Reconciling the Irreconcilable?

Best Practice Guidelines for In-House Lawyers in England and Wales in the new corporate governance environment

11 MARCH 2005
The bottom line

“My message to general counsel is this: these are testing times where there has never been a better time for general counsel to be leaders. Although rules are necessary, they are insufficient. Personal values must shape an enterprise, that is the bottom line, and we as general counsel have to embody those values if we are going to help our companies find the right way forward.”

Bill Friedrich, BG Group plc, 2004

A charter for the office of general counsel

“Mr Wakkie began by asking whether, given the increasingly ambiguous role of ‘gatekeeper’ of the company conscience, it was now time to devise a charter for the office of general counsel.”

Peter Wakkie, Ahold, at the IBA Corporate Counsel Conference in Rome, 2004

A widening role

“In-house lawyers will increasingly need to review their widening role and address issues such as the interaction with the finance team, auditors and their related accounting functions; whistleblowing procedures; privilege; and document handling.”

Jo Bower, Midlands Chair, C&I, and Corporate Counsel & Deputy Company Secretary, IMI plc

Our best practice guidelines

“These best practice guidelines offer in-house lawyers who are willing to grasp the challenges ahead a real opportunity to get even closer to the businesses they serve and to add value in new and strategically important ways whilst at the same time maintaining the independence that is critical to carrying out our duties properly.”

Ann Page & Deepak Malhotra, Co-Chairs, C&I Corporate Governance Committee
From ‘Scapegoat or Saviour?’ to ‘Reconciling the Irreconcilable?’

“You will not be surprised to learn that our in-depth consultation with our members confirmed that the 21st Century in-house lawyer has a unique role to play in business life which encompasses being both employee and adviser, keeper of the conscience and trusted adviser, as well as the privilege of being an officer of the court” says Ann Page, Co-Chair, C&I Corporate Governance Committee.

The following statistics from our consultation exercise (survey & 12 separate forums over 2 years) give a flavour of the results:

- As far as corporate governance involvement is concerned, the in-house lawyers were “right in there”, providing support and documentation and guiding the process, with only 24% having no or very limited involvement. However 18% reported that there was no dedicated committee or function for corporate governance while 42% reported that other committees had some corporate governance responsibility
- 65% of respondents had seen their job change as a result of external scandals and complex regulatory regimes
- All respondents were in favour of the “trusted adviser” role and shared some of the methods of achieving this
- 58% felt that the in-house lawyer was rightly regarded as ‘the conscience of the company’ whilst 22% thought that this was an impossible position
- 46% felt that being an officer of the court enhanced their position
- 36% thought that there would be no inherent conflict were the senior in-house lawyer to have a seat on the board; 29% thought that they should not sit on the board
- 58% of in-house lawyers had daily contact with the CEO and 55% thought that there should be a mandatory reporting line to the board
- 62% and 36% respectively identified the CEO and Chairman as the respective office holders for mandatory reporting

The consultation results have very much informed our thinking in this area and shaped the Best Practice Guidelines which have emerged. Now please read on...
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In-house lawyers are as aware as any, and perhaps more than most, that historic boundaries of corporate governance have started to shift. In common with most participants in the governance arena, in-house lawyers sense that their role is changing and that they are increasingly being expected to assume extra responsibilities in a “post-Enron” world. But in their case, the size and shape of these new responsibilities are perhaps unclear.

Directors remain in the front line certainly and in-house lawyers opting for a seat on the board assume new responsibilities as well as a greater mandate with which to discharge them. The company secretary of a listed company is held accountable under the UK’s Combined Code on Corporate Governance for advising on all governance matters, and in-house lawyers taking on the role of company secretary at such a company can be under little doubt as to their job specification in that capacity and what may fairly be expected of them. But as to an in-house lawyer’s duties and liabilities, in that capacity alone, there is neither consensus nor any legal guidance. There is little agreement for that matter on how to define or even frame governance issues. Rather, corporate governance is the very definition of something that means different things to different people.

That the potential for personal liability exists for in-house lawyers – whether or not also director or secretary – is without doubt. Nor in our view is the exposure limited to employees at listed or US-owned companies – this document is emphatically addressed to all our in-house lawyer members, irrespective of the size and status of their employer.

As for the in-house legal function, we know from our members that practice varies enormously. A lawyer who works exclusively on the management of a property or patent portfolio is evidently in quite a different position to one who has been retained to improve the governance function; or one who is also company secretary; or the senior in-house lawyer who is managing a sizeable legal team. All this does not mean that it is impossible to offer broad guidance, but it does mean that the guidance offered in this document needs to be applied flexibly according to your organisation’s, and your own, circumstances.

We regard it as vital that this document continues to reflect the views of our in-house lawyer members. Where could our Best Practice Guidelines be improved? How can these Guidelines better serve you? You may use the Feedback and Further Guidance Form provided as an insert and either post or fax it to us, or you can complete the same form and submit it online, at www.cigroup.org.uk (corporate governance section). Our intention is to review and, where appropriate, re-issue this document on a regular basis.

We would like to thank all the members of the Committee for their respective contributions to this work. The aim of this document, which has been produced in conjunction with Wragge & Co LLP, is to illuminate and clarify the position in which in-house lawyers increasingly find themselves within a new and demanding corporate governance environment. It is based on the professional practice requirements of solicitors in England and Wales. Comparisons are included to give an international perspective.

Much, we appreciate, will depend on individual circumstances. The governance regime applicable to you will depend fundamentally on your organisation’s status, size and stakeholders, and indeed the sector(s) and countries within which it operates. In-house participants in the corporate governance arena include the board, the chairman, other (executive and non-executive) directors, often an executive committee, other board committees, and senior managers across functions too numerous to name. We use the expression “participants” advisedly. Organisations cannot proceed on the basis that corporate governance is an area in which they need “someone” to specialise (whether company secretary or anyone else) such that it becomes “their responsibility”. Corporate governance demands a collective response from in-house and external participants.

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Director of Legal Affairs
Interbrew UK

Simon Graham
Head of Corporate Governance
Wragge & Co LLP
What the C&I Corporate Governance Committee mean by “governance”

The 1992 Cadbury Report famously defined corporate governance as “the system by which companies are directed and controlled”. The focus was emphatically on board-level issues and on the financial aspects of good governance. Since then the tendency has been to increase both the number of issues falling within the embrace of what one might term “governance” and the extent to which governance-related issues permeate the business. Following the Hampel Report, and Greenbury three years earlier, the Combined Code was issued for the first time in 1998, and in 1999 the Turnbull Report extended the focus to internal controls enterprise-wide, covering both financial and non-financial risks.

At the same time, the Government was launching its company law modernisation programme, a key element of which was to encourage directors to focus not only on shareholder value but also on a broader range of factors both inside and outside the company – including relationships with employees, customers and suppliers, and the company’s impact on the wider community. In 2001, the Myners Report addressed the broad issue of institutional investment and in 2003 the Higgs and Smith reports tackled the positions of the non-executive director and audit committee respectively (and the Combined Code was re-issued). A more restrictive view was espoused, also in 2003, when it was argued that corporate governance was only about reducing the cost of capital. Nevertheless, the ripple effect of US corporate scandals – not limited to Enron, WorldCom and Tyco – continues right up to the current moment.

Given the history, it is hardly surprising that there exists no consensus on the scope or even the purpose of corporate governance. This has been amply evidenced by countless surveys including our own. Is its purpose:

- To reinforce shareholder confidence?
- To manage risk in the business?
- To avoid abuses of corporate power?
- To manage conflicts of interest?
- To spin webs of process around the executive so that evil shall not prevail?
- To keep the executive informed, and to avoid their falling foul, of the expanding range of civil and criminal legislative provisions?
- To buttress the share price (since there is some evidence of a link between good governance and a company’s share price performance)?
- To reduce the cost of capital?

