It's about being a real influencer on corporate culture, demonstrating ethics as a "lived" experience and being a leader within your organisation. It's also about credibility - your credibility, the credibility of your organisation and the credibility of the legal profession.

How professional duties apply to the in-house legal profession does diverge across jurisdictions though, so it is not a homogenous conversation around the world. In England & Wales and Australia, in-house lawyers are generally required to hold practising certificates, therefore they need to balance their professional duties with their in-house work, whereas in Singapore and Hong Kong in-house lawyers are not



required to hold practising certificates. In other countries, such as France and India, lawyers are not allowed to be members of the bar while practising in-house as there is typically seen to be a conflict between their professional duties when they are working exclusively for one client.

This report is not an academic paper or a legal judgement – it is a reminder. A reminder about the role you play in your organisation and the profession. Sometimes, these might be in tension and we shouldn't shy away from discussing these points of divergence. We know that organisations demand that in-house lawyers bring commercial acumen – and many effective, well-respected and ethical lawyers do bring a layer of keen business understanding.

This report isn't saying in-house lawyers need to be un-commercial, allergic to risk or ignorant to commercial realities. We absolutely need effective, commercial and influential in-house lawyers. But we need those in-house professionals to remember their ethical obligations and duties. The role of ethics is fundamental to commerce. In today's crowded, hyper-connected and ever more transparent world, ethical behaviour is key to building trust. And trust is your most valuable currency - personally and for your organisation.

I hope this report brings you pause to reflect. A moment to consider your own moral compass, your leadership within your organisation and to see the true alignment between real value and ethics.

*By Rachel Wright, Legal Director,
LOD Asia*





ARE YOU A GOOD LAWYER?

When you read ‘good’ in that question, did you hear it as ‘technically competent’ or did you hear it as ‘ethical’?

Morality and ethics can be tricky subjects for all professionals. While it’s easy to ignore bad jokes about lawyers, it is hard to ignore the fact that the legal profession is often at the frontline of difficult ethical questions, faced with the tensions of professional obligation and commercial pressure.

With in-house lawyers, it’s been said that working for a single employer, and being embedded in the business, can see lawyers taking on the norms and behaviours of their employers – a form of ‘clientitis’ – and forgetting the bedrock of professionalism on which their expertise rests. In-house lawyers were once known as the “forgotten men and women” of the legal profession. Going in-house was regarded as something you did if you were told you weren’t going to make it as a partner in your law firm, or if you wanted a better work-life balance. Employers saw their in-house lawyers as a cheaper form of labour. The pay wasn’t great, and the role was a rather limited one. Times have well and truly changed.

Today’s in-house lawyers are increasingly well-paid, have high-status, and are integral to decision making and risk management inside the organisations they work for. In England & Wales and Australia, roughly one fifth of all solicitors work in-house. The figure in New Zealand is a little bit higher and growing rapidly. In Hong Kong, the



ACC estimates it's more than a quarter of solicitors. A global bank employs over 1,200 lawyers worldwide – if this team were a private practice law firm, it would rank in the top tier of global firms. Away from the business sector, in-house lawyers work in the public sector, including for government legal departments, local authorities, and other bodies, with a modest number working for charities and NGOs. In-house lawyers are everywhere these days.

Those working in-house have, or aspire to, significant influence. They exert a powerful influence over the external legal counsel they engage. General Counsel are often found wearing multiple hats, taking on high-profile leadership roles. The in-house movement is a story of success. Well, sort of. This story also has its more problematic moments; scandals (which seem to be more frequent of late) in which in-house lawyers have been accused of helping to manage illegality through secrecy, to offload risk onto unwitting third parties, and otherwise aiding and abetting harmful conduct. The Watergate question has moved in-house: where were the lawyers and what were they doing?

This report asks some hard questions about what it means to be an in-house lawyer (how to manage tensions between what your client-employer wants you to do and your obligations to the rule of law, say) and offers up an optimistic view of the future in which in-house lawyers, as professionals, use their expertise to lead ethically.

