

# BEHAVIORAL LEGAL ETHICS

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## INTRODUCTION

Lawyers' ethical improprieties<sup>2</sup> are frequently the subject of jokes,<sup>3</sup> movies,<sup>4</sup> public opinion surveys,<sup>5</sup> disciplinary filings,<sup>6</sup> and news stories. Open a recent newspaper or check your favorite website and you may see stories about attorneys failing to investigate (let alone discipline) alleged

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2. When we discuss lawyers' "ethics" we refer not only to compliance with the formal professional rules of ethics and other relevant statutory provisions, but also to behavior that is consistent with one's own moral compass.

3. See, e.g., Roger C. Cramton, *What Do Lawyer Jokes Tell Us About Lawyers and Lawyering*, 23 CORNELL L.F. 3, 3 (1996); Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 816 (1998); Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CALIF. L. REV. 379, 379 (1987); Robert E. Scott, *The Lawyer as Public Citizen*, 31 U. TOL. L. REV. 733, 733 (2000).

4. See, e.g., *THE DEVIL'S ADVOCATE* (Regency Enterprises 1997) (portraying an attorney who is offered a job by a high profile law firm run by the devil); *LIAR LIAR* (Universal Pictures 1997) (portraying a successful attorney who is forced to be truthful for twenty-four hours); *RUNAWAY JURY* (Regency Enterprises 2003) (portraying litigation involving an unethical jury consultant).

5. See, e.g., Gary A. Hengstler & R. William Ide III, *Vox Populi; The Public Perception of Lawyers: ABA Poll*, 79 A.B.A. J. 60 (1993); David W. Moore, *Nurses Top List in Honesty and Ethics Poll*, GALLUP NEWS SERV. (Dec. 7, 2004), <http://www.gallup.com/poll/14236/nurses-top-list-honesty-ethics-poll.aspx> (placing lawyers nineteenth of twenty-one professions with respect to honesty and ethical standards); Sarah Parikh, *Public Perceptions of Lawyers: Consumer Research Findings*, 2002 A.B.A. SEC. LITIG. 8, 18, available at <http://www.cliffordlaw.com/abaillinoisstatedelegate/publicperceptions1.pdf>.

6. See, e.g., A.B.A. CTR. FOR PROF'L RESP., 2010 SURVEY ON LAWYER DISCIPLINE SYSTEMS (S.O.L.D.) 1-35 (2010), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2010\\_sold\\_finalreport.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2010_sold_finalreport.authcheckdam.pdf) (collecting statistics relating to attorney discipline).

child abusers,<sup>7</sup> allowing corporate employers to pay illegal bribes<sup>8</sup> or commit fraudulent acts,<sup>9</sup> hiding or destroying evidence,<sup>10</sup> lying in negotiations,<sup>11</sup> mishandling prosecutions,<sup>12</sup> or representing clients in the

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7. See, e.g., Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 247–54 (2006) (discussing role of church attorneys in defending Catholic priests accused of sexual misconduct); Michael Rubinkam, *Testimony at Sandusky Trial Shows Missed Chances*, HUFFINGTON POST (June 16, 2012, 1:51 PM), <http://www.huffingtonpost.com/huffwires/20120616/us-penn-state-abuse-under-their-noses> (describing district attorney’s decision not to charge Jerry Sandusky over a 1998 molestation allegation).

8. See David Barstow, *Vast Mexico Bribery Case Hushed up by Walmart After Top-Level Struggle*, N.Y. TIMES, Apr. 22, 2012, at A1; cf. *Upjohn Co. v. United States*, 449 U.S. 383, 394–95 (1981) (discussing Upjohn Company’s self-report to the Internal Revenue Service about questionable payments by a subsidiary to a foreign government).

9. See, e.g., Final Report of Neal Batson, Court-Appointed Examiner at app. C, *In re Enron Corp.*, No. 01-16034 (AJG), 2003 WL 25544836 (Bankr. S.D.N.Y. Nov. 4, 2003), available at [http://www.concernedshareholders.com/CCS\\_ENRON\\_Report.pdf](http://www.concernedshareholders.com/CCS_ENRON_Report.pdf) (finding “sufficient evidence from which a fact-finder could conclude that certain of Enron’s attorneys . . . aided and abetted the Enron officers’ breaches of fiduciary duty”). See generally NANCY B. RAPOPORT ET AL., *ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER* (2d ed. 2009); see also W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1170–71 (2005) (describing role of Enron attorneys); Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 985 (2005).

10. See, e.g., *Qualcomm Inc. v. Broadcom Corp.*, No. 05CV1958-B (BLM), 2008 WL 66932, at \*12 (S.D. Cal. Jan. 7, 2008) (discussing attorneys’ failure to produce 46,000 “critical” documents in a major lawsuit); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley, Inc.*, No. CA 03-5045 A1, 2005 WL 674885 (Fla. Cir. Ct. Mar. 23, 2005) (granting default judgment to plaintiff on ground that attorneys for Morgan Stanley egregiously failed to produce requested computer disk drives); OFF. OF PROF’L RESP., U.S. DEP’T OF JUSTICE, INVESTIGATION OF ALLEGATIONS OF PROSECUTORIAL MISCONDUCT IN UNITED STATES V. THEODORE F. STEVENS, CRIM. NO. 08-231 (D.D.C. 2009) (EGS) (2011), available at <http://www.leahy.senate.gov/imo/media/doc/052412-081511Report.pdf> (detailing investigation into alleged prosecutorial misconduct); Walter Kiechel III, *The Strange Case of Kodak’s Lawyers*, FORTUNE, May 8, 1978, at 188 (describing failure to turn over a suitcase containing documents relied upon by expert witness).

11. See, e.g., Art Hinshaw et al., *Attorneys and Negotiation Ethics: A Material Misunderstanding?*, 29 NEGOT. J. 265 (2013) (reporting that a substantial minority of practicing attorneys engaged in unethical or even fraudulent behavior in experimental settings); Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95, 148 (2011) (finding that attorneys are willing to violate the requirements of the Model Rules of Professional Conduct Rule 4.1 governing legal negotiations).

12. See, e.g., Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 183–86 (2007); Duff Wilson, *Prosecutor in Duke Case Is Disbarred for Ethics Breaches*, N.Y. TIMES, June 16, 2007, <http://www.nytimes.com/2007/06/16/us/16cnd-nifong.html>; cf. *Connick v. Thompson*, 131 S. Ct. 1350, 1355 (2011) (finding that although prosecutor’s office failed to disclose an exculpatory crime report, plaintiff failed to make sufficient showing of “deliberate indifference” for liability under 42 U.S.C. § 1983). See generally Susan A. Bandes, *The Lone Miscreant, the*

face of seemingly obvious conflicts of interest.<sup>13</sup> By perusing bar disciplinary records one would also learn about a myriad of less newsworthy but nonetheless important ethical violations—failure to communicate with clients, neglect of client matters, failure to provide competent representation, and misuse of client trust funds.<sup>14</sup> Whether one is most concerned with some lawyers' failure to comply with even minimal ethical rules, or whether one advocates that lawyers hold themselves to higher standards, one will likely be disturbed by such reports.<sup>15</sup>

A survey by the American Bar Association found that 118,054 ethics complaints were made against U.S. lawyers in 2010.<sup>16</sup> Of course, such

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*Self-Training Prosecutor, and Other Fictions: A Comment on Connick v. Thompson*, 80 FORDHAM L. REV. 715 (2011).

13. MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* 1–12 (Univ. of Mich. Press 2004) (discussing attorney who was sentenced to prison for making false affidavits hiding conflict of interest). In addition, one might identify more politically controversial examples. See Patrick Gavin, *PBS Documentary Looks at Bill Clinton's Career*, POLITICO (Jan. 1, 2012, 2:16 PM), <http://www.politico.com/news/stories/0112/71382.html> (reviewing documentary discussing President Clinton's sexual dalliances and his subsequent dishonesty regarding those dalliances). See generally David Luban, *The Torture Lawyers of Washington*, in LEGAL ETHICS AND HUMAN DIGNITY (2007); see also W. Bradley Wendel, *Executive Branch Lawyers in a Time of Terror: The 2008 F.W. Wickwire Memorial Lecture*, 31 DALHOUSIE L.J. 247, 265 (2009) (urging that the arguments relied upon by Bush administration attorneys to justify harsh inquisition tactics were so far outside the range of reasonable as to be considered unethical).

14. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2012) (concerning Client-Lawyer Relationship); see Jennifer Gerarda Brown & Liana G.T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 NEV. L.J. 253, 259–60 (2012) (reporting that the most common disciplinary complaints made against attorneys involve neglect and lack of communication); Carla Messikomer, *Ambivalence, Contradiction, and Ambiguity: The Everyday Ethics of Defense Litigators*, 67 FORDHAM L. REV. 739, 754 (1998) ("It is difficult to comprehend and define the extraordinary violations without understanding the ordinary ethical issues that practicing lawyers routinely confront and resolve in their everyday professional life. Focusing on the tail of the distribution of ethical conduct tells us little (as the use and misuse of horror stories starkly demonstrates) about the dominant value system that informs everyday conduct."). Lawyers may also act in a variety of other ways that may be considered unethical or otherwise inappropriate. For example, they may make decisions that are discriminatory, take undue credit for joint work, or treat others with disrespect.

15. In this Article, we neither take a position on what ethical standards ought to be applied to attorneys, nor on how ethical misconduct ought to be sanctioned. Instead, our goal is to educate attorneys and legal organizations on how best to fulfill their own ethical goals. Cf. Andrew M. Perlman, *A Behavioral Theory of Legal Ethics* (Suffolk Univ. Law Sch. Research Paper No. 13-31, Sept. 4, 2013), available at <http://ssrn.com/abstract=2320605> (urging that legal ethical rules ought to be made clearer and less discretionary in light of our inability to maintain objectivity while maintaining partisan positions).

16. A.B.A. CTR. FOR PROF'L RESP., *supra* note 6 (surveying lawyer disciplinary agencies across the 50 states). In 2010, there were approximately 1.4 million licensed attorneys in the U.S., 73,240 complaints against lawyers were investigated, and 5,241 lawyers were charged with an ethics violation following a probable cause determination. *Id.*

complaints are both over and under inclusive as a measure of attorneys' ethical misconduct. Some complaints may make allegations that are unfounded. Conversely, much misconduct may never be discovered or reported. Still, the anecdotes, press reports, and ethical complaints suggest that there is reason for concern.

Concerns about ethics cut across all sizes and types of practice. While lawyers at smaller firms tend to be disciplined by the Bar more often than attorneys who practice at larger or more prestigious firms,<sup>17</sup> it is by no means clear that small firm lawyers are inherently less ethical.<sup>18</sup> Indeed, it is evident that attorneys at some of the biggest and most respected firms sometimes commit serious ethical infractions—lying in affidavits,<sup>19</sup> failing to produce discovery,<sup>20</sup> helping their client's officers breach their fiduciary duties,<sup>21</sup> and other ethical improprieties.<sup>22</sup> Ethical missteps reach all levels of prominence. Indeed, two former U.S. presidents (Richard Nixon and Bill Clinton) were disbarred or suspended from the practice of law.<sup>23</sup>

Ethical problems afflict criminal attorneys as well as those handling civil cases. Prosecutors have been found to have committed ethical violations such as concealing exculpatory evidence, knowingly presenting false testimony, misleading witnesses, or continuing to prosecute criminals after

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17. Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 312 (2004).

18. See Brown & Wolf, *supra* note 14, at 260 (noting that the “higher claim rate [against solo and small firm practitioners] appears to stem . . . from challenges that are specific to small scale practice: a client base composed primarily of individuals rather than institutions, lower average hourly billing rates, and a high volume of clients to balance lower rates.”); Levin, *supra* note 17, at 387 (noting that many solo and small firm lawyers are “overwhelmed by their financial circumstances or caseloads”). It may also be true that the Bar comes down harder on attorneys at smaller or solo firms. Levin, *supra* note 17, at 314 (“It may be easier for under-financed discipline systems to successfully prosecute cases against solo or small firm practitioners—who have fewer resources to defend against these complaints.”).

19. REGAN, *supra* note 13, at 1, 3 (describing John Gellene from Milbank, Tweed, Hadley & McCloy).

20. *Qualcomm Inc. v. Broadcom Corp.*, No. 05CV1958-B (BLM), 2008 WL 66932, at \*16 (S.D. Cal. Jan. 7, 2008) (involving attorneys from Heller Ehrman LLP); Kiechel, *supra* note 10 (describing lawyers at Donovan Leisure who hid documents).

21. Final Report of Neal Batson, *supra* note 9, at 6–13; see also Robert W. Gordon, *A New Role for Lawyers? The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1187 (2003) (observing that Enron lawyers from Vinson & Elkins facilitated flawed transactions).

22. See Symposium, *In the Matter of Kaye, Scholer, Fierman, Hays & Handler: A Symposium on Government Regulation, Lawyers' Ethics, and the Rule of Law*, 66 S. CALIF. L. REV. 977, 979–84 (1993) (detailing the chronology of events leading to the Kaye, Scholer scandal). See generally Ed Hendricks & Mary Berkheiser, *Where Were the Lawyers?*, 18 LITIG. 30, 30 (1992); William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243, 243 (1998).

23. *In re Nixon*, 53 A.D.2d 178 (N.Y. App. Div. 1976); *Neal v. Clinton*, No. CIV 2000-5677, 2001 WL 34355768 (Ark. Cir. Jan. 19, 2001) (five-year suspension).

DNA testing seems to show they are not guilty.<sup>24</sup> Similarly, criminal defense attorneys, whether in public defenders' or private offices, have been found to have failed to exercise adequate diligence in representing their clients.<sup>25</sup>

Some have suggested that lawyers behave badly because they are inherently "bad"<sup>26</sup> or "stupid,"<sup>27</sup> because they are susceptible to undue pressure from their clients,<sup>28</sup> because they are under-regulated,<sup>29</sup> or even because they are over-regulated.<sup>30</sup> Surely some attorneys do deliberately engage in conduct that they know to be wrong in order to benefit themselves or their client. However, psychological research suggests a more complex story: that those who commit ethical infractions are not necessarily "bad apples," but are human beings. Many ethical lapses result from a combination of situational pressures and all too human modes of thinking.<sup>31</sup>

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24. See generally Monroe H. Freedman, *The Use of Ethical and Unconstitutional Practices and Policies by Prosecutors' Offices*, 52 WASHBURN L.J. 1, 1 (2012).

25. Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333, 344 (noting that "public defenders, contract lawyers, or appointed counsel—fail to properly investigate in a substantial number of cases").

26. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 110 HARV. L. REV. 991, 992 (1997) (observing that a "bad" man, who "cares nothing for an ethical rule which is believed and practised [sic] by his neighbors," nonetheless has an incentive to obey the law in order to avoid fines and stay out of jail).

27. Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709, 711 (1998) (noting that lawyers often characterize ethics violations as "isolated examples of lawyers being 'stupid,' that is, failing to take adequate account of the downside risks to themselves and to their clients of rule violations").

28. Levin, *supra* note 17, at 337 (discussing the ethical challenge of dealing with "a client who wished to engage in some form of fraud").

29. Eugene R. Gaetke, *Expecting Too Much and Too Little of Lawyers*, 67 U. PITT. L. REV. 693, 750 (2006) (advocating better use of "rulemaking to restrain the current professional default principle of zealous advocacy").

30. See, e.g., Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 885–86 (1996) (arguing that typical statutory prohibitions are likely to stifle "sentimental responsiveness, a key feature of good ethical deliberation," by encouraging lawyers to take a technocratic approach rather than to engage a more virtuous approach); Reed Elizabeth Loder, *Tighter Rules of Professional Conduct: Saltwater for Thirst?*, 1 GEO. J. LEGAL ETHICS 311, 311 (1987) (arguing that "increasing ethical regulation may magnify troublesome problems of role morality and even impede lawyers' moral development"); see also Trina Jones, *Inadvertent Disclosure of Privileged Information and the Law of Mistake: Using Substantive Legal Principles to Guide Ethical Decision Making*, 48 EMORY L.J. 1255, 1282–83 (1999) (critiquing reliance on ethical rules on grounds that they inevitably leave too much room for discretion and discourage lawyers from thoroughly considering how to behave when rules do not apply).

