GC role and purpose: a revolution, not evolution, is needed by business and society

Ciarán Fenton

Leadership and governance consultant Ciarán Fenton argues that in-house counsel should not ask 'the business' what it needs to achieve its objectives; should only do what it's paid to do and no more; and that The Law Society should set up a separate in-house body to protect lawyers from 'elevated ethical pressure'.

Introduction

The purpose of this article is to argue for a revolution in the purpose, strategy and behaviour plans of GCs and the in-house function. Sometime soon would be good. The current evolutionary approach is not serving the needs of business, society and lawyers. My views are based on my observations as a consultant working with boards, GCs and legal teams across all sectors over many years. Other writers and consultants have influenced my thinking.

Evolution

Bjarne Tellmann, GC at Pearson plc, observed in his book *Building an Outstanding Legal Team* (Globe Law and Business, 2017) that: "The general counsel's role has become one of the most complex, intense and challenging in the corporate world because of the changes that have occurred".

The reasons he and others advance for this increased status include complex changes in the legal profession, society and globalisation.

Businesses required more lawyers and needed them to understand their businesses but they were not willing to pay top private practice fees. They increased the size of their in-house teams so that their lawyers and their costs could be more easily controlled.

But many were not willing or able to lead and develop the lawyers fully because they are markedly different from those in the other business functions – finance, marketing, sales, operations and IT – since, as officers of the court, they are regulated outside of the organisation but managed within it.

Soon tensions arose. These were reflected in the content of in-house conference programmes over the years. While sessions on black letter law, technology and 'soft skills' matured and kept pace with developments in business and society, the sessions on the relationship between the in-house legal function and 'the business' remained stuck.

Let us take three session examples from in-house legal conferences in 2018:

- The art of influence: excel at internal publicity to demonstrate your value (Corporate Counsel Forum Europe 2018);
- Expanding your influence: building legal's role in the business (ACC Annual Conference 2018);
- Challenges in the boardroom: what does the CEO want? (The Law Society Annual In-House Conference 2018).

These topics, although useful in general terms, imply an ongoing lack of clarity in respect of the role and purpose of the in-house function. A conference for CFOs, for example, would not contain these session topics. CFOs know what CEOs want, do not need to prove their value, and although they may need lessons in influencing skills, it will not be because they need to 'build' the finance function's role in the business. That job is already done.

Nor would a conference of sales, marketing, IT and operations directors include these headings in the same manner as they are included year in and year out at in-house legal conferences.

Let us look back at examples from the previous four years:

- What does a CEO/COO/CFO expect from the legal team? (ACC Europe Annual Conference 2017);
- What success looks like for legal – the business perspective? (ACC Europe Annual Conference 2016);
- Advocacy: status of in-house counsel across Europe (ACC Europe Annual Conference 2015);
- From 20 to 40: how can we shape the evolution of the legal department business model? (ACC Europe Annual Conference 2014).

It is clear from these examples that the role and purpose of in-house is still up for debate nearly 25

years after the ACC was founded. Why is this the case? The answer is a degree of irresponsibility by 'the business' and some stasis within the profession.

Irresponsibility of 'the business'

A measure of the irresponsibility of the business in respect of the legal function is darkly illustrated in "Mapping the Moral Compass" report published by the UCL Centre for Ethics and Law in 2016 as part of its Ethical Leadership for In-House Layers Initiative. The headline findings included:

- 10–15% experienced elevated ethical pressure;
- 30–40% sometimes experienced ethical pressure;
- 36% agreed that loopholes in the law should be identified that benefit the business;
- 9% indicated saying "no" to the organisation was to be avoided, even when there is no legally acceptable alternative to suggest;
- 65% reported that achieving what their organisation wants has to be their main priority;
- 7% never discussed professional ethics issues with colleagues internally or externally, formally or informally.

The authors of the survey found that there were four categories of in-house lawyer:

- the capitulators;
- the coasters;
- the comfortably numb; and
- the champions.

The report had a mixed reaction to say the least. Rhymer Rigby wrote in the *Financial Times* at the time of publication:

> *A recent piece of research from University College London on in-house lawyers, Mapping the Moral Compass, has caused a stir in the legal community. It identifies four main ethical groups of in-house lawyers: the capitulators, the coasters, the comfortably numb and the champions. Perhaps unsurprisingly, some general counsel have taken exception to these characterisations.*

Indeed, whenever I make reference to the UCL report at conferences as chair or speaker, I frequently encounter a mixture of outright hostility by some GCs and enthusiastic support from others. The profession is divided on the report.

While I acknowledge that the four characterisations in the report are expressed in language which some feel is an unacceptable short hand, I for one can confirm that these four exist because I have encountered them over the last 10 years in my practice.

One would have thought that lawyers would welcome the calling out of poor behaviour by the business towards its members and the behaviour of some lawyers that should be improved. I suspect the defensiveness is because some lawyers do not like to be questioned. But if we stop questioning we start colluding and that is the beginning of the end for transparency.