To frame those hard questions, and to offer some ideas about ways forward, we spent the last five years surveying 400 in-house lawyers and conducting 67 in-depth interviews. This is the largest ever study of in-house lawyers anywhere in the world. What follows are some of the ideas from that work.



In-House Lawyer? Or Lawyer Working In-House?

Take a moment, stop what you are doing, and ask yourself this question: do I see myself more as a lawyer, or an in-house lawyer?

This might seem like a rather odd question, but how we frame our professional identity, how we think about ourselves, matters. And that's for two reasons. First, behavioural psychology tells us that how we see ourselves shapes how we respond to ethical challenges. There is research which shows that 'thinking of oneself as a professional' may (on its own) lead to a form of complacency that promotes greater unethicity. If professionals do not reinforce their professionalism, then they tend to cut themselves too much slack when it comes to tricky ethical decisions. Second, professional regulation (in most jurisdictions) is primarily title based and not activity based. So, for regulatory purposes, it doesn't matter whether you work in-house or in private practice; what matters is whether you are a solicitor or barrister.

“The Watergate question has moved in-house: where were the lawyers and what were they doing?”



“In-house lawyers more inclined to take the view that their role is to take advantage of uncertainty in the law for the business are, on average, less ethically inclined.”

WHAT MOVES YOUR MORAL COMPASS?

Are you commercial as an in-house lawyer? How do you add value? Do you exploit uncertainty in the law for the organisation's benefit?

Do you advise on doing the right thing as well as on what is legal? Do you tell your employers what you think the law really means rather than what you think they want to hear the law means?

Are you more than just a 'mere' adviser? How embedded in the business are you really?

We think that in-house lawyers have a constellation of institutional logics, with many seeing themselves as a distinct professional group within, but different to, the broader legal profession. The results from our work show that although half of the 400 in-house lawyers we surveyed primarily self-identified as a subject specialist or lawyer first (a solicitor, barrister, or attorney), similar proportions saw themselves as an in-house legal adviser (rather than, say, a solicitor or barrister) or as a manager (usually of other lawyers), a business adviser, or as a business person.

Why we think this might be interesting is in how in-house lawyers see their roles, and what that perception then means for how those in-house lawyers act. We gave the in-house lawyers completing our survey a long list of questions which explored these



RECOGNISED ORIENTATIONS

A commercial orientation

Being commercially aware, adding value, advising on business as well as legal considerations, and regarding the commercial success of their organisations as important.

An independence orientation

The desire that an in-house lawyer's judgement is, and is seen to be, independent.

A neutral advisor orientation

The view that the in-house lawyer advises but the organisation decides.

An ethical orientation

A belief in advising on what is right as well as what is legal, including lawful but unethical actions, and taking the lead on what is right when the law is uncertain.

An exploiting uncertainties orientation

The idea that in-house lawyers should identify loopholes in the law that benefit the business, help the business benefit from legal uncertainty, even perhaps exploiting the law for commercial ends.

issues and came up with five statistically significant orientations. Think of these as prevailing winds, competing and pulling you in different directions.

Almost everyone completing the survey recognised these five orientations as having some purchase, but the degree varied between them. Which have the most purchase for you, and in what situations? And for the lawyers in your team? You might be surprised at the differences.

It is perhaps no surprise that a commercial orientation (or outside of commerce, being results oriented) appears to have the most influence across the board. Being ‘too commercial’ has been said, in other academic work on in-house lawyers, to be problematic ethically. We think this conclusion lacks nuance. What our data shows instead is that it is how in-house lawyers respond to uncertainty in the law that might be a better determinant of ethicality. In-house lawyers more inclined to take the view that their role is to take advantage of uncertainty in the law for the business are, on average, less ethically inclined.

“Sometimes an in-house lawyer may be unaware of things that are occurring in his/her company because of the complexity of global business in the 21st century. More and more legal challenges are arising, yet in-house lawyers are also expected to understand, monitor, check and challenge all aspects of the business.”

Associate General Counsel, Asia



HOW PRINCIPLED ARE YOU?

Does your client-employer come first for you? What about acting with integrity? And independence?