31. See, e.g., Gerd Gigerenzer, *Moral Satisficing: Rethinking Moral Behavior as Bounded Rationality*, 2 TOPICS COGNITIVE SCI. 528, 540 (2010) (raising the concept of "ecological morality, that is, that moral behavior results from an interaction between mind and

The psychology we present here helps explain how ethical lapses can occur more easily and less intentionally than we might imagine, providing substantial insight into why attorneys sometimes behave unethically, why attorneys may have difficulty curbing or reporting the unethical conduct of their clients or fellow attorneys, and why it is often difficult for attorneys to learn from their own ethical missteps and the missteps of others. It also helps us see how, even as we make what could be considered to be unethical decisions, we may still believe we are ethical actors. At the same time, the psychological research also provides insight into why attorneys are often able to resist substantial pressure to act unethically—pressure that comes from clients, adversaries, superiors, and their own self-interest.<sup>32</sup>

While we are not the first to apply certain social science insights to the ethical behavior of attorneys in particular settings or situations,<sup>33</sup> this Article

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environment”); Jennifer J. Kish-Gephart et al., *Bad Apples, Bad Cases, and Bad Barrels: Meta-Analytic Evidence About Sources of Unethical Decisions at Work*, 95 J. APPLIED PSYCHOL. 1, 1 (2010) (finding that characteristics of the individual, the ethical issue, and the environment work together to influence ethical decision making and behavior); Benoît Monin & Alexander H. Jordan, *The Dynamic Moral Self: A Social Psychological Perspective*, in PERSONALITY, IDENTITY, AND CHARACTER: EXPLORATIONS IN MORAL PSYCHOLOGY 341 (Darcia Narvaez & Daniel K. Lapsley eds., 2009). See generally BUSINESS ETHICS: SHAPING AN EMERGING FIELD (David De Cremer & Ann E. Tenbrunsel eds., 2011); Yuval Feldman, *Behavioral Ethics Meets Behavioral Law and Economics*, in HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW (Eyal Zamir & Doron Teichman eds., forthcoming); Max H. Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty*, 8 ANN. REV. L. & SOC. SCI. 85 (2012); Michael Bommer et al., *A Behavioral Model of Ethical and Unethical Decision Making*, 6 J. BUS. ETHICS 265 (1987); Celia Moore et al., *Why Employees Do Bad Things: Moral Disengagement and Unethical Organizational Behavior*, 65 PERSONNEL PSYCHOL. 1 (2012) (developing a measure of an individual’s propensity to morally disengage); Linda Klebe Trevino, *Ethical Decision Making in Organizations: A Person-Situation Interactionist Model*, 11 ACAD. MGMT. REV. 601 (1986).

32. See, e.g., Levin, *supra* note 17, at 337 (describing how attorneys report resisting pressures to act unethically).

33. See, e.g., Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006) (prosecutors); Burke, *supra* note 12 (prosecutors); Eldred, *supra* note 25 (criminal defense lawyers); Kath Hall & Vivien Holmes, *The Power of Rationalisation to Influence Lawyers’ Decisions to Act Unethically*, 11 LEGAL ETHICS 137 (2009) (in-house counsel); Kim, *supra* note 9 (in-house counsel); Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631 (2005) (attorneys in large firms); Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers’ Responsibility for Clients’ Fraud*, 46 VAND. L. REV. 75 (1993) (corporate counsel); Levin, *supra* note 17 (small and solo law firm practitioners); Gregory S. McNeal, *Organizational Culture, Professional Ethics and Guantánamo*, 42 CASE W. RES. J. INT’L L. 125 (2009) (military attorneys); Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 FORDHAM L. REV. 773 (1998) (large firm litigators); Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451 (2007); Cassandra Burke

is the first to provide a comprehensive survey of the implications of psychology for legal ethics. In addition, we provide detailed suggestions about how individuals, attorneys, and legal organizations can improve attorneys' ethics across practice areas and settings.

In Part I of the Article we examine the ethical blind spots, slippery slopes, and "ethical fading" that may lead good people to behave badly. These insights may offer some comfort—suggesting that there are not as many inherently bad people (or lawyers) in the world as we might have believed. But this psychologically rich understanding also raises concerns, because it implies that all of us are in danger of behaving unethically should the right (or wrong) circumstances present themselves.

The nature of legal practice means that lawyers face a set of particularly difficult challenges. Part II explains that complex and ambiguous ethical rules and standards, agency relationships, the ethos of the adversarial system, the pressures of modern legal practice, positions or feelings of relative status or power, and cues or pressure from others are all characteristics of the practice of law that attorneys need to pay attention to if they want to avoid crossing ethical lines.<sup>34</sup>

In Part III, we examine why it is difficult to recognize and learn from ethical lapses. Unfortunately, the same kinds of psychological phenomena that can make it hard for lawyers to notice and avoid ethical issues in the first instance also make it difficult for them to identify and learn from ethical mistakes.

Finally, in Part IV, we draw on the psychological research to make some suggestions for how individual attorneys and legal employers can enhance their ethics.<sup>35</sup> While in the end, we do not pretend to offer complete

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Robertson, *Beyond the Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity*, 42 CASE W. RES. J. INT'L L. 389 (2009) (government lawyers); see also Lawrence J. Fox, *I'm Just an Associate . . . At a New York Firm*, 69 FORDHAM L. REV. 939, 939–53 (2000) (recounting fictional story of an associate who is instructed by a senior partner to engage in unethical behavior).

34. We also recognize that many ethical improprieties within the profession are related to drug or alcohol issues or mental health problems. While these issues are important, and may relate in part to the stresses we identify, they are not our focus. See, e.g., Sheila Blackford, *Dealing with Impaired Attorneys*, LAW PRAC. TODAY (June 2009), <http://apps.americanbar.org/lpm/lpt/articles/pma06091.shtml> (noting that impaired lawyers "are frequently the subject of ethics complaints for not communicating with clients and neglecting legal matters"); MICHAEL A. BEDKE & JOHN W. KEEGAN, A.B.A. YOUNG LAW. DIV., COMM'N ON IMPAIRED ATTORNEYS, REPORT TO THE HOUSE OF DELEGATES ¶ I (1995) (reporting estimates that a substantial proportion of lawyer discipline cases are related to impairment).

35. While the psychology we review here surely has implications for the content of the rules of professional conduct as well, we do not address those implications here. Instead, we take as a given the legal and regulatory structure governing professional conduct and explore

solutions that will ensure attorneys' ethical behavior, we do hope that our psychological lens will help equip lawyers to better resist the temptations of unethical conduct.

### I. BOUNDED ETHICALITY

Ethical lapses occur more easily and less intentionally than we might imagine. While most of us desire to act ethically,<sup>36</sup> “psychological processes . . . [can] lead people to engage in ethically questionable behaviors that are inconsistent with their own preferred ethics.”<sup>37</sup>

As an initial example, consider the downfall of prominent bankruptcy attorney John Gellene, as described by Milton Regan in the book *Eat What You Kill*.<sup>38</sup> Gellene, a “bankruptcy partner at the prestigious Wall Street law firm of Milbank, Tweed, Hadley & McCloy. . . . was regarded as one of the best bankruptcy lawyers in the country, and had worked on some of the largest corporate reorganizations in the world.”<sup>39</sup> In the mid-1990s, Gellene and Milbank represented Bucyrus-Erie, a manufacturer of mining tools, as it reorganized in bankruptcy. Following the bankruptcy proceedings, Bucyrus-Erie was healthy enough to be purchased by “a large private investment partnership.”<sup>40</sup> But the Bucyrus-Erie bankruptcy would not turn out so successfully for Gellene, who ended up in jail.<sup>41</sup>

[Gellene had originally] been asked by powerful Milbank partner Larry Lederman to provide his services to Bucyrus because of Gellene's experience in bankruptcy and financial restructuring. Lederman had advised Bucyrus off and on for five years. He also had provided legal guidance for several years to investment banker Mikael Salovaara. Salovaara had furnished financial advice to Bucyrus over the same five-year period. He was a former Goldman Sachs partner who had recently left the firm with a colleague to establish an investment fund known as South Street.

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the implications of behavioral ethics for individual attorneys and their employers within the existing regulatory context.

36. See Nina Mazar et al., *The Dishonesty of Honest People: A Theory of Self-Concept Maintenance*, 45 J. MKTG. RES. 633, 634 (2008) (arguing that people strive to maintain a self-concept that includes honesty).

37. MAX H. BAZERMAN & DON A. MOORE, JUDGMENT IN MANAGERIAL DECISION MAKING 123 (7th ed. 2008); see also C. Daniel Batson et al., *Moral Hypocrisy: Appearing Moral to Oneself Without Being So*, 77 J. PERSONALITY & SOC. PSYCHOL. 525, 525 (1999) (“Moral people often fail to act morally.”).

38. See REGAN, *supra* note 13, at 1.

39. *Id.*

40. *Id.*

41. *Id.* at 287.



In 1992, South Street had advanced \$35 million to Bucyrus in return for a lien on all the company's manufacturing equipment. As the company's major secured creditor, South Street would be first in line to be paid if Bucyrus filed for bankruptcy. . . .

[In applying to be appointed as Bucyrus-Erie's counsel,] Gellene was required under Bankruptcy Rule 2014 to list his and Milbank's connections with any party in interest in the bankruptcy. At the time, Milbank also was representing Mikael Salovaara on one matter and South Street on another. Gellene himself was the lead counsel in the South Street matter, although he had done very little work on the case. The work for Salovaara and South Street created a potential conflict of interest for the law firm. As counsel for Bucyrus in its bankruptcy, Milbank would represent a debtor that had a duty to treat fairly all parties with a claim on its assets. As counsel for Salovaara and South Street, Milbank might have an incentive to provide advice to Bucyrus that favored South Street over other creditors.

[But] Gellene didn't disclose these Milbank ties to Salovaara when he submitted the affidavits that accompanied his application.<sup>42</sup>

When Milbank's ties to Salovaara and South Street were eventually uncovered, the firm was required to return the \$1.86 million in fees that it had earned in the bankruptcy case and settled a professional malpractice suit for between \$27 and \$50 million.<sup>43</sup> For his part, Gellene was charged with and convicted of violating Bankruptcy Rule 2014 for "making false declarations in the affidavits he had submitted to [the judge and] . . . for using a false affidavit under oath to claim that Milbank was eligible to receive payment for its work on the bankruptcy."<sup>44</sup> He was sentenced to 15 months in prison and a \$15,000 fine.<sup>45</sup> How did John Gellene fall so far and so hard?

It is wishful thinking to assume that only "bad apples"—people who differ from us in important ways—will make unethical decisions:

In our conventional way of thinking about ourselves, we are confident that we would know in advance that to do some set of actions would be morally wrong, and that this realization,

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42. *Id.* at 2–3.

43. *Id.* at 3.

44. *Id.*

45. *Id.* at 1–3, 287; see also Nancy B. Rapoport, *The Curious Incident of the Law Firm That Did Nothing in the Night-Time*, 10 LEGAL ETHICS 98, 98–114 (2007) (reviewing REGAN, *supra* note 13).

occurring prior to the actions, would prevent us from taking them. These comforting thoughts turn out to be not true.<sup>46</sup>

Instead, we will see that many psychological phenomena contribute to decisions to act unethically and make it challenging to identify and appropriately respond to the ethical lapses of others—including colleagues and clients.

### A. Ethical Blindspots

Unethical decisions are more likely when the decision maker does not see the decision at hand as involving ethical issues or when she believes that any potential ethical challenges can easily be overcome. Each of us tends to believe that we see the world objectively;<sup>47</sup> to see ourselves as more fair, unbiased, competent, and deserving than average;<sup>48</sup> and to be overconfident about our abilities and prospects.<sup>49</sup> This tendency to view the self in positive terms is heightened when the characteristic at issue is socially desirable—as is the case with ethical behavior. Indeed, attorneys tend to believe that their own ethics and their firm's ethical standards are more stringent than those of other attorneys and other firms.<sup>50</sup>

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46. John M. Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 70 BROOK. L. REV. 1177, 1180 (2005).

47. Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCHOL. REV. 781, 793 (2004); Lee Ross & Andrew Ward, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, in VALUES AND KNOWLEDGE 103, 110–11 (Edward S. Reed et al. eds., 1996).

48. See, e.g., David Alain Armor, *The Illusion of Objectivity: A Bias in the Perception of Freedom from Bias* (1998) (unpublished Ph.D. dissertation, University of California Los Angeles); Scott T. Allison et al., *On Being Better but not Smarter Than Others: The Muhammad Ali Effect*, 7 SOC. COGNITION 275, 291 (1989); Nicholas Epley & David Dunning, *Feeling "Holier Than Thou": Are Self-Serving Assessments Produced by Errors in Self- or Social Prediction?*, 79 J. PERSONALITY & SOC. PSYCHOL. 861, 861 (2000); Roderick M. Kramer et al., *Self-Enhancement Biases and Negotiator Judgment: Effects of Self-Esteem and Mood*, 56 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 110, 124 (1993); Wim B.G. Liebrand et al., *Why We Are Fairer Than Others: A Cross-Cultural Replication and Extension*, 22 J. EXPERIMENTAL SOC. PSYCHOL. 590 (1986); David M. Messick et al., *Why We Are Fairer Than Others*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 480 (1985).

49. See, e.g., Roger Buehler et al., *The Planning Fallacy: Cognitive, Motivational, and Social Origins*, 43 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 1, 8 (2010); Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL., PUB. POL'Y, & L. 133, 144–45 (2010); Don A. Moore & Paul J. Healy, *The Trouble With Overconfidence*, 115 PSYCHOL. REV. 502, 502 (2008).

50. Jonathan R.B. Halbesleben et al., *The Role of Pluralistic Ignorance in Perceptions of Unethical Behavior: An Investigation of Attorneys' and Students' Perceptions of Ethical Behavior*, 14 ETHICS & BEHAV. 17, 18 (2004). With regard to attorneys' views of their firms, see Gordon, *supra* note 27; Messikomer, *supra* note 14; Nelson, *supra* note 33.

These views of the self can lead to an *ethical blind spot* that impedes our ability to perceive and thoughtfully consider the ethical tensions we inevitably face.<sup>51</sup> If we are objective, fair, and unbiased, then we need not be concerned that we might take unfair advantage of another or unfairly privilege one person or position over another. If we are competent, then we need not question our ability to act or decide appropriately. If we are deserving, then any benefits we receive must be warranted. If we do not realize that our judgments of fairness are influenced by our own interests, then we do not need to be on guard against such conflicts.<sup>52</sup> And if we are overconfident—in our own ethical judgment, or in our ability to fix or otherwise manage ethical problems—then we are unlikely to stop and think carefully about a decision or to revisit that decision later.

In addition, people commonly make inaccurate forecasts of their own future emotions and behavior—and, thus, may predict that they will act ethically when this is not necessarily so.<sup>53</sup> It is clear that in the heat of the moment, we respond to a variety of incentives and practical forces.<sup>54</sup> We want to impress (or at least not disappoint) the client by reaching the settlement, getting the contract signed, or winning the case. We want to be

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51. Dolly Chugh et al., *Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest*, in CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 74, 80 (Don A. Moore et al. eds., 2005). See generally Pronin et al., *supra* note 47; Richard F. West et al., *Cognitive Sophistication Does Not Attenuate the Bias Blind Spot*, 103 J. PERSONALITY & SOC. PSYCHOL. 506 (2012).

52. Nicholas Epley & Eugene M. Caruso, *Egocentric Ethics*, 17 SOC. JUST. RES. 171, 181–82 (2004).

53. See, e.g., Kristina A. Diekmann et al., *From Self-Prediction to Self-Defeat: Behavioral Forecasting, Self-Fulfilling Prophecies, and the Effect of Competitive Expectations*, 85 J. PERSONALITY & SOC. PSYCHOL. 672, 674 (2003) (finding that people mis-predict their behavior in negotiation); Oriel Feldman Hall et al., *What We Say and What We Do: The Relationship Between Real and Hypothetical Moral Choices*, 123 COGNITION 434, 438 (2012); Janet K. Swim & Lauri L. Hyers, *Excuse Me—What Did You Just Say?! Women’s Public and Private Responses to Sexist Remarks*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 68, 83 (1999); Julie A. Woodzicka & Marianne LaFrance, *Real Versus Imagined Gender Harassment*, 57 J. SOC. ISSUES 15, 24 (2001) (finding that people mispredict their response to inappropriate interview questions). See generally Emily Balcetis & David A. Dunning, *A Mile in Moccasins: How Situational Experience Diminishes Dispositionism in Social Inference*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 102 (2008); Buehler et al., *supra* note 49 (finding that people predict they will get projects done more quickly than they do).

54. Karl Aquino et al., *Testing a Social-Cognitive Model of Moral Behavior: The Interactive Influence of Situations and Moral Identity Centrality*, 97 J. PERSONALITY & SOC. PSYCHOL. 123, 131 (2009); Ann E. Tenbrunsel, *Misrepresentation and Expectations of Misrepresentation in an Ethical Dilemma: The Role of Incentives and Temptation*, 41 ACAD. MGMT. J. 330, 334–35 (1998) (finding that incentives increase temptation and also the likelihood of acting on temptation); see also Uri Gneezy, *Deception: The Role of Consequences*, 95 AM. ECON. REV. 384, 391 (2005).

seen (and to see ourselves) as competent.<sup>55</sup> Members of a firm don't want to act against the culture of the firm,<sup>56</sup> or put their promotion or job at risk.<sup>57</sup> Decision makers feel pressure to make decisions quickly and efficiently. But when we are predicting our future behavior, we focus on our *idealistic self*—the self that “places principles and values above practical considerations and seeks to express the person’s sense of true self.”<sup>58</sup> With this ideal self in mind, abstract ethical considerations, rather than situational pressures, tend to be our focus and we anticipate that we will act ethically. When the time horizon shortens and we are in the moment, our attention shifts to our *pragmatic self*—the self that is “primarily guided by practical concerns” and is likely to seize opportunity, act impulsively, and focus on the pragmatics of the situation.<sup>59</sup>

### B. *Slippery Slopes and Boiling Frogs*

Another factor that can contribute to our bounded ethics is that the path to unethical conduct often runs along a slippery slope. Just as it is frequently extremely difficult for people to visually detect changes in their environment,<sup>60</sup> so can it be quite difficult to notice when conduct degrades gradually. Psychologist Stanley Milgram famously found that people would follow the instructions of an experimenter to administer slightly

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55. Dennis J. Moberg, *Ethics Blind Spots in Organizations: How Systematic Errors in Person Perception Undermine Moral Agency*, 27 ORGANIZATIONAL STUD. 413, 417 (2006).