Nor is there any consensus as to who bears responsibility for good governance. In part this is the case because good governance is in a very real sense everyone’s concern (to act within a legal and ethical framework, for example) and because entities organise themselves in differing ways in order to meet different governance demands. (Sometimes, admittedly, poor communication and an absence of leadership and/or ownership will be to blame.)

Recent surveys have indicated that in fact many do believe that one person or function is responsible or primarily responsible for good governance (though they are not always of the same mind as to who or what that person or function is!). Candidates include the following:

Board
Board committees
Chairman
Chief Executive
Company Secretary
Compliance department
External auditors
External counsel
Finance Director
In-house legal
Internal auditors
Non-executives
Risk Management department
Senior Independent Director
All employees, and all of the above
What do we as in-house lawyers mean by “governance”?

“Governance refers to the system and processes by which companies and other organisations are controlled. In the case of limited companies, boards of directors are responsible for the good governance of their companies. The board’s actions are subject to laws, regulations and the shareholders in general meeting.

The principles of good governance however guide all organisations, their officers and all their people – collectively and individually – on how to behave and how to discharge their obligations and responsibilities to a range of relevant stakeholders.”

There are thus many participants in the governance system, including in-house lawyers. This document is addressed to them.

What do you think? We invite you to reflect on this definition and have a go yourself. (Try to use less than 25 words).

What do you as in-house lawyer mean by “governance”?

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Do please use the Feedback and Further Guidance Form to pass on any thoughts you have to us.
Making sense of governance...
in the context of your own organisation

Take a moment to answer these questions:

By what criteria would you judge that your organisation is well or less well governed? (Would a layperson unfamiliar with your business readily accept these as valid and complete criteria?)

How does your organisation score against those criteria? (Are these scores improving, static or falling?)

What purpose does governance serve in your organisation? (What purpose(s) should it serve?)

Who bears responsibility? (Who should bear responsibility?)
Making sense of governance... as it applies to you as in-house lawyer

It has often been said of in-house lawyers that they need to wear multiple hats. We have tried to shed some light on this in the diagram below. Take a look. How would you characterise your role? Are some roles invidious? (Which?) Can you reconcile multiple roles? (How?)
Making sense of governance... in the context of your own role

Where does your governance role begin, and where does it end?

We predict that the debates about what corporate governance is and what purpose it serves will continue. But while they do, in-house lawyers need to be clearer about their role in their organisation’s governance effort. As a starting point, we suggest you complete this table.

Over and above your day job as an in-house lawyer (ensuring the delivery of appropriate legal support across the organisation, creative problem-solving, judging when external legal advice is needed, managing that process, and so on), to what extent do you have a responsibility (explicitly or tacitly) in these areas? 

If you are not responsible for these issues, who is? Where the responsibility is shared with others, are you clear where your role begins and ends? Where is the allocation of these responsibilities recorded? If they are not recorded, to what extent do you feel exposed as a result? If you are not clear where responsibility lies, do you feel that your organisation is exposed as a result?

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<td>Risk management generally</td>
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<td>Compliance and regulation generally (design programmes; periodic review; implementation; audit)</td>
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<td>Legal compliance (accounts, advertising/sales and marketing code compliance, competition compliance, contractual/tortious, data protection, environmental, health and safety, insurance, HR, IP, IT, litigation, product liability, real estate, risk management, solvency, tax)</td>
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<td>Ethics; code of conduct; whistleblowing</td>
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<td>Social responsibility</td>
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<td>PR and investor relations</td>
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<td>Reputation risk</td>
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<td>Crisis management; disaster recovery planning</td>
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<td>Monitoring emerging requirements and best practice</td>
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<td>Training on corporate governance (compliance and risk management); also induction</td>
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<td>Drafting governance policies and manuals</td>
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<td>First port of call on governance requirements</td>
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<td>Co-ordination of international governance requirements</td>
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Three perspectives on the new environment...

professional practice requirements

The Law Society’s guide to professional conduct confirms that employed solicitors owe the same duties as solicitors in private practice. Only when we analyse those duties and question how they might apply day-to-day do certain practical implications emerge – see, for example, the table on page 8 headed ‘Solicitors’ duties - a selection’.

In-house lawyers act as legal adviser to and employee of their company. (They also owe a duty to the court.) The essence of their independence is different to that of a solicitor in private practice: in-house lawyers are perceived to be on-the-same-side as well as on-the-spot. The physical boundaries between client and external law firm are absent.

In-house lawyers are distinctive in a more fundamental way – to give business advice may be their principal raison d’etre, and it is axiomatic (if not true in every case) that “the more senior the in-house lawyer, the less law he or she practises”. The lawyer in private practice should give commercial advice of course, but in the absence of express instructions there is no duty on him or her to advise on the client’s business affairs generally. Indeed there appears to be no duty even to advise the client on the wisdom of a transaction on which the lawyer is instructed.

This dual in-house lawyer role - legal adviser and business adviser - has caused consternation in the courts in recent months in the context of legal advice privilege. It becomes desirable, the House of Lords has said (in the Three Rivers case), to know this: which hat was an employed solicitor wearing when he or she spoke to a company executive in a given setting? In the language of the Three Rivers judgment, which spectacles was the in-house lawyer wearing?

The assortment of hats worn by in-house lawyers can be a considerable source of confusion:

• When Jim asks for your opinion in the boardroom and everyone turns to you, is the company seeking your strict legal opinion? As to what would be the “right” thing to do? Or is it what would serve shareholders’ interests best? Or is it what will keep Jim out of trouble? How will your answer be minuted? Even if you were not asked the question so directly, in what circumstances might you have felt under a positive obligation to speak up?

• When, at the coffee machine, Sheila asks for your take on some issue or other, the capacity in which you are asked or in which you respond (friend, company lawyer, adviser, conscience of the company, a fellow-employee who happens to have a legal qualification) may be equally unclear. To make it explicit may appear to be defensive, rude, politically incorrect, counter-cultural and/or not in your best interests. When you propose a given course of action and Sheila appears satisfied and walks away, advice has been given. But is it legal advice or business advice? Advice which she expects you to stand by? If you prefaced your comments with a disclaimer or added one as she left, were those accepted? Recorded? Have you advised Sheila in her personal capacity and in so doing have you extended to her a personal duty of care?

Lack of clarity as to your role is not just an academic or semantic concern. Informality may come at a cost while over-formality may make large parts of your role untenable.
Solicitors’ duties – a selection

• To observe the principles of professional conduct
  - this obligation prevails over your duty to your client.

• As an officer of the court, the solicitor owes a duty to the court as well as to his or her client.

• To carry out instructions received with diligence, exercising reasonable care and skill
  - irrespective of whether the solicitor is receiving payment for his or her services from the client or is acting voluntarily
  - whether or not the solicitor holds a current practising certificate.

• To advise in relation to matters which are ancillary to the instructions and which are a necessary and integral part of the transaction or matter
  - unless the retainer is specifically limited (or it is apparent to the solicitor that such advice is not needed by the client).

• To ensure that the client understands and consents to any actions which the solicitor proposes to take on the client’s behalf, and that the extent of the solicitor’s authority is clearly understood by both the client and the solicitor.

• To act in the best interests of the client by consulting with the client in all areas of doubt which do not fall within the discretion of the solicitor and by keeping the client informed as to the progress of the transaction
  - (in the absence of express instructions) there appears to be no duty to advise on the client’s business affairs generally
  - there also appears to be no general duty to advise the client on the wisdom of the transaction.

In addition:

• A solicitor has implied authority to bind his or her client
  - express authority should be obtained unless the matter is urgent and client’s consent cannot be obtained
  - if solicitors exceed their authority, they may be liable to a third party for breach of warranty of authority.

See also Rule 1 of the Solicitors’ Practice Rules 1990, which appears in full on page 22.
Corporate governance reports and pronouncements over the past decade – many though they are and from a wide variety of stakeholders too – have tended to gloss over the in-house lawyer role. There are no references to lawyers in the Cadbury report just as there are none to solicitors in Greenbury or to general counsel in Hampel (other than as a potential source of non-executive directors in other companies). The same is true of Turnbull, Higgs, Smith and the new Combined Code.

