Professional Minimalism?   
The Ethical Consciousness of Commercial Lawyers

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# Abstract

This paper investigates empirically, through semi-structured interviews, what shapes the professional ethical consciousness of commercial lawyers. It considers in-house and private practice lawyers side by side, interrogating the view that in-house ethics are different *and inferior* to private practice to suggest as much similarity as difference. In both constituencies, and in very similar ways, professional ethical concepts are challenged by the pragmatic logics of business. We examine how their ethical logics are shaped by these pragmatic logics suggesting how both groups of practitioners could sometimes be vulnerable to breaching the boundary between tenable zeal for the client and unethical or unlawful conduct. Although they conceive of themselves as ethical, the extent to which practitioners are well equipped, inclined and positively encouraged to work ethically within their own rules is open to question. As a result, we argue professional ethics exert minimal, superficial influence over a more self-interested, commercially-driven pragmatism.

# Introduction

‘Where were the lawyers?’ is a familiar refrain in the US after corporate scandals but less so in the UK. Recent events suggest that may be changing. Private practitioners and in-house lawyers havehad a role in serious wrongdoing in banking and press hacking.[[2]](#footnote-2) Allen & Overy has been accused of putting inappropriate pressure on a prosecution witness.[[3]](#footnote-3) Clifford Chance litigated a client’s fraud case which was found to be artificial and “replete with defects, illogicalities and inherent improbabilities,”[[4]](#footnote-4) raising serious professional misconduct issues.[[5]](#footnote-5) Evidence during a Russian Oligarch’s trials was ‘polished’.[[6]](#footnote-6) Two former Barclays GCs have been interviewed under caution.[[7]](#footnote-7) Internationally, in-house lawyers in General Motors and private practitioners advising BNP Paribas have been in the spotlight.[[8]](#footnote-8)

A variety of explanations might be given for such cases. Chief amongst these is the concern that the practice of law as a profession is increasingly being replaced with the practice of law as a business. Under such a view, the growing power and status of in-house lawyers marks the increasing power of big business clients over the lawyers it employs and instructs, whilst private practice emulate the business structures and attitudes of their clients, competing more fiercely with each other for the work.[[9]](#footnote-9) The influence of business on law is not a new phenomenon,[[10]](#footnote-10) but the rise of global practices and large, powerful in-house legal teams almost certainly represents an escalation of commercial and business logics within practice. In turn, professional bodies have questioned the adequacy of education and training in the field of ethics.[[11]](#footnote-11) The Legal Education and Training Review commissioned by the three lead professional regulators evidenced a strong professional consensus about the need for education in the area.[[12]](#footnote-12)

Given the general concern about in-house lawyering and the very visible influence of business logics on private practice, it is perhaps surprising that there has been almost no empirical study of the professional ethics of commercial lawyers in England and Wales.[[13]](#footnote-13) This is doubly surprising given the importance of London as a centre for global business. Even in the United States, where there is a larger body of work, the literature concentrates on in-house lawyers. Work directly comparing in-house and private practitioners is largely absent.

This paper begins to redress that imbalance. We focus on senior solicitors in large solicitors’ firms and in-house lawyers in blue-chip corporate and public sector roles. Drawing onsemi-structured interviews with twenty-one commercial lawyers, we sought to understand how our respondents understood ethics to be relevant to their role. Whilst we were interested in how they understood ethics in the broadest sense, our principal focus was on how they understood their professional obligations under the law and their code of conduct. As such, we sought to understand how they saw their role as professionals and their approach to professional principles and rules. Were the commercial and pragmatic logics of professional businesses and business clients emphasised in the work of sociologists and management scientists tempered by a clearly articulated consciousness of professional obligations? We are also able to directly compare the differences between in-house and private practice lawyers.

Our analysis suggests that the professional ethical consciousness of commercial lawyers in-house or in private practice is minimalistic in a number of ways. We are not suggesting this leads to routine unethicality. A minimalistic approach is consistent – up to a point – with the standard, if regularly criticised, conception of zealous lawyering.[[14]](#footnote-14) Minimalism does, however, suggest vulnerabilities where the boundary between tenable zeal for the client and unethical or unlawful conduct can be breached. The extent to which practitioners are well equipped, inclined and positively encouraged to work ethically within their own rules is open to question.

## Existing work on the ethics of

## commercial lawyers

Much work on commercial lawyers concentrates on in-house lawyers. It tends to explore the ways in which the in-house role may be more ethically problematic than a private practice counterpart. Jenoff, the most forceful, argues that in-housers are embedded within business and rendered unable to advise independently; they are incentivised to comply with executive diktats and socialised to identify with corporate objectives.[[15]](#footnote-15) For her, heavy involvement in decision-making removes their objectivity.[[16]](#footnote-16)

In contrast, in-house lawyers might be employed for their relative independence from the business:[[17]](#footnote-17) “if professionals are not able to retain sufficient independence … [why] pay a premium for their skills?”[[18]](#footnote-18) This argument suggests a choice: the skills and apparent professionalism of a lawyer can be usefully deployed towards the evasion, avoidance or creative compliance with the law[[19]](#footnote-19) or they can be deployed towards independent interpretation and application of the law. Which role is chosen for or by in-house lawyers? Nelson and Nielsen define three archetypes: cops, willing to say no when corporate wrongdoing is contemplated; counsellors, who might counsel against unlawful or unethical action, but leave decisions to the business; and, entrepreneurs who might exploit law aggressively as a source of commercial advantage.[[20]](#footnote-20) In their study, cops were a minority and counsellors the most common.[[21]](#footnote-21) In contrast, Rostain’s more recent pilot work has emphasised a belief that corporate governance reforms had strengthened the hand of GCs in resisting wrongdoing.[[22]](#footnote-22)

An assumption tending to underlie these studies is that in-house ethics are different *and inferior* to private practice. The assumption drives questions about the ethicality of in-house lawyers that inform ECJ decisions on legal professional privilege.[[23]](#footnote-23) Assumptions about the relative virtues of private practitioners inform their appointment as independent investigators and corporate monitors[[24]](#footnote-24) as well as otherwise acting as reputational intermediaries between clients and regulators.[[25]](#footnote-25) They are supported by a limited number of US studies supporting the ethicality of large law firms.[[26]](#footnote-26) A series of professional scandals have eroded belief in the ethicality of elite law[[27]](#footnote-27) but the assumption that, in the commercial field, in-house lawyers are the most prone to ethical problems tends to remain.

There are some thoughtful dissents. Seeing in-house lawyers as subject to a binary divide between being client-captured or independent may be too reductive.[[28]](#footnote-28) Langevoort explores the risks posed by in-housers ‘getting too comfortable’ with client preferences; but suggests the pressures may not now be so different in private practice.[[29]](#footnote-29) His suggestion – albeit one not evidenced - is that, commercial and cognitive incentives on private practitioners to do the client’s bidding are great, as is the case for in-house lawyers. Kim suggests that the place of in-house lawyers in the corporate network may mean they are better placed than outside practitioners to exert influence, if not control, over corporate wrongdoing.[[30]](#footnote-30) They have more information and more opportunities to influence conduct and so may have a stronger ethical role than outside lawyers. She also takes the most nuanced position on independence: in-house lawyers may shift between cop, counsellor and entrepreneurial role to match their behaviour to the nature of the risk in questions and the reporting obligations that are placed upon them.[[31]](#footnote-31) Importantly, Kim’s point suggests a closer need to tie essentially sociological understandings of role back to specific legal and professional obligations.

