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## Ethical Challenges in the Role of In-House Counsel

Hugh Gunz

Sally Gunz

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# ETHICAL CHALLENGES IN THE ROLE OF IN-HOUSE COUNSEL

*Hugh Gunz<sup>†</sup> & Sally Gunz<sup>††</sup>*

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## INTRODUCTION

Understanding the subtle pressures and biases that influence the way we behave might provide a far more effective education for future practitioners than studying professional standards alone. In her companion piece to this Article, published in the same issue, Dr. Paula Schaefer highlights the obvious importance of considering ethical decision-making through the lens of the broad variety of behavioral factors that influence how individuals conduct themselves within organizations.<sup>1</sup> In her piece, Dr. Schaefer considers how context can provide far greater insight into actual decisions than simply a review of professional rules. Rules alone have failed to protect society from bad behavior by professionals.

It is tempting to begin this short analysis by referencing the most recent transgressions of those professionals in whom society places trust. It is interesting to study the history of any profession and observe how all writers (including ourselves), in whatever era and discussing

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<sup>†</sup> Professor Emeritus, Institute for Management and Innovation, University of Toronto.

<sup>††</sup> Professor of Business Law and Ethics, School of Accounting and Finance, University of Waterloo. I thank Dr. Cassandra Burke Robertson and the editors of the Case Western Reserve Law Review for the invitation to participate in 2018 Leet Symposium: Fiduciary Duty, Corporate Goals, and Shareholder Activism, Case Western Reserve University School of Law, November 2, 2018 and the panel Ethical Challenges in the Role of In-House Counsel in particular.

1. Paula Schaefer, *Behavioral Legal Ethics Lessons for Corporate Counsel*, 69 CASE W. RES. L. REV. 975 (2019).

whichever profession, motivate our work.<sup>2</sup> The basic question is always: where were the lawyers, accountants, actuaries, engineers, etc.<sup>3</sup> Why did bad things happen? The follow up and more fundamental observation is this—there are few corporate frauds or failures that take place without the active assistance of professionals, all well versed in ethical principles.<sup>4</sup> How then do these transgressions occur?

The focus of this Article will not be major ethical breaches or active fraud by any individual professional. There have always been, and no doubt will continue to be, individuals for whom any sense of moral compass is lacking. When offered the opportunity to engage actively in unethical behavior, say fraud, they do not resist. Part of our disinterest in analyzing the behavior of the really bad actors is our general frustration with the common defense by those remaining in organizations, particularly in the 1990s and early 2000s—the defense of the solitary “bad apple.”<sup>5</sup> By isolating bad decision-making to one or two individuals, the institutions in which the transgressors operate are effectively deemed free from responsibility. Moreover, short of imposing more and more effective control systems, little can be done to prevent the actions of the truly bad individuals if the actions are well executed.

The argument that will be made here, and indeed which is consistent with the work of Dr. Schaefer, is the need to focus upon the subtle shifts in behavior and reasoning that can result from the context in which all professionals operate, and which may, under certain conditions, lead to less than optimal ethical decision-making by anyone.

The panel for which this Article was originally prepared addressed the in-house counsel profession and, in particular, the ethical challenges

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2. The lawyers of firms such as Enron have been accused of supporting—or, at least, not inhibiting—the questionable actions of their clients. *See* Hugh Gunz & Sally Gunz, *Hired Professional to Hired Gun: An Identity Theory Approach to Understanding the Ethical Behaviour of Professionals in Non-Professional Organizations*, 60 HUMAN RELATIONS 851, 851–52 (2007) (“The ethics of business-related professionals have had something of a cloud of suspicion hanging over them in recent years.”); Don A. Moore et al., *Conflicts of Interest and the Case of Auditor Independence: Moral Seduction and Strategic Issue Cycling*, 31 ACAD. MANAGEMENT REVIEW 10, 10 (2006).
  3. Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 WISCONSIN LAW REVIEW 495, 497 (2012) (discussing how people question the role of lawyers after recent financial scandals such as Enron).
  4. Hugh Gunz & Sally Gunz, *Ethical Decision Making and the Employed Lawyer*, 81 JOURNAL OF BUSINESS ETHICS 927, 927 (2008).
  5. For example, see clips repeatedly using “bad apple” in *The Corporation*. The Corporation, *THE CORPORATION [1/23] What Is a Corporation?*, YOUTUBE (Jan. 22, 2007), <https://www.youtube.com/watch?v=Pin8fbdGV9Y> [<https://perma.cc/74UV-QS7E>] (using clips from several reporters, politicians, and news sources).

its members face. This is not a new concern, although in the past the academic literature often addressed very specific professional practice issues such as that of attorney-client privilege.<sup>6</sup> Arguably, this focus evolved from the growth of in-house practice as a unique form of professional practice, distinct from law practice in general.<sup>7</sup> While this is not the place to explore the history of corporate counsel practice,<sup>8</sup> there is no doubt that the real impetus for its modern form followed from shifts within the overall profession, documented by the work of Chayes and Chayes and others.<sup>9</sup>

The discussion that follows will address first the evolution of the study of ethical decision-making by professionals and in-house counsel in particular. Second, it will consider Dr. Schaefer's interest in behavioral ethics within the framework of legal practice, including in-house counsel practice. The final section will consider how professions might better address their fundamental responsibility to meet society's needs.

#### I. THE EVOLUTION OF THE STUDY OF ETHICAL DECISION- MAKING BY PROFESSIONALS AND IN-HOUSE COUNSEL IN PARTICULAR

There is little doubt that the evolution of the academic study of ethical decision-making was encouraged by the occurrence of major corporate scandals. While these have always existed, a useful beginning point in the modern era<sup>10</sup> might be the savings and loans crisis of the

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6. See Amy L. Weiss, *In-House Counsel Beware: Wearing the Business Hat Could Mean Losing the Privilege*, 11 GEO. J. LEGAL ETHICS 393, 393 (1998); Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1721–22 (2005).
  7. For example, in Canada it took some time before the Canadian Corporate Counsel Association could gain recognition as the unique entity within the Canadian Bar Association that represented corporate counsel. See THE CANADIAN BAR ASSOCIATION, <https://www.ccca-accje.org/Who-We-Are/About-us/History> [<https://perma.cc/5757-BMF6>] (last visited Feb. 16, 2019).
  8. For a more detailed history, see Sally Gunz & Marianne Jennings, *The University Counsel: The Role and Its Challenges*, 33 NOTRE DAME J. L. ETHICS & PUB. POL'Y 177 (forthcoming 2019).
  9. Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 277–78 (1985).
  10. Fiscal scandals have undoubtedly existed as long as humanity has had any system that exposes individuals to the risk of fraud by others. The classic cases we can turn to from early modern history would be those of the Tulip Bulb Crash (1630s) and the South Sea Bubble (1711). Andrew Beattie, *Market Crashes: The Tulip and Bulb Craze (1630s)*, INVESTOPEDIA, <https://www.investopedia.com/features/crashes/crashes2.asp> [<https://perma.cc/PCY3-GYNN>] (last visited Feb. 16, 2019); Andrew