Contrast company secretaries whose role in corporate governance has evolved throughout the course of those reports and pronouncements and who are now held responsible under the Combined Code for “ensuring that board procedures are complied with”, “advising the board through the chairman on all governance matters” and (under the direction of the chairman) “ensuring good information flows within the board and its committees and between senior management and non-executive directors, as well as facilitating induction and assisting with professional development as required.”

At the same time, in-house lawyers lack the benefit of the types of organisation that exist elsewhere to aid fellow-participants in the arena of corporate governance, such as directors, shareholders, and company secretaries. ICSA is particularly commendable in this last respect.

That there is a lack of clarity then about the role of the in-house lawyer in this new, demanding corporate governance environment becomes more understandable. But at the same time, we are beginning to see more attention being paid to the in-house legal function when things go wrong. For example, an independent firm concluded that the profile of the legal team at one FTSE-100 company, large though it was, was inadequate to prevent governance failures occurring. Independent specialists, to whom such matters as monitoring companies’ governance have been outsourced by institutional shareholders this last year, are reported to have said that in-house lawyers will be targeted as part of their work. While the agencies say they do not have a set list of questions to put to general counsel, they warn that companies can expect the questions to be more detailed and tougher.

In 2004 the credit ratings agency Standard & Poor’s announced its intention to enhance its surveillance process to use a risk-based approach and determine where incremental governance reviews may be warranted. There appears to have been erroneous press commentary to the effect that S&P would actually evaluate the legal function. Among the risk factors that will be used to determine if incremental governance assessment is warranted are: the aggressiveness of the business model (and of legal, financial and tax structures) and the relative frequency of litigation and/or government or regulatory actions. Assessment would entail an examination of ownership structure and the influence of major shareholders; the external and internal audit process; and board effectiveness (particularly independent oversight of management and/or majority shareholders).

Stakeholder expectations of in-house lawyers are rising globally, and most prominently in the United States. Cultural and other differences exist of course between the two societies - among them the nature of governance scandals, applicable legislation, enforcement policy and so forth - but bearing in mind the internationalisation of governance issues, one cannot ignore here what is happening over there...
Three perspectives on the new environment... recent US headlines

With the increased internationalisation of governance issues in mind, we include on this and the next page reference to some recent US developments. They may not be directly appropriate to you, but they are no less thought-provoking for that:

Legal counsel are identified - along with boards of directors, accounting firms and shareholders – as participants in the governance of public companies with direct, formal governance responsibility. It is said that “this conception of the lawyer as a promoter of corporate compliance with law emanates from the basic values of the legal profession.” Recommendations are made which “will enhance the opportunity for the lawyer to be a more effective contributor to a workable system of checks and balances.” To wit:

“4. Providing information and analysis necessary for the directors to discharge their oversight responsibilities, particularly as they relate to legal compliance matters, requires the active involvement of general counsel for the public corporation.”

“6. The general counsel of a public corporation should have primary responsibility for assuring the implementation of an effective legal compliance system under the oversight of the board of directors.”

“7. Public corporations should adopt practices in which:
   a. The selection, retention, and compensation of the corporation’s general counsel are approved by the board of directors.
   b. General counsel meets regularly and in executive session with a committee of independent directors to communicate concerns regarding legal compliance matters, including potential or ongoing material violations of law by, and breaches of fiduciary duty to, the corporation.
   c. All reporting relationships of internal and outside lawyers for a public corporation establish at the outset a direct line of communication with general counsel through which these lawyers are to inform the general counsel of material potential or ongoing violations of law by, and breaches of fiduciary duty to, the corporation.”

“9. Engagements of counsel by the board of directors, or by a committee of the board, for special investigations or independent advice should be structured to assure independence and direct reporting to the board of directors or the committee.”

“12. Law firms and law departments should adopt procedures to facilitate and promote compliance with rules of professional conduct governing the representation of public corporations.”

From American Bar Association Task Force on Corporate Responsibility report, 31 March 2003 © 2003 ABA, reprinted by permission
“Over 80% of Corporate Directors... thought General Counsel have a great deal of responsibility in ensuring good corporate governance. This is an increase of almost 30% over last year’s findings of the same topic.”

Association of Corporate Counsel, ‘General Counsel as Risk Manager’ Survey, 2004

A US public company’s in-house lawyer has a statutory obligation to report “up-the-ladder” any violations of securities laws or breaches of fiduciary duty. Ultimately, if nothing is done, the lawyer must report to the SEC.

See Section 307, Sarbanes-Oxley.

“The trial is a rare example of an in-house lawyer being prosecuted for allegedly participating in corporate governance scandals. Many US attorneys believe prosecutors are pursuing the case as a warning to in-house lawyers at major corporations... But despite the publicity surrounding the case, many fraud specialists believe the case is unlikely to lead to prosecutors actively targeting in-house lawyers in governance scandals.”

From ‘D-day for ex-Tyco general counsel as jury retires for fraud verdict’, Legal Week, 15 July 2004. Subsequently, after the accused was acquitted, at least one commentator expressed the view that this US verdict would act as a deterrent to prosecutors trying to impose standards that are not clearly stated in law: “the standards expected of internal counsel had returned to normal” (Law Society’s Gazette, 29 July 2004).

The 2004 Federal Sentencing Guidelines (effective 1 November 2004) raise the bar for companies seeking to have compliance programmes that will be considered effective by the US Government and so have a bearing on appropriate penalties in the event of criminal conduct.

Sarbanes-Oxley, section 805, and Chapter 8 of the 2004 Federal Sentencing Guidelines
Best Practice Guidelines for In-House Lawyers in England and Wales

A. How adequately is your organisation configured to meet the challenge?
   A.1 Helping make sense of the governance challenge as it applies to your organisation
   A.2 Prioritising (and stakeholder buy-in)

B. Your role as in-house lawyer
   B.1 What is your role?
   B.2 Board representation (and board access)
   B.3 In-house lawyer as company secretary

C. How adequately is the legal function configured to meet the challenge?
   C.1 Profile
   C.2 Reporting lines - internally
   C.3 Reporting lines - externally
   C.4 Whistleblowing etc.
   C.5 Role in developing the culture
   C.6 Keeping yourself up-to-date
   C.7 Benchmarking

D. Delivering advice
   D.1 Clarifying who you are advising
   D.2 Legal, or business, advice?
   D.3 Privilege
   D.4 Other working practices
   D.5 Job-title

E. Personal considerations
   E.1 Conflict, and other professional issues
   E.2 Contract of employment
   E.3 Insurance
A. How adequately is your organisation configured to meet the challenge?

A.1 Helping make sense of the governance challenge as it applies to your organisation

A number of our in-house lawyer members have said to us that, from time to time, they feel under some ethical obligation to act - or that there is some tacit expectation that they ought to act - as the custodian or trustee of good governance within their organisations, or otherwise to stand in some quasi-fiduciary capacity in this area. Nowhere is this made explicit in common law, statute or professional rules. In our opinion, in-house lawyers should be cautious of taking on a self-appointed role (e.g. as “conscience of the company”) and similarly should be wary of allowing any like expectation to develop on the part of others.

We express this view for several reasons: because good governance is a responsibility to be shared among and required of all management teams; because it is everyone’s duty, whatever their status within an organisation, to work with the highest integrity and honesty; because the role may be one which - even if it had a commonly understood meaning - they may have neither the authority nor the resources to discharge; and because it may be a role which their employing organisation simply does not intend or wish them to assume.

Taking on the role of guardian of good governance within an organisation may have other adverse implications - it may lead to reticence on the part of businessmen openly to discuss difficult issues with the most appropriate officer of the company. It may also tend to the abdication of responsibility for ethical issues by others.

None of this is to deny that in-house lawyers will frequently be well-placed to help make sense of the governance challenge as it specially applies to their own organisations, both generally and in the context of specific decision-making. With the growing profile both of governance and of the in-house lawyer’s governance role, this contribution is likely to be called for to a greater extent in the future.