Positions on the relative ethicality of in-house and private practice are not generally supported by empirical study which compares the two groups together. Indeed, there has been little empirical research on the ethicality of commercial lawyers in private practice. Kirkland’s recent study is of interest. She finds ethics in law firms determined by pragmatic or bureaucratic norms rather than being firmly linked to external standards of right or professional conduct.[[32]](#footnote-32) What matters is the, “norms one's superiors would follow, principles can only be guidelines, ethics can only be etiquette, and values can only be tastes.”[[33]](#footnote-33)  Power relationships render partners dependent on clients and associates dependent on partners and this renders, “notions of right and wrong, proper and improper, mutable in the lawyers' eyes.”[[34]](#footnote-34) Other work emphasises that lawyers are influenced by their clients and their firms but they also have some agency, they have opportunities for resistance or influence.[[35]](#footnote-35) Conversely, a neo-institutional perspective suggests that “Professional identities [now form]…around logics of efficiency and commerce which have displaced traditional logics of ethics and public service.”[[36]](#footnote-36)

In this study we are able to compare how in-house and private practitioner lawyers (say they) think about ethics, and so we are able to engage in a more direct comparison of the two groups within one study. We are also able to add a perspective from England and Wales to the literature on in-house and commercial lawyers. More specifically still, the study takes forward the need for attention to specific professional ethics obligations when considering debates about commercial lawyers. Our focus in this article is primarily on the lawyer’s obligation to, “uphold the rule of law and the proper administration of justice”.[[37]](#footnote-37) Finally, the claims of interactionists and neo-institutional approaches raise an important question: given institutional and commercial influences on professional identity and behavior, do professional ethics exert influence over a more self-interested, commercially-driven pragmatism?

## Methodology

Understanding professional ethics is complex. Ethical questions being foundationally controversial and real problems rarely being public, they are difficult to capture empirically as ‘fact’. A full suite of empirical approaches would tend to involve understanding:[[38]](#footnote-38)

* Character (disposition, personal values, attitudes, role morality);
* Context (economic and social incentives, infrastructure and culture including the decision rules employed); and,
* Capacity (aptitude to recognise issues, knowledge of the rules, reasoning processes demonstrated through ability to weigh competing interests, skills in persuasion of colleagues and others towards ethical ends.)

Each dimension may interrelate: character may influence how we see context; context may influence our capacities; and so on. The importance of context in influencing ethical behaviour is well established.[[39]](#footnote-39) Ethical reasoning skills are measurable and important.[[40]](#footnote-40) Yet, moral and behavioural psychology opens up new research agendas relevant to understanding lawyers’ ethics.[[41]](#footnote-41) Some suggest ethics is more intuitive than rational[[42]](#footnote-42) and prone to identifiable biases.[[43]](#footnote-43)

Accordingly, we see ethical consciousness as a site for studying the competing dimensions of ethicality: character, context and capacity; the intuitive and rational; and, structures and agency. Just as legal consciousness has been employed to recast our study of rules,[[44]](#footnote-44) and the experience of law,[[45]](#footnote-45) “habitual patterns of talk and action” about ethics may help illuminate practitioners’, “common-sense understanding of the world.”[[46]](#footnote-46)

We also use consciousness as a self-aware or self-limiting term, to conjure up the ephemerality of the concept and the elusive relationship between conscious, sub-conscious and intuitive thinking. In studying how lawyers think about ethics, we recognise significant limits on our ability to identify thought. Ultimately we cannot prove what is going on in someone else’s head. Indeed, we do not always know for ourselves what is driven by intuitions rather than conscious thought or what we wish to hide.[[47]](#footnote-47) Yet there is significant value in exploring someone’s experience of their own mind.[[48]](#footnote-48)

In this study, twenty-one interviews were conducted with interviewees recruited from elite practice: twelve were employed in large companies (FTSE 100) and public sector organisations and nine in the kinds of private practice firms typically instructed by the in-house lawyers within our sample (very large firms, often with an international practice).

Of the twelve in-house lawyers, ten were solicitors, one had qualified as a barrister and another had qualified as a barrister and a solicitor. They were also generally senior practitioners, often General Counsel or equivalent, though some were heads of smaller sub-divisions (such as compliance and litigation). The majority had upwards of twenty years’ experience. All the private practitioners were solicitors and were generally a senior group (seven partners had been qualified in excess of thirty years).

Although we attempted to engage both senior and junior lawyers to allow for likely divergence in perceptions,[[49]](#footnote-49) junior lawyers were markedly less likely to agree to talk to us. Even the most junior lawyers in the in-house sample had upwards of ten years’ experience. Two of the private practitioners had less than ten years’ experience. Four of our interviewees were women: three of those worked in-house.

As with all qualitative work, we emphasise that we should not necessarily regard our interviewee views as typical. This is not a sample designed to be representative of all commercial lawyers but one which explores the views of a select and very senior group of elite lawyers. Interviewees often said in agreeing to speak to us that they felt that they had ‘got their house in order’ ethically or otherwise; they signalled their elite status (say as ‘sector leaders’) and comfort with their organisation’s approach to ethics. Interestingly, some identified themselves as having been aggressive risk takers in the past. Some of our participants’ organisations were also affected by significant scandals during or after the course of the research, suggesting that the past returned to haunt them or the ethical present was less sturdy than they thought.

Semi-structured interviews were conducted over the telephone. To reduce defensiveness and mitigate the temptation to give answers which reflected a social desirability bias, participants were told that we were not testing their ethicality, although we were exploring their ethical reasoning. The usual protections of anonymity were given. It was also emphasised that the research was exploratory, independent andnot sponsored by a regulator (which some wanted reassurance on).

Interview schedules provided a series of questions to act as a semi-structured conversation between interviewer and interviewee based on our reading of the relevant literature.[[50]](#footnote-50) The questions explored views on what ethics meant to them; what they thought were the most important values or principles governing how a lawyer should behave; the influence of business incentives on ethics and, how ethics were assured within their organisations.[[51]](#footnote-51) Interviews are, at best, verbal articulations of consciousness rather than consciousness itself.[[52]](#footnote-52) Accurate reporting requires honest, articulate, diligent and self-aware communication. Error, omission, and memory lapse are potential problems, as are response biases designed to show the interviewee in a good light.[[53]](#footnote-53) One way of mitigating these risks is by asking the participant to report on an experience in the immediate moment, rather than whilst recalling previous conduct. For this reason our research approach employed vignettes as part of the interview process: problems which each interviewee was asked to give their response to. These are ethical problems which respondents are asked to ‘solve’ there and then. The risks are only mitigated by such an approach; they are not removed.

# Analysis

In the next sections of the paper we discuss our analysis of the interviews. Interviews were coded thematically, with the interview topic guides forming the basis of the coding framework. NVivo was used to assist in organising and coding the data. Here we draw out the most important themes emerging from the interviews.

