ETHICAL LEADERSHIP FOR IN-HOUSE LAWYERS INITIATIVE

Part I

Mapping the Moral Compass

The relationships between in-house lawyers' role, professional orientations, team cultures, organisational pressures, ethical infrastructure and ethical inclination.

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UCL

CENTRE FOR ETHICS AND LAW

OVERVIEW

This is a survey of 400 in-house lawyers working in public, third and commercial sectors. We set out here the findings at the highest level. A number of organisations assisted with the distribution of the survey.

This report provides a unique profile of real differences within the in-house community. We examine individual and team orientations to the in-house role; the invocation of professional principles; and ethical infrastructure, ethical pressure and relationships with the employer. We relate these to externally validated indicators of ethical inclination: (i) moral attentiveness (the extent to which people deal with problems as moral problems and the extent to which people identify moral problems); and (ii) moral disengagement (the extent to which people are inclined to morally disengage to behave unethically without feeling distress). It is as rich a picture of what it means to be an ethical in-house lawyer as has ever been attempted. A more detailed summary and discussion of our findings is found in the final chapter of the main report for those who would like to know more but do not have the appetite or time to read the whole report.

We identify four main ethical identities:

- *the Capitulators*
- *the Coasters*
- *the Comfortably Numb*
- *the Champions*

Through this research we profile the characteristics of individuals, teams and environments most associated with a stronger or weaker propensity to behave ethically. It is important to emphasise that this mapping of the 'moral compass' of in-house lawyers shows that ethicality is associated with individual and professional notions of the in-house role but also with team orientations and the broader organisational environment. Ethicality is both a systemic and individual phenomenon. We think the systemic lesson is important: there is too much emphasis in legal circles on thinking that ethics is about being the right sort of individual.

That kind of thinking is complacent and dangerous. As we show here, individuals, systems and cultures mesh together in meaningful and measurable ways to increase or reduce ethical risk. As numerous corporate scandals have shown, such ethical risk puts individual lawyers at risk of professional

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misconduct but it also encourages poor quality decision-making for the organisations that employ in-house lawyers: short-termism and sharp practice can lead to catastrophic error.

FOUR ETHICAL IDENTITIES

To help understand the diversity in ethical identities, we identify four main groups of in-house lawyers (described in more detail in Chapter 9):

- the Capitulators (who are reasonably morally attentive but are under ethical pressure and are less morally engaged);
- the Coasters (who do not perceive themselves as under ethical pressure and have moderate-low levels of moral attentiveness but not lower moral disengagement);
- the Comfortably Numb (who do not perceive high levels of ethical pressure and have low levels of moral attentiveness and higher moral disengagement – the most concerning of the four groups); and,
- the Champions (who are under the highest levels of ethical pressure but retain the highest levels of moral attentiveness and the lowest levels of moral disengagement).

Initial findings at a glance

400 respondents

10-15% experienced elevated ethical pressure

30-40% sometimes experienced ethical pressure

Close to 50% agreed that actions were sometimes taken against their advice on legally important matters

Ethical pressure was highest in public sector organisations

53% of the GCs in our sample reported to the CEO

16% reported to the CFO

10% reported to another board member

6% report to a non-executive board member or the chairman

Less than half of in-house lawyers line-managed by the CEO had a formal or informal reporting line to the chair of the board, chair of audit or other non-executive director.

36% agreed that loopholes in the law should be identified that benefit the business

9% indicated saying "no" to the organisation was to be avoided, even when there is no legally acceptable alternative to suggest

65% achieving what their organisation wants has to be their main priority

30% said an emphasis on commercial awareness sometimes inhibits the in-house lawyer in performing his or her role

12% said where commercial desirability and legal professional judgement are in tension, commercial desirability is more important

7% *never* discussed professional ethics issues with colleagues internally or externally, formally or informally. For most in-house teams, formal and informal ethical infrastructure was limited.

Against these four groups, we map data on in-house role, team orientation, approach to professional principles and so on, to see what kinds of characteristics are most commonly associated with each of our four groups and our underlying indicators of ethical inclination. Through such a process we provide insight into the correlates of ethicality in practice.

ETHICAL PRESSURE
Chapter 3 sets out the findings on pressures in the organisation. In particular, we measure reported pressure to advise on unlawful and/or unethical practices. Our examination suggests that ethical pressure might be described as elevated in about 10-15 per cent of our sample and sometimes apparent in about 30-40 per cent of respondents.

Although our sample is broadly representative of the in-house population, a survey of this kind is likely to attract lawyers more interested in ethics, and so we should be wary of generalising the figure to all in-house lawyers.

Ethical pressure was more elevated amongst the lawyers working in the public sector, but it was also found in all sectors.

IDEAS ABOUT ROLE
The report also explores differences in the role and team orientations of lawyers working in-house. Some differences reflect organisational characteristics. So, lawyers working in the public sector place a stronger emphasis on independence, and lawyers working in business put a stronger emphasis on a commercial orientation. There are similar differences in team orientation. Importantly

though, individual and team orientations differ within sectors, and this research shows that such orientations have a significant association with ethical propensity.

How practitioners conceive of the in-house role is a central concern of this research and of practitioners themselves (see Chapter 4). We identify five particular kinds of orientation.

A commercial orientation is commonly supported by in-house lawyers, especially but not only, those working in business. The research evidences links between a stronger commercial orientation and weaker ethical inclination. This suggests the need for the role of in-house lawyers to be conceptualised in ways that restrain or balance the commercial orientation. Our data also suggest a neutral advisor orientation (which risks lawyers seeing themselves as mere servants of the employer, without their own influence) and an exploitation of uncertainty orientation (seeing uncertainty and looking for loopholes as things to benefit the employer) can be similarly problematic.