1980s,<sup>11</sup> which spurred a flurry of exploration of the role that accountants played in particular events (and, to a lesser extent, lawyers).<sup>12</sup> There was no doubt that the primary focus of academic study was the role of independent professionals working within professional service firms (“PSFs”) and auditors specifically.<sup>13</sup> However, there was also starting to be interest in the role of the employed professionals, those working within the often subsequently failed institutions. If we consider the *ideal* (or traditional) model of the professional practitioner as that of working within autonomous professional practice (the PSFs), what happens to decision-making by those same professionals when they are now directly employed by managers who do not owe the same allegiance to professional rules as does the employee professional? Rather, the manager has a primary responsibility to the entity for whom all parties work (non-professional organizations or “NPOs”). And, of course, this same responsibility is also owed by the employed professional.

Academic writers responded to this question by making the observation that employed professionals effectively serve two masters; professionals must continue to meet the ethical obligations of their profession and also the same ethical obligations to the employing institution as does the manager.<sup>14</sup> Such a position was in turn assumed to give rise to what became known as Organizational-Professional

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Beattie, *Market Crashes: The South Sea Bubble (1711)*, INVESTOPEDIA, <https://www.investopedia.com/features/crashes/crashes3.asp> [<https://perma.cc/MA2Q-UFH8>] (last visited Feb. 16, 2019). While it is almost quaint to consider speculation in something as odd as a tulip bulb as the cause of such financial tragedy, future generations may well react with similar surprise to something as seemingly daft as Bre-X or perhaps Bitcoin. Sunny Freeman, *Gold: The Movie About the Bre-X Mining Scandal That Isn't About Bre-X*, FIN. POST (Jan. 20, 2017, 10:36 AM), <https://business.financialpost.com/commodities/mining/gold-the-movie-about-the-bre-x-mining-scandal-that-isnt-about-bre-x> [<https://perma.cc/VC6H-WS9R>].

11. Kenneth J. Robinson, *Savings and Loan Crisis 1980–1989*, FED. RES. HIST., [https://www.federalreservehistory.org/essays/savings\\_and\\_loan\\_crisis](https://www.federalreservehistory.org/essays/savings_and_loan_crisis) [<https://perma.cc/U4PW-NK3F>] (last visited Feb. 16, 2019).
12. See Arthur R. Wyatt, *Accounting Professionalism—They Just Don't Get It!*, 18 ACCT. HORIZONS 45, 48–50 (2004); Stephen A. Zeff, *How the U.S. Accounting Profession Got Where It Is Today: Part I*, 17 ACCT. HORIZONS 189, 189 (2003); Stephen A. Zeff, *How the U.S. Accounting Profession Got Where It Is Today: Part II*, 17 ACCT. HORIZONS 267, 267 (2003) [hereinafter Zeff, *Part II*].
13. *Id.*
14. For an early examination, see James E. Sorensen, *Professional and Bureaucratic Organization in the Public Accounting Firm*, 42 ACCT. REV. 553 (1967).

Conflict (“OPC”);<sup>15</sup> the ethical demands of the external profession and the employer itself may conflict.

Stepping back, professions generally exist by dint of a form of social contract.<sup>16</sup> They are provided a position of considerable privilege by society—often a monopoly over particular services<sup>17</sup>—and in return must exercise their art in a manner that is independent of self-interest and uphold the high-minded principles developed by the profession itself. In common law countries, members of professions also are held to be in a fiduciary relationship with their clients or users of services under particular circumstances.<sup>18</sup> At the same time, employers also have a right to command loyalty in decision-making by employees. While engineers, nurses and other professionals within employment relationships were the focus of the original studies of OPC,<sup>19</sup> members of the accounting profession became of particular concern often because of their key roles in failing to prevent—perhaps even enabling—corporate failures.<sup>20</sup>

Although OPC was a logical proposition—that there may be inherent conflicts between the demands of the two sets of ethical obligations—there was in fact, at least initially, little evidence of professionals identifying such conflicts in practice.<sup>21</sup> Several empirical

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15. See, e.g., James E. Sorensen & Thomas L. Sorensen, *The Conflict of Professionals in Bureaucratic Organizations*, 19 ADMIN. SCI. Q. 98, 105 (1974); Adrian Harrell et al., *Organizational-Professional Conflict and the Job Satisfaction and Turnover Intentions of Internal Auditors*, 5 AUDITING 109, 110 (1986).
  16. “When a man [sic] becomes a member of a profession, he undertakes an honourable calling. His duty is to serve the interests of the public.” ALEXANDER M. CARR-SAUNDERS & PAUL A. WILSON, *THE PROFESSIONS* 421 (1933) (citing FRED BULLOCK, *HANDBOOK FOR VETERINARY SURGEONS* 13–14 (1927)).
  17. See *Id.* at 352–65 (discussing professional registers that allowed certain registered professionals, such as pharmacists and teachers, to corner the market).
  18. See, e.g., *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (Can.) (finding that financial advisors are often, but not always, considered fiduciaries of their clients).
  19. See CARR-SAUNDERS & WILSON, *supra* note 16, at 1; Talcott Parson, *The Professions and Social Structure*, 17 SOC. FORCES 457, 458 (1939).
  20. See W. Richard Scott, *Reactions to Supervision in a Heteronomous Professional Organization*, 10 ADMIN. SCI. Q. 65 (1965) (discussion the potential for professional behavior to be distorted by the employment relation); Zeff, *Part II*, *supra* note 12.
  21. See Seymour Adler & Nissim Aranya, *A Comparison of the Work Needs, Attitudes, and Preferences of Professional Accountants at Different Career Stages*, 25 J. VOC. BEHAV. 45, 53–55 (1984) (finding that accountants organizational and professional commitment tended to increase over time); Harold L. Angle & James L. Perry, *Organizational*

studies demonstrated that professionals seldom reported experiencing such conflicts.<sup>22</sup>

Our own interest in these issues stemmed from studying the role of in-house counsel in organizations generally, and the question of the competing and even conflicting loyalties, or OPC, was intriguing.<sup>23</sup> The work on OPC focused on professions that in many respects originated from serving the needs of organizations, businesses, and commerce in particular. As such, it should not be such a surprise that members of those professions, whether they were engineers, scientists, or