All organisations are different - what are the distinctive characteristics of your own organisation and, accordingly, what is the most fitting governance structure for it? This will change over time, rendering periodic reviews not only desirable but necessary. The more experienced in-house lawyers, especially the senior in-house lawyer, can take effective action to stimulate and structure a debate at the highest level, between directors, managers and other stakeholders, to resolve these questions.

A.2 Prioritising (and stakeholder buy-in)

The literature on corporate governance is sufficiently complex and overlapping without an additional report which offers only the counsel of perfection. We recognise that resources in-house are finite and that in-house lawyers tend to be among the busiest of managers, spread thinly to meet the demands of the executive. Pressures proliferate and not just in this area of governance – changing economic conditions, cost pressures, staffing levels, keeping on top of the workload, exceeding customer expectations, and facilitating legitimate ways in which your organisation can beat the opposition.

“In-house law is all about understanding what is a big risk and what is a little risk and allocating attention and money accordingly.” What are the material governance-related risks within your areas of responsibility? How likely are they to materialise? Are they periodically communicated to those to whom you report? Are attention and money allocated accordingly?

Stakeholder buy-in is vital. In-house lawyers are exposed on a daily basis to the risk that they get sucked into dealing with extremely urgent business issues at the possible expense of more strategically important matters. To what extent do you have comfort that your list of priorities in the area of governance is aligned to that of the board and/or relevant committees? On top of that, individual initiatives in which you are involved will carry a far greater chance of success if top-level support is actively manifested.
B. Your role as in-house lawyer

B.1 What is your role?

“Gone are the days where a general counsel’s remit could be neatly packed into a file labelled ‘legal’. The Shell report is evidence that the legal function’s responsibilities now extend far wider.”

When it comes to professional and ethical obligations, the commanding themes are clear enough: in-house lawyers must act in the best interests of the organisation which they represent, balancing the short and long term consequences of actions open to them, and they must be and be seen to be honest, responsible and capable. Their success depends not only on their legal, managerial and relationship-building skills but also on the acknowledgement by all within their organisation, and those interested outside the organisation, that they are committed to high standards of governance. In-house lawyers are expected to demonstrate, in the words of one commentator, “character, capability and judgement”; “integrity, independence, influence and insight” in the words of another.

In our view, difficulties are most likely to arise where confusion exists as to the allocation of roles in the governance arena. It is clear, at least in the US, that there is a mood to hold general counsel more accountable, to be vigilant and to a greater or lesser extent to be proactive in matters of governance.

Revisit the way in which you completed the table on page 6:

- If you are not responsible for these issues, who is? Where the responsibility is shared between you and others, are you clear where your role begins, and where it ends? Where are these responsibilities recorded? If they are not recorded, to what extent do you feel exposed as a result?

- If you are not clear where responsibility lies, do you feel that your organisation is exposed as a result?

We understand the concern that, in more closely defining one’s role, one might appear to be defensive or pernickety or reluctant to take on a new challenge. But failure to do so may come at a cost. And as you begin to define your role in corporate governance, others’ roles too may come into clearer focus. If you demonstrate to colleagues that their understanding of their own role is narrow (and possibly narrower than that likely to be adopted by other stakeholders in this new environment), they will come better to appreciate the contribution you are making.

B.2 Board representation (and board access)

The appropriateness of board representation for the in-house lawyer will vary from company to company and from candidate to candidate. Many in-house lawyers will embrace board representation and be alive to, and able to manage, any conflicts. A seat on the board affords advantages including a higher profile for legal and governance-related issues; an opportunity to contribute to the board’s thinking, and not merely respond to it; and a more perfect appreciation of the board’s views on a wide range of issues, which will inform subsequent decision-making. It is often argued that there is a risk, where an in-house lawyer joins the board, that his or her professional ethics and objectivity may thereby be compromised. Some in-house lawyers however will argue that conflicts are inherent in the role of director; why should in-house lawyers be any different?

This is not an issue where one can be prescriptive. But we do observe that for the senior in-house lawyer, even where board representation is not an option, access to the board is essential. This is in part a matter of compliance with professional standards:

A solicitor employed as the senior legal adviser of a company or a local authority must have direct access to the board or to the council and its committees.

1 A solicitor employed in this position should seek to ensure that his or her terms of employment provide for such access.

2 ‘Direct access’ does not mean that all instructions and advice must pass directly to and from the council, committee or board, but the solicitor must have direct access where necessary.

Guide Online, 4.08 (www.lawsociety.org/professional/conduct/guideonline)
B. Your role as in-house lawyer

But common sense also dictates that senior in-house lawyers’ effectiveness in making a contribution to governance-related issues will be greatly impaired if they are not in attendance at board (or committee) meetings. (Similarly, if they are excluded from parts of meetings.) The time may come to communicate these matters more insistently and perhaps more formally. A contractual right to “direct access” is one thing, but it came as little surprise when in a recent US survey conducted by the Association of Corporate Counsel, while 82% of general counsel felt that they should attend board meetings as a matter of course, only 57% of company directors shared this view. Put another way, in-house lawyers cannot be fairly held to account if the prevailing governance system at their organisation renders them powerless to contribute to the extent that they deem necessary.

Separately, there is an issue as to exactly when an in-house lawyer is obliged to draw the attention of the board and/or others to governance failings in an organisation. We comment on this further at C.4 below.

B.3 In-house lawyer as company secretary

Views differ as to whether it is appropriate for in-house lawyers also to act as company secretary at their respective organisations. A role at one organisation which is cost-effective and offers Mrs X ready board access in her capacity as joint in-house lawyer and company secretary may be regarded as undesirable in the case of Mr Y who would find himself under-resourced on both fronts.

It is however not just a question of resource. Issues can arise in practice analogous to those described on page 7 (uncertainty as to which hat you are wearing) and at B.2 above (Board representation) and D.5 below (Job-title), and the successful company secretary/in-house lawyer will need to develop strategies to address these issues. The situation will be further complicated if the company secretary/in-house lawyer is also a main board director.

Where the senior in-house lawyer and company secretary positions are not fused, there can again be scope for confusion as to who exactly is doing what. By way of demonstration, ICSA’s Guidance Note headed “Specimen Job Description for the Corporate Governance Role of the Company Secretary” entrusts to the company secretary the following tasks (among others):

- Keeping under close review all legislative, regulatory and corporate governance developments that might affect the company’s operations.
- To ensure, where applicable, that the standards and/or disclosures required by the Combined Code are observed, as well as compliance with the continuing obligations of the Listing Rules.
- To induct new directors into the business and their roles and responsibilities.
- To act as the “conscience of the company”.

As such, it is crucial that an in-house lawyer who is not the company secretary has arrangements in place to work closely with the company secretary to ensure a clear understanding of their respective responsibilities.
C. How adequately is the legal function configured to meet the challenge?

C.1 Profile

A theme of recent governance is that, in the current environment, the in-house legal team merits a higher profile within an organisation - while at the same time needing to be seen to be, and to be, an integral if not entirely integrated part of the business.

The issues will be different for every company. In one case, material disclosure and compliance issues were being raised at a high executive level without the involvement of any lawyer with securities law expertise. The system was not functioning properly, contributing to a failure to address these issues.

Where could this be said to be the case in your organisation? Where should you best sit within a company, in your capacity as an in-house lawyer, better to discharge your agreed corporate governance responsibilities? See B.2 above (Board representation).

More holistically, what would key stakeholders think of your organisation’s corporate governance system and the role and profile of the in-house legal team in it?

C.2 Reporting lines - internally

“Clarity on reporting lines needs urgent focus, especially where the balance is struck between the role of keeper of the conscience against commercial realities/interest of an organisation”, said Deepak Malhotra, Co-Chair of the C&I Group’s Corporate Governance Committee, in September 2003.

a. To whom should the senior in-house lawyer report?