1. *Ethics as not being criminal*

Respondents were first asked what came to mind as ethics in legal practice. This tended to prompt responses suggesting a mixture of honesty, integrity and serving the client. Some in-house lawyers mentioned their Company’s Code of Conduct. Bribery came up regularly, being topical because of the introduction of the Bribery Act 2010. Several in-house lawyers in emphasising their duty to do the best for their client raised tensions between commercial aims, law and the lawyer’s role as an employee. In this way a concern about independence became apparent.

To return to Nelson and Neilson’s archetypes, our sample of in-house lawyers generally saw themselves as counsellors or technicians and not as cops. As Counsellors they advised, but they did not take responsibility. The notion of a grey zone suggested something legally or ethically problematic about a course of action that flowed from (or was assisted by) advice. Our lawyers generally had no difficulty distancing themselves from ethical responsibility for these grey zones, commonly falling back on the mantra of: I advise, but the client decides. Here a lawyer takes the position one step further, they facilitate understanding but the client (the business) interprets the grey zones. IH11 said:

[I] always make sure that the client …understand[s] the law. I think they also need to understand what the law is trying to achieve, so that if there is a grey area they know the correct way to interpret it.

These grey zones plainly gave rise to a tension in the lawyers’ minds. Although they professed comfort with greyness, many discussed a tension with legality. How did this tension manifest? There was wide-spread acceptance that a narrow, legalistic ‘what can I get away with’ interpretation of law might damage the client’s interests. Doing the ‘right’ thing rather than simply the legally permitted thing was sometimes seen as commercially wise and ethical. Equally, most suggested limits to their ability to say no to a client, even where they might consider this a legitimate part of their role. They were constrained by a number of factors.

First, the only notion of unlawfulness which appeared to restrain respondents consistently was *criminality*. Respondents regularly distinguished tolerable legal risk from potentially criminal activity, acting, “not [in] a criminal way, but act in a way which is in the best interests of the client rather than always necessarily following your advice….” (IH11). Even where an in-houser emphasised “being the conscience of the organisation… not only sticking to the law but also the letter of the law” they had experienced being asked to, “find a way around something which is an absolute prohibition” (IH12). Another said, law only restrains if, “there isn’t a way around it.” (IH2)

Are second way of looking at the problem was to see the lawyer’s job as ensuring an informed cost-benefit calculation when behaving in a potentially unlawful way or generating sufficiently plausible claims to legality to minimise the risk of regulatory action or third party litigation. The calculation was not ‘is something lawful?’ but whether the commercial benefits of action outweigh the risks of regulatory infraction or civil suit. Whilst some respondents thought they might exert ethical influence as part of the process of weighing costs and benefits, the technical competence of the lawyer was ultimately employed in examining the limits of the law, not the ethicality of the decision.

Not all respondents were comfortable with this. Tensions were evident across a range of respondents: IH6 talked of risks to independence in the, “general conflicts in terms of the [in-house] role”; IH4 about, “Ill-advised activity by some senior managers, which have [sic] cropped up occasionally”; and IH10, “the demands of management to do certain things, which may not always be either legal or may kind of hover on the edge of illegality.”

Seeing unlawfulness as risk operated to both recognise and normalise the tension between whether a course of action was lawful or unlawful. In framing a decision as risk-based, ambiguity and potential unlawfulness was tolerated. They were the facilitator of calculated risk-taking with law. Where legal risk is unavoidable, and risks are neutrally weighed, this may be unexceptional. Yet, in balancing risk, the lawyers acted as guardians of their client interests not as independent administrators of the rule of law. They recognised that the boundaries of tolerable risk were malleable and open to interpretation and that corporate dynamics (generally) pushed in one direction: don’t say no, say how. There was a strong sense of the reputational cost to a lawyer in saying, “‘No, you can’t do certain things’, or ‘I’m sorry but certain things are required’ …they don’t like it.” (IH10).

Private practitioners recognised similar gradations of tolerable unlawfulness. Some suggested even narrower tests, “knowing participation in criminality” (PP1) or, “straight dishonesty” (PP7). ‘Non-criminal’ regulation had significantly less resonance. When making these kinds of comments, in-house and private practice interviewees were often distinguishing ‘regulation’ from more criminal prohibition in a somewhat hazy way.[[54]](#footnote-54)

They too were informed by an incorrect but strongly held assumption that client’s interests were pre-eminent. A regulatory framework, or the law in general, might establish a broad idea of what was probably expected or required, but if there was ambiguity and the client had a weak (but runnable) argument then that too was permitted. PP1, for example, was willing to assist with actions which were, in his judgment, arguably, but probably not, lawful. They can advance, in his view, the “wrong” argument. He contrasted criminal liability, “…Certainly, we’d never get involved’.” (PP1) The aim was not to establish legality but defensibility:

… it’s not for us necessarily to consider the wider public interest. …we don’t need to necessarily think in the same way the regulator might about wider issues and wider implications. We just need to make sure that our clients stay within the law and if they do that, their position will be defensible.” PP6

The impact of this was that ‘within the law’ means it is *arguably* legal not that it is *clearly or probably* legal and arguability may provide a generously low threshold. The law of negligence may, in some ways, drive lawyers towards such an approach by allowing loss of chance claims to be advanced where the prospects of success may be low.[[55]](#footnote-55) To avoid being negligent in litigation, the need to advance all plausible claims may thus drive towards saying the client can bring claims (or – by analogy for transactional lawyers- take steps) where the prospects of success (by analogy – legality) is questionable.

1. *Wariness of the Public Interest*

The narrow view that the client should be promoted first with only the criminal law providing significant restraint is the ethics of zealous advocacy, though even the strongest academic versions of zeal emphasise that lawyers should be retrained by the law and their rules of conduct.[[56]](#footnote-56) The Solicitors’ Code of Conduct requires a principle-based approach to professional ethics. This requires solicitors to uphold the rule of law and the proper administration of justice; act with independence; and act in the best interests of each [client](javascript:handleLink('/solicitors/handbook/glossary#client','glossary-term-13')).[[57]](#footnote-57) “Where two or more [Principles](javascript:handleLink('/solicitors/handbook/glossary#SRA_Principles','glossary-term-11')) come into conflict the one which takes precedence is the one which best serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice.”[[58]](#footnote-58) In simple terms, then, the rules specify that public interest concerns can trump client interest concerns where there is a conflict between the professional principles. One’s own economic or other interests as a lawyer are subservient to both.

The ‘grey zones’ discussed above provide an interesting testing ground for the application of this principle. As we have seen, our respondents indicated, in general, that non-criminal activity, “sort of on the edge of commercial practice” (IH11) would be tolerated. Pushes towards creative or selective compliance took place against a management who, “want to know how far can they go before they breach the criminal law” (IH11). At what point is the obligation to law and the administration of justice engaged sufficiently to trump the client’s interest? The Code of Conduct does not confine itself to behaviour which is criminal – and if it did one would have a legitimate question to ask about the idea of the profession: if the rule is simply do not act criminally then that is a rule which applies to all, not just professional lawyers. Equally, the law is tolerant of deliberate breaches of contract and the like where remedies can be found in damages. There is a balance to be struck, but how should it be struck?