How does the rule of law shape what you do on a day-to-day basis? Did that question cause you to pause? When was the last time you even thought about the rule of law?

As well as measuring role orientations we looked in our survey at the influence of professional principles. The results are shown on page 16. In broad terms, client interests, and effectiveness and integrity principles were more strongly influential than independence and legality principles. What's problematic here is that the regulatory rulebooks across the globe frame these requirements in a way that can be misunderstood or misinterpreted. For example, in England & Wales for solicitors, the Code of Conduct in the Handbook of the Solicitors Regulation Authority, lists all ten of these principles and does not rank them. Each of the ten is (in theory) equal. This Code also says that where the best interest of the client principle conflicts with other principles then it is the principle which best serves the public interest, and especially the public interest in the administration of justice, that takes precedence. In other parts of the world, this might be framed as an overriding duty to the court or to the rule of law.

Does the frequency with which client interests are emphasised in our survey data suggest a resistance to, or lack of awareness of, the pre-eminence of the public interest in the rule of law when dealing with difficult decisions? Certainly, our



FROM THE RESEARCH INTERVIEWS:

“Do you think the business appreciates that distinction, that you as a solicitor have those professional obligations potentially over and above your employment relationship obligations?”

“I don’t know what those professional obligations are. What are they?”

“What I’m mainly thinking of are the 10 principles at the front of the SRA Handbook.”

“I’ve never read the SRA Handbook.”

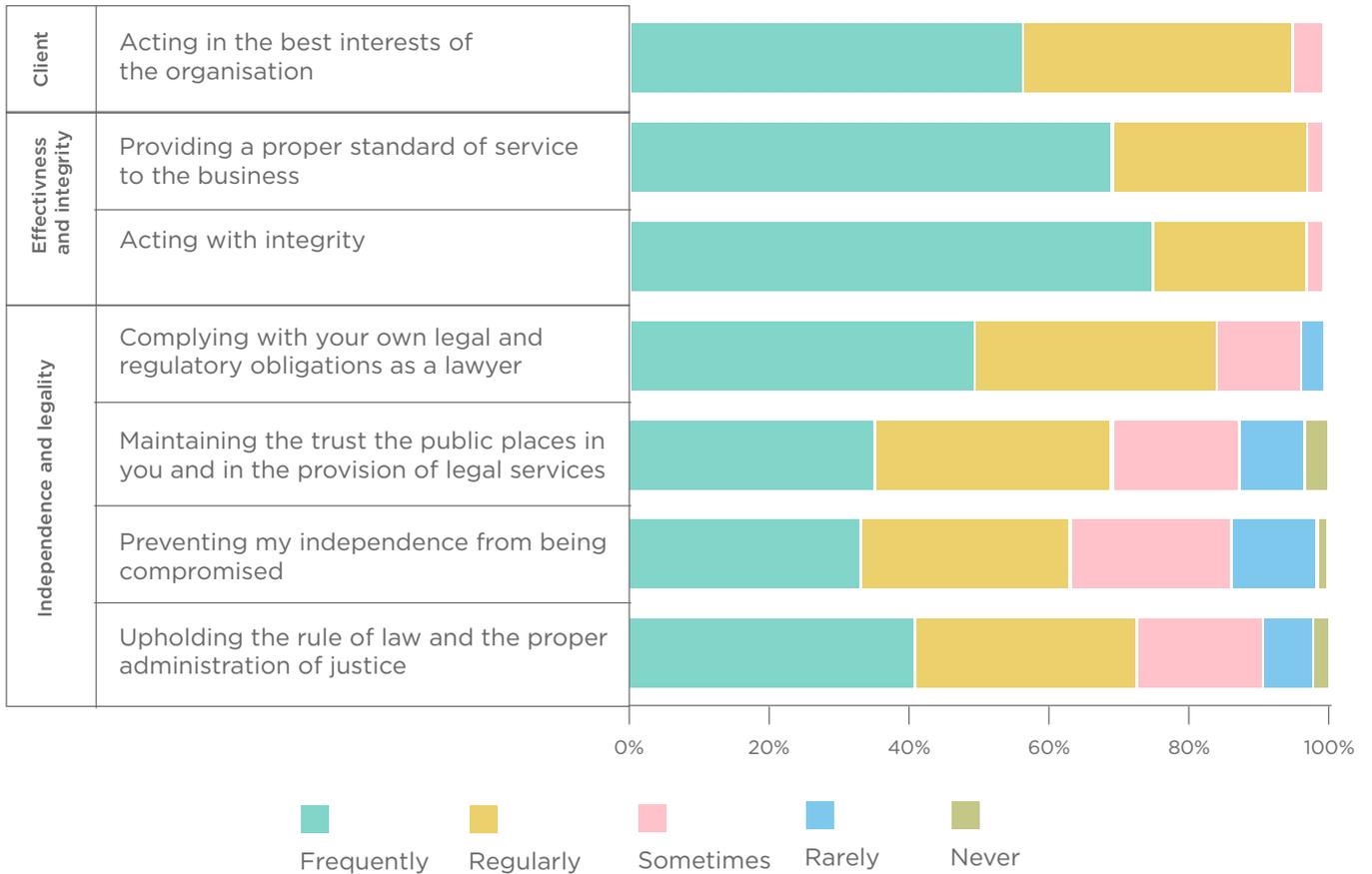
interviewees were hazy (sometimes very hazy) on the content of their own Code of Conduct. The quote to the left is not especially extreme...

