Modern Lawyer

Ideas for Legal Leaders

Editor: Catherine McGregor

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Globe Law and Business

Featured in this issue

Is the modern lawyer a good listener?

Lawyers and their regulators can make or break the ESG movement

Improving results within lateral partner hiring – changing terminology and mindset

Welcome to *Modern Lawyer*.

“Meet the new boss, Same as the old boss”, sang The Who in their 1971 song *Won’t Get Fooled Again*.

How much will our new normal in the legal profession be the same as the old normal or has the world of work in the law and beyond crossed the Rubicon in what are the accepted ways of working? In this issue of *Modern Lawyer*, we explore some of the key changes which new ways of thinking about work are producing. But we also consider how some old mindsets are still causing many cultural issues to continue.

In our latest roundtable, we discuss this very topic with a range of general counsel and Cyril Shroff of Amarchand Mangaldas. Our discussion focused on working patterns post-Covid; the balance between the digital and the human; and where the opportunities for new ways of working together lie for law firms and their clients.

One thing both employers and employees in the legal profession are becoming much more cognizant about is the issue of organisational culture. A particular cultural issue of the legal profession is the issue of stress and burnout. In his article “Sidestepping burnout”, former lawyer and now counsellor and coach, Angus Lyon, explores how lawyers can find ways to recognise and avoid burnout before it becomes unavoidable.

Dr Hakon Runer has a PhD in behavioural economics and is the veteran of a 20-year banking career. He now he runs a consultancy which uses AI to explore cultural issues organisations have. He explains how many cultural issues in law firms and other organisations could be solved simply by listening to employees.

Another cultural nuance is explored by Tom Spence, a management consultant focusing on talent strategies. Lateral hiring is a prominent focus for law firms but why do so many lateral hires fail? Why do firms not put more effort into understanding how lateral hires can fit in?

Ciarán Fenton brings his knowledge on ethics and leadership to the ways in which lawyers, both in-house and in private practice, may be central to the success or failure of the ESG agenda.

We also sadly bid farewell to our regular columnist Herman Stewart. Due to lots of exciting new developments in Herman’s mentoring business he will be focusing on that. His new normal promises to be incredibly exciting, while producing new ways of approaching mentoring and leadership development for organisations and young people. Watch this space for a new columnist with some very fresh ideas and perspectives in our next issue!

Catherine McGregor
Editor

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Lawyers and their regulators can make or break the ESG movement

Ciarán Fenton

There are many perspectives on ESG but few doubt it is here to stay. Inevitably, lawyers will play a big part in its implementation. This article sets out to explore how lawyers and regulators could make or, perhaps, break it.

The ESG (environmental, social and governance) movement is enjoying mixed success. Its supporters point to the trillions of dollars invested in impact funds, while its detractors say it's all deeply shallow PR. Nevertheless, the direction of travel is clear – ESG is here to stay. The reasons depend on your perspective.

Sara Bernow, who leads McKinsey's work in sustainable investing and co-leads their institutional investing practice in Europe, illustrates one perspective – the business case – in a May 2020 podcast:

We looked at the reasons behind the relationship between ESG performance and financial outcomes and identified five sources of fundamental business value that explain these findings. The first is top-line growth. If you are a consumer goods company with a stronger sustainability proposition, you are more likely to attract customer loyalty and new customer segments. There is evidence that brands with more sustainable impact grow faster than brands that have a less sustainable proposition. On the business-to-business side, there also is a link. Large companies are seeking to channel ESG through their value chain. If you want to be a supplier to one of the world's largest retailers, for example, you had better have a strong sustainability proposition on plastics, packaging, water use, and so on. The second aspect is cost. If you are more resource-efficient, more water-efficient, have less packaging, you will generally have a lower unit-cost structure. The third area are your regulatory relationships. If you are more responsible about your assets' environmental footprint, then the chances of an adverse, punitive regulatory outcome are lower, so there is potentially regulatory value here. The fourth is talent. These days, newer recruits and millennials demand purposeful work and if you are an employer that can meet that need, you will attract and retain that talent, and likely have higher productivity in the workplace. The evidence suggests that this is worth roughly 2 percent of your stock price each year. Then the fifth factor we found is investment optimisation. There are downside risks of holding assets that become stranded. Coal assets and oil tankers, for example, have seen significant write-downs in recent years. Conversely, there are enormous opportunities in ESG-related investments. For example, there is a huge demand for technology that could improve air quality. When you add up all five factors, they explain this roughly 10 percent advantage in your cost of capital.