We asked respondents to focus more explicitly on this question by rating in order of importance the public interest, the client’s interest and the firm’s (or their own) commercial interest. Generally, for our interviewees, client interests came unequivocally first. This was particularly true of private practitioners. Though even here there were some expressions of anxiety around instructions that had been accepted from banks. For example:

I myself have always wanted to avoid situations where we just take on work because the institutions want us to do it, even though I think to some extent, we shouldn’t be doing it. … (PP3)

Generally, there was a wariness of notions of the public interest which respondents saw as subjective and difficult to define:

I don’t think …the law should rely on public interest. If the law hasn’t caught up …it’s not my duty to do that. I will leave that to legislators and other people…. (IH12)

Some criticised the public interest ideas as populist, “the old 20/20 hindsight problem.” (PP5) Or saw companies as purely economic creatures generally operating in a moral vacuum:

companies aren’t in a position to have morals, they haven’t got a soul…. [They are] taking actually what are not moral or ethical decisions once you are outside the area where this is straight dishonesty…(PP7)

Where law was imperfect, where ambiguity created space for doubt about right or wrong, that space was typically inhabited by the client (in the shape of those giving them instructions) not any obligation to promote the rule of law. An opposite view, that ambiguity creates a space where ethical judgments are possible, perhaps essential, was usually resisted by our respondents:

… you’re not here to judge moral issues …the client has retained you to advise …it’s not for you to judge the morality of it…. (IH4)

The risk inherent in a minimalist approach to restraining clients can be captured in the mutual convenience of divided responsibility. Lawyers advise that the law does not prohibit it and the clients say ‘our lawyers said we could do it’. Ambiguity is helpfully defined as within the law. Such shifts in understanding may be deliberate or accidental conveniences. It was a problem at least some of our respondents were conscious of. PP1 suggested lawyers needed to keep their antennae up to prevent being taken advantage of by clients as vehicles for dishonesty. PP6 was similarly cognisant of the role of the lawyer as reputational intermediary, where grey areas could be sanctified by the giving of legal advice:

And if the law firm has given them advice that it’s legal, then they can go to the regulator and …say, ‘we’ve taken legal advice and we’re comfortable.’(PP6)

It is also worth emphasising that scepticism of public interest was not universal. In-house lawyers were somewhat more likely than private practitioners to suggest the public interest came first. Some claimed that corporate codes and cultures of doing the right thing supported this. Judgment calls went beyond purely legal requirements because theircompany had a “very strong sense of public purpose” (IH9) or because “ethical and reputational [reasons]” (IH9) required it. Perhaps too they could not as easily rely on a distinction between them as the lawyer-adviser and the ‘client’ as morally autonomous, as they were part of the business:

ultimately we have to do what we think is right regardless of what the company wants or what the... stakeholders/clients want. (IH10)

Some respondents also described more interpersonal notions of ethics: for example, IH1’s “the way we conduct ourselves as a business,” limiting opportunistic bargaining or PP2’s “openness with clients and how you deal with people” or PP8’s “being able to accept the word of another practitioner… [and] conducting themselves in a proper and appropriate kind of way” (PP8). What was notably absent from much of the discussion was any notion of *professional* responsibility. Very few lawyers we spoke to utilised principles within their professional Code to protect their professional independence or to frame the judgments they took in the grey zones. Where they did so they tended to refer only to their obligation not to mislead the Court. Beyond adherence to notions of criminal legality, rule of law considerations had minimal purchase. For private practitioners, where anxiety about sharp practice by a client became acute and/or prolonged this was accompanied by an approach to professional ethics which emphasised ‘quiet exit’ from the client relationship and not acting for very controversial clients or, “acting [only] for the sorts of clients we would want to be associated with reputationally” (PP9).

1. *Contextual pressures*

Scholars have suggested that framing a problem in terms of commerciality leads to a general weakening of ethical sensitivity,[[59]](#footnote-59) or that the need to establish and maintain relationships within the organisation or with the client have similar affects.[[60]](#footnote-60) When asked in general how they rated public, firm/own and client interests most in-housers tended to say they placed their own interests a distant third place. Interestingly, though, private practitioners often put their firm’s commercial interest *before* the public interest and sometimes pointed to situations where the firm’s interests would come before the client’s interests (principally in decisions about clients who might not fit reputationally). Some even suggested that, in fact, the firm’s interests might be pre-eminent. If this view influences their practice then this is the mirror image of what their Code of Conduct expects.

To delve into the issue of context more deeply, we asked about the influence of the business on their ethics. When asked whether billing, target or other economic pressures impacted on their ethical decision-making most respondents suggested not. In-housers usually distanced themselves from the potential downsides of performance related bonuses:

my bonus is based on the profitability of [the] company … …there’s nothing …[I could do] that would really move that needle one way or the other. [Also] …it’s sufficiently geared towards my performance …my performance personally… there’s nothing ethical that would make a difference to that…. (IH1)

The answer is contradictory: a bonus geared toward personal performance means the needle can be moved. His point is that ethicality was not assessed because ethical conduct was taken as a given not in tensions with other performance indicators*.* Others thought bonuses could *encourage* ethicality (“if we don’t meet our targets for training or …give examples of leadership in the ethical or compliance area …that impacts on your bonus” (IH11)), but avoided saying they could do the reverse. Others simply emphasised their own independence as a bulwark against bonuses driving questionable behaviour.

Some concerns *were* expressed about what a general pressure to deliver on work too quickly could do:

It’s not about trying to be unlawful at all, or... rejoicing in illegalities but managing the tensions between the rightful objectives of the organisation and the requirements of the law (IH10).

A general culture of getting things done, or thinking of the bottom line could cause problems, but we also heard of in-housers being deliberately managed towards ‘thinking the unthinkable’:

[O]k, you’re not really being asked to make it happen …you’re being asked to... brainstorm these ideas which you feel deeply uncomfortable about… how can we kind of slide this under someone’s radar... how can we get away with something …we kind of know we shouldn’t be doing, and that’s the kind of pressure you always get in organisations, there’s always people who …[are] not constrained by any particular professional code, you know... they just want to... do something to make the management happy (IH10)

Private practitioners were more inclined to see a potential problem with targets and bonuses but typically said these problems did not apply to them, or that sophisticated clients did not need protection (suggesting they did not perceive public interest risks inherent in commercial incentives). In private practice, lockstep and departmental, rather than individual billing, targets were also held up as inhibiting dangers. Overbilling was sometimes said to have occurred *in the past* yet every lawyer knew high billing could, “only improve their reputation and their chances…” (PP3) Or that hourly billing and targets presented, “a temptation which in my view, you must always resist”(PP4).PP1 suggested targets were not taken overly seriously, and simply part of “any commercial organisation.” But also that for, “bonuses the most important factor is contribution to fees.” Comfort was also taken from the idea that billing pressures are worse elsewhere (in the US in particular). There is a whiff of relativist thinking here: we can’t have a problem, because somewhere else is worse, whilst ‘any commercial organisation’ is the same.

The idea that targets are not meant to incentivise behaviour begs the question, why are they there? PP6, a non-partner, acknowledged problems more directly and did not portray them as historic:

It’s probably something probably pretty fundamental to the way law firms work …the way law firms bill creates all kinds of issues for lawyers … … the reality is everybody will put down hours that make it look like they are doing the seven hours a day even if they are not. …there is such a link between performance and promotion and bonus payments that come off of that that people will always put down more hours, regardless of whether those hours are actually a hundred per cent accurate. …if you don’t do your seven hours one day, you will get an email saying ‘you haven’t done your hours’ and then questions will come in and if it goes on too long, then you will start getting a red light above your name with partners or senior partners, so the culture is, the whole way its set up is very much set up to encourages associates to make sure associates put their seven hours down every day.