56. See, e.g., Kirkland, *supra* note 33, at 705 (noting that lawyers are affected by the “logic of their firms”).

57. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006) (refusing to grant First Amendment protection to deputy district attorney who alleged he was denied a promotion after criticizing the legitimacy of a warrant); see also Fox, *supra* note 33, at 949 (discussing fears of junior associate who knew he ought to report partner’s unethical conduct).

58. Yifat Kivetz & Tom R. Tyler, *Tomorrow I’ll Be Me: The Effect of Time Perspective on the Activation of Idealistic Versus Pragmatic Selves*, 102 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 193, 193 (2007).

59. *Id.*; see also Hal E. Hershfield et al., *Short Horizons and Tempting Situations: Lack of Continuity to Our Future Selves Leads to Unethical Decision Making and Behavior*, 117 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 298, 303 (2012) (finding that feeling continuous with and able to imagine one’s future self makes future consequences more prominent and decreases unethical behavior); Daniel Read et al., *Mixing Virtue and Vice: Combining the Immediacy Effect and the Diversification Heuristic*, 12 J. BEHAV. DECISION MAKING 257, 258 (1999); Yaacov Trope & Nira Liberman, *Temporal Construal*, 110 PSYCHOL. REV. 403, 403 (2003). More generally, taking a broad perspective is less likely to result in unethical behavior than is a narrow perspective that focuses on individual decisions in isolation. Amos Schurr et al., *Is That the Answer You Had In Mind? The Effect of Perspective on Unethical Behavior*, 7 JUDGMENT & DECISION MAKING 679, 679 (2012).

60. See, e.g., Daniel J. Simons et al., *Change Blindness in the Absence of a Visual Disruption*, 29 PERCEPTION 1143, 1143 (2000).

increasingly severe shocks to another person, ostensibly as part of an experiment on punishment and learning.<sup>61</sup> The step-by-step nature of the shift may be one reason why so many people (63% of participants) ended up being willing to administer shocks that elicited increasingly “desperate” cries of pain to the point that the other person became seemingly non-responsive.<sup>62</sup> It seems that the gradual intensification of the shock made it difficult for participants to determine precisely when they were being asked to cross the line. This ride down the slippery ethics slope turns out to be a bit like the apocryphal story about how to boil frogs: “Folk wisdom says that if you throw a frog in boiling water, it will jump out. But if you put a frog in nice warm water and slowly raise the temperature, by the time the frog realizes the water has become too hot, it will already be cooked.”<sup>63</sup>

Early decisions may be made in circumstances in which the ethical course of action is not clear. Wanting to believe that the small steps we have already taken have been good ones and preferring to act in ways that are consistent with our previous behavior,<sup>64</sup> we find it difficult to shift course. Eventually, as a practice becomes routine, the points at which deliberation might have occurred disappear, as do the decision’s ethical contours.<sup>65</sup> “Over time, people become more comfortable pushing the boundaries of professional propriety, and they also find themselves having to continue previous courses of action in order to avoid admitting that their earlier actions were improper.”<sup>66</sup>

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61. STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY* 123 (1974); *see also* Jerry M. Burger, *Replicating Milgram: Would People Still Obey Today?*, 64 *AM. PSYCHOL.* 1, 8 (2009) (attempting to partially replicate Milgram’s study and obtaining similar results).

62. Burger, *supra* note 61, at 8.

63. BAZERMAN & MOORE, *supra* note 37, at 48; *see also* Francesca Gino & Max H. Bazerman, *When Misconduct Goes Unnoticed: The Acceptability of Gradual Erosion in Others’ Unethical Behavior*, 45 *J. EXPERIMENTAL SOC. PSYCHOL.* 708, 717 (2009).

64. *See* ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 52 (5th ed. 2009).

65. *See* Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 *RES. ORGANIZATIONAL BEHAV.* 1, 3 (2003); Linda K. Treviño et al., *Behavioral Ethics in Organizations: A Review*, 32 *J. MGMT.* 951, 970 (2006). *See generally* HERBERT C. KELMAN & V. LEE HAMILTON, *CRIMES OF OBEDIENCE* 18 (1989).

66. Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 *SOC. JUST. RES.* 189, 196 (2004); *see also* Michael Guttentag, *Stumbling into Crime: Stochastic Process Models of Accounting Fraud*, in *RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW* 204 (Alon Harel & Keith Hylton eds., 2011); Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis* (Georgetown Pub. Law and Legal Theory Research Paper, No. 11-135, 2011), *available at* [http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1156&context=fwps\\_papers](http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1156&context=fwps_papers) (noting that “by the time reality starts to set in, our complicity is set as well”).

### C. Ethical Fading

Ethical blindspots and the contours of the slippery slope contribute to a process of *ethical fading* or *moral disengagement* in which decision makers “do not ‘see’ the moral components of an ethical decision, not so much because they are morally uneducated, but because psychological processes *fade* the ‘ethics’ from an ethical dilemma.”<sup>67</sup> A variety of additional psychological processes also play a role in fading ethical considerations from view, making unethical decisions more likely.

For example, the *scripts*—knowledge structures that guide our understanding of how events typically unfold—that govern a particular situation may determine whether or not ethical considerations are taken into account.<sup>68</sup> One “may approach a particular [decision] with a script that has moral content, triggering moral judgment processes, or with one that is devoid of moral content, triggering non-moral judgment processes.”<sup>69</sup> The relevant script may characterize a particular decision—such as whether a conflict is an obstacle to taking on representation of a new client—as a *business* decision as opposed to an ethical decision, fading the ethical implications from view.<sup>70</sup> Consider the Ford Pinto. The Pinto’s gas tank was

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67. Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 224 (2004); see also Albert Bandura, *Moral Disengagement in the Perpetration of Inhumanities*, 3 PERSONALITY & SOC. PSYCHOL. REV. 193, 193 (1999); James R. Detert et al., *Moral Disengagement in Ethical Decision Making: A Study of Antecedents and Outcomes*, 93 J. APPLIED PSYCHOL. 374, 374 (2008); Moore et al., *supra* note 31, at 2.

68. See Robert P. Abelson, *Psychological Status of the Script Concept*, 36 AM. PSYCHOLOGIST 715, 715 (1981).

69. Kenneth D. Butterfield et al., *Moral Awareness in Business Organizations: Influences of Issue-Related and Social Context Factors*, 53 HUM. REL. 981, 989 (2000).

70. See *id.*; Tenbrunsel & Messick, *supra* note 67. Aspects of a situation can evoke business or competitive norms. See, e.g., Aaron C. Kay et al., *Material Priming: The Influence of Mundane Physical Objects on Situational Construal and Competitive Behavioral Choice*, 95 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 83 (2004) (finding that those primed with things associated with business tend to act less cooperatively); Maryam Kouchaki et al., *Seeing Green: Mere Exposure to Money Triggers a Business Decision Frame and Unethical Outcomes*, 121 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 53 (2013); Kathleen D. Vohs et al., *The Psychological Consequences of Money*, 314 SCI. 1154, 1154 (2006) (finding that when reminded of money, people tend to behave more selfishly); Francesca Gino & Lamar Pierce, *The Abundance Effect: Unethical Behavior in the Presence of Wealth*, 109 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 142, 142 (2009); see also Qing Yang et al., *Diverging Effects of Clean Versus Dirty Money on Attitudes, Values, and Interpersonal Behavior*, 104 J. PERSONALITY & SOC. PSYCHOL. 473, 473 (2013). For evidence that clearing conflicts is often thought of as a business, rather than an ethical, decision, see Kimberly Kirkland, *Ethical Infrastructures and De Facto Ethical Norms at Work in Large US Law Firms: The Role of Ethics Counsel*, 11 LEGAL ETHICS 181, 181 (2008). More generally, legal rules or practices may cue moral intuitions in a variety of ways. See, e.g., Ben Depoorter & Stephan W.

susceptible to rupture and burst into flames in slow-speed crashes. Observe how Ford's Field Recall Coordinator describes his reaction to early reports of fires involving the Pinto:

My cue for labeling a case as a problem either required high frequencies of occurrence or directly-traceable causes. I had little time for speculative contemplation on potential problems that did not fit a pattern that suggested known courses of action leading to possible recall. . . . I remember no strong *ethical* overtones to the case whatsoever. It was a very straightforward decision, driven by dominant scripts for the time, place, and context.<sup>71</sup>

The early reports of Pintos "lighting up" did not fit the Coordinator's schema for what a problem would look like—these reports "trickle[d] in" and "did not fit the pattern of recallable standards; the evidence was not overwhelming that the car was defective in some way." Accordingly, the ethical dimensions of the decision about whether to recall were not focal in his mind.<sup>72</sup>

This account is consistent with lawyers' frequent reactions to discussions of ethics. In interviews, lawyers' responses

suggest[] that they simply did not think very much about legal ethics or that they did not consider the issues they confronted in moral or ethical terms. One lawyer explained that he did not confront ethical issues because "when you're dealing with big companies, it doesn't seem to come up." . . . In some cases lawyers appeared to be so acculturated to certain practices they did not consider the ethical issues implicated by those practices.<sup>73</sup>

Certain routine decisions or practices—providing competent services, maintaining sufficient support staff, or communicating with clients—may not be thought of as raising ethical issues in the same ways as more egregious behaviors, such as fraudulent misrepresentation or sleeping with a client.<sup>74</sup> But, these practices are covered by the formal rules of ethics<sup>75</sup> and

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Tontrup, *How Law Frames Moral Intuitions: The Expressive Effect of Specific Performance*, 54 ARIZ. L. REV. 673, 673 (2012); Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1, 1 (2000); Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEG. STUD. 405, 405 (2009).

71. Dennis A. Gioia, *Pinto Fires and Personal Ethics: A Script Analysis of Missed Opportunities*, 11 J. BUS. ETHICS 379, 381–82, 388 (1992).

72. *Id.* at 380; see also Mark Dowie, *Pinto Madness*, MOTHER JONES, Sept./Oct. 1977, available at <http://www.motherjones.com/politics/1977/09/pinto-madness>.

73. Levin, *supra* note 17, at 336 (citation omitted).

74. See, e.g., *id.* at 336 (finding that attorneys were unlikely to raise such routine issues in discussions of ethics).

75. See *infra* note 91.

tend to comprise a significant proportion of the complaints made to bar disciplinary authorities.<sup>76</sup>

Along these same lines, the language that we use to describe a particular act or decision can mask its ethical contours. Euphemisms—such as *friendly fire*, *collateral damage*, *downsizing*, *strategic misrepresentation*, *creative time-keeping*, *bluffing*, *decedent*, a case with *bad facts*, or Ford Pintos *lighting up*—can strip the decision of much of its ethical content.<sup>77</sup> These effects of language can even be seen in the ways that lawyers prefer to talk about ethical issues. Lawyers tend to shy away from labeling behavior as “misconduct,” and are seemingly more comfortable discussing issues involving “gray areas” or “incivility.”<sup>78</sup>

This minimizing of the ethical implications of an act is also seen in the ways that we compare the act to other real or hypothetical acts. One might be able to construct a tenuous justification for the unethical act.<sup>79</sup> And, it is usually possible to imagine instances of behavior that are *worse* than the act at issue and such *advantageous comparisons* can be used to cast a particular decision in a more positive light.<sup>80</sup> Indeed, this sort of comparison is common among lawyers who have been disciplined for ethical breaches, with lawyers pointing to more egregious breaches than those with which they are charged.<sup>81</sup>

The perceived *moral intensity* of a decision can also be influenced by the ease with which the nature, magnitude, probability, and timing of any potential consequences can be drawn to mind.<sup>82</sup> For example, decisions are seen as more unethical when they result in observable harm (the *outcome*

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76. See *supra* note 14.

77. Tenbrunsel & Messick, *supra* note 67, at 226; see also Bandura, *supra* note 67, at 195; William Safire, *The Fine Art of Euphemism*, S.F. SUN. EXAMINER & CHRON., May 13, 1979, at 34.

78. Messikomer, *supra* note 14, at 742; see also RICHARD L. ABEL, LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS 101 (2008) (noting disciplined lawyer’s argument that he “was guilty of ‘mistakes,’ not ‘professional misconduct.’”).

79. See Shaul Shalvi et al., *Justified Ethicality: Observing Desired Counterfactuals Modifies Ethical Perceptions and Behavior*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 181, 181 (2011); see also Francesca Gino & Dan Ariely, *The Dark Side of Creativity: Original Thinkers Can Be More Dishonest*, 102 J. PERSONALITY & SOC. PSYCHOL. 445, 446 (2012); Shaul Shalvi et al., *Honesty Requires Time (and Lack of Justifications)*, 23 PSYCHOL. SCI. 1264, 1264 (2012).

80. See Bandura, *supra* note 67, at 196.

81. ABEL, *supra* note 78, at 32, 200.

82. This is an instance of the *availability heuristic*. When particular information is available or accessible in memory, it has a greater influence on judgments and decisions. See, e.g., Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 4 COGNITIVE PSYCHOL. 207 (1973).



bias)<sup>83</sup> and when they harm identifiable victims.<sup>84</sup> In contrast, when harm is perceived as less likely to occur or more removed in time, the decision will feel less ethically fraught.<sup>85</sup>

Decision makers are also more likely to engage in a range of unethical behaviors when facing a decision that is framed as a *loss* than when the same decision is framed as a *gain*.<sup>86</sup> For instance, professional tax preparers have been found to be more likely to approve returns containing large deductions associated with ambiguous tax rules when they are faced with the possibility of losing an existing client as compared to when they are in the position of trying to develop new clients.<sup>87</sup> In addition, decision makers who are falling just short of reaching their goals are more likely to act unethically (for example, to misrepresent their performance).<sup>88</sup>

Consider how this might apply to a young associate trying to meet the firm's billable hour requirement. Taking the billable hour requirement as

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83. The *outcome bias* occurs when people judge the quality of a decision based on its outcome—for example, decisions resulting in negative consequences are judged to have been bad *decisions*. See Jonathan Baron & John C. Hershey, *Outcome Bias in Decision Evaluation*, 54 J. PERSONALITY & SOC. PSYCHOL. 569, 569 (1988); Francesca Gino et al., *No Harm, No Foul: The Outcome Bias in Ethical Judgments* (Harv. Bus. School, Working Paper No. 08-080, 2008).

84. Francesca Gino et al., *Nameless + Harmless = Blameless: When Seemingly Irrelevant Factors Influence Judgment of (Un)ethical Behavior*, 111 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 93, 94 (2010); see also Karen E. Jenni & George Loewenstein, *Explaining the "Identifiable Victim Effect,"* 14 J. RISK & UNCERTAINTY 235, 236 (1997).

85. Sefa Hayibor & David M Wasieleski, *Effects of the Use of the Availability Heuristic on Ethical Decision-Making in Organizations*, 84 J. BUS. ETHICS 151, 153 (2009); see also Kish-Gephart et al., *supra* note 31, at 5.

86. Jessica S. Cameron & Dale T. Miller, *Ethical Standards in Gain Versus Loss Frames*, in PSYCHOLOGICAL PERSPECTIVES ON ETHICAL BEHAVIOR AND DECISION MAKING 91 (David De Cremer ed., 2009); Mary C. Kern & Dolly Chugh, *Bounded Ethicality: The Perils of Loss Framing*, 20 PSYCHOL. SCI. 378, 378 (2009); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 119 (1996) (Study 2); Christopher P. Reinders Folmer & David De Cremer, *Bad for Me or Bad for Us? Interpersonal Orientations and the Impact of Losses on Unethical Behavior*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 760, 766–77 (2012) (exploring moderators of the effect of loss frame on ethics); see also Francesca Gino & Joshua D. Margolis, *Bringing Ethics Into Focus: How Regulatory Focus and Risk Preferences Influence (Un)Ethical Behavior*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 145, 147 (2011); see generally Daniel Kahneman & Amos Tversky, *Choices, Values, & Frames*, 39 AM. PSYCHOL. 341, 343–44 (1984).