Take a look at the table on the next page - there are a number of ways of interpreting the data: one is that rule of law type concerns simply surface less often for in-house lawyers. Another is that the rule of law and administration of justice principle is less well known and perhaps less well understood. A third is that any ‘ethical orientation’ is more likely to be seen through an integrity rather than a public interest/rule of law lens, with the ever present need to serve the client’s best interest given high priority. How often, for example, have you thought about a legal challenge facing your organisation in terms of ‘the public interest’ or the ‘rule of law’?

The current debate in the UK over the role of private practice and in-house lawyers in drafting and using Non-Disclosure Agreements is one example where lawyers have perhaps been too quick to see the legal challenge facing their employers as one of risk to the employer rather than one which

The Impact of Professional Obligations

To what extent do the following obligations have an important influence on you in practice?



UNDER PRESSURE

Do you have a good relationship with your boss? Do they listen to you? How often do they tighten the thumbscrews?

We wanted to know about the relationships of our in-house lawyers with their employers. What is it really like to work in-house these days? We have some sense that the status inferiority of working in-house has almost disappeared. Team sizes have expanded, the in-house legal role has become less narrow and more strategic, and governance and compliance roles have become stronger. In-house lawyers have become more embedded in organisational decision-making and influential in processes.

Where once the mantra about in-house lawyers may have been solely about being cheaper than external counsel, now there are plausible expectations that in-house lawyers should be cheaper, better (more understanding of what the business needs) and (perhaps) more ethical, at least to the extent that they are expected to be more tuned in to the long term interests of their organisation and how those interests might be shaped by legal and reputational risk.

“There was no correlation between size of team and ethical pressure”

A more embedded role, closer to the organisation, and with more varied work, is part of the reason why many of our interviewees told us that they chose to go into, or stay, in-house. So too was an explicit rejection of elements of private practice: the “moral bankruptcy” of time sheets and

Ethical Pressure

	Strongly Disagree	Disagree	Somewhat Disagree	Neither Agree/Disagree	Somewhat Agree	Agree	Strongly Agree
I'm sometimes asked to advise or assist on things that make me uncomfortable ethically	12%	23%	21%	11%	17%	13%	2%
There are tensions between the way I and the business respects obligations to uphold the law	14%	29%	18%	13%	14%	8%	4%
			Never	Rarely	Sometimes	Regularly	Frequently
How often are you asked to advise on something where the legality of a proposed action by the organisation is debatable?			9%	52%	26%	9%	4%
How often are you asked to advise on something where the ethicality (as opposed to the legality) of a proposed action by the organisation is debatable?			7%	50%	34%	8%	3%



pyramid models of selling hours; avoiding over-specialisation; and the sense that a broader set of skills might be engaged by working in, rather than for, an organisation. In our survey, we found that it was particularly common for the in-house legal function to sometimes be criticised for inhibiting or slowing decisions (80 percent agreed that this happened); and just over half of those we surveyed agreed that colleagues were sometimes reluctant to raise issues with legal.

