

2.4 The Ethical Environment in Different Areas of Law and Types of Legal Practice

There are many types of law practice. Table 2.2 describes the options that may be open to you and their individual ethical challenges.

Table 2.2. *Ethical challenges and opportunities faced by different types of legal practice*

Broad descriptions of lawyers' work	Organisational categories and types of legal practice – plus the ethical opportunities and challenges
Criminal defence lawyers	<ul style="list-style-type: none"> • You will concentrate on defences and pleas of 'guilty' in local and regional courts, rarely in national courts. • You will have a heroic role and do much to safeguard the Rule of Law. • You must withstand client pressure to bend truth and hide guilt. You will need to understand detailed advocacy rules about what you can say and do, for example, in the PRC: • the rule that allows you to keep confidential what your client tells you, except where the information compromises national or public security or endangers personal safety (Article 6, Rules on the Handling of Criminal Cases^a), • the rule that allows a law firm to represent two criminal defendants in the same case, but tries to manage the conflict of interest by appointing different lawyers for each defendant (Article 13, Rules on the Handling of Criminal Cases^b) • will you feel able to ask if your client has made a confession after being tortured (Article 22(9), Rules on the Handling of Criminal Cases^c) • are the 'compulsory measures' which restrict your client's liberty prior to trial, fair and reasonable? (Article 62, Rules on the Handling of Criminal Cases^d) • You will need to deal with extreme Public Procurator pressure on your client to plead guilty to small charges to avoid trial on more serious matters.

Table 2.2. (*cont.*)

Broad descriptions of lawyers' work	Organisational categories and types of legal practice – plus the ethical opportunities and challenges
Family lawyers	<ul style="list-style-type: none"> • Sometimes, you will have doubts about the legality of sources of funds that clients intend to use to pay your legal fees. <p>See Chapter 5 for more information.</p>
	<ul style="list-style-type: none"> • You are a caring and often compassionate person, but you also prefer to find a small team of supportive colleagues to work with. • You will need high-level emotional intelligence and resilience in order to deliver your best work; this is highly satisfying for an appropriate personality motivated by compassion and a love of justice. • You must withstand clients' pressure to 'hide' assets such as land or shares, or to be aggressive and to delay settlement as a punitive strategy in dealing with their estranged partners. <p>See Chapter 7 for more information.</p> <ul style="list-style-type: none"> • You will receive client pressure to 'sue the bastard' immediately. Resist this pressure and divert your client into alternative dispute resolution. • Your clients have little understanding of the time needed to prepare a case and, owing to their understandable stress, can project their grief, anger and frustration on to you in complaints about delays and overcharging. • You must be verbally clear and confirm in writing the level of your likely fees, in advance of commencing any work. • You will need to deal with pressure to reduce fees where your clients are poor. <p>See Chapter 5 for more information.</p> <ul style="list-style-type: none"> • Threats of violence are sometimes received from ex-partners of clients or made by clients against the lives of the other party, or their own lawyer. Very occasionally, these threats are acted upon. If you receive a threat, you will have to consider whether to report it.

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General practitioners (in land transfers, minor criminal cases, civil debt, family law, minor civil cases, wills and estates)	<ul style="list-style-type: none"> • General practice (GP) lawyers are often highly experienced, wise and well respected. • As a conscientious GP lawyer, you can develop a wide and deep knowledge of your clients as individuals and make a major contribution to their success and welfare, but your own financial future may be stronger as a GP if you work in a regional centre or rural area where there are few other lawyers. • Fees received in city general practice can be too small to cover your costs of practice, with capacity to make only a modest income. See Chapter 7 for more information. • The economics of city practice mean that GPs do best in work areas where there is limited competition and longstanding reputations are intact, but this can lead to conflicts of interest arising from pressure to act for both sides in some property and commercial transactions. • However, in rural areas you can be isolated and there can be problems in staying up to date with the law. Depression can be a problem. • More disciplinary prosecutions occur in this area than for other categories of lawyer, for a range of offences surrounding stealing clients' money (from clients' trust accounts), overcharging, delay and mistakes leading to client financial loss.
Civil litigators; commercial and corporate/ transactional lawyers; corporate 'enablers' – large and very large law firms with international clients	<ul style="list-style-type: none"> • You will 'add' ethical value to a transaction or case, in the sense that your real expertise is in your ability to provide truly independent, strategic, ethical judgment, so that a business plan that is financially and environmentally sustainable is advised, rather than any less stable or shorter-term plan. • There is opportunity for real character development for you, as a contribution to value-adding judgment.