PP9 described targets as “incredibly motivating” for “some people”. They also pointed to an important narrowing of professional values which occurred if law firm management is too reductively numbers-oriented:

… more effort …should be made to actually acknowledge the contribution that people might be making to the firm in other ways. If they don’t then the associates and … [other] staff become quite cynical that …[what] we are saying in terms of …our commitment to corporate social responsibility is all about PR and nothing else.

If research on financial incentives and business frames is correct, the cultural importance of financial incentives may influence professional judgement in risky and sometimes subconscious ways.[[61]](#footnote-61) Even amongst those downplaying the significance of incentives, there were some clues that they had reservations about the context within which they and their firms operated. They tended to support a view that things were changing: younger staff were sometimes, “a bit gung-ho …doing things that we’re very uncomfortable [with]” (PP2), their, “instincts are sound but [their] experiences are weak” (PP5). The increasingly cut-throat lateral-hiring market for partners was also blamed for diminishing cultures of ethics; loyalty was more short-term and the concern for reputation less strong:

…they are out to make as much money as they can. And I don’t think they put the reputation of the firm as highly as I do. (PP4)

Contextual pressures were not generally offset by significant counter-balances.: “in the training we give, [ethics] doesn’t feature very highly.” (PP4) Some private practice firms did have some infrastructure for taking ethics matters more seriously but an ethical culture tended to be assumed rather than actively fostered. “[T]one from the top” (PP1) and the idea that the unethical would get caught out were frequently mentioned. Also, firms were reliant on choosing the ‘right’ people: “The best solution though is that you’ve got to trust the people and employ the right people which reflect the firm’s ethos….” (PP1). Whether a culture of trust was a coherent or robust response to such pressures was doubted by some:

there’s a big difference between deeds and words. … [We have] a set of values for the organisation.... which are kind of inculcated at every point, but the... difficulty... …always is... Are they truly embedded? Are they truly how the company operates? Or are they again, a fig leaf... …... much is... observed in the breach rather than... in the real practice. (IH10)

As others have noted,[[62]](#footnote-62) the view could also be different from the top and the bottom of an organisation; PP6:

I don’t think I’ve ever come across any support or encouragement on [the ethics] front. …it’s assumed that you’ve …gone through your ethics training …and you are meant to know it all. Nothing has ever, really ever, been said to me …from the partners or in terms of training that in any way encourages it or supports it.

It seems, therefore, fair to say that for our respondents the infrastructure for ensuring ethicality was limited. A number would say this was on the basis that such infrastructure was largely unnecessary.

1. *An example of contextual pressures? The Billing Scenario*

The last section of our interviews involved short ethical dilemmas to which respondents were asked how they would and should respond. They were reassured there was no necessarily correct answer to any problem.

The vignettes discussed here were adapted from tools used with lawyers and law students in Australia.[[63]](#footnote-63) They were designed to draw out key ethical issues facing lawyers in a variety of practice situations. Offering an encouragement to think in the moment, and to examine the ideas and values at play when the problems were discussed, the vignettes were an integral part of our approach. Here we discuss the two ethical scenarios most likely to fall within the ordinary experience of commercial lawyers. Firstly, a billing scenario relevant to the tension between client and personal/business interests:

Imagine you are an associate in a law firm; your supervising partner meets a regular client, and provides an estimate of £20,000 for the work on what he assesses as a complicated matter. The client is usually billed on an hourly fee basis. The partner gives the matter to you to progress, and you find it less complex following some changes in the client’s situation and you finish the work much earlier than expected. It then comes to your attention that the client has still been billed for £20,000. The client is delighted that the work has been completed ahead of time and he’s happy with the bill. Can I ask you what would you do in that situation?

The aim of the problem was to suggest contractual ambiguity on what the agreed billing arrangement was. As drafted, the £20,000 appears to be only an estimate and not a quote. In professional terms there is less ambiguity, a lawyer is supposed to put the client’s position before their own. In a situation of ambiguity, one might expect the client’s interest to be put first. How did our respondent interpret the problem?

It was mostly in-house practitioners that said because an *estimate* was given then billing the £20,000 was probably wrong. Those assuming it was a fixed fee had been agreed tended to be in private practice. Although the numbers of interviews we conducted was small, the difference was striking. Both groups tended to interpret an ambiguity in the facts of the question in a self-interested manner: the in-housers natural perspective would have been as a client (although they would have experience of billing situations from when they were in private practice), the private practitioners as billers.

Almost all our respondents proceeded on the assumption that the partner would not be receptive to an argument that the bill was not appropriate. PP4 said:

[T]he partner would have explained that …‘you win on some of these and you lose on some of these’. And having agreed a fee with the client, I think that the partner would say, we are going to charge that amount.

PP4 appears to ignore ambiguity (whether a fee has been agreed) in favour of the firm: the fee is assumed to have been agreed. Others picked up an ambiguity, but almost without exception their approach to resolution was by reference to the partner rather than the client: i.e. the associate should raise it with the partner. Some indicated that if the partner did not provide a satisfactory explanation then it would need to be taken further with (say) the Senior Partner, although that too was a rare response.

Different values appeared to be at work when our respondents discussed this approach. The notion of a trusted relationship with the client was shaped within the context of the business interests of the firm and the hierarchy within it. Few said they should discuss it with the client, and thought that unlikely to occur in actual practice.

Even where there was more willingness to assist the client, this was framed not in ethical terms but in terms of the firm’s business interest, as an opportunity to protect and promote the reputation of the firm. A case has to be made in terms of the firms’ reputation and business:

…I think both for professional reasons and actually for good business reasons it makes sense... why don’t we charge them 10k? …they’ll be bounding back to us with more business’. (IH10)

They then need to conform to the social hierarchy of the firm and how action threatened the security of the associate:

... well I know what they will do [laughs] …is keep their mouth shut, and not look like idiot... because …they don’t want to lose the firm money and look like people who want to give it away. … you do that at some risk to yourself…” (IH10)

Even the suggestion of offering the client a reduction was thought to pose a risk associate’s status within the firm. IH12, “…it would be difficult …You might express surprise but you would only challenge it gently”. IH6 was blunter:

…would I bring it to the attention of the client? …I’m also old and wise enough now I think to know that if I did that then that would be the end of my career at that firm. (IH6)

One way of coping with this tension between the client interest and the security and status of the lawyer was to frame the problem as a *business* decision for the firm or partner, not an ethical problem for the associate (or indeed the partner):

the decision on billing, is ultimately the partner’s decision, it’s the partner’s client. …that is entirely between the partner and the client … I wouldn’t do anything. (PP6)

PP8 similarly, “it wouldn’t have been my place to. …the business belongs to the partners and they are the one liaising with the client and agreeing the fee.” PP9 suggested raising it with the partner and suggesting a fee of £15,000 to leave the client “more delighted”. They also provided an interesting insight into how they thought the Partner would respond. The centrality of economics and the link between money and reputation within the firm was emphasised:

…it would very much depend on the partner in question …what pressure that individual partner was under... if their billings were down then it could be that they were putting their own personal standing within the firm above what was in the best interests of the client and what was fair to the client. … [even if I raised it] I can’t imagine that it would actually come to anything. (PP9)

Notice again how this is seen as a matter of client management and relationships rather than of professional responsibilities. Arguments were almost always business arguments that spoke to the firm’s reputation and the ongoing ability of the firm to make money.