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*Commitment: Individual and Organizational Influences*, 10 WORK & OCCUPATIONS 123, 143-44 (1983); N. Aranya et al., *An Examination of Professional Commitment in Public Accounting*, 6 ACCT. ORGS. & SOC. 271, 276-77 (1981); Nissim Aranya & Kenneth R. Ferris, *A Reexamination of Accountants' Organizational-Professional Conflict*, 64 ACCT. REV. 1, 11-12 (1984) [hereinafter Aranya & Ferris, *Reexamination*]; P. K. Berger & A. J. Grimes, *Cosmopolitan-Local: A Factor Analysis of the Construct*, 18 ADMIN. SCI. Q. 223, 234 (1973); John A. Brierley & Christopher J. Cowton, *Putting Meta-Analysis to Work: Accountants' Organizational-Professional Conflict*, 24 J. BUS. ETHICS 343, 351-52 (2000); Arthur P. Brief & Ramon J. Aldag, *Antecedents of Organizational Commitment Among Hospital Nurses*, 7 SOC. WORK & OCCUPATIONS 210, 217-18 (1980); Jeffrey R. Cornwall & Andrew J. Grimes, *Cosmopolitan-Local: A Cross-Lagged Correlation Analysis of the Relationship Between Professional Role Orientations and Behaviors in an Academic Organization*, 40 HUM. REL. 281, 293-94 (1987); Victor E. Flango & Robert B. Brumbaugh, *The Dimensionality of the Cosmopolitan-Local Construct*, 19 ADMIN. SCI. Q. 198, 201 (1974); Frank Friedlander, *Performance and Orientation Structure of Research Scientists*, 6 ORG. BEHAV. & HUM. PERF. 169, 182 (1971); Hugh Gunz & Sarah P. Gunz, *Professional/Organizational Commitment and Job Satisfaction for Employed Lawyers*, 47 HUM. REL. 801, 814-15 (1994); Adrian Harrell et al., *Organizational-Professional Conflict and the Job Satisfaction and Turnover Intentions of Internal Auditors*, 5 AUDITING: J. PRAC. & THEORY 109, 115-16 (1986); Lawrence R. Jauch et al., *Organizational Loyalty, Professional Commitment, and Academic Research Productivity*, 21 ACAD. MGMT. J. 84, 88-89 (1978); Ran Lachman & Nissim Aranya, *Evaluation of Alternative Models of Commitments and Job Attitudes of Professionals*, 7 J. OCCUPATIONAL BEHAV. 227, 239 (1986); John E. Mathieu & Karin Hamel, *A Causal Model of the Antecedents of Organizational Commitment Among Professionals and Nonprofessionals*, 34 J. VOC. BEHAV. 299, 313-14 (1989); Buck K.W. Pei & Frederick G. Davis, *The Impact of Organizational Structure on Internal Auditor Organizational-Professional Conflict and Role Stress: An Exploration of Linkages*, 8 AUDITING J. PRAC. & THEORY 101 (1989); Arnon E. Reichers, *Conflict and Organizational Commitments*, 71 J. APPLIED PSYCHOL. 508, 511-12 (1986).

22. See, e.g., Aranya & Ferris, *Reexamination*, *supra* note 21, at 9-11; Gunz & Gunz, *supra* note 21, at 814.

23. SALLY GUNZ, THE NEW CORPORATE COUNSEL 3 (1991).



accountants, might arguably tend to resolve potential conflict in a manner consistent with the goals of the employer.<sup>24</sup> If this was to occur, they would also be less inclined to report significant levels of OPC.<sup>25</sup>

Lawyers, in contrast, have a lengthy history as independent professionals<sup>26</sup> and have a particularly powerful external reference group in the form of the various bar associations and law societies.<sup>27</sup> Arguably,

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24. That said, virtually all professions impose on their members an overriding responsibility to uphold the public interest. This is expressed in different forms. In law, the familiar expression is in terms of the duties that flow from the role as “officer of the court.” See MODEL RULES OF PROF’L CONDUCT pmb. (AM. BAR. ASS’N 2017) (commenting that “[a] lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious,” but “[i]n the nature of law practice . . . conflicting responsibilities are encountered” between professional duties and the need for “earning a satisfactory living”); cf. *id.* at r. 3.3 cmt. 2 (explaining that a lawyer’s duty to advocate for their client may come into conflict with their duty to not present evidence they know to be false to the court). The auditor must maintain objectivity. See CODE OF PROF’L CONDUCT AND BYLAWS 0.300.050.04 (AICPA 2018), <https://pub.aicpa.org/codeofconduct/ethicsresources/et-cod.pdf> [<https://perma.cc/ZNK6-GA43>] (“For a *member* in public practice, the maintenance of objectivity and *independence* requires a continuing assessment of *client* relationships and public responsibility. Such a *member* who provides auditing and other attestation services should be independent in fact and appearance. In providing all other services, a *member* should maintain objectivity and avoid conflicts of interest.”). There are equivalent responsibilities for the actuary. See CODE OF PROF’L CONDUCT PRECEPT 1 (SOCIETY OF ACTUARIES 2001), <https://www.soa.org/Files/static-pages/about/.../soa-code-of-professional-conduct.pdf> [<https://perma.cc/WZ5E-2JUR>] (“[A]ct honestly, with integrity and competence, and in a manner to fulfill the profession’s responsibility to the public . . . .”); *id.* at 70. (“The purpose of this Code of Professional Conduct (‘Code’) is to require Actuaries to adhere to the high standards of conduct, practice, and qualifications of the actuarial profession, thereby supporting the actuarial profession in fulfilling its responsibility to the public.”).
25. Please note that at all times during these studies the focus was on what the individual professional perceived and reported, not what is actually the case. The latter reality would, of course, be difficult to observe other than in a laboratory setting.
26. There are in fact many ways of classifying professions. Generally, there are considered to be three ‘ancient’ professions: law, medicine, and the priesthood. One description of these three is as “collegiate.” See TERENCE J. JOHNSON, PROFESSIONS AND POWER 45 (1972) (defining collegiate as a form of control through an autonomous occupational association).
27. Hugh P. Gunz & Sally P. Gunz, *The Lawyer’s Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of In-House Counsel*, 39 AM. BUS. L.J. 241, 250 n.33 (2002) (“[The collegiate professions] were evidenced by a degree of mystification of knowledge that increased the power and social distance between professional and client. The problems clients brought to the professional



if there was ever a profession equipped to resist employer pressure to compromise professional ethical obligations, the law would be it.<sup>28</sup> Thus, we might expect the perceived experience of OPC to be higher for employed lawyers than that reported by other professions—for example, higher than accountants in particular. In our own study of a large sample of in-house counsel, this was, however, not in fact the case. Our findings of perceived OPC were remarkably consistent with those of other studies of different employed professionals.<sup>29</sup>

At this stage, all we could do was posit possible explanations for this unexpected outcome.<sup>30</sup> We did observe that the more in-house counsel saw their careers moving into senior management itself—and there had long been evidence that this was a common career path<sup>31</sup>—the more committed they were to the employing organization and the less they reported experiencing OPC.<sup>32</sup> What might this mean? Perhaps our assumption that lawyers should experience OPC, because of the nature of their profession itself, was flawed. Was it possible that those entering the in-house profession, and thus becoming employed lawyers, are often quite different in terms of their professional expectations than those in PSFs? Maybe they simply miss the potential conflict because they are more inclined to think like a manager than a lawyer? Alternatively, might the results of our study suggest that lawyers are simply highly effective at balancing ethical responsibilities and therefore do not experience conflict? They find ways of ensuring they remain in compliance with their professional obligations.<sup>33</sup> More troubling, might it simply be the case that employers nimbly side-step in-house counsel altogether when faced with an issue they might sense would raise concerns from the perspective of professional independence?<sup>34</sup>

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called for that professional to become aware of issues of real intimacy to the client and, as a result, the client would often experience a sense of vulnerability.”).