It is clearly not practical in terms of line management for the in-house lawyer continually to report to all the directors. Where the senior in-house lawyer is also a director, this will be less of an issue but in other cases inappropriate reporting lines may serve to minimise a person’s authority, range of influence and effectiveness. Nor should reporting lines be confused with the ultimate line of authority.

Our survey suggested that the norm was for the senior in-house lawyer to report to the CEO. On a day-to-day basis, multiple reporting points may be appropriate, to different directors and internal clients in respect of different matters (and this is likely to be an increasing feature of UK practice following Three Rivers). The ability to leverage multiple contact points may indeed be essential to ensure that issues are addressed to the in-house lawyer’s satisfaction.

b. Where should you be based?

Should you be based at a central headquarters or locally, closer to the trading activities? There will be advantages and disadvantages:

Central
- Access to information and other resources
- Proximity to power base
- BUT
- Remote, inaccessible
- Loss of connection with the business

Local
- Accessible
- Proximity to local business
- BUT
- Risk of going native
- Harder to supervise
- Scope creep (with risk/perception of increased responsibilities)

c. Control over the legal function

A linked question is that of control exercised within the in-house legal department. We recommend that:

• The senior in-house lawyer should retain overall control of his or her department. This will be consistent with his or her departmental responsibility and will better enable him or her to deliver legal plans against strategy and to control departmental budgets, costs and targets.

• Clearly the larger the in-house team, the looser on average will be the senior in-house lawyer’s grip on each matter. He or she should be allowed to operate independently within an agreed strategic framework in deciding which matters most merit and therefore are to receive his or her detailed attention and input.

• Members of the legal team should adhere to a clearly stated policy as regards the required flow of information on different types of matter. Authority levels should be clearly communicated.

• Responsibility for the legal team’s performance review and salary and incentive structures should lie with the senior in-house lawyer, within a framework agreed by the board. Input on their performance should be sought from internal clients in advance of review meetings.
C. How adequately is the legal function configured to meet the challenge?

- Responsibility for the senior in-house lawyer’s performance review and salary and incentive structures should lie with the board or where appropriate the remuneration committee. Input on his or her performance should be sought from directors, internal clients and team members, in advance of review meetings.

d. To whom should directors and executives address legal/governance concerns?

It should be periodically emphasised to employees enterprise-wide that concerns relative to the remit of the in-house legal team should be raised with them as appropriate. A written policy may be helpful, aligned to any whistleblowing arrangements which are in place (see C.3 of the Combined Code, which provides that a listed company’s audit committee should review arrangements by which staff of the company may, in confidence, raise concerns about possible improprieties in matters of financial reporting or other matters). The important point is that directors and managers should feel under an obligation to disclose to the senior in-house lawyer information relevant to his or her responsibilities.

e. To whom should in-house lawyers report their concerns?

Within the in-house legal team, in order to remove any reporting ambiguities, all lawyers should be unambiguously instructed to report any matters of concern to the senior in-house lawyer (save of course where the concern relates specifically to the senior in-house lawyer). Remember also, in this context, that an employed solicitor is answerable in conduct for the acts of staff assisting in his or her practice as a solicitor.

C.3 Reporting lines - externally

External lawyers should be left in no doubt as to their reporting responsibility in respect of governance matters – concerns should be raised with the senior in-house lawyer direct. This may be addressed by individual terms of engagement/business, but the existence and purpose of such a requirement should be regularly communicated by the client partner at the external law firm to his or her dedicated client team (with an appropriate follow-up confirmation to the senior in-house lawyer).

Views differ as to whether it should always be an in-house lawyer who instructs external counsel. Some conclude that one lesson of the Three Rivers judgment is that companies should limit the power to instruct external counsel to in-house lawyers on the basis that failure to keep track of which employees are instructing external counsel could jeopardise legal advice privilege. See D.3 below. However it is also critical to recognise that this puts additional demands on the legal team, especially one that is under-resourced. The senior in-house lawyer will be best-placed, within a framework agreed by the board, to judge, fix and communicate an appropriate policy as to who is empowered to instruct external law firms. Where it is right for the business that other professional colleagues instruct direct, the in-house lawyer’s role is to provide a sensible framework in which this can happen.

C.4 Whistleblowing etc.

Professional standards in the US introduced in 2003 (section 307, Sarbanes-Oxley) require certain attorneys - including in-house lawyers - to report material violations of the securities laws or of fiduciary duty to the company’s chief legal officer or chief executive officer and, if they do not appropriately respond, to another committee of independent directors or to the full board. These rules have proved highly controversial. They have no direct counterpart in England and Wales. Nevertheless, a practical application of the solicitor’s general duties may well in appropriate circumstances be to require him or her to draw the attention of the board to governance failings which he or she observes within the organisation. Note that the solicitor’s duty of confidentiality to his or her client, at least in so far as the Law Society’s professional practice requirements are concerned, does not apply to:

- information acquired by a solicitor where he or she is being used by the client to facilitate the commission of a crime or fraud, because that is not within the scope of a professional retainer. If the solicitor becomes suspicious about a client’s activities the solicitor should normally assess the situation in the light of the client’s explanations and the solicitor’s professional judgement.

Guide Online, 16.02 (www.lawsociety.org/professional/conduct/guideline)

Even absent a formal whistleblowing system, an in-house lawyer may decide to escalate, within the company, concerns he or she has which are material and left persistently unaddressed. To whom such concerns should be addressed – line manager, individual director, company
secretary, board or board committee – will depend very much upon the circumstances. In very exceptional cases, where the corporate response remains inadequate, the in-house lawyer may be left with no option but to resign. It would however be far more common for the in-house lawyer involved to be working together with a responsible management team, and within a sensible timeframe, to analyse the problem, fix the issue and take such steps as were necessary to make sure that it did not recur.

In this context it is unfortunate that the Employment Rights Act 1996, as amended in 1998, may be said to put in-house lawyers at a disadvantage. Public Concern at Work, an independent authority on public interest whistleblowing, have brought attention to an “unwarranted and unjustified side effect” as a result of the way in which the legislation defines protected disclosures, and has called for an amendment to the legislation “so that the raising of concerns about wrongdoing within the client-lawyer relationship (i.e. within the law firm or with the client) are protected... There are sound ethical and public interest reasons why lawyers should be protected under [the Public Interest Disclosure Act 1998] for raising concerns where privilege is not breached”. For more information, see PCAW’s website, www.pcaw.org.uk.

The in-house legal community should also inform themselves as to their responsibilities under the Proceeds of Crime Act 2002 (POCA), the Terrorism Act 2000 (TA) and the Money Laundering Regulations 2003 (2003 Regulations). In-house lawyers are clearly subject to the general law enshrined in POCA and TA, while only those in “the regulated sector” as defined are required to (among other things) appoint a nominated officer and comply with the notification requirements under POCA. The definition of “regulated sector” (see Regulation 2(2), 2003 Regulations and Schedule 9, POCA) is a broad one.

C.5 Role in developing the culture

With improved visibility, the legal function will be well-placed proactively to identify participants’ training needs in the field of governance and, within its area of responsibility and where it is empowered to do so, to devise or procure training programmes to address those needs. The subject might be legal or regulatory changes, compliance or ethical issues, perhaps according to a rolling agenda throughout the year.

Training sessions may also be used to underpin the organisation’s governance system and to demonstrate how it is and should be functioning. We emphasise that this is an area in which the in-house lawyer can make a valuable contribution. But he or she is not in a position to compel. Ultimately the responsibility for setting a healthy governance culture, underpinned by training and compliance programmes, is one for the board or other governing body.

C.6 Keeping yourself up-to-date

Governance developments are taking place at a very rapid rate. Professional development is a must-have and taking action to address a training need should be seen as a strength and not a weakness.

Some organisations have been able to establish a centre of excellence in the governance arena, designating the legal team as an in-house resource. In other cases, it is the company secretariat that takes the lead, or a combination of the two. In any event, this requires a sizeable investment, on both the individual’s and the corporate’s parts. It is one that demands a SMART action plan, with its own budget.