87. Kaye J. Newberry et al., *An Examination of Tax Practitioner Decisions: The Role of Preparer Sanctions and Framing Effects Associated with Client Condition*, 14 J. ECON. PSYCHOL. 439, 441 (1993); see also Henry S. J. Robben et al., *Decision Frame and Opportunity as Determinants of Tax Cheating: An International Experimental Study*, 11 J. ECON. PSYCHOL. 341, 344–45 (1990); Elizabeth F. Loftus, *To File, Perchance to Cheat*, PSYCHOL. TODAY, Apr. 1985, at 35, 37–38.

88. Maurice E. Schweitzer et al., *Goal Setting as a Motivator of Unethical Behavior*, 47 ACAD. MGMT. J. 422, 422 (2004).

the relevant reference point, the associate may fall just short and may perceive this failure as a loss.<sup>89</sup> Both of these features of the situation tend to increase the likelihood of unethical behavior. Similarly, a client and lawyer who are engaged in selling an unsuccessful business<sup>90</sup> are likely to find themselves in a loss frame and at greater risk of unethical behavior. By the same token, once one has stumbled into an unethical decision, considerations about what to do next are likely to be made in a loss frame. One can own up to one's unethical decision and face the negative consequences now, or keep quiet and face a possible and uncertain loss sometime in the future. Such a posture can make risk-seeking behavior more likely.

## II. ETHICS IN LAW PRACTICE

The psychological tendencies that may lead people to behave unethically can be compounded by particular aspects of legal practice. The rules governing professional conduct, the agency relationship between attorney and client, the role of advocate, the demands of practice, the status inherent in the legal profession, and the social environment of the firm or practice area can all influence how lawyers make decisions about issues that implicate ethics. While we recognize that other professions face ethical challenges as well, we think it is helpful to focus on those aspects of law practice that are most likely to influence attorneys.

### A. Ethical Rules and Standards

The regulation of lawyers' professional conduct draws on rules and norms from a variety of sources. Attorneys are, of course, regulated by the rules of professional conduct adopted in their own jurisdiction. These rules typically cover, for example, conflicts of interest, veracity, confidentiality, advertising, billing, trust funds, and sex with clients.<sup>91</sup> Ethical constraints in particular contexts are also sometimes set out in statutes or regulations. For example, statutory provisions governing wiretapping,<sup>92</sup> corporate

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89. Cameron & Miller, *supra* note 86, at 102–03.

90. See Richard W. Painter, *Lawyers' Rules, Auditors' Rules and the Psychology of Concealment*, 84 MINN. L. REV. 1399, 1417–18 (2000).

91. See, e.g., N.Y. RULES OF PROF'L CONDUCT R. 1.7 (2009) (Conflict of Interest: Current Clients); ILL. RULES OF PROF'L CONDUCT R. 3.3 (2010) (Candor Toward the Tribunal); CAL. RULES OF PROF'L CONDUCT R. 1-400 (2012) (Advertising and Solicitation).

92. 18 U.S.C. §§ 2510–22 (2006).

accountability,<sup>93</sup> and foreign corruption<sup>94</sup> require particular disclosures, proscribe certain behavior, or seek to hold lawyers accountable in other ways. Court rules regarding evidence, discovery, and other matters provide additional regulation.<sup>95</sup>

While abundant, the ethical rules governing attorneys leave many gaps, and can be ambiguous and even conflicting.<sup>96</sup> In addition, many of these rules articulate a minimum standard of conduct that must be supplemented with guidance from one's own internal moral code.<sup>97</sup> The frequent opacity of the Model Rules of Professional Conduct is attributable, at least in part, to the potential for intense tension between the duty to diligently represent one's client and duties to opponents, to the public at large, or to the judicial system.<sup>98</sup> While the Prologue to the Model Rules contemplates that these various responsibilities "are usually harmonious,"<sup>99</sup> it also recognizes that "[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."<sup>100</sup> The Rules endeavor to resolve these conflicts when possible, but also provide that often "[s]uch issues must be resolved through the exercise

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93. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

94. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 (2006).

95. Recall that John Gellene, the attorney in our opening example, was tripped up by Bankruptcy Rule 2014. *See* FED. R. BANKR. P. 2014 (requiring "a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee"). *See generally* Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73 (2009) (discussing different forms of lawyer regulation).

96. *See* Wendel, *supra* note 9, at 1168 (arguing that the rules can never be completely clear).

97. *See* MODEL RULES OF PROF'L CONDUCT, PREAMBLE AND SCOPE (2010) (noting the importance of a lawyer's "personal conscience" as a guide to professional responsibility and observing that the "Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules"); *see also* Suchman, *infra* note 101, at 837 ("[A]n ethical profession requires more than just professional ethics. It requires a sense of right and wrong . . . that rises above the letter of the rules . . . [and] a set of social structures for creating, preserving, and transmitting this understanding in the face of real-world challenges."); Fred C. Zacharias, *Integrity Ethics*, 22 GEO. J. LEGAL ETHICS 541, 541 (2009) (arguing that "the very structure of the codes is to provide a framework under which lawyers can and will act as ordinary moral individuals").

98. MODEL RULES OF PROF'L CONDUCT, PROLOGUE (2010) ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

99. *Id.*

100. *Id.*; *see also* Keith Leavitt et al., *Different Hats, Different Obligations: Plural Occupational Identities and Situated Moral Judgments*, 55 ACAD. MGMT. J. 1316 (2012) (exploring the effects on moral judgment of different occupational identities and roles).

of sensitive professional and moral judgment guided by the basic principles underlying the Rules.”<sup>101</sup>

Resolving such ambiguities is particularly challenging because while laudable values can underlie good behavior, they can also motivate unethical behavior.<sup>102</sup> And, lawyers’ expertise at parsing rules, paying attention to exceptions and loopholes, interpreting text, and making arguments on both sides of an issue, while commendable in many ways, can also be problematic in this context.<sup>103</sup> Indeed, psychologists have compared the process of post-hoc moral reasoning to that of lawyering: “moral reasoning is not left free to search for truth but is likely to be hired out like a lawyer by various motives, employed only to seek confirmation of preordained conclusions.”<sup>104</sup> This lawyerly approach can contribute to unethical conduct when it comes to ethical rules that specify only minimum standards, that raise conflicting standards and gray areas, that involve discretionary application of underlying moral principles, and that may be supplemented by additional personal morality.

All of this is enhanced by the fact that lawyers tend to be more comfortable talking about “rules” and “norms” and less comfortable talking about “morality” or “values.”<sup>105</sup> Indeed, law students conclude early on that

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101. *Id.*; see also Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 *FORDHAM L. REV.* 837, 837 (1998) (“[P]rofessional ethics must explicitly incorporate the existence of various competing moral obligations, in a way that purely aspirational principles . . . do not.”). Attorneys who work in transnational contexts face even greater challenges as they will inevitably encounter conflicting rules and norms across jurisdictions. See John Flood, *Transnational Lawyering: Clients, Ethics, & Regulation*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 176, 182 (Leslie C. Levin & Lynn Mather eds., 2012).

102. Jaime D. Crowley & Michael C. Gottlieb, *Objects in the Mirror are Closer Than They Appear: A Primary Prevention Model for Ethical Decision Making*, 43 *PROF. PSYCHOL.: RES. & PRAC.* 65, 68 (2012) (“Sound values can build resiliency, but they can also function as vulnerabilities.”); Linda J. Skitka & G. Scott Morgan, *The Double Edged Sword of a Moral State of Mind*, in *PERSONALITY, IDENTITY, AND CHARACTER: EXPLORATIONS IN MORAL PSYCHOLOGY*, *supra* note 31, at 355; Alan C. Tjeltveit & Michael C. Gottlieb, *Avoiding the Road to Ethical Disaster: Overcoming Vulnerabilities and Developing Resilience*, 47 *PSYCHOTHERAPY: THEORY, RES., PRAC., TRAINING* 98, 98 (2010).

103. While the ethics rules that are applicable to other professionals may share many of the features we have described, the particular analytical approach of lawyers may interact with the nature of the rules to make these characteristics more problematic. This strikes us as an interesting empirical question that would benefit from additional research.

104. Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *PSYCHOL. REV.* 814, 822 (2001); see also JONAH LEHRER, *HOW WE DECIDE* 173 (2009) (“When it comes to making ethical decisions, human rationality isn’t a scientist, it’s a lawyer. This inner attorney gathers bits of evidence, post hoc justifications, and pithy rhetoric in order to make the automatic reaction seem reasonable.”).

105. Messikomer, *supra* note 14, at 742; Lynn Mather & Leslie C. Levin, *Why Context Matters*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT*, *supra* note 101, at

what matters is not their *opinion* about a matter but whether they can articulate a credible argument, complicating their inclination to consult their own sense of right and wrong.<sup>106</sup> One study of lawyers' ethics found:

When [attorneys] spoke of "doing the right thing," they tended to define this term as respecting some external source of authority or opinion: the civil discovery rules, ethics codes, judges' orders, clients' orders and preferences. They clearly preferred utilitarian (cost-benefit) analysis to normative reasoning, and they exhibited a positive allergy to moral language and an inclination to express even the norms of basic truth telling and fairness in compliance with the standard of some external standard or group.<sup>107</sup>

This discomfort echoes, and may stem in part from, debates over the role that personal morality should (or should not) play in conjunction with the lawyer's professional duties.<sup>108</sup> It may also encourage lawyers to take a minimalist approach to ethics, substituting rules that may only articulate minimum standards for thoughtful reflection on the ethical implications of a decision.

Lawyers may also be affected by the human tendency to be less compliant with rules or authorities that they see as illegitimate.<sup>109</sup> Lawyers in different specialties or communities of practice may encounter different norms or find that particular rules fit the contours of that practice area more or less well.<sup>110</sup> Ethical guidelines that make sense for litigators may not fit

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11; see also Suchman, *supra* note 101, at 844–45. Business managers, too, resist casting decisions in *moral* terms. See Frederick B. Bird & James A. Waters, *The Moral Muteness of Managers*, 32 CAL. MGMT. REV. 73, 73 (1989); see also Tamar A. Kreps & Benoît Monin, "Doing Well By Doing Good"? *Ambivalent Moral Framing in Organizations*, 31 RES. ORGANIZATIONAL BEHAV. 99, 102 (2011).

106. Our thanks to a law student at the Yale-Quinnipiac Dispute Resolution Workshop for putting the problem in these terms.

107. Gordon, *supra* note 27, at 732.

108. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 394 (1988) (describing the "standard conception" of the lawyer's role as "partisanship and nonaccountability"); see Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493, 501 (2011) (describing the evolution of this debate); see also Gordon, *supra* note 21, at 1195 (describing conception of the adversary role and offering an alternative role for corporate lawyers).

109. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 108 (2006); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 387 (2006)..

110. Lynn Mather & Craig McEwen, *Client Grievances and Lawyer Conduct: The Challenges of Divorce Practice*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT*, *supra* note 101, at 69 (noting that the rules may "ignore the highly variable circumstances of legal practice . . . because they must be framed at a level of generality that crosses practice areas").

transactional work as well—and vice versa.<sup>111</sup> Many solo and small firm attorneys see certain rules as calculated to “interfere with [their] business-getting activities” and, therefore, do not respect them.<sup>112</sup>

All of these factors can lead attorneys to adopt a situationist approach to ethics. In discussing discovery ethics with attorneys, for example, Robert Nelson found that “[t]he answer to almost every question was that it ‘depends.’ Aggressiveness generally is inappropriate, *unless* the war was initiated by the other side. Hardball usually is inappropriate, *unless* there is a specter of mischievous plaintiffs’ lawyers waiting to use the information from discovery for other suits.”<sup>113</sup>

In similar ways, ambiguity provides open space for other influences to operate as lawyers construct arguments about what is and is not appropriate.<sup>114</sup> In one study, the lawyers interviewed indicated that they “*assumed* that the ‘real’ meaning of ethical rules was consistent with pragmatic concerns, even when the letter of the rules was not.”<sup>115</sup> Other lawyers talk about the need to “get comfortable” with what a client wants them to do—a process by which they convince themselves that a course of action is acceptable. This process of getting comfortable is made easier when the rules are ambiguous.<sup>116</sup>

### B. *The Agency Relationship*

The fact that attorneys are charged with representing clients in agency relationships can complicate ethical decision making in several important ways. First, although an agent is expected to further the interests of the principal, it is clear that attorneys have their own personal interests that may or may not be directly compatible with those of their client. In addition, clients may be willing to engage in conduct through their attorneys that they would not engage in on their own. Similarly, lawyers who might not have

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111. Carrie Menkel-Meadow, *The Limits of Adversarial Ethics*, in ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATION 123, 126 n.14 (Deborah L. Rhode ed., 2000); REGAN, *supra* note 13, at 328 (describing how conflicts of interest differ in litigation and transactional work).

112. *See, e.g.*, Levin, *supra* note 17, at 371; *see also* Mather & Levin, *supra* note 105.

113. Nelson, *supra* note 33, at 780 (emphasis added).

114. *See* Wendel, *supra* note 9, at 1171 (“[N]o matter how clear a rule appears to be, it will always be ambiguous enough to be manipulated.”). *See generally* Feldman, *supra* note 30, at 885 (describing how technocratic lawyering interferes with ethical decision making).

115. Suchman, *supra* note 101, at 844 (emphasis added). *See also* Levin, *supra* note 17, at 369–71 (providing examples of small firm and individual practitioners who felt that there was a “disconnect” between the ethical rules and the “realities of practice”).

116. Langevoort, *supra* note 66, at 22.

been independently disposed to undertake or to propose a particular course of unethical conduct may be more willing to do so when it is suggested by a client.

### 1. The Role of the Lawyer's Interests

The interests of lawyer and client are often aligned and often favor ethical behavior. Specifically, lawyers and clients will generally share an interest in winning a case or negotiating a favorable deal.<sup>117</sup> Lawyers have interests in seeing themselves as ethical legal professionals, in avoiding discipline, and in maintaining a good reputation.<sup>118</sup> Clients, too, may have interests in behaving ethically.<sup>119</sup>

But, lawyers also routinely face situations in which their interests come into conflict with clients' interests and with their professional responsibilities. Lawyers' judgments can be influenced by a myriad of desires—including the desire to satisfy the client, to make partner, to generate fees, to manage their own cash flow, to win a case, to achieve or maintain a particular reputation or status, to “do justice,” or to manage limited time.<sup>120</sup>

These interests can influence the ways in which lawyers seek out and interpret information and generate arguments.<sup>121</sup> There is a tendency to conflate what is fair or ethical with what serves one's own interest, especially as there are many metrics by which one can judge fairness.<sup>122</sup> And, *confirmation bias* can lead us to interpret new information in ways that favor our existing beliefs and to ignore dissent or other indications of

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117. Note that there are ethical limits on attorneys being too closely aligned with their client. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.8 (2010).

118. See, e.g., Joshua E. Perry et al., *The Ethical Health Lawyer: An Empirical Assessment of Moral Decision Making*, 37 J. L. MED. & ETHICS 461, 466 (2009).

119. We recognize that clients may also have interests in behaving unethically, at least in the short run and as long as they don't get caught.

120. See, e.g., Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 412 (1997) (discussing how attorney self-interest might affect advice about risk); Suchman, *supra* note 101 (describing the variety of interests that attorneys bring to ethical decision making). For a general discussion of how legal actors manage multiple, sometimes conflicting, interests, see Jennifer K. Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1153–54 (2003).

121. See Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 480 (1990).

122. See Morton Deutsch, *Equity, Equality, and Need: What Determines Which Value Will be Used as the Basis of Distributive Justice?*, 31 J. SOC. ISSUES 137, 147 (1975).

ethical challenges.<sup>123</sup> Thus, when an unethical course of action serves our interests, it may be easy to latch on to the particular metric that validates that course of action or to interpret the facts or the law in ways that are consistent with a judgment that the desired course of action is appropriate. “The ethical failure [then,] is not in the commitment to fairness but in the biased interpretation of information.”<sup>124</sup> But because we tend to believe that we make decisions based on objective criteria—the *illusion of objectivity*—it is difficult for us to recognize these effects.<sup>125</sup>

Such interests can affect how attorneys bill their time, the factual and legal conclusions they draw, how they behave in negotiation, and the advice they give their clients. Consider, for example, the lawyers advising Enron, who “agreed to review the propriety of Enron transactions in which [the lawyers’] own services had been used.”<sup>126</sup> It would not be surprising if the lawyers were motivated (consciously or unconsciously) to find that those prior transactions had been appropriate.<sup>127</sup> Consider, too, how an attorney might feel the need to engage in puffing in order to land a particular client, how an attorney might be influenced by the desire to obtain or keep a client, or how an attorney’s desire for or fear of publicity might impact his representation of a client.

Or think about how different billing arrangements might influence lawyer decision making.<sup>128</sup> A lawyer who is paid by the hour might be inclined to spend more (conceivably unnecessary) time on a matter, be “aggressive rather than conservative” in billing his time, and have a

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123. Scott Sonenshein, *The Role of Construction, Intuition, and Justification in Responding to Ethical Issues at Work: The Sensemaking-Intuition Model*, 32 ACAD. MGMT. REV. 1022, 1029–30 (2007). See generally Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998); Barbara O’Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 PSYCHOL. PUB. POL’Y & L. 315, 315 (2009).