28. See Gunz & Gunz, *supra* note 2, at 871.

29. *Id.* at 873.

30. See H.P. Gunz & S.P. Gunz, *Ethical Implications of the Employment Relationship for Professional Lawyers*, 28 U. BRIT. COLUM. L. REV. 123, 136 (1994) (hypothesizing that OPC among corporate counsel was lower than expected either because conflicts are infrequently encountered, or corporate counsel exhibit characteristics different than those traditionally associated with the profession).

31. GUNZ, *supra* note 23, at 135–36.

32. Gunz & Gunz, *supra* note 2, at 857.

33. GUNZ, *supra* note 23, at 75–76.

34. See *id.* at 162 (noting that in-house corporate counsel may have difficulty managing outside counsel where they are not also the primary decision-makers in hiring outside counsel).

As we explored these alternate explanations, it was increasingly obvious that sweeping assumptions about who in-house counsel are and how they might react to pressures assumed to be inherent to their position risked our drawing overly simplistic conclusions. There are significant differences in size of corporate legal departments, types of organization, and roles of counsel. Our expectation became that real understanding of ethical reasoning by counsel called for a far better understanding of the individual and the context in which they worked, a conclusion not inconsistent with that of Dr. Schaefer in her current article.<sup>35</sup>

## II. ETHICAL DECISION-MAKING AND IN-HOUSE COUNSEL PRACTICE

In order to understand ethical decision-making and its challenges in corporate counsel practice, it is first necessary to have at least some understanding of what the practice itself looks like and what purpose it is intended to serve in the organization.<sup>36</sup> Starting with the second part of this question, there has typically been a clear divergence over the years in terms of response. One view of the corporate counsel function in the organization is that it is there to “do law.”<sup>37</sup> The alternate response includes a perspective of counsel as the manager of legal services and needs. For example, the following description by Chayes and Chayes still finds resonance amongst most counsel today: in-house practice includes “(1) preventive or anticipatory legal services, including longer range planning and programmatic prevention, and (2) management of outside counsel.”<sup>38</sup> Often the role is further couched in terms of saving costs, although such a goal undoubtedly does the function a real disservice and any organization introducing a legal department solely to meet this goal will likely be disappointed and may well fall far short of achieving full potential value.<sup>39</sup>

There are clear risks associated with either of these alternate descriptions for any in-house law department. Each description has

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35. Schaefer, *supra* note 1.

36. For a more complete discussion about the history and current state of in-house practice, see Gunz & Jennings, *supra* note 8.

37. GUNZ, *supra* note 23, at 3.

38. Chayes & Chayes, *supra* note 9, at 280.

39. See, e.g., Warren Bongard, *Corporate In-House Counsel on the Increase*, FIN. POST (Apr. 24, 2012, 8:34 AM), <https://business.financialpost.com/executive/corporate-in-house-counsel-on-the-increase> [<https://perma.cc/MC63-LPT7>] (“There are obviously many great reasons to have in-house counsel, but the single best reason is not cost saving. While reducing costs is certainly a benefit, it is probably not even one of the top three reasons.”).

serious implications both in terms of meeting the needs of the organization and how the function complies with its ethical responsibilities.<sup>40</sup> Lawyers who simply ‘do law’ without integrating the delivery of that service into the needs of the organization may offer diminished value. The primary concern is that the department can become essentially a captive private law firm. While at first blush this might be attractive to managers—access to your own law firm without any of the pain of interacting with high priced, external lawyers—a department that looks inwards for its work definition runs the real risk of failing to understand actual organizational needs. Further, if left to its own devices, the department will define its work load according to personal expertise and preference far more than what makes sense from an economic perspective. This will be discussed further below. In terms of compliance with ethical responsibilities, the captive law firm model runs the risk of failing to understand what is really happening in the organization and where, therefore, it should be providing not only strict legal but also ethical guidance.<sup>41</sup>

At the same time, where a legal department focuses too extensively on management issues,<sup>42</sup> the risk becomes that the department’s

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40. Gunz & Jennings, *supra* note 8.

41. It was once not uncommon to hear the general counsel described as the “conscience” of the firm. This notion has also been used more recently in the corporate context:

Conscience is also an important component of the GC role. Championing diversity, encouraging the enterprise to act ethically and responsibly, adherence to the law and high ethical standards, devoting resources to pro bono activities, “re-educating” the corporate legal team, and defending democracy and the institutions supporting it are all important aspects of the General counsel’s [sic] role as the standard bearer for the corporate conscience. The GC must lead by example, serving as a pillar of strength, fairness, and credibility within the department, the enterprise, the community and beyond.

Mark A. Cohen, *General Counsel: Guardian and Conscience of the Company*, FORBES (Aug. 14, 2017, 1:26 PM), <https://www.forbes.com/sites/markcohen1/2017/08/14/general-counsel-guardian-and-conscience-of-the-company/#482e8d5763a9> [https://perma.cc/XZY5-6534]. This terminology is far from universally accepted as sound. *See, e.g.*, Jerome Doraisamy, *In-House Lawyers are Not ‘Gatekeepers’ of Corporate Conscience*, LAW. WKLY. (May 29, 2018), <https://www.lawyersweekly.com.au/corporate-counsel/23333-in-house-lawyers-are-not-gatekeepers-of-corporate-conscience> [https://perma.cc/XBG3-RUM8] (arguing that businesses should not delegate their corporate conscience to in-house counsel).

42. It is not uncommon to have several “departments” in different branches of the organization. This tends to be the case in large organizations and ones that are geographically dispersed. There typically, however, remains a lead department with oversight for all operations. Deborah A. DeMott,

members lose sight of their value to the organization as lawyers.<sup>43</sup> Lawyers are hired often at a cost premium to the organization.<sup>44</sup> They are hired for their legal expertise. For the most part, lawyers have minimal business training,<sup>45</sup> and the vast majority of in-house counsel come to their present position either directly upon qualification or, more typically, from private practice.<sup>46</sup> Their value, in other words, comes

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*The Discrete Roles of General Counsel*, 74 *FORDHAM L. REV.* 955, 970 (2005).