Private practitioners were also more inclined to describe the relationship in contractual terms (and as already noted) preferring to see the relationship as a fixed fee or that ambiguity should favour their interests:

…it’s open market… time charges are simply an illustration… unless you said to the client, ‘it will be the lower of x and what we actually record’. That is a commercial relationship. (PP1)

That it is a commercial relationship implicitly excludes the professional dimensions of the relationship. Most spoke in commercial terms: “I have no problem having a tough negotiation with a client on fees” (PP2) The same lawyer emphasised the need to be open and honest, but ambiguity, so often used to the client’s benefit, is turned against the client.

[U]nless you are dealing with a situation where you’ve got a clear and unambiguous contractual position where you can only bill on hours times rate, then I would be intuitively comfortable about that. (PP2)

Some assumed that the client would understand the full situation so there was not a problem. Another said that there was only a problem if there was a falsified fee note with the wrong hours (which “strikes me as dishonesty” (PP7)).

The language and approach suggests quite strongly that context and hierarchy do matter and that – on this occasion - ambiguity is minimised in such a way as to favour the firm’s – and the individual lawyer’s interests – in tension with the clients. It was striking that in-house lawyers saw the tension immediately and did not minimise the ambiguity.

1. *A Second Vignette: Being Asked to Do Something Questionable*

A second vignette looks at the tension between legality and client interests:

You are an in-house lawyer acting for a company in a property conveyance. The rules are that before the property can be acquired by the company, a director’s meeting must be held, minutes must be recorded and written authority must be given to the director signing the contract. Just before settlement you discover that there is no document authorising the company to enter into the transaction. You discuss this with the directors and they suggest you deal with it by typing up a minute of a meeting and then backdating it to show that they did have the required authority at the relevant time, so that the settlement can proceed. They say they simply overlooked holding the meeting and it’s purely a technical matter and the deal is worth millions of pounds to the company. So what do you think you would do if you were asked to do that?

The vast majority of our respondents said they would not backdate, and most suggested they would find a work-around which involved holding an emergency meeting or otherwise ratifying the decision legitimately. Several respondents noted that pressure to do this was not uncommon (both in-house and in private practice) and that this was often accentuated by colleagues working outside this jurisdiction where backdating was, it was said, permitted.

Mostly the reasons given for not doing so were straightforward: it was seen as a fraud or a breach of a lawyer’s ‘duty to the court’ (although no court was involved).

…you have a duty as a lawyer not only you know, you’re not just an employee of your company… You’re an officer of the court, you have a duty to behave properly. Falsifying documentation doesn’t fall under that category as far as I‘m concerned. (IH12)

The dominant reaction though was not based on professional duties but basic principles of honesty and the risk of criminality. For example, PP3 referred to it as “producing a deceptive document” and PP5 as “falsifying documents”.

IH5 described it as “illegal” and “bad practice” but also appeared to be influenced by the risk such activity posed to their own reputation and security, “with computers it is so easy to tell when a document was created.” Lawyers were plainly happy to say it was “just wrong” where, “there are plenty of other ways you can deal with the event you’ve referred to which are perfectly acceptable” (PP1)**.** Some predicted a more genuine struggle with clients:

You just can’t. Backdating of documents is fraud. ..[A]ctually... I have had incidents like that… there’s a nasty technicality …an irritating one, and everyone argues ‘Oh for goodness sake …let’s just imagine we did it’. …you can sometimes get under pressure particularly from clients who are just you know... hyped up, want to do a particular deal or something, and regard this kind of thing as just the kind of irritating legal technicality that... gives lawyers a bad name and then get all angry about it. (PP2)

There might also be a risk that ‘finding a solution’ could lead to overreaching as hinted at by IH10’s comments:

everything can be regularised by inventive minutes, um... but again, um... I mean... if it’s... I mean... if it can be done.

... there might be a workaround there. But that is to record something genuine, not to create something that never happened.

IH3 pointed to less black and white situations where documents were created after the event to ensure detailed compliance appeared to have occurred in the spirit of the occasion:

…occasions where …people are together and they’ve talked about certain things and then we’ve um, you know, prepared the minutes several weeks’ later to reflect that conversation and perhaps dotted the i’s and crossed the t’s in the minutes in terms of, you know, what we really wanted them to say … …Yes, we’ve done that, yeah.

In IH3’s example, the nature of the I’s and the T’s is opaque but it is an interesting indication how the boundary between something which is clearly wrong and something which is simply helping the client get their problem resolved is dealt with through the benevolent interpretation of uncertainty. Whilst backdating is potentially fraudulent, the benevolent interpretation of ambiguity is a ‘normal’ part of the lawyer’s skill. Some rejected this kind of approach:

you quickly get into a kind of... slippery slope of... of misbehaviour which becomes increasingly difficult to prevent or argue against because with every little departure from the rules, you’ve got less to hang your hat on. (IH10)

IH2 said they would advise against it but not prevent it occurring, seeking clearly to extricate themselves from personal responsibility rather than stop the practice of backdating:

…I think I would probably get someone else to write the minute.... I would say ‘Look, what you’re proposing to do is [tantamount] to fraud, um... and um... my professional code of conduct doesn’t allow me to um... assist you in perpetrating that fraud’.

This concern with their own power and the tension to do the best for the company is clearly shown by his anxiety: “even though it may... bring me into a certain amount of disrepute... you know, to be seen as an awkward so and so.” (IH2) IH7 also saw his role as making his concerns known but not standing in the way:

I would …raise it as an issue with [senior in-house counsel]… escalate the matter to them. If I was asked for a recommendation, I would say that the firm’s reputation is more important than this deal and that we shouldn’t proceed to create notes and I wouldn’t be party to creating notes.

Several in-housers mentioned they might need to take a reputational hit for resisting in this way. IH6 had his own long-term reputation firmly in mind:

... it’s not just a case of dishonesty, you’re making yourself a fall guy. So it would be very unwise to do what was requested because basically they’re asking you to lie on their behalf, and carry the can, which I just wouldn’t do...

It was mainly but not solely in-housers who contemplated the possibility of backdating. PP6 was an exception, mindful that:

I would feel I was taking all of the risk on myself in doing that. So I think I would refuse to do it. But then again you are weighing that up against the falling apart of a huge, as you say, multi-million pound deal.

And PP8 indicated, “I’d like to think that I wouldn’t but I can’t help but think that in that situation there would be a lot of personal ramifications to consider.”

# Conclusions

In many ways the interviews suggest similarities in the ethical consciousness of in-house lawyers and commercial private practitioners. The vignettes we have just discussed provide detailed examples of how institutional hierarchies and pragmatism may shape decision-making. For some of our interviewees, ethical obligations in their code of conduct to put the client’s interest before their own or their firm’s interests and to promote the rule of law and the administration of justice were muted in their reasoning. Their discussions were richly infused with notions of hierarchy and reputation. In particular, where ethical concerns were recognised these were often framed as reputational concerns to be made as part of a ‘business case’.