124. Chugh et al., *supra* note 51, at 83; see also David M. Messick & Keith P. Sentis, *Fairness and Preference*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 418, 418 (1979).

125. Armor, *supra* note 48, at 11–12.

126. Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1334 (2006).

127. If the lawyers were to find that their own prior advice was improper, they might not only embarrass themselves but also expose themselves to possible legal liability. See Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW. 143, 164–66 (2002).

128. See SUSAN SHAPIRO, TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE 242–46 (2002); A.B.A. COMMISSION ON BILLABLE HOURS REPORT 2001–2002, at 5 (2002), available at [http://ilta.ebiz.uapps.net/productfiles/productfiles/914311/FMPG4\\_ABABillableHours2002.pdf](http://ilta.ebiz.uapps.net/productfiles/productfiles/914311/FMPG4_ABABillableHours2002.pdf); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 193–95 (1987). See generally Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1979–80 (2002).



tendency to be slow in settling his clients' disputes.<sup>129</sup> In contrast, a lawyer who is paid on a flat-fee or other fixed-rate basis might be inclined to minimize the amount of time devoted to the matter.<sup>130</sup> And, while a lawyer working on a contingent fee may be motivated to spend time on the case in order to increase the amount of the verdict, settlement, or deal on which her fee will be based, she will only want to do so to the extent that such an increase is greater than her investment.<sup>131</sup> In addition, the contingent fee attorney may be more likely to focus on the financial aspects of settlement which will impact her fee, rather than non-financial aspects which could benefit the client but not directly benefit the lawyer.

Finally, consider the case of the lawyer who represented the plaintiff in a sexual harassment and discrimination suit.<sup>132</sup> During a break in a deposition, plaintiff found a set of privileged documents belonging to the other side on a conference room table, read them, and removed them from the room.<sup>133</sup> Upon learning of his client's action and unsure about how to respond, the lawyer began to interpret the facts in a favorable way (noting that the documents "were right in front of her" and were not marked "confidential"), to blame the other side ("they certainly knew how to handle documents"), and to read selectively prior case law (relying on a case involving the *inadvertent delivery* of privileged documents). He obtained a second opinion, but from someone who also had an interest in the outcome of the case. In all these ways, he convinced himself that the use of the documents was allowable.<sup>134</sup>

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129. See Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 320 (1999); see also Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 531–33 (1994) (distinguishing between interests of firm, which may desire to keep client happy, and interests of individual attorney, who may have need to bill a large numbers of hours).

130. Deborah L. Rhode, *Ethics in Practice*, in ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION, *supra* note 111, at 7.

131. See Sternlight, *supra* note 129, at 327–28.

132. ABEL, *supra* note 78, at 389.

133. *Id.*

134. The disciplinary authorities disagreed with the lawyer's interpretation, ultimately finding him in violation of ethics rules. *Id.*; Leslie C. Levin, *Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock*, 22 GEO J. LEGAL ETHICS 1549, 1570 (2009) (reviewing ABEL, *supra* note 78).

## 2. Conflicts and Disclosure

Conflicts of interest can arise not only between attorneys and their clients, but also between the interests of multiple clients, or between current and future or former clients.<sup>135</sup> While many believe that adequate disclosure of conflicts and consent thereto can help to address any potential problems,<sup>136</sup> and while the Model Rules seem to be based on this assumption,<sup>137</sup> recent research suggests that disclosure as a remedy is potentially problematic.

Ideally, the disclosure of a conflicting interest permits the affected party to discount the conflicted party's advice or opinion to account for the conflict.<sup>138</sup> In practice, however, the affected party may not sufficiently discount the advice.

First, although disclosure of a conflict of interest is likely to decrease trust in the advisor's recommendation,<sup>139</sup> the discounting that results may not be sufficient. Because we tend to underestimate the extent to which situational pressures influence the behavior of others, the client may underestimate the extent to which the conflict may have influenced the attorney's advice.<sup>140</sup> Further, even were the client to attempt to discount the conflicted advice, the client may have difficulty sufficiently adjusting away from the *anchor* provided by the advice<sup>141</sup> and may find it difficult to ignore the advice once it has been proffered.<sup>142</sup> Moreover, disclosure is also likely

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135. See generally SHAPIRO, *supra* note 128, at 289.

136. See generally Omri Ben Shohar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 649–50 (2011) (surveying the frequency of disclosure as remedy in a range of contexts). Note also that there are practical considerations involved in disclosing conflicts and asking for a waiver. See SHAPIRO, *supra* note 128, at 376–92.

137. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6–1.9 (2010) (allowing representation in some instances following disclosure and informed consent).

138. *Id.* R. 1.7 cmt. 18 (2010). A client deciding whether to retain a conflicted attorney might similarly discount the likely impact of the conflict and overestimate their ability to discount the advice given.

139. See, e.g., Daylian M. Cain et al., *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. LEGAL STUD. 1, 5–6 (2005); Sunita Sah et al., *The Burden of Disclosure: Increased Compliance with Distrusted Advice*, 104 J. PERSONALITY & SOC. PSYCHOL. 289, 289 (2013).

140. This tendency is known as the *fundamental attribution error*. See Edward E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 J. EXPERIMENTAL SOC. PSYCHOL. 1, 11 (1967).

141. *Anchors* provide a starting point for a judgment; adjustments are then made away from the anchor, but these adjustments are often insufficient and result in judgments that are skewed toward the starting point. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 14 (Daniel Kahneman et al. eds., 1982).

142. Cain et al., *supra* note 139, at 6; see also Colin Camerer et al., *The Curse of Knowledge in Economic Settings: An Experimental Analysis*, 97 J. POL. ECON. 1232, 1246–47 (1989); Fritz Strack & Thomas Mussweiler, *Explaining the Enigmatic Anchoring Effect:*

to generate some countervailing degree of *increased* trust in the conflicted advisor in some cases. In particular, to the extent that the disclosure signals to the recipient that the attorney is attentive to potential conflicts and wants to address them with integrity, disclosure may make the advisor seem particularly forthright.<sup>143</sup>

Even when trust in the recommendation is degraded, there may be increased pressure to act in accordance with the recommendation because the client does not want to *signal* her distrust of the advisor (*insinuation anxiety*).<sup>144</sup> Wanting to be consistent in her own decision making,<sup>145</sup> the client may also resist second guessing her original decision to consult the attorney and may compare the certain and immediate loss of the attorney's assistance with the less certain and future consequences stemming from the conflict.<sup>146</sup>

Further, in addition to the failure of clients to sufficiently take account of the potentially biasing effect of a conflict, attorneys' disclosure of a conflict might actually *increase* the influence of the conflict on *attorney* judgments and actions. Research has found that behaving ethically at one point in time can result in less ethical behavior at a later point in time by establishing the moral credentials of the actor in her own mind and *licensing* her to behave less ethically later.<sup>147</sup> This is consistent with research finding that an

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*Mechanisms of Selective Accessibility*, 73 J. PERSONALITY & SOC. PSYCHOL. 437, 437 (1997). Legal fact-finders have similar difficulties in ignoring inadmissible evidence. *See, e.g.*, Mark Kelman et al., *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287, 301–03 (1996); Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113, 124–25 (1994); William C. Thompson et al., *Inadmissible Evidence and Juror Verdicts*, 40 J. PERSONALITY & SOC. PSYCHOL. 453, 453 (1981); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1253–58 (2005).

143. *See* Sah et al., *supra* note 139, at 290; *see also* Steven D. Pearson et al., *A Trial of Disclosing Physicians' Financial Incentives to Patients*, 166 ARCH. INTERNAL MED. 623, 626 (2006); Denise M. Rousseau et al., *Not So Different After All: A Cross-Discipline View of Trust*, 23 ACAD. MGMT. REV. 393, 399 (1998) (explaining the development of relational trust).

144. Sah et al., *supra* note 139, at 290.

145. *See* CIALDINI, *supra* note 64, at 52 (describing the pressure for consistency).

146. *See* Leonard E. Gross, *Are Differences Among the Attorney Conflict of Interest Rules Consistent with the Principles of Behavioral Economics?*, 19 GEO J. LEGAL ETHICS 111, 114 (2006); Cameron & Miller, *supra* note 86, at 91–101 (discussing loss aversion).

147. Dale T. Miller & Daniel A. Effron, *Psychological License: When It Is Needed and How It Functions*, 43 ADVS. EXPERIMENTAL SOC. PSYCHOL. 115 (2010); Benoît Monin & Dale T. Miller, *Moral Credentials and the Expression of Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 33, 34 (2001); *see also* Anna C. Merritt et al., *The Strategic Pursuit of Moral Credentials*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 774, 774 (2012). It is possible that acceptance of routine disclosure as a remedy for conflicts might license the profession as a whole to believe that they have effectively dealt with conflicts situations. *See* George Loewenstein et al., *The*

individual who discloses a conflict may actually give more biased advice than the attorney who does not disclose—a process known as *disclosure distortion*.<sup>148</sup>

### 3. Acting Unethically Indirectly—Through and On Behalf of Others

Another complication that flows from the agency relationship between attorney and client relates to the *omission bias*—the tendency to prefer options that entail inaction to options that require action.<sup>149</sup> Because harms caused *indirectly* entail less moral intensity than harms inflicted directly, people tend to be more willing to engage in unethical conduct when acting through an agent than when acting for themselves.<sup>150</sup> For example, in one variant of the Milgram shock experiments in which the study participant relied on another person to administer the shock<sup>151</sup> over 90% of participants administered the highest shock, as compared to “only” 63% of solo participants who themselves had to shock a person in the next room and 30% of participants who had to directly place the other’s hand on a plate to

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*Unintended Consequences of Conflict of Interest Disclosures*, 307 J. AM. MED. ASS’N 669, 669 (2012) (applying this literature to conflicts of interest in the medical profession).

148. Cain et al., *supra* note 139, at 13; Daylian Cain et al., *When Sunlight Fails to Disinfect: Understanding the Perverse Effects of Disclosing Conflicts of Interest*, 37 J. CONSUMER RES. 836, 841 (2011); see Daylian M. Cain et al., *Coming Clean but Playing Dirtier: The Shortcomings of Disclosure as a Solution to Conflicts of Interest*, in CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY, *supra* note 51, at 104; George Loewenstein et al., *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest*, 101 AM. ECON. REV.: PAPERS & PROCEEDINGS 423, 424 (2011); Moore & Loewenstein, *supra* note 66, at 190–91.

149. See generally Jonathan Baron & Ilana Ritov, *Reference Points and Omission Bias*, 59 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 475, 475 (1994); Mark Spranca et al., *Omission and Commission in Judgment and Choice*, 27 J. EXPERIMENTAL SOC. PSYCHOL. 76, 78–79 (1991).

150. Lucas C. Coffman, *Intermediation Reduces Punishment (and Reward)*, 3 AM. ECON. J.: MICROECON. 77, 78 (2011); Neeru Paharia et al., *Dirty Work, Clean Hands: The Moral Psychology of Indirect Agency*, 109 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 134, 134 (2009). Harms caused indirectly also tend to be punished less severely. *Id.* at 141; see also Björn Bartling & Urs Fischbacher, *Shifting the Blame: On Delegation and Responsibility 2* (Univ. of Zurich Institute for Empirical Research in Economics, Working Paper No. 380, 2008), available at [www.iew.uzh.ch/wp/iewwp380.pdf](http://www.iew.uzh.ch/wp/iewwp380.pdf); Edward B. Royzman & Jonathan Baron, *The Preference for Indirect Harm*, 15 SOC. JUST. RES. 165, 182 (2002). See generally Jason Dana et al., *Ethical Immunity: How People Violate Their Own Moral Standards Without Feeling They Are Doing So*, in BEHAVIORAL BUSINESS ETHICS: SHAPING AN EMERGING FIELD 201 (David De Cremer & Ann E. Tenbrunsel eds., 2012).

151. See *supra* Section I.B.

administer the shock.<sup>152</sup> Clients, similarly, may be more willing to have their attorneys act unethically on their behalf than they would be to themselves engage in a particular unethical act. Indeed, some clients may hold a *schema*<sup>153</sup> or mental representation for “lawyer” that inclines them to make such proposals.<sup>154</sup>

At the same time, because people tend to be more willing to endorse an unfair proposal suggested by someone else than they would be to originate such a suggestion themselves,<sup>155</sup> lawyers may be more willing to approve a client’s proposed unethical course of action than they would be to initiate such a course. One recent study examined the extent to which attorneys would disclose a material but damaging piece of information that had come to their attention on the eve of reaching a favorable settlement agreement. One of the primary justifications given by lawyers who chose not to disclose was that *their client* did not want them to divulge the information.<sup>156</sup> While, legally, the fact that nondisclosure was requested by the client does not justify the attorney’s action,<sup>157</sup>

the principal may feel more detached, and hence less responsible, for such an action if it is delegated, while the agent may feel that he or she was “just carrying out orders” . . . . Through the use of agents, therefore, accountability for morally questionable behavior can become vertically diffused, with no individual taking responsibility.<sup>158</sup>

Finally, psychologists have found that people are more willing to engage in unethical conduct when they believe such conduct will benefit another

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152. MILGRAM, *supra* note 61, at 119–22.

153. See LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION* 76 (1991) (defining “schema”).

154. Levin, *supra* note 17, at 339 (reporting the comments of one lawyer: “There’s an expectation that people have that you are going to lie for them. That you’re going to make up things for them. That that’s expected of them.”).

155. Don A. Moore et al., *Conflicts of Interest and the Case of Auditor Independence: Moral Seduction and Strategic Issue Cycling*, 31 *ACAD. MGMT. REV.* 10, 17 (2006) (describing Kristina A. Diekmann et al., *Self-Interest and Fairness in Problems of Resource Allocation: Allocators Versus Recipients*, 72 *J. PERSONALITY & SOC. PSYCHOL.* 1061, 1072 (1997)); Paharia et al., *supra* note 150, at 141. This willingness to endorse another’s unethical suggestions is in step with norms that “assign[] ultimate responsibility for the moral content of a client’s position to the client himself,” rather than to the attorney as agent. Austin Sarat, *Ethics in Litigation: Rhetoric of Crisis, Realities of Practice*, in *ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATION*, *supra* note 111, at 149.

156. Hinshaw & Alberts, *supra* note 11, at 125; see also Levin, *supra* note 17, at 338–40 (discussing lawyers requested to do things by “bad” clients).

157. Hinshaw & Alberts, *supra* note 11, at 123–25.

158. John R. Hamman et al., *Self-Interest Through Delegation: An Additional Rationale for the Principal-Agent Relationship*, 100 *AM. ECON. REV.* 1826, 1826 (2010).

person.<sup>159</sup> For example, questionable actions in discovery might be seen as more appropriate when done to benefit a client one sees as being “railroaded,” or a conflict of interest might be ignored to spare a client added expense. Thus, lawyers may be more inclined to engage in unethical acts they believe will benefit clients than they would be to engage in the same behavior to benefit themselves alone.<sup>160</sup>

#### 4. Benefits of Agency Relationship

While we have seen that agency relationships can create ethical difficulties for attorneys, attorney-client relationships can also serve as a check on ethics. First, as we have noted, attorneys will not share all of their clients’ interests—and attorneys have their own interests in avoiding censure. This different perspective on clients’ decisions may allow the attorney to see the ethical contours of a decision that have faded for the client. Similarly, to the extent that an attorney has only periodic involvement with a client, the attorney may be in a position to notice shifts in practice that are not noticeable to a client who sees only the more incremental changes. That is, the attorney may be better positioned to notice the client’s slide down the slippery slope. In addition, harmful behavior is less likely in the presence of a dissenter.<sup>161</sup> Thus, developing a relationship in which attorney and client are able to effectively express dissent can mean that each can serve as an ethical check for the other. And, finally, to the extent that searching analysis is part of our basic understanding of or *schema* for attorneys, a client may be more receptive to the questioning of

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159. See, e.g., Francesca Gino & Lamar Pierce, *Dishonesty in the Name of Equity*, 20 PSYCHOL. SCI. 1153, 1159 (2009); Francesca Gino & Lamar Pierce, *Lying to Level the Playing Field: Why People May Dishonestly Help or Hurt Others to Create Equity*, 95 J. BUS. ETHICS 89, 101 (2010); Francesca Gino & Lamar Pierce, *Robin Hood Under the Hood: Wealth-Based Discrimination in Illicit Customer Help*, 21 ORGANIZATIONAL SCI. 1176, 1189 (2010); Scott S. Wiltermuth, *Cheating More When the Spoils are Split*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 157, 166–67 (2011).

160. See, e.g., Robert K. Vischer, *Legal Advice As Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 243 (2006) (“The lawyers bought into an understanding of Enron as a valiant corporate renegade, looking to manipulate the system in furtherance of the greater corporate good.”); Michael Powell & Lois Romano, *Roman Catholic Church Shifts Legal Strategy: Aggressive Litigation Replaces Quiet Settlements*, WASH. POST, May 13, 2002, at A1 (discussing attorneys for Catholic priests accused of sexual abuse “fighting to keep documents secret and engaging in new tactics to minimize settlements,” so as to defend “good priests”).