It might have been thought that those in small teams would be more vulnerable to ethical pressure and so experience more of it. We did not find this. There was no correlation between size of team and ethical pressure. Interestingly too, lawyers working in a public sector organisation showed significantly higher ratings of ethical pressure than those working in a business. We have decided not to make the obvious joke here about having politicians as your bosses...

“Ensuring you remain independent is a tricky problem. One of the key ways of protecting your independence is external counsel. Advice from outside of the organisation is something I rely on.”

VP Legal, United Kingdom

In broad terms, our survey respondents reported working in organisations where they felt supported, but where an unevenness of relationship was common, and where they were sometimes criticised for being obstructive. In the interviews, almost everyone we talked with was wary of being seen as “creating obstacles... being difficult”, of being “the checkers and the blockers and a silo”. And every single person we spoke with wanted to be seen as a “problem solver”, as “people who help them [the organisation] to achieve their objectives”, “on the right side of not being obstructive”.

This was often, almost universally, framed in terms of being perceived to ‘add value’ (although few could articulate clearly what ‘adding value’ actually meant or looked like). The intangibility of legal value, and sceptical views of in-house lawyers by others in the organisation, meant that the common posture of our interviewees was to be seen as someone proactive, who added value (but was unsure what that meant) and who created solutions, not problems. Our in-house lawyers could see that this risked sometimes running counter to a need to be independent and to give robust advice. When does being a helpful person inside the organisation rub up against your professional obligations as a lawyer? And how willing are you to push back when you’re asked to do things you’re not comfortable with? As this interviewee puts it rather vividly:

“...they’re your employer ultimately and the concern [is] that you are... poking a stick in the eye of the person who is potentially in control of your own destiny.”

**“In-house lawyers
have multiple,
and possibly
conflicting, spheres
of influence that
will shape how
they approach hard
questions...”**

THE ECOLOGIES OF IN-HOUSE LAWYERING

What shapes your thinking? How are you influenced in the day-to-day practices of your in-house lawyering?

The American sociologist Andrew Abbott talks of professional ecologies, a system of linked sub-systems which have their own ways of thinking of, and acting on, problems that are in turn influenced by other social sub-systems. For us, in-house lawyers constitute a subsystem nested within the broader systems of their profession and their host organisations, where they compete for job satisfaction, influence, and status. Think of the sub-cultures of legal, finance, sales, and compliance and you are part way to understanding Abbott's point.

In-house lawyers have multiple, and possibly conflicting, spheres of influence that will shape how they approach hard questions: ways of thinking and acting that come from them being trained as lawyers, from their roles and experiences as in-house lawyers, from what their organisation expects of them (and what they

IN-DEPTH

Ecological accounts of decision making suggest that individuals are neither fully constrained nor fully free to act as they wish. They suggest that individuals facilitate exchanges between different systems while also competing for influence within their own organisations. A lawyer and accountant may have to work together with a business to decide on financial disclosures. A risk manager, lawyer, and NGO may work together to understand human rights risks in a country an organisation plans to do business in. A scandal around litigation may depend on reputational optics as much as law.



think about those expectations); from legal services and other regulators etc. For in-house lawyers to succeed, their solutions must be both legally acceptable and organisationally useful.

IN SUMMARY

What this all boils down is that our understanding of professions, and how professionals make decisions and why, needs to account for the context and the fluidity of professional and institutional ecologies. A wide range of constituencies and ideas might influence the thinking and practices of professionals; they must adapt or bend to each other's ways of thinking and a key question is: how much?

“You’re not just a lawyer earning an income. You’re also an officer of the court, you’re told that the day you’re admitted to practice by the Chief Justice and I’ve just never forgotten that.”