Meanwhile, the irresponsible behaviour of business, not just towards in-house counsel, but generally speaking, continues apace without any end in sight.

Recently, the Banking Standards Board published its second annual review and in respect of which the *Financial Times* ran the headline: "Bankers battle with ethics versus career quandary". Based on a survey of 28,000 employees at banks and building societies:

- more than one-third fear negative consequences for voicing concern;
- one in eight had seen instances where unethical behaviour had been rewarded; and
- [a large number saw] a conflict between their organisation's values and how it did business.

If a company's risk register is a list of top and emerging business, legal and reputation risks it follows that conduct by directors should go right to the top of that list because many conduct risks are forged in the crucible of boardroom relationships.

There are few better examples of the horror of conduct risk than the collapse of Carillion Plc. The Joint BEIS and Work and Pensions Committees Report into the collapse notes on p47:

> *107. Carillion's directors, both executive and non-executive, were optimistic until the very end of the company. They had built a culture of ever-growing*

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reward behind the façade of an ever-growing company, focused on their personal profit and success. Even after the company became insolvent, directors seemed surprised the business had not survived. 108. Once the business had completely collapsed, Carillion's directors sought to blame everyone but themselves for the destruction they caused. Their expressions of regret offer no comfort for employees, former employees and suppliers who have suffered because of their failure of leadership.

None of the main recommendations contained in the report refer to the behaviour of in-house lawyers. This can be interpreted in several ways. My interpretation is that, generally speaking, if lawyers are allowed and resourced to do their jobs then these risk events will become more infrequent.

The revolution

While companies were happy to increase the status of in-house lawyers because of macro pressures, they often paid scant attention to the needs of those lawyers to keep pace with those changes. Indeed, they visited on them the reverse. They doubled down on their demands to do 'more for less'.

Many practice lawyers have not helped their in-house colleagues who feed them. They continue, for the most part, to measure value in time rather than impact.

In-house lawyers have become caught in the middle and the officer of the court role will not go away although some try hard to make it so. The language used at conferences bears this out:

- "I'm a business person first, lawyer second";
- "How can we become better business partners?";
- "We can't be seen as blockers".

But the problem for in-house lawyers is that the business which they are trying to impress is losing the public's trust because corporate conduct is still poor. There is a clamour for improved behaviour and a growing emphasis on ESG issues – environment, society and governance.

The inclusion of ESG factors in *Harvard Business Review*'s 2017 Best Performing CEOs in the World is evidence of the increase in influence of those issues. But the inclusion of ESG factors is a function of boardroom decision-making processes.

If you Google "how decisions are made in the boardroom" and read a cross-section of the links presented, it will become clear that decision-making in the boardroom is mostly art, a little science and even less law.

The evidence for this assertion is illustrated, for example, by a link to a 2013 New South Wales Court of Appeal judgment that "created a stir in Australian legal and corporate circles about the culture of board decision-making".

One of the Appeal Court Judges (Barrett JA) commented that:

Value is often attached to collegial conduct leading to consensual decision-making, with a chair saying, after discussion of a particular proposal, "I think we are all agreed on that", intending thereby to indicate that the proposal has been approved by the votes of all present… Such practices are dangerous unless supplemented by appropriate formality … The aim is rather that members of the board should consult together so that individual views may be formed and the individual will of each member may be made known in a clearly communicated way."

If ESG is here to stay, so also is the increased emphasis on good corporate governance. The recently published updated UK Corporate Governance Code contains a strong emphasis on behaviour.

Because of these developments, the boardroom will increasingly turn to lawyers for help. A revolution is urgently required to reframe the function to meet these needs. The revolution, which I suspect would not be welcomed by all, would involve some radical changes.

First, in-house counsel would emphasise more than they do now that they are different to everyone else in the business: officers of the court first, business partners second; whose purpose is to enable better decision-making. They would waive their LTIPs and bonuses in exchange for fixed higher salaries. How can a lawyer be confident that they are not conflicted in giving advice, even unconsciously, if they are to benefit from the outcomes through bonuses and LTIPs?

When I raise this with lawyers they bristle – some say that being treated like everyone else strengthens their position. Others feel they should be allowed to

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benefit from their contribution to growth like everyone else. But none can deny that they could be compromised.

Second, in-house needs its own industry body – or a restructured Law Society – with its own rules, qualifications and procedures. Few would argue that current regulations in respect of in-house lawyers are bolt-ons to private practice regulations. The Law Society is funded primarily from private practice levies.

Through this body in-house counsel could support each other in enforcing the highest standards of conduct in business with zero tolerance for 'elevated ethical pressure'. Lawyers and its industry body would actively support colleagues who are being bullied or sidelined. Businesses would not dare try it on. The shocking ethical pressure percentages in the UCL report would be reversed.

Philip Wood QC, former head of Allen & Overy Global Law Intelligence Unit and author, wrote in a previous issue of *Modern Legal Practice* that: "legal systems are in all their respects the most fundamental source of morality".