43. For a full discussion of the risk, see Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 *IND. L.J.* 479, 531–32 (1989). One example of this risk has been described as follows:

More generally, to the extent general counsel participates at an early stage in shaping major transactions and corporate policy, counsel's ability to bring detached, professional judgment to bear in assessing their legality may be compromised, especially when the question of legality is tinged in shades of gray as opposed to black and white. An executive who participates in formulating strategic corporate decisions is likely to view the steps necessary to implement them differently than would a more subsidiary actor within the organization. Even if a general counsel's role as a lawyer always distances counsel somewhat from other members of the senior management team, counsel's ongoing associations with them may sway counsel's loyalties away from the corporation and toward more personalized loyalties focused on the agents who comprise the corporate senior management team. Additionally, as a member of the senior management team, counsel may tend to address legal questions in a manner that pays allegiance to the wisdom of executive-level commitments and perspectives, even in the absence of explicit instructions from other members of the team.

DeMott, *supra* note 42, at 968–69.

44. See Rosen, *supra* note 43, at 508 (describing how law firms' hourly rates include a price premium reflecting the investments that they make in their reputations).
45. Undergraduate business degrees were not a common precursor to the law degree. See GUNZ, *supra* note 23, at 123–28. Today, programs are offered to overcome the lack of business education. One such program is the Certified In-House Counsel Canada program, introduced in 2013 by the Canadian Corporate Counsel Association in conjunction with the Rotman School of Management. Jennifer Brown, *Certified In-house Counsel*, *CANADIAN LAW*. (May 27, 2013), <https://www.canadianlawyermag.com/author/jennifer-brown/certified-in-house-counsel-2043/> [<https://perma.cc/XQS8-LU6N>].
46. David B. Wilkins, a professor at Harvard Law School, notes:
- In the past, in-house departments were viewed as less prestigious destinations for young lawyers, and competition for entry was less tough than at law firms. Today, the relevant status between in-house legal positions and law firms has been significantly reversed,

from their role as lawyers and not managers. Again, management might find such a department very much to its liking, particularly when management is risk averse. A lawyer who is prepared not only to advise on the law but also to suggest the appropriate management response to the law, removes one level of concern particularly to such a manager concerned as they are about making management errors. Further, at the most senior levels of strategic decision-making, a general counsel with very close ties to top management can become an important ally when it comes to reaching business decisions.<sup>47</sup> While most counsel will find themselves from time to time answering what-do-you-think questions from management, real caution must be taken that they retain their primary function, namely, advising on matters relating to the legal issues of the firm.

Many of the concerns for ethical decision-making when the focus is too extensively on management will be discussed later. However, a

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particularly at more senior levels. . . . [T]hey now have their pick of talented midlevel associates and junior partners from the best law firms, with senior in-house lawyers frequently recruited from the top ranks of the partnerships of outside firms.

David B. Wilkins, *The In-House Counsel Movement, Metrics of Change*, LEGAL BUS. WORLD (Jan. 20, 2017), <https://www.legalbusinessworld.com/single-post/2017/01/20/The-In-House-Counsel-Movement-Metrics-of-Change> [<https://perma.cc/8YP5-3BV3>]. Additionally, a 2018 report from the Counsel Network found that:

This year, 88% of in-house counsel report working in private practice before going in-house. The average tenure in private practice is 4.9 years. The greatest percentage of respondents (33%) had spent three to five years in private practice before going in-house. The next highest (32%) spent more than five years in private practice. This is a return to the levels that we saw in 2012 (35%). The number of years spent in private practice is highest with the GC Director Level (6.2 years) followed by the GC Executive Level (5.9 years) and Senior Counsel (5.8 years). The lowest number is with Legal Counsel at 3.2 years.

COUNS. NETWORK, IN-HOUSE COUNSEL COMPENSATION & CAREER SURVEY REPORT 15 (2018), [https://s3.amazonaws.com/tld-documents.llnassets.com/0006000/6000/2018%20in-house%20counsel%20compensation%20&%20career%20survey%20report%20\\_final.pdf](https://s3.amazonaws.com/tld-documents.llnassets.com/0006000/6000/2018%20in-house%20counsel%20compensation%20&%20career%20survey%20report%20_final.pdf) [<https://perma.cc/KJZ2-ZQM9>].

47. DeMott has described this phenomenon:

Even if a general counsel's role as a lawyer always distances counsel somewhat from other members of the senior management team, counsel's ongoing associations with them may sway counsel's loyalties away from the corporation and toward more personalized loyalties focused on the agents who comprise the corporate senior management team.

DeMott, *supra* note 42, at 969.

serious concern about the role of in-house counsel was raised by Robert Eli Rosen in an important analysis of in-house counsel practice.<sup>48</sup> Rosen saw the potential for harm arising in one of two ways. First, should in-house counsel assume too expansive a role in briefing external counsel, there exists the potential for outside lawyers to view in-house counsel, and not the firm (and its managers) itself, as the client.<sup>49</sup> Of greater concern was the potential for an in-house counsel becoming the primary access point to the firm for outside lawyers and the manager of the flow of information.<sup>50</sup> While all in-house counsel need to manage who can brief outside counsel and when,<sup>51</sup> the risk of counsel over-stepping this role and effectively controlling information flow means they may well assume more of a managerial role than they should.<sup>52</sup> “First, in managing outside counsel’s work, inside counsel limit the questions and information outside counsel supply. Second, in centralizing control over legal services in the legal department, inside counsel manage what options other corporate actors explore.”<sup>53</sup> Interestingly, this concern was expressed in a recent study by lawyers in outside law firms who identified times where “the outside lawyer may assume the information fully represents the interests of the client. And this may not always be the case.”<sup>54</sup>

Undoubtedly most in-house counsel practice is a blend of doing and managing law or legal issues. And there are strong reasons for this beyond the personalities and expectations of the individual practitioner. Most in-house law departments are small and have always been so.<sup>55</sup> There are, of course, also very large departments that attract a good

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48. Rosen, *supra* note 43, at 480–81.

49. *Id.* at 484–85.

50. *Id.*

51. GUNZ, *supra* note 23, at 160–63; ASS’N OF CORP. COUNSEL, ESTABLISHING THE IN-HOUSE LAW DEPARTMENT: A GUIDE FOR AN ORGANIZATION’S FIRST GENERAL COUNSEL 56 (2012), [https://www.acc.com/\\_cs\\_upload/v1/membersonly/InfoPAK/1313060\\_1.pdf](https://www.acc.com/_cs_upload/v1/membersonly/InfoPAK/1313060_1.pdf) [<https://perma.cc/7PVS-ZVXZ>] (“Engagement with Outside Counsel—the guidelines should limit who can engage outside counsel to those approved by the general counsel and restrict discussions of legal matters with outside counsel to law department attorneys.”).