Group GC, Australia



ARE YOU AN ETHICAL CHAMPION OR COMFORTABLY NUMB?

Ethics is hard. And researching ethics is hard. If you ask someone ‘do you think you are ethical?’, you’re likely to get various flavours of positive reply. At the same time, the ecology of lawyering we have just talked about means that we need to consider ‘the 3 C’s’: context, character, and capacity. Looking at any one of these in isolation tells us something about ethics, but that something might be masked or shaped by the other two.

What this means is that, in practice, most measures of ethicality, of doing the right thing, are blunt instruments. They are, at best, useful tools for examining differences between people rather than the final and wholly authoritative word on what counts as ethical behaviour. With those caveats in mind, let’s talk about the ethics of in-house lawyers.

In our work, the ‘blunt instruments’ look at two measures which have been repeatedly deployed in other fields as predictors of ethical misconduct: moral attentiveness and moral disengagement. These are measures of common morality which can predict a propensity to lie and cheat.



IN-DEPTH

Moral attentiveness looks at whether an individual can recognise the moral aspects of everyday life and how often that person reflects on moral issues. First described by psychologist Albert Bandura, moral disengagement is said to occur through eight inter-related cognitive mechanisms that facilitate unethical behaviour. Measuring moral disengagement has been suggested by behavioural ethicist Celia Moore to be the “strongest individual predictor of unethical behaviour identified to date”. Moore and her colleagues have created a set of statements which people are asked to respond to (such as “It is okay to spread rumours to defend those you care about”), which in turn give a score of moral disengagement.

What we did in our own survey was to give in-house lawyers the standardised moral attentiveness and moral disengagement tests and then, through some complex stats (namely, three different linear regression models) look to see what they have previously told us in the survey about how they viewed their professional identity. Our results were really quite interesting...

We found that the more commercially oriented in-house lawyers were less likely to perceive problems as moral ones (and so may have a higher propensity to ethical blind spots), but were more likely, should such problems arise, to think about those problems in moral terms. Those in-house lawyers who saw a strong ethical orientation to their work - seeing, for example, their advice as going beyond legal considerations to also consider whether something is the right thing ethically to do - had higher moral attentiveness and lower moral disengagement. And, as we said earlier, those who saw a strong part of their role as exploiting uncertainty did poorly.

Our data allowed us to cluster in-house lawyers into four groups. These were:

1. the Troubled
2. the Coasters
3. the Champions
4. the Comfortably Numb.

The **'Troubled'** constituted a fifth of our survey group. These were the in-house lawyers who experienced the second highest levels of ethical pressure, had moderately high moral attentiveness and yet also significantly higher levels of moral disengagement. They saw moral challenges and thought about moral challenges, but appeared to have begun to disengage in response.

The **'Coasters'** were the largest group by some distance: 213 respondents (72%) were in it. They had moderately low levels of perceptual moral attentiveness but moderately high reflective moral attentiveness. Yet they also had lower levels of moral disengagement than the Troubled and the Comfortably Numb. The lawyers are 'coasting' as we speculate that this group is not yet being tested or testing itself in ethical terms.

The **'Champions'** were in the minority, with only 48 respondents (12%). They get their name as they had significantly higher perceptual and reflective moral attentiveness than the other groups and were also experiencing the greatest ethical pressure. They also had the lowest moral disengagement. These in-house lawyers, despite being under significant ethical pressure, saw moral issues in their work and didn't shy away from engaging with those issues.

The **'Comfortably Numb'** are (just) our smallest group, with 47 respondents. This is the group of most concern. They showed a significantly higher level of moral disengagement than the Coasters and the Champions and the lowest levels of moral attentiveness on both indicators. These lawyers were the worst at spotting moral issues and, frankly, didn't care even when they did.