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Broad descriptions of lawyers' work	Organisational categories and types of legal practice – plus the ethical opportunities and challenges
	<ul style="list-style-type: none"> • Research a law firm to see if it has an 'Ethical infrastructure' – the collection of informal policies and formal guidelines that determine how the law firm behaves in ethically difficult situations – the best law firms will have an ethical infrastructure. • The rapid growth of international and particularly Indian legal process outsourcing (LPO), assisted by artificial intelligence (AI or 'sausage-machine law') will contribute to fewer jobs for traditionally oriented transactional lawyers in large firms. This means less work for lawyers who are only technically competent, and lack long-term ethics. • LPO pressures will encourage more firms to greater specialization, so that you may need to be clearer about your own specialization and have some relevant voluntary or clinical legal education experience before you apply for a job. However, if you specialize too early, you may be less flexible in your longer-term career. You can manage these risks in law school by undertaking both a general clinic and then a specialized clinic, before you graduate. • In very large commercial law firms you can expect an increased use of psychological and even surveillance profiling before a job offer to you as a new employee lawyer is confirmed. The profile typically desired is one of 'conscientious' work habits, politically conservative or centrist values, and a psychological openness to being 'moulded' by firm culture. Despite such profiling, you will also need to show psychological balance, so that you do not fit the profile of the so-called typical person attracted to law, who has 'high IQ', but 'low accessing EQ'.^e

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	<p>See Chapters 3 and 4 for more information.</p> <ul style="list-style-type: none"> • You will need to be aware of an apparent priority of business profit over ethical behaviour, where the two are in conflict. In large law firms with international clients, there is a tendency to account for and bill to clients, every 6 <i>minutes</i> spent on a client file. Six-minute time intervals are used because they equate to one-tenth of 1 hour and are easily managed by digital time tracking systems. An Australian Chief Justice has said: 'Young lawyers have little or no interaction with clients. They are motivated to bill as much as possible in the interests of career advancement. This conflicts with their professional duties to act honestly and efficiently. . . . Their duties as lawyers are superceded by personal gain.' He added that firms who rely on the billable hour for commercial reasons may end up paying a higher price in the end. '[Young lawyers] will avoid firms that are governed by the billable hour. They won't stay long, so it's not a [good] commercial strategy in the end. . . . The courts now attract the brightest graduates, and the one thing they have in common is a desire to avoid the mega firms. It is a problem, and one thing that these firms are going to have to confront [lest they] end up with mindless drones adding six minutes here and there, to the general dissatisfaction of clients.'^f • Be aware that large-firm lawyers can experience reduced independence because of their identification with their large clients' causes, plans and strategies, or more independence if they are respected for their willingness to question the wisdom of some plans and strategies. • You will likely be inside a firm that faces pressure to act for corporations with legal, but morally

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	<p>compromised and dangerous businesses (for example, tobacco, alcohol and arms manufacturers, or manufacturing processes with unrestricted greenhouse emissions).</p> <ul style="list-style-type: none"> • Working days of 7am–9pm will be common (though not universal), leading to resentment, life–work tension, relationship stress at home and an attitude that ‘others should also work hard if I have to’. • You may face ‘budget’ pressure to bill a minimum fee level every month –regardless of whether the firm uses 6-minute timesheet intervals or versions of a fixed price to measure value and therefore the size of the client’s bill. • There may be pressure from some senior lawyers to ‘round up’ hours on time sheets (that is, to overcharge clients, which is really the same as stealing from them) to achieve budget targets. • You will need courage to confront work cultures inside some larger firms that rationalize poor (unethical) behaviour so that it is normalized and becomes acceptable.⁸ • New lawyers in larger firms can face repetitive work in their early months, leading to boredom and hyper-competitiveness to escape such work by billing more. <p><i>Recommendations:</i></p> <p>If you know you prefer a commercial or corporate legal practice environment:</p> <ul style="list-style-type: none"> ... first seek out the second- or mid-tier and niche firms and assess their capacity to deliver a balanced, ‘good’ life. ... prioritize your conscience and self-respect, because that draws on your character. ... consider using the list of issues above to identify the right firm for you.

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Corporate/in-house lawyers	<ul style="list-style-type: none"> • With less pressure to work ultra-long hours, you will have more time to assess and consider the nature of your work, and better life–work balance. <p>See Chapter 5 for more information.</p> <ul style="list-style-type: none"> • This offers you the capacity and opportunity to ethically guide your employer on a safe course of conduct. • However, you may experience a lack of independence from your employer/client. • You will have no other client, no other income source and little comradeship in a small legal department and will therefore encounter pressure to do what your corporation requires, regardless of morality.
Government lawyers (including lawyers who make government laws)	<ul style="list-style-type: none"> • You will have a relatively stable if lower-paid career compared to some commercial law peers, but over time you will have the chance to mould good law-making and will often be able to achieve a better life–work balance than peers in private practice. • You will occasionally face powerful pressure to do what government requires, regardless of morality. For example, consider the extreme historical case of the German government lawyers who set up the legal structure behind the Nazi Nuremberg Laws,^h and the US lawyers who authored the Pentagon ‘Torture Memos’.ⁱ
Public Procurators	<ul style="list-style-type: none"> • You will be trusted to prosecute crime and seek justice on behalf of the people and in so doing, strengthen society. • Public procurators must faithfully ‘... implement the Constitution and laws, safeguard social fairness and justice, and serve the people whole-heartedly’.^j • You must be ‘... diligent and responsible, be honest and upright, and abide by professional ethics’.^k