161. See, e.g., MILGRAM, *supra* note 61, at 116; see also Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS: GEN. & APPLIED 1, 2 (1956).

her plans or activities that comes from her attorney than to similar critique from another source.

### C. *The Challenges of the Adversarial System*

To advocate for a client's interests implies some level of partisanship. Both litigators and transactional attorneys often represent parties with opposed positions and lawyers representing regulated entities can also come to see regulators as their adversaries.<sup>162</sup>

Many ethical issues arise in this adversarial context. In the service of "zealous advocacy,"<sup>163</sup> attorneys may fail to ask their client important or probing questions, fail to disclose material information to an opponent, exaggerate claims, dissemble about alternative deals, coach rather than prepare witnesses, aggressively cross-examine even candid witnesses, and so on. Indeed, some lawyers view "an ability to push the ethical envelope [as] a source of pride, rather than an embarrassing confession of susceptibility to temptation."<sup>164</sup> In this view, "cautious punctiliousness [is] at least as ethically troubling as venturesome zeal."<sup>165</sup> The structure of attorneys' relationships with their clients can sometimes mean that attorneys are ethically obligated to behave in ways that would be viewed as unethical in other contexts.<sup>166</sup> But, the adversary system can also incline lawyers take

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162. See, e.g., Langevoort, *supra* note 66, at 22 ("Where a loyalty to the corporate mission comes to color the lawyers' thinking, it becomes easy to start thinking of regulators and the courts as rivals.").

163. Although the Model Rules were revised in 2002 to make "zealous advoca[cy]" part of the preamble, rather than part of the Rules, many attorneys continue to believe and act as if "zealous advocacy" is required in all circumstances. The comment to Rule 1.3, requiring "reasonable diligence," makes clear however that "zeal" is limited by ethics and professional discretion.

164. Suchman, *supra* note 101, at 854 ("Zealous advocacy was, to them, an affirmative moral obligation, even when it came into conflict with other ethical rules."); Wendel, *supra* note 9, at 1170 (recounting how long-time Enron attorneys defended their behavior as "creative and aggressive" structuring of transactions for the benefit of their client).

165. Suchman, *supra* note 101, at 854.

166. See Gordon, *supra* note 27, at 710 (noting that "much of what is characterized as aggressive or 'hardball' behavior is legitimate and functional in view of valid litigation objectives and the conventional norms of the adversary game"); see also, e.g., *People v. Belge*, 376 N.Y.S.2d 771, 771 (N.Y. App. Div. 1975) (holding that attorney-client privilege exempted attorney from duty to report death occurring without medical attendance); Adam Liptak, *When Law Prevents Righting A Wrong*, N.Y. TIMES, May 4, 2008, at WK4; *Slayer's 2 Lawyers Kept Secret of 2 More Killings*, N.Y. TIMES, June 20, 1974, at 81.

this zealotry too far and to “treat[] behavior that would be ethically problematic in other contexts as not problematic.”<sup>167</sup>

Consider how an adversarial mindset might have influenced John Gellene as he considered whether to disclose his ties to South Street and Salovaara in the Bucyrus bankruptcy:

In the moral calculus that likely had emerged for Gellene during [the bankruptcy] negotiations, [disclosure] would mean that the party [(JNL)] that had behaved so unreasonably during the past year would gain the upper hand. The debtor would have to hire new counsel. That counsel would have to spend valuable time becoming familiar with Bucyrus, the other parties, and the plan. Furthermore, JNL undoubtedly would use this disruption as an opportunity to push for drastic changes in the plan. . . . Given the hostility of other parties to JNL, the result might be a bloody mess that would leave Bucyrus beyond repair.

For these reasons, Gellene may have convinced himself that non-disclosure *not only was not morally blameworthy, but that it was morally justified*. . . . Disclosure would do little to add to the integrity of the bankruptcy process, but could seriously undermine the chance for a timely and successful reorganization.<sup>168</sup>

Acting in a way that would provide an advantage to an opponent may have been unthinkable.

Consider, too, that approaching a conflict or negotiation from a competitive perspective tends to increase unethical behavior.<sup>169</sup> Similarly, we tend to evaluate behavior as being more ethical when we believe that we are acting in response to unfair behavior by another.<sup>170</sup> These findings are consistent, for example, with many lawyers’ views of the discovery process:

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167. Sarat, *supra* note 155, at 149; see KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 156 (1930) (“Why should you expect the ethics of the game to be different from the game itself?”).

168. REGAN, *supra* note 13, at 347–48 (emphasis added).

169. Deepak Malhotra, *The Desire to Win: The Effects of Competitive Arousal on Motivation and Behavior*, 111 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 139, 139 (2010); Maurice E. Schweitzer et al., *Conflict Frames and the Use of Deception: Are Competitive Negotiators Less Ethical?*, 35 *J. APPLIED SOC. PSYCHOL.* 2123, 2140 (2005); Wolfgang Steinel & Carsten K.W. De Dreu, *Social Motives and Strategic Misrepresentation in Social Decision Making*, 86 *J. PERSONALITY & SOC. PSYCHOL.* 419, 431 (2004); see also Gillian Ku et al., *Towards a Competitive Arousal Model of Decision-Making: A Study of Auction Fever in Live and Internet Auctions*, 96 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 89, 101–02 (2005).

170. Maurice E. Schweitzer & Donald E. Gibson, *Fairness, Feelings, and Ethical Decision-Making: Consequences of Violating Community Standards of Fairness*, 77 *J. BUS. ETHICS* 287, 298 (2008).



A question I have often asked lawyers is this: If the other side does it, can you retaliate? The legal answer is no. The federal rule against discovery abuse (Rule 26) does not have a “they started it!” exception. But many lawyers think that if the other side starts playing discovery games, they would be hurting their clients to turn the other cheek.<sup>171</sup>

The tendency to assess the propriety of questionable negotiation tactics more positively when they are described as *responses* to a questionable tactic used by the other side<sup>172</sup> can be particularly pernicious when combined with our tendency to attribute bias or unfairness to those with whom we simply disagree.<sup>173</sup>

Consider how all of this might influence a prosecutor’s application of *Brady v. Maryland*.<sup>174</sup> *Brady* requires the prosecution to disclose evidence that is favorable to the defense when it “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.”<sup>175</sup> In particular,

*Brady* requires a prosecutor who is determining whether to disclose a piece of evidence to the defense to speculate first about how the remaining evidence will come together against the defendant at trial, and then about whether a reasonable probability exists that the piece of evidence at issue would affect the result of the trial. During the first step, a risk exists that prosecutors will engage in biased recall, retrieving from memory only those facts that tend to confirm the hypothesis of guilt. Moreover, because of selective information processing, the prosecutor will accept at face value the evidence she views as inculpatory, without subjecting it to the scrutiny that a defense attorney would encourage jurors to apply.

Cognitive bias would also appear to taint the second speculative step of the *Brady* analysis, requiring the prosecutor to

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171. David Luban, *Making Sense of Moral Meltdowns*, in *MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT, AND POLICY* 60 (Deborah L. Rhode ed., 2006). Many litigated discovery disputes involve allegations by all parties about their opponents’ bad behavior. See, e.g., 6 Michael B. Keating, *BUSINESS & COMMERCIAL LITIGATION IN FEDERAL COURTS* § 66:8 (Robert L. Haig ed., 3d ed. 2012); see also Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 *COLUM. L. REV.* 1618, 1630 (1996).

172. Stephen M. Garcia et al., *Morally Questionable Tactics: Negotiations Between District Attorneys and Public Defenders*, 27 *PERSONALITY & SOC. PSYCHOL. BULL.* 731, 739 (2001).

173. Kathleen A. Kennedy & Emily Pronin, *When Disagreement Gets Ugly: Perceptions of Bias and the Escalation of Conflict*, 34 *PERSONALITY & SOC. PSYCHOL. BULL.* 833, 845 (2008).

174. 373 U.S. 83 (1963).

175. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); see also *United States v. Bagley*, 473 U.S. 667, 675 (1985).

determine the value of the potentially exculpatory evidence in the context of the entire record. Because of selective information processing, the prosecutor will look for weaknesses in evidence contradicting her existing belief in the defendant's guilt. In short, compared to a neutral decision maker, the prosecutor will overestimate the strength of the government's case against the defendant and underestimate the potential exculpatory value of the evidence whose disclosure is at issue. As a consequence, the prosecutor will fail to see materiality where it might in fact exist.<sup>176</sup>

#### D. *The Tolls of Law Practice*

Long hours, deadlines, and workplace politics can combine to take a toll on lawyers, as can lack of sleep, frequent interruptions, travel, difficult decisions, and the struggle to balance work and family life.<sup>177</sup> In *Eat What You Kill*, Regan describes John Gellene as working in an "environment of constant urgency" in which getting five hours of sleep was thought to be a "luxury." Gellene did not sleep at all during the two days leading up to the filing of the bankruptcy petition and the application for appointment as Bucyrus' counsel, two days that were described as being "'a circus,' with people running around, papers flying, and a large group of lawyers, legal assistants, and financial advisors turning the Bucyrus board room into command central. The stress on everyone was palpable."<sup>178</sup>

These sorts of job stresses impact ethical decision making. In a classic study on time pressures, seminary students were assigned to give a three to five minute impromptu talk in an adjacent building. Some students were

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176. Burke, *supra* note 33, at 1611–12 (2006). It is also worth noting that there are circumstances in which it is *good* rapport, rather than an adversarial relationship, that puts one at risk of engaging in unethical behavior. In particular, one recent study demonstrated that "negotiators seeking to build or maintain rapport may be more likely to deceive their partners than to disappoint them with the truth." Sandy D. Jap et al., *The Dark Side of Rapport: Agent Misbehavior Face-to-Face and Online*, 57 MGMT. SCI. 1610, 1612 (2011).

177. See, e.g., Janine Robben, *Burnout: Cautionary Tales*, 69 OR. ST. B. BULL. 16, 22–24 (2008), available at <http://www.osbar.org/publications/bulletin/08oct/burnout.html>; see also *Public Defender v. Florida*, 115 So. 3d 261, 285 (Fla. 2013), available at <http://www.floridasupremecourt.org/decisions/2013/sc09-1181.pdf> (finding that excessive workloads justified withdrawal by public defenders from an array of cases); JEAN WALLACE, *JUGGLING IT ALL: A STUDY OF LAWYERS' WORK, HOME, AND FAMILY DEMANDS AND COPING STRATEGIES*, REPORT OF STAGE 2 FINDINGS 12–15 (2004); Stephanie Francis Ward, *The Ultimate Time-Money Trade-Off*, 93 A.B.A. J. 24, 24–25 (2007); Mary Flood, *New Lawyers Say, 'Pay Us Less, Don't Work Us So Hard'*, HOUS. CHRON., Apr. 16, 2007, at 1, available at <http://www.chron.com/disp/story.mpl/business/flood/4714709.html>.

178. REGAN, *supra* note 13, at 134.

told that they were late for their turn to talk; others were led to believe they had more time. On the way to the other building each student encountered a person in need of help—a person planted by the researchers: “the victim was sitting slumped in a doorway, head down, eyes closed, not moving. As the subject went by, the victim coughed twice and groaned, keeping his head down.” Those participants who were in a hurry were significantly less likely to stop to help than were those who were less rushed.<sup>179</sup> More recent research has found that time pressure also results in a greater likelihood of lying.<sup>180</sup>

Studies have also found that unethical decisions are more common when the decision maker suffers from a lack of sleep or is otherwise cognitively taxed.<sup>181</sup> And, the process of making decisions, being deprived of food, and even resisting the desire to snack can also result in cognitive depletion.<sup>182</sup> When a decision maker’s cognitive resources have already been challenged, the decision maker is more likely to put himself in temptation’s way and then succumb to that temptation.<sup>183</sup> Depleted individuals are also less likely

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179. John M. Darley & C. Daniel Batson, “From Jerusalem to Jericho”: A Study of Situational and Dispositional Variables in Helping Behavior, 27 J. PERSONALITY & SOC. PSYCHOL. 100, 104 (1973). Interestingly, participants who were assigned to speak about the parable of the “Good Samaritan”—a story about helping someone in need—were no more likely to stop to help than those assigned to speak about another topic. *Id.*

180. Shalvi et al., *Honesty Requires Time*, *supra* note 79, at 1265.

181. See, e.g., Christopher M. Barnes et al., *Lack of Sleep and Unethical Conduct*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 169, 178 (2011); Michael S. Christian & Aleksander P.J. Ellis, *Examining the Effects of Sleep Deprivation on Workplace Deviance: A Self-Regulatory Perspective*, 54 ACAD. MGMT. J. 913, 926 (2011); Francesca Gino et al., *Unable to Resist Temptation: How Self-Control Depletion Promotes Unethical Behavior*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 191, 199 (2011); Nicole L. Mead et al., *Too Tired to Tell the Truth: Self-Control Resource Depletion and Dishonesty*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 594, 596 (2009); Mark Muraven et al., *Self-Control Depletion and the General Theory of Crime*, 22 J. QUANTITATIVE CRIMINOLOGY 263, 273 (2006); see also William D.S. Kilgore et al., *The Effects of 53 Hours of Sleep Deprivation on Moral Judgment*, 30 SLEEP 345, 350 (2007).

182. Roy F. Baumeister et al., *Ego Depletion: Is the Active Self a Limited Resource?*, 74 J. PERSONALITY & SOC. PSYCHOL. 1252, 1263 (1998); Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT’L ACAD. SCI. 6889, 6890 (2011) (finding more generous parole board decisions when board members were well fed); Kathleen D. Vohs et al., *Making Choices Impairs Subsequent Self-Control: A Limited-Resource Account of Decision Making, Self-Regulation, and Active Initiative*, 94 J. PERSONALITY & SOC. PSYCHOL. 883, 897 (2008). President Barack Obama has eliminated all suits that are neither gray nor blue, so that he need not expend cognitive energy making clothing choices. Obama says: “I’m trying to pare down decisions. I don’t want to make decisions about what I’m eating or wearing. Because I have too many other decisions to make.” Michael Lewis, *Obama’s Way*, VANITY FAIR, Oct. 2012, at 216, available at <http://www.vanityfair.com/politics/2012/10/michael-lewis-profile-barack-obama>.

183. Mead et al., *supra* note 181, at 596.

to recognize the moral dimensions of decisions<sup>184</sup> and experience less guilt.<sup>185</sup> Making matters worse, decision makers do not anticipate these effects on decision making.<sup>186</sup>

At the same time, these unfortunate forces can be countered. There is evidence that decision makers who recognize the need for self-control, and who are motivated to exercise that control, may be able to temper the depleting effects of cognitive strain.<sup>187</sup> Other research has found that those who believe that their willpower is a non-limited resource are less likely to show decreased performance following a demanding task.<sup>188</sup>

Finally, some of the most common sorts of ethical failures—such as poor client communication, the neglect of client matters, overbilling, or abuse of client trust funds—can stem in part from the economic pressures of law practice.<sup>189</sup> For example, a lawyer or firm may feel economic pressure to accept cases that would be better declined. A lawyer may succumb to the *planning fallacy*, overconfidently believing that he can competently handle another case, and then find himself overwhelmed.<sup>190</sup> A lawyer may decide to engage in advertising that she otherwise finds disagreeable in order to generate scarce business.<sup>191</sup> Or, a lawyer who is surviving hand-to-mouth may begin her slide down the slippery slope when she is tempted to “borrow” from client accounts or to co-mingle funds—just a little bit, for just a little while—in order to deal with perceived temporary cash flow

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184. Gino et al., *supra* note 181, at 199.

185. Hanyi Xu et al., *Too Fatigued to Care: Ego Depletion, Guilt, and Prosocial Behavior*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1183, 1185 (2012).

186. Mead et al., *supra* note 181, at 596.

187. See Michael Inzlicht & Brandon J. Schmeichel, *What Is Ego Depletion? Toward a Mechanistic Revision of the Resource Model of Self-Control*, 7 PERSP. ON PSYCHOL. SCI. 450, 459 (2012) (reviewing studies); Mark Muraven & Elisaveta Slessareva, *Mechanisms of Self-Control Failure: Motivation and Limited Resources*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 894, 905 (2003) (finding that motivation moderates depletion effects).

188. Joshua J. Clarkson et al., *When Perception is More Than Reality: The Effects of Perceived Versus Actual Resource Depletion on Self-Regulatory Behavior*, 98 J. PERSONALITY & SOC. PSYCHOL. 29, 45 (2010); Veronika Job et al., *Ego Depletion—Is It All in Your Head?: Implicit Theories About Willpower Affect Self-Regulation*, 21 PSYCHOL. SCI. 1686, 1692 (2010).

189. For a discussion of the changing economics of legal practice, see Gordon, *supra* note 27, at 717–18; Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1913 (2008). As part of this transformation, the relationship between in-house and outside counsel has changed as well. See Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 543–44 (1985).