Simon French, chief economist at Panmure Gordon, illustrates a more nuanced perspective as set out in his piece for London's *Evening Standard* in September 2021, which views measurement and reporting as open to "selective interpretation" by company management teams:

On the environment side, this has led to accusation of 'greenwashing' – a situation where a company reports on the environmental measures that present it in the most favourable light. Similar criticisms are faced by businesses that commit to particularly salient social issues and are selective about their governance standards. This is where ESG and sustainable investing needs to be allowed to transition from a blunt 'invest or divest' approach to something with more nuance.

The Financial Reporting Council (FRC) illustrates a third perspective – a regulatory one – in their

decision in September 2021 to exclude a third of the 189 applicants, including Schroders, Morgan Stanley Investment Management and Rothschild Wealth Management, from their list of successful signatories to the revised UK code, which sets standards for asset managers, pension schemes and insurers to explain how they are creating "long-term value for clients and beneficiaries leading to sustainable benefits for the economy". For the first time, applicants were required to show detailed evidence of how their actions complied (Source: ES 6 September 2021).

My perspective is that the words 'environment', 'society' and 'governance' have a clear meaning and, in combination, are here to stay. The search for metrics for ESG reporting will eventually deliver acceptable if imperfect codes because society – the S in ESG – is skilled at designing workable regulations when it must. It must do so, not least because businesses drew down substantial sums of taxpayers' money during the pandemic, and society will hold them to a much higher standard of behaviour than previously. ESG is becoming the shorthand for that standard. A new term – climate change – has replaced global warming and has caught the public imagination. The press and politicians ask questions about business behaviour regarding the environment, and companies feel that heat. The MeToo and D, E&I movements – all part of the S – are in full voice, forcing companies to respond. Fresh corporate scandals – The Post Office Limited and RICS, to mention just two, are keeping governance – the G – in the headlines.

But what's to stop ESG from going the way of CSR, which enjoyed a similar fillip after the global financial crash in 2008 before losing momentum later? Or put another way, who could do what to ensure that ESG doesn't stall?

Lawyers and their regulators are in a strong position placed as they are at the intersection of law, compliance and governance to make or break the ESG movement. In-house lawyers (IHLs) can enable better ESG-based decisions by their boards. Their out-of-house law firm advisers can help them do so.

The opposite will happen if IHLs don't engage fully with ESG or if their bosses won't allow them to do so and/or if their law firm advisers talk the ESG talk but don't walk the walk themselves. Law firms are keen to remind GCs how core they are to ESG implementation:

As companies increase their commitment to sustainability and responsible business, so too has the involvement of the legal team. General counsel and in-house legal teams (and their external advisors) have always played an important role in managing social, ethical and environmental issues for organisations. However, legal teams are no longer just reacting to ESG issues, but proactively becoming involved in integrating material ESG risks and opportunities in business organisations, their operational policies and go-to-market strategies. The following key themes are emerging … (DLA Piper – website 3 December 2020).

My perspective is that the words 'environment', 'society' and 'governance' have a clear meaning and, in combination, are here to stay.

Is ESG the opportunity GCs have been waiting for? With global ESG assets at more than $30tn and expected to grow further, ESG will help define the future for business and society. General Counsel (GCs) have a powerful opportunity to steer businesses towards sustainability and Timothy Wilkins, Global Partner for Client Sustainability, recently led a discussion to investigate how lawyers will play a central role. He was joined by Kirin Kalsi, Head of Legal UK for E-ON; Keith Carr, General Counsel at Lafarge Holcim; and Chris Allen, General Counsel for Corporate, Commercial and Institutional Banking and General Counsel for Europe and America at Standard Chartered Bank. Kicking off the webinar, Wilkins noted that sustainability and the economic, social and governance aspects of ESG have all now moved into the core of board strategy and C-suite decision-making … (Freshfields – Blog 7 June 2021).

How are top law firms advising clients in the hot

> ***"It is critical for in-house lawyers to go beyond being the guardians of compliance and take on a wider role around ethically driving ESG through the strategy in the business."***

ESG practice area? Reuters Legal wanted to find out, so we put together a panel of sustainability experts who created a fictitious tractor company facing environmental, social and governance issues. We asked law firms to give fictitious Brighton Tractor Supply Co advice that takes advantage of ESG lawyers' creativity and ingenuity in this growing legal field. Here are the 18 law firms that responded: Baker Botts; Ballard Spahr; Crowell & Moring; Fox Rothschild; Hogan Lovells; K&L Gates; King & Spalding; Kirkland & Ellis; Mayer Brown; McDermott Will & Emery; Mintz, Levin, Cohn, Ferris, Glovsky and Popeo; Orrick Herrington & Sutcliffe; Paul Hastings; Pillsbury Winthrop Shaw Pittman; Ropes & Gray; Schiff Hardin; Stroock & Stroock & Lavan; and Troutman Pepper Hamilton Sanders (Reuters – Scenario Test 28 July 2021).