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Barristers (in the Hong Kong SAR)	See Chapter 4 for more information.
	<ul style="list-style-type: none"> • You are not supposed to be too zealous because the state (or state authority) that you represent is generally more powerful than a defendant, but you will often feel an emotional pressure to aggressively 'hurt' defendants in the interests of victims; such pressure must be tempered according to criminal procedure rules that mandate a fair presentation of the case for the prosecution.^l • You must balance the discretion not to prosecute someone by weighing up competing public interests: that is, by balancing the likely prospects of a successful prosecution (in the interests of individual victims or government revenue) against the substantial cost of mounting a case that fails to prove a sufficient offence. • You will also have to manage a sub-category of discretion to negotiate 'deals' with defendants for 'guilty' pleas to lesser charges and consider what victims will think of such deals. • You are a lawyer who <i>only</i> appears in courts and tribunals. You will have a certain amount of prestige, independence and – opportunity to concentrate in areas of work that interest you. • You will appear in all courts and tribunals and face challenges similar to those of criminal defence solicitors. • You will encounter the historical 'cab-rank' rule, which nominally requires you to appear for a client even if you do not like or believe them,^m and you must resist the temptation to abuse the rule: by, for example, being 'unavailable', or declining the work if your 'normal fee' cannot be met.ⁿ • It has been asserted that some barristers use the cab-rank principle in order to justify their

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	<p>representation of morally questionable clients in civil cases, but other barristers reject this criticism and ask 'Why is there such pressure for the advocate to identify with their client?'</p> <ul style="list-style-type: none"> • You will face continuous client pressure to distort truth and hide guilt, even though it may be subtle in many cases. It is rarely easy to decide where the line is between putting your client's case forward in a properly zealous manner (see Chapters 3 and 4) and consciously obscuring the truth. • As with criminal defence solicitors, there is also constant pressure to navigate detailed advocacy rules about permissible deception (see above and Chapter 5). • You must deal with public prosecutor/procurator pressure on your client to plead guilty to lesser charges to avoid trial on more serious matters, where a successful defence will be difficult but not impossible. • Ongoing reductions in the availability of legal aid may mean that you have less time and capacity to prepare thoroughly. • On occasion, you will be doubtful as to the legality of sources of funds that your client intends to use to pay their legal fees.

^a All China Lawyers' Association, *Rules on the Handling of Criminal Cases by Lawyers*, No. 51 [2017], Article 6.

^b *Ibid.*, Article 13.

^c *Ibid.*, Article 22(9).

^d *Ibid.*, Article 62.

^e Rachel Nickless, 'Mental aid course is a know-brainer', *Australian Financial Review*, 22 June 2012, 43.

^f *Lawyers' Weekly*, n 33, 1. Bathurst CJ was speaking at the 2012 Commonwealth Lawyers Association Regional Law Conference, Sydney. See also Michael Bradley, 'The time sheet shuffle', *The Australian, Legal Affairs*, 4 May 2012, 43.

Table 2.2. (*cont.*)

^g To the point that challenging that culture can itself be seen as unethical (that is, disloyal). Parker and Rostain have attempted to get beneath the argument about whether business or professional ethics are to blame for lawyers' 'poor moral behaviours, beginning with the example of the James Hardie's external lawyer' (Allens), who insufficiently identified the importance of fully funding the corporation's asbestos compensation fund. Their conclusion is that large firm lawyers' networks are monochrome, narrow and few, and that they are simply withdrawing socially, psychologically and personally, to the point that they do not automatically recognize any alternatives to purely business imperatives in their decision-making. See Tanina Rostain and Christine Parker, 'Law firms, global capital and the sociological imagination' (2012) 80 *Fordham Law Review* 2347.

^h Nazi lawyer Wilhelm Frick and his colleagues created the Final Solution through the use of law and official policy. In 1933 the Law for the Restoration of the Professional Civil Service banned Jews from government jobs. Other laws followed, culminating with the Nuremberg Laws, the Law for the Protection of German Blood and German Honour, and the Reich Citizenship Law. See the US National Archives – Nuremberg Laws, at www.archives.gov/publications/prologue/2010/winter/nuremberg.html. For a 2005 film that dramatizes the Nazi courts' suppression of Germans' internal resistance, see *Sophie Scholl – The Final Days* (Dir. Marc Rothemund).

ⁱ See Robert K. Vischer, 'Legal advice as moral perspective' (2006) 19 *Georgetown Journal of Legal Ethics* 225 and more generally, Ch. 3. See also Carol Coulter, 'Public confuse solicitor with client – Assange lawyer', *Irish Times*, 4 October 2012.

^j *Public Procurators' Law of the People's Republic of China* (2019 Revision), Article 3 at Procurators Law of the People's Republic of China (npc.gov.cn).

^k *Ibid.*, Article 4.

^l See *ibid.*; Christine Parker and Adrian Evans, *Inside Lawyers' Ethics*, 3rd ed., Cambridge University Press, Port Melbourne, 2018, n 29, 148.

^m See Gino Dal Pont, *Lawyers' Professional Responsibility* (5th ed.), Thomson Reuters, Melbourne, 2015, para. 3.140.

ⁿ *Ibid.*, paras. 3.150–75. A recent UK report has recommended its abolition. See www.legalfutures.co.uk/latest-news/end-line-cab-rank-rule.