190. Buehler et al., *supra* note 49, at 2.

191. See, e.g., Stephen Daniels & Joanne Martin, *Plaintiffs’ Lawyers and the Tension between Professional Norms and the Need to Generate Business*, in LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT, *supra* note 101, at 118 (highlighting one lawyer’s belief that a failure to use the same tactics as others forfeits business to those that do).

problems.<sup>192</sup> Even attorneys at the largest and most prestigious firms feel serious financial pressure to try to maintain or build their reputation as being highly profitable.<sup>193</sup>

### E. Status and Power

In addition to being a demanding profession, lawyering also tends to be a relatively high status profession and lawyers may frequently perceive themselves to be more powerful than others, such as clients.<sup>194</sup> Attorneys may also draw power in particular situations (such as a negotiation) from their possession of private information or an attractive alternative.<sup>195</sup> Thus, while attorneys will not always be more powerful than others with whom they interact and will vary in the degree to which they occupy positions of status or power, they may regularly find themselves functioning from a position of perceived status, power, or strength.

All this matters for attorney ethics because social status tends to be negatively associated with ethics, with those in higher status positions tending to engage in more unethical behavior.<sup>196</sup> There is even evidence that simply conceiving of the self as a *professional*—which entails a belief in one's technical and ethical competence—is associated with unethical behavior.<sup>197</sup> In addition, people who feel powerful can be more likely to

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192. See, e.g., Levin, *supra* note 17, at 359.

193. See Jeffrey W. Stempel, *Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession*, 27 FLA. ST. U. L. REV. 25, 31 (2000).

194. See, e.g., Keiko Nakao & Judith Treas, *Updating Occupational Prestige and Socioeconomic Scores: How the New Measures Measure Up*, 24 SOC. METHODOLOGY 1, 48 (1994); Gillian Stevens & David L. Featherman, *A Revised Socioeconomic Index of Occupational Status*, 10 SOC. SCI. RES. 364, 383 (1981); Robert M. Hauser & John Robert Warren, *Socioeconomic Indexes for Occupations: A Review, Update, and Critique* app. A at 5, (Ctr. Demography & Ecology, Working Paper No. 96-01, 1996). A recent Harris Poll reported that 81% of respondents felt lawyers have “some” to “very great prestige.” *Firefighters, Scientists and Doctors Seen as Most Prestigious Occupations*, HARRIS INTERACTIVE (Aug. 4, 2009), <http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Pres-Occupations-2009-08.pdf>.

195. See Ann E. Tenbrunsel & David M. Messick, *Power Asymmetries and the Ethical Atmosphere in Negotiations*, in SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS 209 (John M. Darley et al. eds., 2001).

196. Paul K. Piff et al., *Higher Social Class Predicts Increased Unethical Behavior*, 109 PROC. NAT'L ACAD. SCI. 4086, 4088 (2012); see also Bella L. Galperin et al., *Status Differentiation and the Protean Self: A Social-Cognitive Model of Unethical Behavior in Organizations*, 98 J. BUS. ETHICS 407, 416 (2011).

197. Maryam Kouchaki, *Professionalism and Moral Behavior: Does a Professional Self-Conception Make One More Unethical?* 37 (Edmond J. Safra Res. Lab Working Papers, Paper No. 4, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2243811](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243811).

engage in unethical behaviors such as cheating.<sup>198</sup> Power tends to make people more attuned to the attraction of rewards, feel more entitled, be more goal directed, be more overconfident, and be less concerned about social censure than are those who feel more powerless.<sup>199</sup>

In addition, more powerful people tend to be less likely to take the perspective or feel the emotions of another person. In particular, powerful people are less likely to take into account another person's visual perspective, less likely to adjust for the fact that others lack access to their private information, and are less accurate at identifying emotions in others.<sup>200</sup> Predictably, less empathy or understanding of the emotions of another is associated with more unethical behavior.<sup>201</sup> And, for lawyers, such difficulties in reading others may result in a failure to attend to the needs of clients and lead to ethical violations such as a failure to communicate.

While feeling powerful can increase unethical behavior, powerful people may be more protected than are others against at least one set of pressures. To the extent that powerful people are less concerned about social censure or other situational pressures, they may be better able to resist conforming to unethical social norms.<sup>202</sup> In addition, power tends to increase the focus

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198. Joris Lammers et al., *Power Increases Hypocrisy: Moralizing in Reasoning, Immorality in Behavior*, 21 PSYCHOL. SCI. 737, 742 (2010); see also Terry L. Boles et al., *Deception and Retribution in Repeated Ultimatum Bargaining*, 83 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 235, 237 (2000); Helmut Crott et al., *The Effects of Information Exchange and Communication in an Asymmetrical Negotiation Situation*, 10 EUR. J. SOC. PSYCHOL. 149, 160 (1980). Ironically, powerful people tend to judge others more harshly for unethical conduct. Lammers et al., *supra*.

199. See, e.g., Nathaneal J. Fast et al., *Power and Overconfident Decision-Making*, 117 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 249, 257 (2012); Ana Guinote, *Power and Goal Pursuit*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 1076, 1084 (2007); Dacher Keltner et al., *Power, Approach, and Inhibition*, 110 PSYCHOL. REV. 265, 279 (2003); Lammers et al., *supra* note 198, at 738; Deepak Malhotra & Francesca Gino, *The Pursuit of Power Corrupts: How Investing in Outside Options Motivates Opportunism in Relationships*, 56 ADMIN. SCI. Q. 559, 563 (2011). People in more powerful roles may also be "buffered" from feeling the effects of unethical behavior. See, e.g., Dana R. Carney et al., *How Power Corrupts: Power Buffers the Emotional, Cognitive, and Physiological Stress of Lying* 20 (Univ. of Cal. Berkeley, Haas Sch. of Bus. Research Grant, 2011–2016, 2011), <http://mors.haas.berkeley.edu/papers/Carney.HowPowerCorrupts.pdf>.

200. Adam D. Galinsky et al., *Power and Perspectives Not Taken*, 17 PSYCHOL. SCI. 1068, 1072 (2006).

201. See Taya R. Cohen, *Moral Emotions and Unethical Bargaining: The Differential Effects of Empathy and Perspective Taking in Deterring Deceitful Negotiation*, 94 J. BUS. ETHICS 569, 576 (2010).

202. See Adam D. Galinsky et al., *Power Reduces the Press of the Situation: Implications for Creativity, Conformity, and Dissonance*, 95 J. PERSONALITY & SOC. PSYCHOL. 1450, 1462 (2008). It also seems to be the case that power *asymmetries* can result in unethical behavior by

on salient goals. To the extent that these focal goals are strongly linked to ethical or cooperative behavior, more ethical conduct may be expected.<sup>203</sup>

#### F. *Lawyers as Social Actors*

No dilemma causes [students] more anxiety than the prospect of being pressured by their boss to do something unethical. Not only do they worry about losing their jobs if they defy the boss to do the right thing, they also fear that the pressures of the situation might undermine their ability to know what the right thing is.<sup>204</sup>

These students are right to be worried.

First, recall the Milgram studies in which people followed the instructions of an authoritative experimenter to administer increasingly severe shocks to another person.<sup>205</sup> These studies make evident “that each of us ought to believe three things about ourselves: that we disapprove of destructive obedience, that we think we would never engage in it, and more likely than not, that we are wrong to think we would never engage in it.”<sup>206</sup> In the context of legal practice, the influence of authority can come in the form of a more senior lawyer, a colleague, or a client.<sup>207</sup>

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either the more powerful or the weaker party. *See* Tenbrunsel & Messick, *supra* note 195, at 210.

203. *See* Jacob B. Hirsh, Adam D. Galinsky, & Chen-Bo Zhong, *Drunk, Powerful, and in the Dark: How General Processes of Disinhibition Produce Both Prosocial and Antisocial Behavior*, 6 *PERSP. ON PSYCHOL. SCI.* 415, 418 (2011); *see also* Stéphane Côté et al., *Social Power Facilitates the Effect of Prosocial Orientation on Empathic Accuracy*, 101 *J. PERSONALITY & SOC. PSYCHOL.* 217, 217 (2011). For discussion of the ways in which different dimensions of social class may influence ethical behavior in different ways, *see* Stefan T. Trautmann et al., *Social Class and (Un)Ethical Behavior: A Framework, With Evidence From a Large Population Sample*, 8 *PERSP. ON PSYCHOL. SCI.* 487 (2013).

204. David J. Luban, *The Ethics of Wrongful Obedience*, in *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION*, *supra* note 111, at 94–95.

205. *See* MILGRAM, *supra* note 61.

206. Luban, *supra* note 204, at 97 (emphasis omitted); *see also* Perlman, *supra* note 33; Kim, *supra* note 9; KELMAN & HAMILTON, *supra* note 65. For examples from other professions, *see* Annamarie Krackow & Thomas Blass, *When Nurses Obey or Defy Inappropriate Physician Orders: Attributional Differences*, 10 *J. SOC. BEHAV. & PERSONALITY* 585, 585 (1995); Eugen Tarnow, *Self-Destructive Obedience in the Airplane Cockpit and the Concept of Obedience Optimization*, in *OBEDIENCE TO AUTHORITY: CURRENT PERSPECTIVES ON THE MILGRAM PARADIGM* 111 (Thomas Blass ed., 2000).

207. *See, e.g.*, Eldred, *supra* note 25, at 354–55 (describing pressure from superiors on public defenders to handle more cases); Perlman, *supra* note 33, at 451 (describing associate told not to produce documents within scope of discovery request). Young lawyers or lawyers who lack mobility may be particularly susceptible in this regard. Psychological research has found that those who are more dependent upon an organization are more likely to engage in

While the rules of professional responsibility do not allow a lawyer who acts “at the direction of another person” to escape responsibility for ethical misconduct, the rules do provide that a “subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.”<sup>208</sup> Given all that we know about ethical blindspots, it would not be surprising if subordinate lawyers had difficulty making objective judgments about whether a question is “arguable” and about the “reasonableness” of the superior’s resolution. And, as we have discussed, lawyers are skilled at making arguments on multiple sides of an issue.<sup>209</sup> Thus, when a partner tells an associate to do something the associate initially finds ethically questionable, the associate may well be able to craft an argument to convince himself that the particular behavior is acceptable.

Even in the absence of directions from an authority, ethical behavior can be influenced by other people. We learn how to comport ourselves, in part, by watching the actions of those around us, looking to see how others—particularly those with more experience or expertise—behave.<sup>210</sup> “[L]awyers are social beings; like other human beings in social and occupational groups, lawyers behave largely in accordance with group norms.”<sup>211</sup> For attorneys this might be other lawyers within a firm or agency, lawyers who share space, or other formal or informal advice networks—their “communities of practice.”<sup>212</sup> The more widespread an attorney believes a

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compliant unethical behaviors. *See, e.g.,* Judy Wahn, *Organizational Dependence and the Likelihood of Complying with Organizational Pressures to Behave Unethically*, 12 J. BUS. ETHICS 245, 248 (1993).

208. MODEL RULES OF PROF’L CONDUCT R. 5.2 (2010).

209. *See supra* text accompanying note 103.

210. *See, e.g.,* ELLIOT ARONSON, *THE SOCIAL ANIMAL* 27 (Erik Gilg ed., 11th ed. 2012); Bibb Latané & John M. Darley, *Group Inhibition of Bystander Intervention in Emergencies*, 10 J. PERSONALITY & SOC. PSYCHOL. 215, 220 (1968); *see also* MUZAFER SHERIF, *THE PSYCHOLOGY OF SOCIAL NORMS* 84–85 (1936); PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 221 (2007) (describing the Stanford Prison Experiment); Asch, *supra* note 161, at 70; Gregory S. Berns et al., *Neurobiological Correlates of Social Conformity and Independence During Mental Rotation*, 58 BIOLOGICAL PSYCHIATRY 245, 251 (2005) (examining the effects of conformity and independence on brain activity); Michael J. O’Fallon & Kenneth D. Butterfield, *The Influence of Unethical Peer Behavior on Observers’ Unethical Behavior: A Social Cognitive Perspective*, 109 J. BUS. ETHICS 117, 126 (2012).

211. Jeffrey W. Stempel, *Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession*, 27 FLA. ST. U. L. REV. 25, 27 (2000).

212. LYNN M. MATHER ET AL., *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* 41 (2001) (describing communities of practice and their effects); Lynn Mather, *How and Why Do Lawyers Misbehave? Lawyers, Discipline, and Collegial Control*, in *THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE* 109, 116 (Scott L. Cummings ed., 2011) (reviewing empirical literature on different



particular practice is, the more likely he is to indicate that he would engage in it<sup>213</sup> and the more tempting the unethical behavior, the more widespread he will believe it to be.<sup>214</sup>

When [lawyers] begin work at law firms, they watch the more experienced lawyers to see what the real standards of conduct are. Each firm quickly communicates its institutional norms to new associates; many associates are anxious to assimilate themselves into an institution and to be successful within it. Therefore, they are not critical of the norms they are asked to adopt. They redraw their lines to fit into the value systems of their firms. If the senior lawyers are not precise in their billing practices, the junior lawyers will not be. If the senior lawyers exaggerate their credentials or expertise when talking with new clients, the junior lawyers will do the same.<sup>215</sup>

We are particularly influenced by others who we consider to be members of our group. Studies have found that observing an in-group peer acting unethically increases the likelihood that the observer will similarly act unethically.<sup>216</sup> When someone with whom one shares similarities (even the same name or birthday, let alone the same profession or firm) acts unethically, we judge their behavior as less unethical and feel greater distance from our own moral compass.<sup>217</sup> The Milgram studies also show

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communities of practice); *see also* Elizabeth Chambliss, *Whose Ethics? The Benchmark Problem in Legal Ethics Research*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT*, *supra* note 101, at 47, 48 (describing the “ethical learning” that takes place as “lawyers gradually acquire specialized ethical expertise”); Leslie C. Levin, *Specialty Bars as a Site of Professionalism: The Immigration Bar Example*, 8 U. ST. THOMAS L.J. 194, 196–97 (2011) (describing communication of professional norms within specialty bars). The Model Rules of Professional Conduct point lawyers to “the approbation of professional peers” as a source of ethical guidance. MODEL RULES OF PROF’L CONDUCT, PREAMBLE AND SCOPE (2010).

213. *See, e.g.*, Hinshaw & Alberts, *supra* note 11, at 150.

214. Tenbrunsel, *supra* note 54, at 336.

215. Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 681 (1990); *see* JEROME E. CARLIN, *LAWYERS ETHICS: A SURVEY OF THE NEW YORK CITY BAR* 116–17 (1966); *see also* Kirkland, *supra* note 33, at 691; Levin, *supra* note 17, at 322; Nelson, *supra* note 189, at 527; Suchman, *supra* note 101, at 860–61.

216. Francesca Gino et al., *Contagion and Differentiation in Unethical Behavior: The Effect of One Bad Apple on the Barrel*, 20 PSYCHOL. SCI. 393, 397 (2009). In contrast, “observing an out-group peer engaging in unethical behavior reduced participants’ likelihood of acting unethically themselves.” *Id.* (emphasis added); *see also* Francesca Gino et al., *Contagion or Restitution? When Bad Apples Can Motivate Good Behavior*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 1299, 1301 (2009) (finding that seeing a member of one’s in-group act unethically can trigger compensatory ethical behavior when an out-group member is present).

217. Francesca Gino & Adam D. Galinsky, *Vicarious Dishonesty: When Psychological Closeness Creates Distance From One’s Moral Compass*, 119 ORGANIZATIONAL BEHAV. &

the importance of social norms—when participants worked together with a (confederate) peer who administered the shocks, compliance reached over 90%. But when peers refused to comply, compliance dropped to 10%.<sup>218</sup>

When a lawyer is discomfited by what he sees, he may struggle to make sense of and justify that conduct. For example, David Luban describes an associate who observed a senior litigator lie to an opponent about a discovery matter and then watched the senior litigator compound that mistake by lying to a federal judge in an attempt to cover up the initial lie. The associate did not take any steps to correct the record and labored to make sense of what he was seeing—he “couldn’t believe it . . . [and] *kept thinking there must be a reason.*”<sup>219</sup>

Consider also the possibility of *pluralistic ignorance*—mistakenly believing that others do not share one’s understanding or perception of the world.<sup>220</sup> When one looks around the firm (or to other observers such as accountants or regulators) and does not see anyone else objecting to questionable behavior, one may conclude that nothing is amiss, judging others’ failure to object as evidence that the behavior is not improper. But those others may be silent because they too are attempting to assess the situation.<sup>221</sup>

To make matters worse, the *illusion of transparency*—the tendency to overestimate our ability to accurately read others’ emotional states and their ability to read ours—can compound the difficulties that people have in assessing each other’s reactions.<sup>222</sup> In one set of studies, for example, observers’ ratings of the extent to which people appeared outwardly concerned about another person’s unethical behavior were significantly *lower* than those same people’s self-rated levels of actual concern. That is, people were more concerned than they looked. But people also

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HUM. DECISION PROCESSES 15, 24 (2012). The study also found a similar, but smaller, effect with respect to vicarious honesty. *Id.* at 23.