We did some further statistical wizardry to understand if there were any particular characteristics that stood out within the groups (e.g. were all the Champions General Counsel who had been in-house for decades?). Interestingly, there were no significant differences across the clusters in terms of post-qualification experience, size of legal team, gender, use of professional principles, or work identity. As a group, Champions had proportionately fewer business but more public sector in-house lawyers than other groups - 8 percent of business in-house lawyers were classified as Champions, compared to 20 percent of public sector in-house lawyers. In comparison with the Comfortably Numb, Champions had a more negative relationship with the business and had weaker/less even relations with the business. Champions were also less likely to be inexperienced in-house lawyers than the Comfortably Numb.

Our work also shows how professional orientation is correlated with ethical inclination. All our in-house lawyers tended to emphasise their obligations to the organisation (to the client) most often when taking decisions. This is a pragmatic approach, but this is not how their relevant professional codes of conduct see professional obligations. Nonetheless, some practitioners emphasised independence and legality or integrity and effectiveness more strongly than others. Those that did so tended to be more ethically inclined.

“But ultimately ethical leadership is about leaders leading in a way that creates a benchmark and empowers people to act ethically, and also refuse to act unethically, even when that has a cost.”

Associate General Counsel, Asia



A NOTE OF OPTIMISM

After five years of empirical work with in-house lawyers, we are rather concerned. Our work repeatedly shows tensions between organisational and professional logics and the tendency of in-house lawyers to prioritise the former over the latter.

We are worried when in-house lawyers see themselves as ‘mere’ advisors. We realise that in-house lawyers are often not the people who have the final say in many of the decisions their employers take. But in-house lawyers are *not* mere advisors; they have leadership roles and, if senior, constitute an important part of the client. As such, in-house lawyers are both advisor and part of the client: dependent and constituent; servant and agent.

There is a balance to be struck between the client’s desires and an independent interpretation of the law. It is worth in-house lawyers reminding themselves every time they think that their professional obligations require them to put the client’s interests first, that this is not what their professional obligations may in fact require. It is also worth them remembering that, psychologically, in-house lawyers are already likely to be interpreting the law through a lens of client loyalty.

Much of the data we created on in-house lawyers paints a rather gloomy picture. And it would be remiss of us as academics to paint our data in any other way. Despite this, we remain optimistic. This is for two reasons.

The first is that, hidden among our survey participants, are a group of in-house

lawyers we call 'ethical champions'. These were in-house lawyers who were under significant pressure in their jobs, but who were able to see and reflect on the ethics of their actions, and who did not shy away from engaging with hard issues.

The second reason for our optimism is that we think there is a space - little occupied at present - for ethical leadership by in-house lawyers. In-house legal teams can be encouraged to interpret laws by the letter and in their spirit. The narrow framing of legal tasks can be discouraged. Resources can be committed into improving the ethical environments of in-house lawyers. There may be institutional protections to be stimulated through relationships with non-executive directors and careful management of incentives; via appraisal processes and via encouragement to discuss and sometimes escalate ethical issues.

Similarly, in-house legal teams can seek to strengthen professional logics themselves: by taking tasks on the basis that they will look at them with a professional rather than instrumental mindset; by defining and supporting a professional approach to work which attends to independence; and by their attitude to uncertainty.

Ethical leadership by in-house lawyers is possible, and important.

CONCLUSION

It can often be hard to know what to do at the end of reading a report like this. With something challenging and thought-provoking, the instinct can be to return to it later. Food for thought, but not for immediate digestion.

At LOD HQ, we're pretty keen that this isn't the case with this report. We'd like to encourage you to talk about this with your peers, colleagues and friends. We believe, along with Steven and Richard, that a more transparent and open dialogue on ethics is essential to a healthy profession. This report may raise awareness, but it should merely be a stepping-stone to a more important goal - a wide and robust conversation about the interplay between ethics, business and the legal profession.

As the quotes from LOD lawyers and clients around the world echo, this is a tricky subject - and it is only going to get trickier. Something that we are acutely aware of is that different jurisdictions treat the professional duties of lawyers differently. In a complex, varied and often global landscape, the need for dialogue has never been greater.

We'd like to hope this report is a helpful read and, more importantly, that it inspires you to reflect and act.

Rachel Wright





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