52. Rosen, *supra* note 43, at 514.

53. *Id.* at 515.

54. Ronit Dinovitzer, Hugh P. Gunz & Sally P. Gunz, *Reconsidering Lawyer Autonomy: The Nexus Between Firm, Lawyer, and Client in Large Commercial Practice*, 51 AM. B. L. J. 661, 698 (2014).

55. Susan Hackett, *Inside Out: An Examination of Demographic Trends in the In-House Profession*, 44 ARIZ. L. REV. 609, 610–11 (2002).

deal of attention but generally these are the exceptions.<sup>56</sup> There has also always been some fluctuation both in size of departments and even their existence per se although, as a percentage of the total bar, the proportion of in-house counsel tends to remain remarkably unchanged.<sup>57</sup> Often, unfortunately, the comings and goings of actual departments is a result of relatively poor—and sometimes even impulsive—decision-making by organizations seeking instant fixes, for example, to the cost of external services or alternatively reacting to the inevitable costs of internal departments.<sup>58</sup> The significance of the size of department is that in many respects the size must define what can be achieved. Organizations with small departments comprised primarily of generalist lawyers will continue to incur significant external legal costs albeit with hope that there will also be the intended added value of the in-house lawyers introducing sound controls over such services.<sup>59</sup> They ensure that the appropriate level of external service will be used and with the best value law firm for the particular issues. But such a model will not necessarily reduce costs per se. The well-managed department will provide the assurance, however, that what money is incurred is well spent.<sup>60</sup>

The question of significance here is what is the relationship between the nature of the law department and ethical decision-making by counsel themselves? The work that follows is framed from the position that where we work and the nature of both the department itself in which we work and the organization as a whole affect how we make all

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56. *Id.* at 611.

57. *Id.* at 610 (“[T]he in-house bar has remained, as best we can tell, largely unchanged as a percentage of the American bar as a whole since the ABA began conducting its census about fifty years ago. The common perception is that the in-house profession has been subject to larger fluctuations: periods of great growth in the 1980s and 1990s with recent significant downturns. In reality, however, it appears that the profession has grown and shrunk in direct proportion to the rest of the legal profession, always constituting about 10% of the bar.”) (internal citations omitted).

58. While the following article is certainly highly contentious, it does have clear kernels of truth. Harrison Barnes, *Why Going In-house Is Often the Worst Decision a Good Attorney Can Ever Make*, BCG ATT’Y SEARCH, <https://www.bcgsearch.com/article/900045115/Why-Going-In-house-is-Often-the-Worst-Decision-a-Good-Attorney-Can-Ever-Make/> [https://perma.cc/MYB7-MGMS] (last visited Feb. 17, 2019) (asserting that in-house attorneys “will become a ‘cost center’ and not a profit-generator (in most instances) and will be one of the first to go when the company experiences problems—and all companies do”).

59. Hackett, *supra* note 55, at 611.

60. For further discussion, see generally Constance E. Bagley, *Winning Legally: The Value of Legal Astuteness*, 33 ACAD. MGMT. REV. 378 (2008).



kinds of decisions, and ethical decisions in particular. While some of the conclusions drawn are founded in empirical studies, it should be made clear from the outset that there are few, if any, claims to causality.<sup>61</sup> By that we mean that while we might find certain types of decision-making occurring in certain types of department, we make no claim that the department *causes* the decision maker to behave as they do. Nor, for that matter, do we know whether particular kinds of decision makers are attracted to certain departments or organizations. What we do report is what we observe, and while we may draw inferences for organizations to consider in our final section, we also want to ensure that the parameters around our original findings are understood.

We begin with what we consider to be a non-controversial assumption that all in-house counsel are practicing lawyers and, as such, obligated to comply with the ethical dictates of their respective bar association or law society. Indeed, they are hired not solely for their technical expertise but also for their commitment to uphold the ethical principles of their profession.<sup>62</sup> Of paramount significance to this observation is that in-house counsel must therefore ensure that at all times they act in the best interests of the client, which typically means the organization by which they are employed. This raises inherent challenges for counsel of a corporation—for example, while being a legal entity in its own right, a corporation operates through agents and it is these agents with whom counsel has their interaction.<sup>63</sup> Further, these agents may well have interests that contradict those of the organization itself,<sup>64</sup> irrespective of whether they might themselves owe fiduciary duties otherwise.<sup>65</sup>

We suggested above that the “bad apple” hypothesis, while undoubtedly a force at work in many corporate scandals, is too stark to describe the forces typically at work in the offices of in-house counsels.<sup>66</sup> Most counsel, for most of the time, endeavor to discharge

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61. See Gunz & Gunz, *supra* note 2, at 876.

62. See Ralph Nader, *Corporate Law Firms and Corporate Ethics*, 2 J. INST. FOR STUDY LEGAL ETHICS 1, 5 (1999); see also SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION* 26 (1994).

63. For convenience, we will continue to use the term corporation in this context since the majority of counsel are, in fact, employed within some corporate form, even when it is in a not-for-profit sector.

64. Interestingly, in a recent study of lawyers in large commercial law firms, many failed to distinguish between the obligation to the true client, the corporation, and the needs of the manager with whom they typically interacted, and therefore failed to elevate an issue to a higher level where the manager’s actions raised ethical concerns. Dinovitzer, Gunz, & Gunz, *supra* note 54, at 716.

65. For example, as directors and officers.

66. See *supra* note 5 and accompanying text.

their duties not only in accordance both with their training and the requirements of their profession but also in the interests of their employing organization. Next, we turn to work that has explored the pressures that act on in-house counsel in such a way as to affect the way they might react to the kind of ethical dilemmas they encounter in practice.

### III. LESSONS LEARNED FOR THE ETHICAL ROLE OF PROFESSIONALS

The study we draw on surveyed Canadian corporate counsel,<sup>67</sup> who were asked to respond to vignettes putting them in the position of having to decide how to respond to situations drawn from practice (albeit anonymized).<sup>68</sup> Based on the precept noted above, that these professionals aim to act professionally, the study set out to see whether organizational influences could be identified that might affect the lawyers' judgement, quite possibly, in ways that they are entirely unaware. The study drew on identity theory to structure its argument.