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But the problem is that "all recipients of professional service ... seem to be short of money ... managers in business complain not only of shrinking budgets but also that they have more need of professional help ... we call this problem the 'more for less' challenge". So wrote Richard and David Susskind in *The Future of the Professions – How Technology Will Transform the Work of Human Experts* (Oxford University Press, 2015), p108.

The writers were reflecting the wide acceptance in the marketplace of this 'more for less' mantra. GCs and in-house counsel across the world embraced the challenge with gusto. No conference was complete without 'more for less' PowerPoint presentations. Even 'new law' providers claimed it as a benefit in their innovative services. And legal functions drove their teams to deliver more for less with the kind of ferocity that only lawyers can bring to bear on a problem.

Who could blame them? Mark Cohen observed, writing in *Forbes Magazine* in January 2018: "Legal consumers, not 'smart lawyers' are now calling the shots ... The corporate C-suite has mandated GCs to do 'more with less'".

But, to date, GCs and their teams have taken the brunt of the 'less' and are doing the 'more' because they are employees. They feel they must 'deliver', or else.

This hardworking band of cost-cutters is caught in a trap exacerbated by the advance of new technology, the resilience of the billable hour and the glacial pace of so-called 'disruption in legal services'.

So the third and final element of the revolution would be the manner in which GCs would negotiate their budgets using three steps.

Step 1: Make the board's 'SWOT Analysis' the Legal function's core strategic document

The board's SWOT Analysis is, at any point in time, the Legal function's best friend for contained in it is all Legal needs to kill off 'more for less' for good. Why?

The board's SWOT Analysis is the board's risk register, by another name. And the anticipation/management of risk trumps 'more for less', if sold properly.

Step 2: Write a point-for-point SWOT Risk Management Plan

Explain, in detail, how Legal will mitigate each point in the Weaknesses list, and each point in the Threats list and also how Legal will reduce the risks of the business not capitalising on its strengths and opportunities.

Some will counter that Legal is only concerned with legal risks in the SWOT which will also contain business and reputation risks. I disagree. The purpose of the in-house function is to enable better decision-making and implementation across the business, and Legal should therefore engage with all risks. That's why it is 'in-house'.

Step 3: Budget from 'zero' to support the SWOT Risk Management Plan

Typically, in-house function development lags behind business development. Business strategic decision-making rarely sweats too much over the costs of the

legal function implications of strategic decisions as much as it does it over finance, marketing, sales, operations and IT.

That is because the business does not always understand Legal and has a vague and, not entirely unreasonable, assumption that legal costs too much.

Forward-looking private practice firms will be helping to dispel this view, before they are forced to do so. That is where the 'selling in', with the proactive support and collaboration of private practice, of the SWOT Risk Management Plan to the business will help the board see a direct correlation between business strategy and Legal spend.

That is not to say that the business will always be able to afford the $10 required to pay for the ten things that Legal says the business needs to risk manage the SWOT.

It may only be able to afford $7. But then it should just expect to receive seven things and take a calculated risk on the other three, provided the seven things are delivered as cost-efficiently as possible and, crucially, no lawyer on the team performs a diving catch to do one of the three things not covered in the budget. The latter lack of discipline on some Legal teams is part of the current problem.

The success of this process depends on a level of behaviour change within Legal which many may find painful. But it is a far less painful way to live than 'more for less'. Instead, the business gets what it pays for, no more but no less.

One way to accelerate this is to increase the number of conferences at which there are an equal number of business and lawyer delegates.

My proposal is that GCs can choose to change the status quo. The incentive to do so is threefold: the function will be properly resourced; the business will be better protected and, crucially, in-house careers will be more fulfilling, especially for those not currently at the top of the function's hierarchy.

Recently, I facilitated a workshop involving over 30 in-house counsel from a large global corporate business. They were no different from any group I have encountered over the last 10 years.

At one point I said, more or less what I always say: "You all realise, I'm sure, that you could be key players in enabling better decision-making in your organisation across the globe and potentially save them and the world from self-inflicted economic and other harm and even contribute to preventing another global financial crash".

They looked at me blankly. One said, brusquely: "We don't do compliance. That's a separate department".

Indeed it is. But my invitation is to middle-ranking in-house lawyers, ie the GCs of the future, with the support of private practice to lead a revolution in reframing the purpose, strategy and behaviour of in-house lawyers as enablers of better decision-making. That is not compliance. That is leadership.

Ciarán Fenton, has over the last 15 years, following a corporate career with Hachette, ITN, Pearson and The Guardian Media Group and worked with scores of individuals and organisations on making small changes in behaviour based on a shared purpose. He is a mentor at London Business School, a faculty member on Paul Gilbert's in-house counsel programme, and a regular speaker and writer. Pamphlets include The GC-CEO Relationship post Global Financial Crash: Flourish or Flounder *and* The 7 Deadly Sins of Nascent NEDs. *Ciarán holds a business degree, B Com (Hons) from The National University of Ireland, Cork and he lives in Brighton. He is married to writer Marian Garvey and they have two children.*

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