The vignettes are illustrative of our broader point. For both groups of lawyers, ethical consciousness was, in important senses, narrowly drawn. This ethical minimalism occurred in a number of ways. Firstly, there was some resistance to the idea that ethical issues occurred with significant frequency. It followed that they thought ethics was not much relevant to what they saw themselves as doing.[[64]](#footnote-64) Where specific ethical problems were recalled, interviewees almost always distanced themselves from those problems: other firms; clients; old employers; or other groups in the firm (young lawyers, if the partners were being interviewed; partners, if the associates were being interviewed) were responsible, or the problems occurred years ago and were rarer now. Ethics was something that arose elsewhere, at a distance, for someone else.

Secondly, there was a strong tendency to equate unethical conduct only with criminal illegality. Our respondents leaned heavily on criminality, and dishonesty in particular, as determining the boundaries of what was acceptable. Consistent with a view that professionals might bias towards risky conduct,[[65]](#footnote-65) some even emphasised the need to be *knowingly* involved in criminality or the need for conduct to be *clearly* criminal if it was to give rise to ethical concerns. If they are right to take this view, then it might be said that as regards their public interest facing functions professionals are not held to a higher standard than ordinary citizens.

Thirdly, ethical consciousness was minimal in the sense that there was relatively little discussion of professional principles or (still less) professional conduct rules, either when practitioners were asked to talk about what ethics meant to them or when faced with the ethical dilemmas. Practitioners often did not discuss, still less dwell on, the professional conduct dimensions to any problem. Where such things were mentioned it was generally specific rules (the conflict rules, the rules on client money, the duty to the court) rather than general principles that they focused on. This is contrary to the intent of the current codes of professional conduct which emphasises the importance of the principles.

A notable exception to this principle blindness was the idea that the lawyer should pursue the client’s interests. This was recognised and emphasised by all. Many believed in the pre-eminence of this principle, a view contrary to the Solicitors’ Code. Except for the specific example of the duty not to mislead a Court, our respondents either ignored, did not know, or minimised the impact of this key part of their Code.

This brings us to our fourth ethical minimalism: the role of ambiguity. Ambiguity was a shelter from which lawyers’ deflected criticism. It is possible to see ambiguity as something which creates a space for ethical judgment but this is not how most practitioners, especially private practitioners, saw it. For them, ambiguity diminished rather than heightened ethical relevance and played an important role in limiting ethical consciousness. Deciding when, whether and how something was ambiguous influences an individual lawyer’s decision to say no, to advise against or to facilitate the exploitation of law’s ambiguity. We saw in the billing case study how ambiguity could be interpreted in a self-interested fashion and in the backdating scenario how ambiguity could be used as the vehicle for submitting to the pragmatic needs of a commercial hierarchy.

In this way, whilst Nelson and Nielsen saw lawyers using“legal knowledge to serve the ideology and prerogatives of corporate management” as entrepreneurial,[[66]](#footnote-66) our interviews suggested this kind of service was more standard. The active use of ambiguity sometimes gave rise to a sense of discomfort about bending too strongly to their clients’ imperatives. They comforted themselves with the view that they were the client’s agent, clients (or their employers) decided what constitutes acceptable risk, and they (not the lawyers) were ethically responsible for sharp practice or other problems.

Finally, we should reiterate that saying the approach of our interviewees is ethically minimalist is not the same as saying they are behaving unethically. The ethically minimalist position is consistent with the idea of the zealous lawyer, doing all they can within the law for their client.[[67]](#footnote-67) This is not the place to rehearse all the arguments for and against the zealous lawyer paradigm but we emphasise that professional rules and principles are supposed also to act as a restraint on lawyerly zeal, and a minimalist understanding of those rules and principles significantly weakens the impact of that restraint. The rare articulation of obligations to protect the rule of law contrasts with a fond and regular conjuring of the client’s interest. All lawyers, be they in-housers or private practitioners, were very clear in seeing ethical problems not principally through the lens of professional principles, but through the social and economic lenses of business. They were conscious of business and of law, but they were not much conscious of ethics as defined by their own profession’s principles and they often actively resisted a broader notion of public interest.

In these ways in-house and private practise were similar. Let us concentrate now on some areas of difference. We cannot say in a study of this kind whether in-house lawyers are more likely to be unethical than private practitioners. Our interviews suggested in-house lawyers may be exposed more directly to pressure to push the envelope of ambiguity and – albeit in a small number of cases - they perhaps responded more flexibly to the backdating problem. The commercial and pragmatic influences of their organisations may well be stronger on the in-house lawyers, but they are far from weak influences on private practitioners. As we have noted already, some also had a broader notion of ethicality than private practice, extra-legal notions of fairness might enter into the decision making process explicitly. Corporate codes and a culture of ethical leadership, where they were in place and taken seriously by corporate employers or the in-house lawyers themselves, helped them take (they thought) ethical decisions although ultimately the balance to be struck remained the company’s calculation not theirs.

Private practitioners could plausibly claim greater independence. They could walk away from instructions, or exit relationships, more easily than an in-house lawyer can walk away from their job, but they too have their own de-ethicalising tendencies. The traditional notion that a lawyer is not morally responsible for advancing a client’s ethically or legally dubious case, coupled with the idea that they were often advising on difficult, ambiguous questions allowed them more leeway to discount any notion of public interest in their work than in-house lawyers.

A final ethical minimalism was displacement. Ethical problems were generally a matter for their managers or employers not for them. In-housers’ qualms may have been stronger because they were more often in the position of originating or managing legal problems than private practitioners (who simply received instructions). That role may have given them a stronger sense of their own agency (or control) over how legal issues were defined and managed within a corporation. Because in-house lawyers were more likely to suggest they had a voice in a normative (or business) judgment about whether risky activities were the right thing to do, their discomfort may have been higher. They were involved in the process of corporate decision-making in a way private practitioners were generally not and this made it harder for them to disclaim responsibility. This may also have given them more opportunity to influence towards good than private practitioners who clearly saw themselves as technicians for whom such questions were not relevant. Equally they may have just seen more behaviour of concern. This sense that the ethical lives of in-house lawyers are somewhat richer but more challenged may explain why some have begun to take a questioning position on the sector’s identity and approach.[[68]](#footnote-68)

Even though, professional responsibilities cannot be delegated or displaced,[[69]](#footnote-69) displacement can be a powerful force if a business demands something at the margins of lawfulness. Whilst Rostain suggested in-house lawyers had no compunction about saying ‘no’ to a client in the appropriate circumstance,[[70]](#footnote-70) our data strongly suggests they put significant effort into avoiding doing so and achieved this with some dexterity. They did so, in part, to protect their own employment, status and influence within the organisation. Yet, private practitioner dealings with clients were subject to similar, if less intense, pressures. And both seemed to be applying similar reasoning and tests to the question of what was permissible or impermissible. If this is right, the firm, and the ‘market’ are the main institutional influences on professional decision-making, and ethical consciousness is not a strong part of professional identity.