We discussed above the concept of OPC and noted that, while it might be expected as a consequence of working as a lawyer for an employer with different aims than those of a law firm, a number of studies have established that in-house counsel and other professionals in similar situations report surprisingly low levels of OPC.<sup>69</sup> The study we draw on here suggests an explanation for this well-established finding, based on identity theory.<sup>70</sup> Identity is a widely used concept in organization studies.<sup>71</sup> It has been described as a "relatively stable and enduring constellation of attributes, beliefs, values, motives, and experiences in terms of which people define themselves in a professional

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67. Gunz & Jennings, *supra* note 8 ("We have always made the case (and not been challenged) that other than in terms of scale, the professions look very similar at least in the major common law countries, and in the U.S. and Canada in particular. The interconnectedness of the latter two economies alone make this almost inevitably the case.") (internal citations omitted); *see also* Gunz & Gunz, *supra* note 27, at 263 n.84.

68. Gunz & Gunz, *supra* note 2, at 860–63.

69. *See supra* notes 15–34 and accompanying text.

70. *See generally* Herminia Ibarra, *Provisional Selves: Experimenting with Image and Identity in Professional Adaptation*, 44 ADMIN. SCI. Q. 764 (1999); Sheldon Stryker & Peter J. Burke, *The Past, Present, and Future of an Identity Theory*, 63 SOC. PSYCHOL. Q. 284 (2000).

71. *See generally* Stefan Sveningsson & Mats Alvesson, *Managing Managerial Identities: Organizational Fragmentation, Discourse and Identity Struggle*, 56 HUM. REL. 1163 (2003).

role.”<sup>72</sup> Individuals have multiple identities that come into play under differing circumstances and are organized into a salience hierarchy. Identity salience is “the probability that an identity will be invoked across a variety of situations, or alternatively across persons in a given situation . . . commitment shapes identity salience shapes role choice behavior.”<sup>73</sup> Earlier research had shown that in-house counsel vary in the identities they adopt, between two poles labelled “technician” and “organization person.”<sup>74</sup> In the more recent study, these were relabeled “professional” and “organizational.”<sup>75</sup>

The ‘professional’ identity is adopted by someone who sees him- or herself as, for example, a lawyer, accountant or engineer who just happens to be working for the NPO in question . . . . The ‘organizational’ identity is that of a professional who has taken on some of the characteristics of a non-professional employee of the NPO, in the limit, seeing him- or herself as an employee who just happens to have, for example, a law, accounting or engineering degree.”<sup>76</sup>

To put it another way:

[S]omeone enacting a professional identity will ask him- or herself: *how does my profession require me to deal with this ethical dilemma?* By contrast, someone adopting an organizational identity will ask him- or herself: *how should I, as an employee of this [non-professional organization], deal with this ethical dilemma?*<sup>77</sup>

Drawing on the “logic of appropriateness”<sup>78</sup> the individual is, in effect, asking themselves: “What does a person like me do in a situation like this?”<sup>79</sup>

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72. Ibarra, *supra* note 70, at 764–65 (citing EDGAR H. SCHEIN, CAREER DYNAMICS: MATCHING INDIVIDUAL AND ORGANIZATIONAL NEEDS 24–26 (Richard Beckhard et al. eds., 1978)).
73. Stryker & Burke, *supra* note 70, at 286.
74. Gunz & Gunz, *supra* note 30, at 133.
75. Gunz & Gunz, *supra* note 2, at 858–59.
76. *Id.* at 855 (internal citations omitted).
77. *Id.* (emphasis in original).
78. JAMES G. MARCH, A PRIMER ON DECISION-MAKING: HOW DECISIONS HAPPEN 58 (1994).
79. J. Mark Weber et al., *A Conceptual Review of Decision Making in Social Dilemmas: Applying a Logic of Appropriateness*, 8 PERSONALITY SOC. PSYCHOL. REV. 281, 282 (2004).

In order to establish the identity that respondents regarded as most salient, they were asked to say where they fell on a scale that ranged from “[l]awyer with captive client” at one end and “[e]mployee of organization who happens to have law degree” at the other.<sup>80</sup> While half of the respondents put themselves at the midpoint of the scale, a third put themselves at the professional end and the remaining 17 percent at the organizational end.<sup>81</sup>

The respondents were also presented with several vignettes drawn from professional practice in three cases and, in the fourth, from the famous Texaco boardroom imbroglio.<sup>82</sup> Each vignette represented an ethical dilemma in the sense that it raised issues of professional ethics, but there was no ideal solution; however, one participant in the study responded that any decision would have a downside for someone. The vignettes were anonymized and carefully tested on a pilot group of subjects for their realism and their lack of bias, the latter in the sense that it was important not to bias the wording in favor of one type of response or the other.<sup>83</sup> In each case, the respondents were given two possible courses of action for them to take, each based on one of the identities.<sup>84</sup> The courses of action were carefully worded to ensure that they represented reasonable actions for an in-house counsel to take without breaking any laws or rules of professional practice. For example, in the (disguised) Texaco case the respondent is general counsel and compliance officer for a large corporation with a major public profile.<sup>85</sup> “[T]he top management team (TMT) is almost uniformly WASP (White Anglo-Saxon Protestant),” and it is common for its members to inject racist comments into their conversation.<sup>86</sup> On the one hand, the subject is told that they are aware that if these comments became public it would be a public relations disaster for the company, and there was a risk that a disaffected employee might well make this happen. On the other, the executives in question are the subject’s friends and colleagues and have already reacted to mild attempts to change their behavior with derision. The respondents were given two choices, one organizational—an in-camera, non-minuted discussion in which the risks are pointed out and it is suggested that

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80. Gunz & Gunz, *supra* note 2, at 864.

81. *Id.*

82. *Id.* at 861–62; see Thomas S. Mulligan & Chris Kraul, *Texaco Settles Race Bias Suit for \$176 Million*, L.A. TIMES (Nov. 16, 1996), [http://articles.latimes.com/1996-11-16/news/mn-65290\\_1\\_texaco-settles-race-bias-suit/2](http://articles.latimes.com/1996-11-16/news/mn-65290_1_texaco-settles-race-bias-suit/2) [<https://perma.cc/29HG-9DJL>].

83. Gunz & Gunz, *supra* note 2, at 861–62.

84. *Id.* at 861.

85. *Id.* at 861, 885.

86. *Id.* at 885.

the executives keep their behavior strictly private; and the other professional—a formal note that goes to the TMT explaining that if the situation does not change it will have to be reported to the board.<sup>87</sup>

There were two main findings from the study. First, the identity claimed by the respondent predicted well the approach they said they would take with each of the vignettes: those with organizational identities preferred organizational responses, and those with professional identities preferred professional responses.<sup>88</sup>

Second, it was possible to explain some of the reasons for adopting one identity over the other based on information the respondents provided about themselves. They were given a list of ten items drawn from research on the work of corporate counsel and asked to describe the allocation of their time between the items.<sup>89</sup> Some (e.g. routine legal matters and caseload, legal counselling) were clearly professional, while others (e.g. management outside the legal department, government liaison) were more obviously non-professional. The greater the proportion of their time was spent on non-professional work, the more likely they were to say that they had organizational identities.<sup>90</sup> Furthermore, a workload biased towards non-professional work was also associated with a feeling of isolation from the organization's strategic decision-making process.<sup>91</sup> In other words, the more involved the counsel were in the strategic management of the organization and the more time they spent on non-professional work, the more likely they were to adopt an organizational identity and to resolve the ethical dilemmas they were presented with in an organizational, as opposed to professional, manner.