Moreover, irrespective of the level of resource committed to this issue, each organisation should have a system of recording and capturing governance-related know-how. It is of course unreasonable to expect that every company will have available to it a perfect, complete and up-to-date corporate governance knowhow base; resources are finite and are not solely at the disposal of the in-house lawyer. At the least, know-how which the organisation needs should not depart because a key employee does.

C.7 Benchmarking

In-house lawyers agree that staying in touch with peers in other organisations is of great benefit in the new environment. A single blueprint is not possible. Networking sessions such as those frequently provided under the auspices of the C&I Group allow in-house lawyers, in “Chatham House” conditions, to monitor both emerging requirements and best practice.

Initiatives such as those described in this document involving Standard & Poor’s or other commercial organisations may increasingly offer the opportunity to benchmark the way one operates with others.
D. Delivering advice

D.1 Clarifying who you are advising

In-house lawyers assume a unique position in their organisations. They want to work closely with business managers to develop the potential of the business and, knowing it intimately and from the centre, help provide a compliant framework to make this possible. As an in-house lawyer, you need your internal customers to be abundantly clear that “your client” is the company, independent of the personal interests of its directors, officers and employees. Directors may rely on your advice but only in their capacities as officers of the company. If they need separate advice as to their personal positions, they should be advised to seek it from an external source. The manner in which you communicate this fundamental principle is for you to decide, but no director, officer or employee should be left in any doubt.

Sometimes the warning bells will sound relatively clearly, for example where a matter is of obvious significance, or where a conflict has arisen, or where the substance of the advice sought relates solely or exclusively to a colleague’s personal position. At the earliest possible stage, conflict and confidentiality issues should be highlighted and appropriate action taken.

D.2 Legal, or business, advice?

We recognise that it is sometimes difficult to identify when a given in-house lawyer’s opinion is in the nature of business or legal advice. The two are often intertwined. Moreover the recent Clementi Report amply demonstrated a good deal of variety in the definitions of “legal services” (see Chapter E, paras. 7-13). The distinction has become of increased importance following Three Rivers, since legal advice privilege serves to cover certain types of communication between lawyers and their clients whereby legal advice is sought or given. “That there must be a ‘relevant legal context’ in order for the advice to attract legal professional privilege should not be in doubt”, said Lord Scott of Fosgate, adding that:

if a solicitor becomes the client’s ‘man of business’, and some solicitors do, responsible for advising the client on all matters of business, including investment policy, finance policy and other business matters, the advice may lack a relevant legal context.

All or nearly all opinions sought from an in-house lawyer will contain elements of business advice and/or be informed by or influenced by that in-house lawyer’s opinion and experience as a man of business. It follows that the giving by in-house lawyers of advice rooted in an understanding not just of “the business” but of business generally is to be encouraged – it adds value; it encourages management to respect in-house lawyers’ opinions (and to enlist their help to a greater extent than they might otherwise, and on a wider variety of matters); and it paves the way for a more favourable reception should they need to submit more strictly legal opinions.

That said, the in-house lawyer does need to stay alive to the distinction between business and legal advice, in part for reasons of privilege (for more detail on this, see D.3 below) and in part because it may not be in the in-house lawyer’s interest that colleagues rely on comments which were effectively proffered as good business sense (or even common sense) as if they had the character of robust and definitive legal advice.

D.3 Privilege

In Three Rivers, the House of Lords held that presentational advice and assistance provided by solicitors in the context of a government inquiry did establish the type of professional relationship between solicitor and client that attracted legal advice privilege. This somewhat restored in-house lawyers’ belief in the extent of privilege, which had been shaken by an earlier Court of Appeal ruling in the same case. The House of Lords endorsed the approach in Balabel v Air India [1988] Ch 317 and, in particular, the observation that “legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context”.

The Lords held further that legal advice privilege attaches to advice and assistance in relation to both private and public law rights, liabilities and obligations. Communications in relation to company law, family, tax, inheritance, conveyancing and other private law matters are privileged, as are client/lawyer communications in relation to such things as planning inquiries, coroner’s inquests and statutory inquiries or ad hoc inquiries, where an individual or corporation may believe itself to be at risk of criticism. The skills of professional lawyers when advising a client on what evidence to present and how best to do so are “legal skills being applied in a relevant legal context”. Privilege should attach whenever those skills, in that context, are brought into play.
D. Delivering advice

However, legal advice privilege may not apply where a lawyer becomes the client’s “man of business” responsible for advising on all matters of business, including investment policy, finance policy and other business matters. Advice in relation to such matters will not attract privilege if that advice does not relate to the rights, liabilities, obligations or remedies of the client, either under private or public law.

Three Rivers is a very recent decision, with significant implications for in-house lawyers in many areas including governance. Organisations must continue to be very wary as to how, and through whom, they seek legal advice. This applies just as much when advice is being sourced internally as externally. Consider the following to help ensure that legal advice privilege does attach:

- Identify at the outset who the internal client is for the purpose of seeking the legal advice in question. It is likely that this will be the person or persons who actually communicate with the lawyer and who make decisions upon the advice to be sought and received. If the communicator with the lawyer is not the same person as the relevant decision maker, then you could have a problem.

- Once the client is identified, do not allow the provision or receipt of information to, or from, legal advisers to be delegated to others.

- Be careful how information is disseminated internally and externally. If it is disseminated widely there is again a possibility that legal advice privilege will be lost.

- Consider the greater use of “litigation privilege” when litigation is reasonably in prospect. It can cover communications with a third party so long as the dominant purpose of the communication is that there is an intention it be put before the lawyer.

- Avoid making manuscript amendments in the margin of documents or correspondence, as these may not be privileged.

- Where legal advice is obtained, any internal assessment of that advice may not be privileged, so consider how it is recorded. It may be sensible for all initial assessments and summaries to be conducted by an in-house lawyer before circulation to internal clients.

In-house lawyers will wish to ensure that fellow-employees are aware of these pitfalls, with respect to both internal communications and those with outside parties.

D.4 Other working practices

a. Memos and e-mails

In-house lawyers acquire over time a refined sense of when, what, how and why things need to be committed to writing (and circulated). Their judgement in this context needs to be informed by considerations of their employer’s best interests, the smooth conduct of its business and issues relating to privilege as well as enlightened self-interest. The bottom line is that, as an in-house lawyer, you need to be clear about what purposes are fairly being served by committing thoughts to writing (and circulating them).

Where you are going into print, you will be using your words carefully. Do you mean ‘opinion’, ‘recommendation’, or ‘view’? Where you say something ‘should’ be done, do you specify why? E-mail presents new ways of getting into hot water, and recent experience suggests that lawyers are not only not immune from e-mail abuse but actually may be disproportionately inclined to it! An in-house lawyer should certainly be a member of any working party reviewing an organisation’s protocol on the use of e-mail and other technologies.

All communications relating to legal advice between a client and its lawyer, whether in-house or external, should be clearly marked ‘Legally Privileged’. This practice could be devalued however if used indiscriminately, and the courts will consider the dominant purpose of the communication when determining whether privilege does in fact attach.

b. Cautionary language

In select cases, cautionary language should be considered putting it beyond doubt:

- who you are advising and in what capacity;

- that you are advising the recipient in his or her capacity as an executive of the organisation and in no other capacity;

- the facts on which your advice is based;

- the limitations to which your advice is subject; and

- if you are copying your advice to colleagues the reasons why, in order to deflect any argument that by so doing you are waiving privilege.
D. Delivering advice

c. Compliance reports

Periodic reports by general counsel (for internal management consumption) on their company’s compliance activities are becoming the norm in the US. Would they complement your organisation’s compliance programme?

D.5 Job-title

For a variety of reasons, in-house lawyers have differing job-titles: examples are General Counsel, Head of Legal, Solicitor, Legal Counsel and Legal Adviser. In the current context - particularly when combined with ‘Compliance’, ‘Governance’ or ‘Regulatory’ - your job title may be a factor influencing how others perceive your role. It is worth periodically considering whether your title accurately describes and communicates what it is that you do.