Independence and ethical orientations are associated with greater ethical inclination. Most respondents support ideas of independence and ethicality, but do so with varying levels of intensity.

Commercial orientation
Neutral advisor orientation
Exploitation of uncertainty orientation

Independence orientation
Ethical orientation
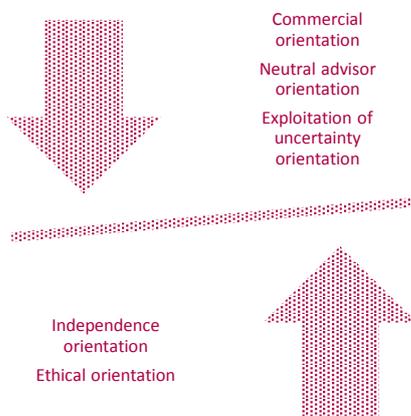
Chapter 5 looks at team orientation. Team orientations similarly reflect ethical and, although there was less consensus here, societal dispositions. These orientations were generally less strong than commercial, financial and effectiveness oriented concerns. Where independence, ethicality and societal concerns were more strongly supported, respondents were more ethically attentive and engaged.

The report also contains data on the representation of in-house lawyers on boards and their reporting lines (see Chapter 2). There are good reasons why the line management of in-house lawyers would come from the executive side of an organisation, but we would question the limited extent to which senior in-house lawyers appear to have formal or informal reporting lines to non-executive directors.

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PROFESSIONALISM AND ETHICAL INFRASTRUCTURE

Existing research suggests that in-house lawyers are not as clear as they might be about when or how to invoke professional principles. This issue goes to the heart of whether there is anything special about a *professional* lawyer working in a business. In Chapter 6, we look at respondents' invocation of professional principles in the resolution of problems.

Our respondents suggested that client interests were prioritised more often than the principles of integrity and effectiveness, which in turn were prioritised more than the principles of independence and legality. This is not consistent with the approach required under professional codes.

Conversely, those who prioritised these obligations in a way more consistent with the codes – that is, those who more often saw the principles of independence and legality as important to their decision-making, even if they did not see independence as *more* important than other elements of the principles – were also the most ethically inclined of our respondents. These respondents had a more rounded, less narrow, view of their professional obligations.

Client's interests	• Acting in the best interests of the organisation
Effectiveness and Integrity	• Acting with integrity • Providing a proper standard of service to the business • Carrying out your role in the organisation effectively and in accordance with proper governance and sound financial and risk management principles
Independence and Legality	• Upholding the rule of law and the proper administration of justice • Preventing your independence from being compromised • Maintaining the trust the public places in you and in the provision of legal services • Complying with your own legal and regulatory obligations as a lawyer • Dealing with your own regulators in an open, timely and co-operative manner

In Chapter 7, we examine the management of professional ethics by in-house teams. We draw attention to the general paucity of ethical infrastructure within in-house teams, by which we mean the general absence or infrequency of formal guidance, training and informal discussion on professional ethical matters. Given the level of ethical pressure experienced by respondents, we think this is a concern.

THE CENTRAL LESSON

Our analysis of the data and our four archetypes show that a stronger ethical infrastructure, as well as the individual, team and professional orientations we have discussed, are all associated with a more ethical (and we would say more professional) in-house lawyer.

We think this last finding is the most important and deserves emphasis. Our research suggests that ethical in-house practice is about individual understandings of the role; it is about the approach of teams and the organisations those teams work in; it is about understanding and drawing on all the obligations of professionalism; and, it is about building a better infrastructure to manage the tensions within the role. We can but speculate on what corporate mishaps might have been avoided or managed better, with concomitant reduction in social and economic harm; or what stress could have been avoided, or how many careers could have been saved, by understanding and acting on this.

WHAT'S NEXT?

It is also important to emphasise that this is not a report which tells in-house lawyers how to behave ethically. Nor do we offer specific solutions. Solutions depend on context: they should be tailored to the needs of individuals, teams and their employers; and they are best led, in our view, by the in-house community themselves. Some will respond defensively, but we hope this research provides a spur to action. In Part II of our Ethical Leadership project, we are taking forward these issues in discussion with the in-house community. The lawyers we have met, and those we have interviewed, have been enormously helpful, engaging, thoughtful and challenging. Their response speaks to a rich river of professionalism as well as the need for improvement. We will be reporting on this work in due course.

The plan is to produce a white paper which sets out ideas about how best to structure the in-house role and manage in-house legal functions for ethical practice. This white paper will be led in large part by discussion with the in-house community, and informed by our research. For now, we make the following observations:

- The varied understandings of the in-house role suggest that in-house teams should engage in an honest and open evaluation of their own approaches and consider where on

the spectrum of approaches we have outlined they sit.

- The evaluation should engage the employer and their in-house teams.
- The balance between a commercial (or, outside business, a client-delivery) orientation and independence and ethical orientations should be a particular focus of this review, with consideration given to how independence and ethicality become part of the role description, reporting and day-to-day management of in-house teams.
- The balancing and use of professional principles in day-to-day practice – especially those that promote integrity, independence and ethicality – should be considered and supported.
- The approach to managing for ethicality through ethical infrastructure (such as training, guidance, appraisal and discussion) should be considered as a matter of urgency.

THE FULL REPORT CAN BE DOWNLOADED AT:

http://www.ucl.ac.uk/laws/law-ethics/cel-events/mapping-moral-compass-in-house-lawyers

ABOUT THE ETHICAL LEADERSHIP FOR IN-HOUSE LAWYERS PROJECT

This research is part of a broader process of engagement and evolution of best practice with the practitioner community about ethical practice for in-house lawyers. You can keep abreast of developments at:

http://elihls.wordpress.com.

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