Issues around ESG have increasingly become a vital focus within the financial services industry and dominated conversations at board meetings. Legal teams within businesses and organisations can play a much bigger role driving the ESG strategy instead of being an implementer of the regulations and business strategies. That's the key message from a roundtable co-hosted by The Lawyer *and Irwin Mitchell's chief commercial officer Victoria Brackett, where a delegation of senior in-house legal counsel shared their thoughts on the progress made so far, practical advice and experience in dealing with challenging situations. "ESG is going to sit at the centre of all our strategies and purpose moving forward," said Brackett. There's been an acceleration moving from tick box exercises, and lawyers can become advocates of ESG at board level and make sure key messages are heard … It is critical for in-house lawyers to go beyond being the guardians of compliance and take on a wider role around ethically driving ESG through the strategy in the business. But getting the right structure and the right business culture balance is essential* (*The Lawyer* roundtable: How legal teams can use ESG to drive purposeful change – 2 August 2021).

So, we can assume:

- ESG is here to stay;
- GCs can play a big part in it; and
- law firms are unsurprisingly keen that they do.

What can go wrong?

- law firms' ESG practices fail because their firms fail to practise ESG;
- GCs fail to lead holistically on ESG, cleaving only to the regulatory aspects; and
- the SRA fails to support GCs in acting with independence in respect of ESG advice to their employers.

Law firms have a woeful track record in the S and G of ESG:

Women still missing from top ranks of law firms: According to an extensive data project conducted by the Financial Times, *women are still sorely under-represented at the highest echelons of the industry. Data collected from the largest UK and US firms in London, using a list derived from* The Lawyer *magazine's rankings, revealed a sharp drop-off in the number of women as they progress up the legal ranks, compounded by stark pay gaps between the sexes, particularly at higher levels. The £28bn legal profession is one of Britain's most important exports but, like other financial and professional services sectors, remains among the most male-dominated industries globally. The FT's research shows that while there are now more women practising law in the UK than men, and just under half of associates – mid-ranking lawyers – in the firms sampled were women, only about a fifth of senior lawyers – or partners – were female. Most firms only increased the proportion of women in their partnerships by a percentage point or less year on year* (*Financial Times* – 2 January 2020).

Research shows that one in 15 junior lawyers has had suicidal thoughts. The issue of stress among junior lawyers returns to the spotlight this week, with research showing that the proportion claiming to have recently experienced mental ill-health has risen sharply over the past year – and that 6.4% have experienced suicidal thoughts. These are among the findings of the third Junior Lawyers Division (JLD) resilience and wellbeing survey, published at the weekend. Of more than 1,800 respondents, 48% said they had experienced mental ill-health in the last month, up from 38% last year (an increase of 26%).

Law firms won't fool GCs with shallow bolt-on ESG offerings to their menu of services without a nuanced approach to ESG in their own firm and to their firm's organisational purpose in the context of society at large.

Some 93.5% of respondents said they experienced stress in their role. A quarter of those experienced 'severe/extreme' levels of stress. The most frequently mentioned consequences of work-related stress were disrupted sleep (66%) and a negative impact on mental health, including anxiety, emotional upset, fatigue, and negative and depressed thoughts (60%). Meanwhile, 6.4% of respondents (amounting to more than 100 junior lawyers) said they had experienced suicidal thoughts (*The Law Society Gazette* – 8 April 2019).

Finally, little has changed in the governance (G) of law firms since Laura Empson wrote this piece in 2015:

> *Leaders, by definition, must have followers. In most studies of leadership, this statement is self-evident. Such studies assume that hierarchical relationships within organisations are relatively stable, and take for granted that the most senior people in an organisation have the formal authority to lead it. In law firms, however, the distinction between leaders and followers is more difficult, as traditional hierarchies are replaced by more ambiguous and negotiated relationships among professional peers. As the client relationship partner in one global law firm expressed this to me:*
>
> *Empson: Does anyone have power over you?*
> *Partner: Not as far as I'm concerned, no.*
> *Empson: Does anyone think they have power over you?*
> *Partner: I don't think so.*
>
> *In recent years, I have undertaken two major UK government-funded research studies into governance and leadership in global professional service firms. Through these studies I have conducted more than 400 interviews in almost 20 countries with leaders and partners from many of the world's leading professional service firms. These interviews have been supplemented by archival and observational analysis. With regard to the legal sector, through my research and consulting I have worked closely with 15 of the world's leading law firms in the United Kingdom, Europe and the United States. I have found that in law firms, which are filled with highly educated, independent thinkers, who do not like being told what to do, it is not easy to find lawyers who are happy to identify themselves as followers. Furthermore, finding lawyers who are happy to put themselves forward as leaders is even harder. We tend to assume that the most ambitious people in an organisation will aspire to leadership roles because they crave the opportunity to influence decisions and exercise power. In a law firm, however, taking on a leadership position can potentially entail losing power. In any organisation, as in most areas of life, power comes from controlling access to valuable resources. In a law firm, or indeed in any professional service firm, the most valuable resources are specialist professional expertise and lucrative client relationships. Lawyers who take on major leadership roles necessarily reduce their fee-earning work and may find their hard-won client relationships migrating to their colleagues, or to other firms. By taking time away from frontline client work, they will struggle to ensure that their professional expertise remains at the cutting edge. Of course the idiosyncrasies of each law firm's governance structure will determine the leaders' formal authority and the personal credibility of*

each individual will determine their informal authority, but the same basic conundrum applies. Individuals who take on leadership roles in law firms risk exchanging their most valuable assets (ie, their client relationships and professional expertise) for a title which brings with it relatively little formal authority but a great deal of responsibility (Laura Empson, "Leadership, power, and politics in law firms" in Rebecca Normand-Hochman (ed), *Leadership for Lawyers*, International Bar Association, 2015).

In my view there is an opportunity for a new or old law firm with the courage to model ESG behaviour to build a substantial, sustainable ESG practice. But law firms won't fool GCs with shallow bolt-on ESG offerings to their menu of services without a nuanced approach to ESG in their own firm and to their firm's organisational purpose in the context of society at large.

GCs must become ESG-caring CEOs of their own internal break-even legal services business. They must understand how ESG fits with business strategy and then tell, not ask, the business how they will enable better ESG decisions through excellent legal counsel and process. Then they must not repeat the mistake of many GCs, which is to perform the 'diving catch' on ESG and promise to deliver outcomes which the business has not fully funded.

Finally, the Solicitors Regulation Authority (SRA) must create an environment in which GCs can stand up to CEOs, CXOs and NEDs whenever the board is baulking at taking good ESG-based decisions because of the negative impact on the bottom line. If there had been money in ESG, everyone would have been doing it long before now. Serious ESG conduct – behaviour over time – will cost money, and GCs can hold directors' feet to the fire on this. But they need support from the regulator, as Professor Stephen Mayson pointed out in his Independent Review of Legal Services Regulation in 2020.

The Centre for Ethics and Law, University College London, published a report on 11 June 2020 written by Professor Stephen Mayson with the title: "Reforming legal services – regulation beyond the echo chambers – final report of the independent review of legal services regulation". Section 4.12 relates to "Corporate legal departments and in-house lawyers" and in respect of which he makes a recommendation, Recommendation 20, as follows:

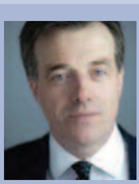
An in-house legal department should be capable, for regulatory purposes, of being registered as a distinct business unit, so that the department's delivery of legal services would be subject to the same regulatory obligations as any other registered provider. Individuals within such a registered in-house unit should also be registered personally if they carry on activities for which before-the-event authorisation or personal accreditation would otherwise be required.

Professor Mayson sets out his reasons for this Recommendation as follows:

There is little doubt that a tension is inherent in this relationship when the client for legal services is also the adviser's employer. The usual expectation of 'independent' legal advice is often stretched … arguable that those with professional obligations might benefit from further regulatory support… In principle, they should not be at risk of dismissal or disadvantage simply for observing their professional obligations … This might entail express conditions in their employment contract, and a direct reporting line to the board … As we have seen in recent years, corporate failures can lead to consumer and societal detriment. In-house lawyers have to be able to sound alarm bells without the chilling effect of potential reprisal. …

The words "chilling effect of potential reprisal" are indeed chilling when you consider the impact of corporate failures on society and which failures, more often than not, hit the more vulnerable parts of society.

Sadly, it isn't easy to see how ESG can succeed unless law firms, GCs and the regulator come together to ensure it.


Ciarán Fenton is a leadership consultant who facilitates boards and teams on purpose, effectiveness and ESG awareness and individual leaders on emotional intelligence, performance and career management. Advising lawyers-as-leaders is his specialism having worked with many lawyers and their teams in-house and out, over 10 years.

This article 'Lawyers and their regulators can make or break the ESG movement' by Ciarán Fenton *is from the October 2021 edition of* Modern Lawyer*, published by Globe Law and Business.*
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