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   *We are very grateful indeed for the very helpful comments of three anonymous reviewers.* [↑](#footnote-ref-1)
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14. See references at n. 58 [↑](#footnote-ref-14)
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21. Id. pg. 468–469. [↑](#footnote-ref-21)
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23. *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*. Case C-550/07 P, Reports of Cases 2010 I-08301 (Court of Justice, Grand Chamber 2010). [↑](#footnote-ref-23)
24. There are numerous examples: Lord Gold was appointed as independent monitor at BAE. Law firms are often appointed to investigate or assist in investigating existing clients, e.g. Reed Smith were appointed to advise the BBC’s investigation of Newsnight dropping a Jimmy Saville documentary. [↑](#footnote-ref-24)
25. John C. Coffee Jr, ‘The Attorney as Gatekeeper: An Agenda for the SEC’ (2003) 103 *Colum. L. Rev.* 1293. [↑](#footnote-ref-25)
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34. Id, 712 [↑](#footnote-ref-34)
35. Timothy Kuhn, ‘Positioning Lawyers: Discursive Resources, Professional Ethics and Identification,’ (2009) 16 *Organization* 681–704. [↑](#footnote-ref-35)
36. . Daniel Muzio, David M. Brock, and Roy Suddaby, ‘Professions and Institutional Change: Towards an Institutionalist Sociology of the Professions’ (2013) 50 *Journal of Management Studies* 699, 700 [↑](#footnote-ref-36)
37. Principle 1, *SRA Handbook and Code of Conduct* (2011). [↑](#footnote-ref-37)
38. Richard Moorhead et al., *Designing Ethics Indicators for Legal Services Provision* (2012). [↑](#footnote-ref-38)
39. See, for example, Lynn Mather and Leslie C Levin, *Lawyers in Practice: Ethical Decision Making in Context* (2012). [↑](#footnote-ref-39)
40. E.g. James Rest et al., ‘Alchemy and Beyond: Indexing the Defining Issues Test’ (1997) *Journal of Educational Psychology* 498 [↑](#footnote-ref-40)
41. Andrew M. Perlman, ‘A Behavioral Theory of Legal Ethics’ (2013) SSRN Scholarly Paper (Rochester, NY: Social Science Research Network) <http://papers.ssrn.com/abstract=2320605> [↑](#footnote-ref-41)
42. Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (2013); Fiery Cushman, Liane Young, and Joshua D. Greene, ‘Multi-System Moral Psychology’ in *The Moral Psychology Handbook* (2010). [↑](#footnote-ref-42)
43. For example, Donald C. Langevoort, ’Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis’ (2012) *Wis. L. Rev*. 495 [↑](#footnote-ref-43)
44. Austin Sarat, ‘Law Is All Over: Power, Resistance and the Legal Consciousness of the Welfare Poor’ (1990) *Yale JL & Human.* 343, 345 [↑](#footnote-ref-44)
45. Patricia Ewick and Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (1998), 3. [↑](#footnote-ref-45)
46. Sally Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (1990). [↑](#footnote-ref-46)
47. Jillian Craigie, ‘Thinking and Feeling: Moral Deliberation in a Dual-Process Framework’ (2011) *Philosophical Psychology* 53; Jesse Graham et al., ‘Mapping the Moral Domain’ 101 *Journal of Personality and Social Psychology* 366. [↑](#footnote-ref-47)
48. Daniel Dennett, ‘Quining qualia’ in A. Marcel and E. Bisiach, *Consciousness in Modern Science* (1992) [↑](#footnote-ref-48)
49. Trevino and others, ‘It’s Lovely at the Top: Hierarchical Levels, Identities and Perceptions of Organizational Ethics’ (2008) 18(2) *Business Ethics Quarterly* 233; Parker and Aitken, ‘Workplace Culture Check: Learning from Reflection on Ethics Inside Law Firms’ (2011) 24(2) *Georgetown Journal of Legal Ethics* 399. [↑](#footnote-ref-49)
50. See, in particular, Richard Moorhead et al., *Designing Ethics Indicators for Legal Services Provision* (2012). . [↑](#footnote-ref-50)
51. The schedules are available on request, address at footnote 1. . [↑](#footnote-ref-51)
52. Bernard Baars, *A Cognitive Theory of Consciousness* (1993) pp. 15–18. [↑](#footnote-ref-52)
53. See, for example, Donna M. Randall and Maria F. Fernandes, 'The Social Desirability Response Bias in Ethics Research' (1991) *Journal of Business Ethics* 805. [↑](#footnote-ref-53)
54. Whilst practitioners distinguished regulatory requirements, ‘criminal’ prohibitions and civil obligations, the distinctions are not conceptually clear cut. See, e.g., Matthew Dyson, *Unravelling Tort and Crime* ( 2014). [↑](#footnote-ref-54)
55. *Sharpe v Addison* [2003] All ER (D) 403 (Jul) [↑](#footnote-ref-55)
56. Stephen L Pepper, ‘The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities’ (1986) *American Bar Foundation Research Journal* 24; D Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (2009); Charles Fried, ‘Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation’ (1975) 85 *Yale. LJ* 1060; Tim Dare, ‘Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers’ (2004) 7 *Legal Ethics* 24–38. [↑](#footnote-ref-56)
57. *SRA Handbook and Code of Conduct*, Part 1 [↑](#footnote-ref-57)
58. Id. [↑](#footnote-ref-58)
59. Maryam Kouchaki et al., ‘Seeing Green: Mere Exposure to Money Triggers a Business Decision Frame and Unethical Outcomes’ (2013) 12 *Organizational Behavior and Human Decision Processes* 153. [↑](#footnote-ref-59)
60. See references at n 16-33 [↑](#footnote-ref-60)
61. For example, Maryam Kouchaki et al., ‘Seeing Green: Mere Exposure to Money Triggers a Business Decision Frame and Unethical Outcomes’ (2013) 12 *Organizational Behavior and Human Decision Processes* 153 [↑](#footnote-ref-61)
62. See references at n.50 [↑](#footnote-ref-62)
63. The Queensland Ethics Survey <http://www.lsc.qld.gov.au/ethics-checks/surveys> and Josephine Palermo and Adrian Evans, ‘Zero Impact: Are Lawyers Values Affected by Law School’ (2005) 8(2) *Legal Ethics* 240. A third vignette not applicable to the commercial context and so less illuminating to this article was also used. [↑](#footnote-ref-63)
64. We do not regard interviews such as these as being a good vehicle for exploring the frequency of ethical problems. There is too much of a bias against admitting to there being a problem (especially because one is dealing with elite groups). Nevertheless, as our interviewees proceeded they began to recall some matters of concern. [↑](#footnote-ref-64)
65. See, for example, Langevoort n.30 and Donald C. Langevoort, ‘Chasing the Greased Pig Down Wall Street: A Gatekeeper’s Guide to the Psychology, Culture, and Ethics of Financial Risk Taking’ (2010) 96 *Cornell L. Rev*. 1209. [↑](#footnote-ref-65)
66. Nelson and Nielsen, n. 21, pp. 469-470 [↑](#footnote-ref-66)
67. See references at n 58. [↑](#footnote-ref-67)
68. Ben W. Heineman, Jr., William F. Lee and David B. Wilkins (2014) ‘Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century’ <https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf> [↑](#footnote-ref-68)
69. *Shaw v Logue* [2014] EWHC 5 (Admin). [↑](#footnote-ref-69)
70. See Rostain n 23. [↑](#footnote-ref-70)