If your designation describes more than one role, is it always clear in which capacity you are acting? Consider dropping the non-legal title when you are giving purely legal advice, and vice versa.

You should also make sure that your function is accurately stated, for example in your company’s annual report and accounts or other public statements.
E. Personal considerations

E.1 Conflict, and other professional issues

Rule 1 of the Solicitors’ Practice Rules 1990 bears repeating:

A solicitor shall not do anything in the course of practising as a solicitor, or permit another person to do anything on his or her behalf, which compromises or impairs or is likely to compromise or impair any of the following:

(a) the solicitor’s independence or integrity;

(b) a person’s freedom to instruct a solicitor of his or her choice;

(c) the solicitor’s duty to act in the best interests of the client;

(d) the good repute of the solicitor or of the solicitor’s profession;

(e) the solicitor’s proper standard of work;

(f) the solicitor’s duty to the Court.

In the current context, in-house lawyers should be alert to the potential for conflict. Concerns may arise outside the context of transactions in which you are involved directly (as was alleged to be the case with certain Enron in-house counsel). In the United States an ABA task force has identified various pressures on in-house lawyers – including the desire to advance within the corporate executive structure – that “may induce lawyers to seek to please the corporate officials with whom they deal rather than to focus on the long-term interest of their client, the corporation”.vii

To do your job to the best of your ability, as an in-house lawyer you need a thorough understanding of your client’s objectives. This means close involvement with directors and other managers, with whom a constructive and collaborative relationship is also necessary. At the same time, the in-house lawyer must retain the professional detachment that allows him to recognise and point out issues of (for example) legal compliance, even at the risk of being perceived as unduly pessimistic or obstructive.

Remember Rule 1. If your own independence is or is liable to be compromised, you will need to take action accordingly. The course of action you prefer will vary according to the circumstances but there are some things you can think about in advance. In a given transaction or implementation programme for example, should you be proposing milestones at which critical legal or ethical issues will be re-addressed and/or escalated and action taken as necessary (e.g. sanity checks; independent advice; the involvement of external law firms)? This is in everyone’s interests – to avoid not merely impropriety but also the appearance of impropriety. Would a policy on how to deal with actual, potential or perceived conflicts and different methods of addressing them be valuable? Might it reinforce among your colleagues the unique position which you and other team members are in, and that compliance with your professional obligations is paramount?

Where you accept for example certain appointments, should it be expressly on the basis that if at any time you become concerned that continuing in that position is or may be incompatible with your professional obligations, you are free to remove yourself in whatever way you reasonably see fit? Can you pre-agree a “Plan B” in such a case?

Sometimes it helps just periodically to assess where you are susceptible to possible conflict or undue pressure, and to re-assess how that might be regarded by other stakeholders. Experience suggests that the sooner you identify and begin to handle this sort of situation, the less awkward life is liable to become.

E.2 Contract of employment

It goes without saying that your role should be reflected properly in your contract of employment, and addenda made as necessary. It may be that the in-house lawyer is given/accepts responsibility for ‘compliance’ or ‘control issues’ without adequate thought being given to the possible implications or inferences that might be drawn.

Change is constant. What is important is that you have a set of formal, departmental objectives agreed and reviewed periodically which are tied in to resource-allocation, your appraisals and reward structures. Your contract of employment and in particular your job description should be reviewed periodically as roles and objectives consensually change. See also B.2 (direct access to the board) and D5 (Job-title).
E. Personal considerations

E.3 Insurance

The potential exists for claims against in-house lawyers personally from one or more of the following:

• their employers;
• directors and officers of their employers, and fellow-employees, in their personal capacities; and
• other third parties (including shareholders, creditors and regulators),

in the latter two cases in circumstances where the in-house lawyer may have extended a personal duty of care to them. While employers have not historically tended to pursue employees and it will be rare indeed that the in-house lawyer finds himself or herself liable to other third parties, the possibility nevertheless exists that in certain circumstances liability might arise. And even if the claim is ill-founded, the in-house lawyer will incur costs defending proceedings.

Insurance cover may or may not avail the in-house lawyer in this event. The in-house lawyer should make enquiries.

Indemnification might also be considered in appropriate cases, that is to say a contractual indemnity secured in favour of the in-house lawyer whereby the employing organisation agrees to protect the lawyer from and against any claims which arise out of the provision of advice offered in good faith. In the case of directors (contrast, from April 2005, company secretaries), care will need to be taken to ensure compliance with sections 309A/310 Companies Act 1985, which render certain provisions protecting directors from liability void.

In this complex area it may be possible for you to seek professional advice, where appropriate at your employer’s expense. We recognise there may be some sensitivities in this area, but it may be a suitable option at the right time.
Summary

1 Governance refers to the system and processes by which companies and other organisations are controlled. The principles of good governance guide organisations, their officers and all their people on how to behave and how to discharge their responsibilities to a range of relevant stakeholders.

2 In-house lawyers are one of many participants in the governance arena. Because of their position and training and the multiplicity of duties they have (and may be perceived by others to have), their role is a unique one, and resists easy categorisation.

3 Unlike other participants in the sphere of governance, in-house lawyers have received little attention in the various corporate governance codes and reports. Every in-house lawyer needs to be as clear as possible about the governance role he or she has. You arrive at this:

- first by clarifying the governance regime applicable to your organisation. This will typically be a function of law, regulation and stakeholder expectation; and

- secondly by articulating, in a dialogue with your managers and/or the directors, your individual governance role or mandate.

The exercise on page 3 invites you to reflect on what governance means. Subsequent exercises are designed to help you better understand:

- in the precise context of your own organisation, the criteria by which it might be considered well or less well governed, and who actually bears responsibility for good governance (see page 4); and

- relative to your own situation as in-house lawyer, where your governance role begins and ends (see page 6).

4 The distinctive position occupied by in-house solicitors in England and Wales arises in part from the professional practice requirements to which they are subject, which are discussed on pages 7 and 8. Recent developments in the United States are included (pages 10 and 11) to give an international perspective.

5 All organisations - and all in-house lawyers - are different. Consequently our guidelines need to be applied flexibly. They address:

- how adequately your organisation is configured to meet the governance challenge (A.1 - A.2);

- your precise role as in-house lawyer (whether or not you are also director and/or company secretary) (B.1);

- the advantages of board representation for in-house lawyers, and the imperative of board access (B.2);

- the position of an in-house lawyer who is also company secretary and, where the position is not fused, the relationship between the two (B.3);

- a range of practical matters affecting the in-house legal function, including:

  - the importance of an adequate profile for the team, underpinned by appropriate authority levels (and not undermined by inappropriate reporting lines) (C.1 - C.7);

  - best practice for the delivery of advice, including clarifying who you are advising, whether your advice is likely to attract privilege and related working practices (D.1 - D.5); and

  - personal considerations affecting you as an in-house solicitor (including professional issues; your contract of employment; and liability insurance) (E.1 - E.3).

6 It is vital that this document continues to reflect the views of our in-house lawyer members. Your feedback is critical. Where could our Best Practice Guidelines be improved? How can these Guidelines better serve you? You may use the Feedback and Further Guidance Form provided as an insert to this document and post or fax it to us, or you can complete the same form and submit it online, at www.cigroup.org.uk (corporate governance section).
Clementi Report

company
Where our comments are confined to an organisational subset – for example, listed companies – we make that clear. Governance affects every organisation and every in-house lawyer in a unique way; in this area, one size emphatically does not fit all. However our observation would be that in-house lawyers in all sorts of organisation, whether or not limited companies, may benefit from adopting some of the attitudes and policies which are discussed in this document.

Combined Code
The Combined Code on Corporate Governance (July 2003); see www.frc.org.uk. The code is on its face applicable only to listed companies, but has been adopted more widely (often with modifications).

employed solicitor
An employed solicitor is defined by the Law Society as “a solicitor practising as a solicitor in the employment of a non-solicitor”. If a solicitor is not practising as a solicitor, he or she will not be subject to the rules of conduct governing practising solicitors, but may still be disciplined for conduct unbecitting a member of the solicitors’ profession. See Guide Online, 4.01, para. 1.