Other features of their work situation also appeared to play a part in deciding how they handled the dilemmas. The most interesting involved the vulnerability the respondents felt towards their work being outsourced, an outcome commonly faced by in-house counsel. The more vulnerable they felt, the more likely they were to adopt an organizational identity and choose organizational solutions to the dilemmas.<sup>92</sup>

To summarize, then, this study produced disquieting findings with respect to the way in which in-house counsel might be expected to respond to ethical dilemmas. Nothing in the study addressed the individual ethical standards of the counsel. There may or may not have

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87. *Id.* at 885–86.

88. *Id.* at 874.

89. *Id.* at 863.

90. *Id.* at 871.

91. *Id.* at 869, 871.

92. *Id.* at 858.

been some bad apples in the 484 counsel who responded, but the study's authors had no way of knowing whether this was the case. On the other hand, it *was* possible to predict something of the way that each respondent would respond to the dilemmas by knowing something of their situation in the organization: how involved they felt themselves to be in the firm's strategic leadership, and whether they felt their work to be at risk of outsourcing. Firms hire in-house counsel in order to have legal expertise at hand. But this expertise risks being subject to a phenomenon known as "client capture."<sup>93</sup> Normally used to reference the client's power to "capture" the professional by "undermin[ing] professional prerogatives and status";<sup>94</sup> in the case of corporate counsel, the risk that is evident in this study's findings is that, consciously or otherwise, the professional advice that corporations get from their in-house counsel may be less "professional" than they realize, and the more closely they involve their counsel in the operations of the company, the less "professional" it may be. But it is a frequent recommendation that in-house counsel *should* be involved in the corporation's management;<sup>95</sup> otherwise, so goes the argument, why have in-house counsel at all? Why not just outsource legal work to law firms specializing in corporate law? So a paradox emerges—the arguments favoring the use of in-house counsel and its effective deployment also result in the legal advice being potentially less useful to the firm, or, at least, not as disinterested and unbiased as expected. On the other hand, as pointed out above, a legal department that isolates itself from the firm's management may be seen to be not earning its keep.

#### CONCLUSION

In our review of recent thinking on the ethical challenges facing in-house counsel, we have covered a reasonable amount of territory. Perhaps our key theme is one of avoiding simplistic explanations for unethical behavior observed amongst professionals supporting business.

On the one hand, it is certainly the case that ethical transgressions in the business world may be facilitated, and if not facilitated then at least not inhibited, by professionals who, were they to have adhered strictly to their professional codes of conduct, would have behaved otherwise. The cry of "where were the lawyers?" needs to be heard. On the other hand, the individual ethical standards of individual professionals undoubtedly varies, and—as the Enron case demonstrated

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93. KEVIN T. LEICHT & MARY L. FENNEL, PROFESSIONAL WORK: A SOCIOLOGICAL APPROACH 106 (2001).

94. *Id.* at 105.

95. See Chayes & Chayes, *supra* note 9, at 281 ("The general counsel, as a part of senior management, is committed to optimizing business success, and has both the right and responsibility to insist upon early legal involvement in major transactions that will raise significant legal issues.").

all too vividly—there are certainly professionals who are apparently prepared to behave in surprisingly unethical ways. However, these so-called bad apples may or may not, to follow the metaphor, infect the rest of the barrel, but they are probably relatively rare. Of greater concern is the possibility that the working environment of a professional may lead them to act in ways that are not entirely consistent with their professional training. In other words, ordinary, decent lawyers who put in a particular environment may act in ways that feel right to them but not to others. We explored the findings of research that suggests that in-house counsel can be particularly vulnerable to these pressures because they are working in an organizational environment that is fundamentally non-professional.

It should be noted that we are not describing here behavior that is flagrantly illegal or unethical, nor situations that are particularly uncommon in practice. Ethical dilemmas come in many shapes and sizes, but the ones that we are concerned with here are those that are most commonly encountered in everyday professional life, so-called low-intensity ethical dilemmas.<sup>96</sup> The vignettes used in the research described in Part III provide situations that were realistic to the research subjects. In an earlier study, nearly half of in-house counsel surveyed said that they had encountered situations similar to those in the vignettes, and of those who had, over half said they encountered them at least twice in the past two years.<sup>97</sup>

To summarize, the pressures identified in the research affect the ethical decision-making of ordinary, decent in-house counsel, and the situations in which such decisions-making is required are not uncommon. While universities and professional bodies teaching ethics to future professional practitioners inevitably and not incorrectly focus on the prescripts of the relevant professional codes, the message from the line of research cited in this Article is that this will provide a far from complete or even adequate preparation for future careers. It is essential to ensure that professionals, and all managers and employees, understand that ethical decisions are made within a context and that context subtly influences how decisions are made. At the extreme (e.g. Enron), if immense rewards go to those who cut corners and who engage in aggressive and often opaque practices, it should not be surprising that maintenance of high ethical standards is simply not a particularly relevant consideration. But the message from our findings is that we are all affected by the world in which we work, and this in turn can

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96. Dov Zohar, Inst. for Work & Health, Presentation at the Nova Scotia Safety Council Conference at Halifax, Nova Scotia: Safety as a Marker of Corporate Ethics (Apr. 2005), <https://campus.safetyservicesns.com/registration/conference/presentations/SESSION%2012A%20Safety%20as%20a%20Marker%20for%20Corporate%20Ethics.pdf> [<https://perma.cc/7NM6-ZDSY>].

97. Gunz & Gunz, *supra* note 27, at 259–65.



result in very subtle shifts and differences in terms of how we reason through issues of ethical responsibility. In most contexts the magnitude of these shifts will not result in out-right bad ethical decision-making. But being a good person is not alone protection from influences that will lead to less than optimal decisions. The way our identity is shaped and the way our environment impacts the expectations of our role in the organization all impact how we ultimately resolve ethical dilemmas and reach decisions. It is beholden upon all of us, and upon in-house counsel in particular, to understand the world in which we operate and, ideally, to plan ahead for how we will react to difficult situations as they arise.<sup>98</sup>

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98. See MARY C. GENTILE, *GIVING VOICE TO VALUES: HOW TO SPEAK YOUR MIND WHEN YOU KNOW WHAT'S RIGHT* 171–173 (2010) (discussing how people in the workplace make unethical decisions often because of emotions and instinct, rather than reason, and the arguments of ways to respond to the reasons and rationalizations around us).