Employed Solicitors Code
The Employed Solicitors Code 1990, last amended 7 October 2004. The code sets out the principles to be followed and the conditions which must apply whenever an employed solicitor, as part of his or her employment, acts for a person other than the employer.

Guide Online
Guide Online is the definitive resource for solicitors’ ethics and professional conduct (pending introduction of the new Code of Conduct, which is expected to come into force towards the end of 2005). It contains the text of The Guide to the Professional Conduct of Solicitors (eighth edition, 1999) and to this are added new conduct rules published since the Guide (that is, since August 1999) and other relevant conduct guidance. See www.lawsociety.org.uk/professional/conduct/guideonline

ICS

Sarbanes-Oxley
The US Sarbanes-Oxley Act of 2002, enacted on 30 July 2002 as a reaction to scandals such as those at Enron, WorldCom and Tyco.

senior in-house lawyer
By this we mean the in-house lawyer having general supervisory responsibility for the legal affairs of a company; the ‘Head of Legal’, or what in the United States would be termed ‘general counsel’ and increasingly CLO (Chief Legal Officer).

Three Rivers
Appendix 2 - Further reading

1. Sir Adrian Cadbury, Corporate Governance and Chairmanship: A Personal View, Oxford University Press, 2002

2. CBI and Wragge & Co LLP, A Practical Guide to the Combined Code on Corporate Governance, 1 June 2004


5. The ICSA Company Secretary's Handbook (5th Edition) Currently available to subscribed C&I Group members for the discounted price of £15 including postage (RRP £39.95)

6. Christine A Mallin, Corporate Governance, Oxford University Press, 2004


## Appendix 3 - Relevant websites

The following is a short selection from what could easily become an intimidating list:

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<tr>
<th>URL</th>
<th>Description</th>
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<tr>
<td><a href="http://www.abanet.org/buslaw/corporateresponsibility">www.abanet.org/buslaw/corporateresponsibility</a></td>
<td>This is the website of the American Bar Association’s Task Force on Corporate Responsibility.</td>
</tr>
<tr>
<td><a href="http://www.ecgi.org">www.ecgi.org</a></td>
<td>The website of the European Corporate Governance Institute. Among other things, it maintains an index of governance codes worldwide, including thirteen entries from the United Kingdom.</td>
</tr>
<tr>
<td><a href="http://www.fast.org.uk">www.fast.org.uk</a></td>
<td>This is the website of the Federation Against Software Theft. Fast Limited has been established to address the issue of compliance and promote the legal use of software.</td>
</tr>
<tr>
<td><a href="http://www.gcgf.org">www.gcgf.org</a></td>
<td>This is the website of the Global Corporate Governance Forum: “Our mission is to help countries improve the standards of governance for their corporations, by fostering the spirit of enterprise and accountability, promoting fairness, transparency and responsibility”.</td>
</tr>
<tr>
<td><a href="http://www.icgn.org">www.icgn.org</a></td>
<td>Website of the International Corporate Governance Network, which exists to exchange corporate governance information internationally, raising corporate governance standards throughout the world.</td>
</tr>
<tr>
<td><a href="http://www.icsa.org.uk">www.icsa.org.uk</a></td>
<td>ICSA’s website provides a wide range of information on issues relating to good corporate governance and administration.</td>
</tr>
<tr>
<td><a href="http://www.thecorporatelibrary.com">www.thecorporatelibrary.com</a></td>
<td>The Corporate Library is an independent investment research firm providing corporate governance data, analysis and risk assessment tools.</td>
</tr>
<tr>
<td><a href="http://www.cigroup.org.uk">www.cigroup.org.uk</a></td>
<td>Website of the Commerce &amp; Industry Group, offering resources and membership benefits, as well as a dedicated Corporate Governance page.</td>
</tr>
<tr>
<td><a href="http://www.wragge.com">www.wragge.com</a></td>
<td>Website of Wragge &amp; Co LLP. Click Legal Advice followed by Corporate Governance, Compliance and Risk Management for details of relevant experience, newsletters, briefing notes and events.</td>
</tr>
</tbody>
</table>
The C&I Group would like to extend its thanks for past and continuing services to the current members of the Corporate Governance Committee. They are:

Ann Page / Law Book Consulting
Deepak Malhotra / Interbrew UK
Tony Brierley / 3i Group plc
Bruce Macmillan / Dell EMEA
Richard Tapp / Carillion plc
Maxine Chow / LGC Group Holdings plc
Adam Eades / Euronext.LIFFE
Jasan Fitzpatrick / Northern Rock plc
David Haig / UFJ International plc
Alison Dillon / Unilever PLC
Colin Leaver / Simmons & Simmons
Simon Graham / Wragge & Co LLP

The Committee would also like to acknowledge the excellent external support it has received in particular from:

- Simon Graham at Wragge & Co LLP for his commitment and endeavour in the preparation of these Guidelines;
- Janet Gaymer and Charles Mayo of Simmons & Simmons for their key support in launching the ‘Scapegoat or Saviour?’ programme;
- Neil Gerrard of DLA Piper for his support; and
- Sue Blake, PR Consultant, for her enthusiasm and media coverage of this initiative.

We would also to thank

- the Unincorporated Association (recognised by the Law Society), the Regions, the Board of C&I Group Services Limited, and the C&I Central Office for their collective support; and
- the Guidelines sub-group of the committee namely Bruce Macmillan and Alison Dillon for their dedication and detailed guidance and comments

and last but not least our Co-Chairs for ensuring we stayed on track and added value to our members in this important area of our daily working life.

Most of all the Committee would like to thank all our unsung C&I members who participated in the ‘Scapegoat or Saviour?’ consultation, survey and meetings during 2003/4 – over 250 of you – impressive! We hope that you will take an opportunity to continue this involvement by meeting us to discuss our Guidelines during the coming year and utilising the feedback form provided as an insert. We would really welcome your feedback.
Disclaimer

The information in this document is given in good faith with the intention of furthering the understanding of its subject matter. Whilst the Corporate Governance Committee of the Commerce & Industry Group (“Committee”) believes that it is accurate and up-to-date as at the date on which it was approved for publication (11 March 2005), none of the Committee, the Commerce & Industry Group, the Law Society of England and Wales, Wragge & Co LLP or any of their respective members or employees accept any liability:

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The views and opinions expressed in this document are not necessarily to be attributed to the organisations represented by Committee members.
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The Commerce & Industry Group is a recognised Law Society Group run by in-house solicitors – who give their time freely – to provide services to its members.

The C&I Group has established a dedicated Committee to deal with a range of corporate governance issues, and is committed to addressing them in order to support its membership community.

The Corporate Governance Committee’s activities in 2005-6 are sponsored by Wragge & Co LLP.

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Reconciling the Irreconcilable?

Best Practice Guidelines for In-House Lawyers in England and Wales
in the new corporate governance environment
C&I Group and Wragge & Co LLP

In what ways could our guidelines be improved in subsequent versions?

Do you have specific, practical issues we might be able to help you with?

Name (optional): ............................................................................................................................................................... 
Organisation (optional): .........................................................................................................................................................

May we contact you?  If so, how?

Telephone: ........................................................................................................ E-mail: .................................................................

C&I Group.................................................................................................................. Wragge & Co LLP (Corporate Governance Team)
Woodbank House.................................................................................................................. 55 Colmore Row
80 Churchgate, Stockport................................................................................................. Birmingham
Cheshire, SK1 1YJ.............................................................................................................. B3 2AS
or fax to: 0161 968 1851

The C&I Group and Wragge & Co LLP will only use the information you supply for the stated purposes, ie. to hear your views and take them into account in subsequent versions of our guidelines or to contact you if you have indicated you would like us to do so. We will contact you only if you provide a telephone number / e-mail address for the purpose.