218. MILGRAM, *supra* note 61, at 119.

219. Luban, *supra* note 204, at 95 (emphasis added).

220. Dale T. Miller & Deborah A. Prentice, *Collective Errors and Errors About the Collective*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 541, 541 (1994); Deborah A. Prentice & Dale T. Miller, *Pluralistic Ignorance and the Perpetuation of Social Norms by Unwitting Actors*, in 28 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 161, 161 (Mark P. Zanna ed., 1996).

221. In a classic study, psychologists Bibb Latané and John Darley investigated what would happen when smoke started to drift into a room in which research participants were filling out questionnaires. When participants were alone, most (75%) reported the smoke. But, when more participants were in the room, far fewer reported the smoke. Latané & Darley, *supra* note 210, at 217–18. Looking to others for social cues often provides useful information—but not always.

222. See Thomas Gilovich et al., *The Illusion of Transparency: Biased Assessments of Others’ Ability to Read One’s Emotional States*, 75 J. PERSONALITY & SOC. PSYCHOL. 332, 344 (1998).

*overestimated* the degree to which they manifested their concern to others. Thus, individuals may believe that their own concern is apparent to others when it is not.<sup>223</sup>

Finally, the presence of others can sometimes result in a diffusion of responsibility in which no one assumes responsibility for acting.

A well-known example involves the failure of top Salomon Brothers officials to report or take prompt corrective action against a trader who submitted false auction bids to evade Treasury Department purchase limits. Four top executives knew of the misconduct and failed to act for several months: the CEO, the president, the general counsel, and the vice chairman, who was the trader's supervisor. According to findings by the Securities and Exchange Commission, each of these officials "placed responsibility for investigating [and curbing the trader's] conduct . . . on someone else." The result was a major financial crisis when the threat of a public investigation ultimately forced disclosure.<sup>224</sup>

Similar diffusion of responsibility can occur, for example, when an associate assumes that someone else will make a decision about how to bill her hours.<sup>225</sup>

### G. *Responding to Others' Ethicality*

Lawyers often find themselves in the position of dealing with the ethicality of others—clients, colleagues, and opponents.<sup>226</sup> Interestingly, we tend to be much more judgmental of the ethical failings of others than we are of our own, to see ourselves as being more ethical, objective, and fair than others,<sup>227</sup> to doubt others' reasons for engaging in cooperative acts, and to assume that other people are motivated by self-interest.<sup>228</sup> We often have

223. *Id.* at 343 (studies 3a and 3b).

224. Deborah L. Rhode, *Introduction: Where is the Leadership in Moral Leadership?*, in *MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT, AND POLICY* 1, 27–28 (Deborah L. Rhode ed., 2006).

225. *See, e.g.*, Lerman, *supra* note 215, at 716 (describing firm in which associates and paralegals were to keep complete billing records and partners would reduce if they thought the work was excessive).

226. MODEL RULES OF PROF'L CONDUCT R. 8.3 (2010) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").

227. *See* Gilovich et al, *supra* note 222.

228. Epley & Caruso, *supra* note 52, at 172; *see also* Clayton R. Critcher & David Dunning, *No Good Deed Goes Unquestioned: Cynical Reconstructions Maintain Belief in the Power of Self-Interest*, 47 *J. EXPERIMENTAL SOC. PSYCHOL.* 1207, 1212 (2011); Epley &

an *interpersonal ethics blind spot* in which others' unethical behaviors are more noticeable than their ethical ones.<sup>229</sup> Consistent with the *actor-observer bias*, we attribute others' moral failings to flaws in their dispositions, but attribute our own missteps to situational factors.<sup>230</sup> We focus more on ethics when judging others, but find competence more important than integrity when judging ourselves.<sup>231</sup> And we judge others based on faulty predictions about what we might have done under the same circumstances.<sup>232</sup>

But while we can be relatively harsh judges of others' ethics, our psychology can make it difficult to notice and respond to others' unethical behavior.<sup>233</sup> First, limits on our ability to pay attention can lead us to miss unethical behavior taking place right in front of us when we are focused on other things like our own cases and deadlines.<sup>234</sup> Second, we have a tendency to identify with other people—colleagues or clients—whose interests are aligned with ours,<sup>235</sup> making it harder to notice and objectively

Dunning, *supra* note 48, at 873; Tal Eyal et al., *Judging Near and Distant Virtue and Vice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1204, 1209 (2008); Dale T. Miller & Rebecca K. Ratner, *The Disparity Between the Actual and Assumed Power of Self-Interest*, 74 J. PERSONALITY & SOC. PSYCHOL. 53, 60 (1998).

229. Moberg, *supra* note 55, at 416.

230. Edward E. Jones & Richard E. Nisbett, *The Actor and the Observer: Divergent Perceptions of the Causes of Behavior*, in *ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR* 80 (Edward E. Jones et al. eds., 1972).

231. See, e.g., Bogdan Wojciszke, *Morality and Competence in Person- and Self-Perception*, 16 EUR. REV. SOC. PSYCHOL. 155, 181 (2005).

232. See DAVID A. DUNNING, *SELF-INSIGHT: ROADBLOCKS AND DETOURS ON THE PATH TO KNOWING THYSELF* 131 (2005); Mark D. Alicke, *Egocentric Standards of Conduct Evaluation*, 14 BASIC & APPLIED SOC. PSYCHOL. 171, 189 (1993); Balcetis & Dunning, *supra* note 53, at 112; Kristina A. Diekmann, *"She Did What? There Is No Way I Would Do That!" The Potential Interpersonal Harm Caused by Mispredicting One's Behavior*, 80 J. BUS. ETHICS 5, 5 (2008); Woodzicka & LaFrance, *supra* note 53, at 17; see also Rachel Barkan et al., *The Pot Calling the Kettle Black: Distancing Response to Ethical Dissonance*, 141 J. EXPERIMENTAL PSYCHOL.: GEN. 757, 768 (2012) (finding process of "double distancing" in that acting unethically causes us to judge others more harshly and to present the self as more virtuous).

233. Francesca Gino et al., *See No Evil: When We Overlook Other People's Unethical Behavior*, in *SOCIAL DECISION MAKING: SOCIAL DILEMMAS, SOCIAL VALUES, & ETHICAL JUDGMENTS* 241, 241–42 (Roderick M. Kramer et al. eds., 2010).

234. See Christopher F. Chabris et al., *You Do Not Talk About Fight Club If You Do Not Notice Fight Club: Inattentional Blindness for a Simulated Real-World Assault*, 21 PERCEPTION 150, 150 (2011); Graham Davies & Sarah Hine, *Change Blindness and Eyewitness Testimony*, 141 J. PSYCHOL. 423, 431–33 (2007); Kally J. Nelson et al., *Change Blindness Can Cause Mistaken Eyewitness Identification*, 16 LEGAL & CRIMINOLOGICAL PSYCHOL. 62, 62 (2011); Daniel J. Simons & Christopher F. Chabris, *Gorillas in Our Midst: Sustained Inattentional Blindness for Dynamic Events*, 28 PERCEPTION 1059, 1059 (1999).

235. Don A. Moore et al., *Conflict of Interest and the Intrusion of Bias*, 5 JUDGMENT & DECISION MAKING 37, 45 (2010); Leigh Thompson, *"They Saw a Negotiation": Partisanship and Involvement*, 68 J. PERSONALITY & SOC. PSYCHOL. 839, 850 (1995); see also Leigh

assess their ethics. Similarly, it can be difficult to acknowledge the unethical behavior of others when doing so would harm one's own interests. This *motivated blindness* can cause our judgments to be biased in favor of our client or colleague and we are inclined to view their actions favorably, disinclined to believe that they have acted wrongly, and able to recruit reasons to support their actions.<sup>236</sup> Third, we may let others off the hook because we are aware of other instances in which they have acted ethically—a form of *moral licensing*.<sup>237</sup> Fourth, just as it can be difficult to identify the point at which one's own behavior has gradually crossed the line, detection of when others' incrementally degrading behavior becomes unethical can be challenging.<sup>238</sup> Fifth, the fact that *outcome bias* may cause our evaluations of the quality of a decision to be influenced by how the decision turns out,<sup>239</sup> can lead us to ignore others' unethical decisions unless and until something bad happens.<sup>240</sup>

Finally, people tend to think that they “will take socially risky actions, when they, in fact, do not”—the *illusion of courage*.<sup>241</sup> In the abstract we might think we would have the courage to call out the unethical behavior of a client or colleague,<sup>242</sup> but when actually deciding whether to do so the immediate negative consequences of confronting the other person—a difficult conversation, the loss of a client, the ire of a partner, the loss of a job, or the difficulty of procuring future employment—loom large. Consider also another key lesson from the Milgram obedience studies—that although

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Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 176, 194 (1992).

236. Moore et al., *supra* note 235, at 40; see Langevoort, *supra* note 33, at 104; see also Kimberly Kirkland, *Self-Deception and the Pursuit of Ethical Practice: Challenges Faced by Large Law Firm General Counsel*, 9 U. ST. THOMAS L.J. 593, 593–94 (2011) (describing the difficulty that large firm general counsel have in characterizing colleagues as unethical).

237. See Daniel A. Effron & Benoît Monin, *Letting People Off the Hook: When Do Good Deeds Excuse Transgressions?*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 1618, 1631 (2010) (finding this to be the case when the unethical act is somewhat ambiguous and the prior ethical behavior is in the same domain).

238. BAZERMAN & MOORE, *supra* note 37, at 48 (discussing how auditors might gradually come to accept corporation's unethical accounting practices).

239. Baron & Hershey, *supra* note 83, at 578.

240. Gino et al., *supra* note 84, at 93; see also, e.g., Robert Prentice, *Contract-Based Defenses in Securities Fraud Litigation: A Behavioral Analysis*, 23 U. ILL. L. REV. 337, 404 (2003) (noting that a supervisor may rate an employee's bad conduct negatively upon learning of a poor outcome, but is less likely to do so if the outcome is unknown).

241. DUNNING, *supra* note 232, at 148.

242. Here, too, there is a blind spot: we tend to believe that we are more likely to call out bad behavior than are our peers (and that our reporting is more internally driven, while that of our peers is more driven by external rewards). Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1190 (2010).

most of the participants *noticed* that what they were being asked to do was problematic, and indeed, many clearly expressed reservations,<sup>243</sup> they were nonetheless unable to turn their objections into a course of behavior that effectively resisted the direction to continue. As psychologists Lee Ross and Richard Nisbett have noted: “the Milgram experiments ultimately may have less to say about ‘destructive obedience’ than about ineffectual, and indecisive, *disobedience*.”<sup>244</sup> For example, there were lawyers who raised questions about Enron’s dealings before its collapse. “In the end, [however,] the doubting lawyers never pressed the issues.”<sup>245</sup>

In this vein, consider again the story of John Gellene and his false declarations about potential conflicts of interest in affidavits submitted to the court. At several points in the course of the representation, one of Gellene’s partners, Toni Lichstein, raised questions about the potential conflict of interest. Lichstein, however, was repeatedly told by Gellene and Lederman that “it was not a problem . . . [and] that Milbank had undertaken all of its disclosure obligations.”<sup>246</sup> Although Lichstein questioned the conduct on several occasions, she was not able push the issue hard enough to convince the firm to take action.

When faced with others’ potentially unethical conduct, attorneys may make decisions with an eye toward minimizing the regret that they anticipate feeling—worrying more about making a false accusation than about failing to intervene.<sup>247</sup> Attorneys may overweight such anticipated losses as compared to the less certain and more abstract future consequences of remaining silent. Yet, the future consequences may turn out to be severe.<sup>248</sup>

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243. MILGRAM, *supra* note 61, at 116.

244. ROSS & NISBETT, *supra* note 153, at 57 (emphasis added).

245. Gordon, *supra* note 21, at 1193 (citing Mike France, *What About the Lawyers?*, BUS. WK., Dec. 23, 2002, at 58; Ellen Joan Pollock, *Limited Partners: Lawyers for Enron Faulted Its Deals, Didn’t Force Issue*, WALL ST. J., May 22, 2002, at A1).

246. REGAN, *supra* note 13, at 250.

247. Mark D. Rogerson et al., *Nonrational Processes in Ethical Decision Making*, 66 AM. PSYCHOL. 614, 616 (2011). This is also another example of the *omission bias*. See Baron & Hershey, *supra* note 83, at 569.

248. For example, some of those who heard about or witnessed Penn State coach Jerry Sandusky’s transgressions, but failed to report them, are themselves now being prosecuted. Mark Scolforo, *Graham Spanier Charged: Ex-Penn State President Facing Perjury Charge in Jerry Sandusky Case*, HUFFINGTON POST, Nov. 1, 2012, [http://www.huffingtonpost.com/2012/11/01/graham-spanier-charged-penn-state-sandusky\\_n\\_2057723.html](http://www.huffingtonpost.com/2012/11/01/graham-spanier-charged-penn-state-sandusky_n_2057723.html).

## III. WHY DON'T WE RECOGNIZE AND LEARN FROM ETHICAL FAILURES?

For many of the same reasons that we find it difficult to identify ethical challenges in the moment, we also find it difficult to see the ethical implications of our decisions after the fact. Indeed, in one study of lawyer discipline cases, most of the lawyers “were convinced that they had done nothing wrong.”<sup>249</sup> And, in many notorious cases—such as the collapse of Enron—the lawyers involved maintain that they acted properly.<sup>250</sup> Once we have engaged in unethical behavior, we feel the need to reconcile that behavior with our otherwise positive views of ourselves, to avoid the distressing feeling known as *cognitive dissonance*.<sup>251</sup> Thus, we may engage in a post-hoc process of moral disengagement in which we re-characterize what happened so that questionable conduct becomes more permissible.<sup>252</sup> While many people think of ethical decision making as being the product of deliberative ethical reasoning, psychologists have found that ethical decision making tends to be based on relatively intuitive judgments, with moral reasoning occurring after the fact.<sup>253</sup> Once we have made a choice, we are usually able to mobilize reasons to bolster that decision.<sup>254</sup>

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249. ABEL, *supra* note 78, at 491.

250. See Gordon, *supra* note 21, at 1190; see also *The Financial Collapse of Enron—Part 4: Hearing Before the S. Comm. On Oversight and Investigations*, 107th Cong. 19–22 (2002) (statement of Joseph C. Dilg, Managing Partner of Vinson & Elkins, L.L.P.), available at <http://www.gpo.gov/fdsys/pkg/CHRG-107hhrg78506/html/CHRG-107hhrg78506.htm> (expressing his confidence that the firm “fully met its ethical and professional responsibilities” in representing Enron).

251. See LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* 8 (1957); see also Shahar Ayal & Francesca Gino, *Honest Rationales for Dishonest Behavior*, in *THE SOCIAL PSYCHOLOGY OF MORALITY: EXPLORING THE CAUSES OF GOOD AND EVIL* 149, 150 (Mario Mikulincer & Phillip R. Shaver eds., 2012) (describing *ethical dissonance*); Luban, *supra* note 204, at 95.

252. Bandura, *supra* note 67, at 194; Lisa L. Shu et al., *Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Motivated Forgetting*, 37 *PERSONALITY & SOC. PSYCHOL. BULL.* 330, 331 (2011).

253. Haidt, *supra* note 104, at 818. For a general discussion of intuitive and deliberative thinking, see DANIEL KAHNEMAN, *THINKING FAST AND SLOW* (2011).

254. See, e.g., Christopher K. Hsee, *Elastic Justification: How Unjustifiable Factors Influence Judgments*, 66 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 122, 123 (1996); Michael I. Norton, Joseph A. Vandello, & John M. Darley, *Casualty and Social Category Bias*, 87 *J. PERSONALITY & SOC. PSYCHOL.* 817, 817 (2004); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 *LAW & HUM. BEHAV.* 261, 264 (2007); see also Richard Nisbett & Timothy Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 *PSYCHOL. REV.* 231, 232 (1977). The analytic skills of lawyers seem well suited to this sort of thinking. Indeed, people engaging in this sort of rationalization are sometimes characterized as “intuitive lawyers.” See, e.g., Haidt, *supra* note 104, at 821; Roderick M. Kramer & David M. Messick, *Ethical Cognition and the Framing of Organizational Dilemmas: Decision Makers as Intuitive Lawyers*, in *CODES OF CONDUCT:*

Given this general human tendency, it is unsurprising that lawyers who face ethical complaints or questions tend to recruit a range of justifications.<sup>255</sup> Conduct that is inconsistent with one's image of oneself as an ethical person can be attributed to situational, rather than dispositional, factors.<sup>256</sup> Attempts may also be made to locate blame elsewhere—on adversaries,<sup>257</sup> on the circumstances,<sup>258</sup> on regulators,<sup>259</sup> on clients,<sup>260</sup> and on judges.<sup>261</sup> The *omission bias* described above can be invoked to minimize blame of one who did not engage in an affirmative *act*.<sup>262</sup> Unethical conduct can also be rationalized post-hoc through appeals to different metrics of

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BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 59 (David M. Messick & Ann E. Tenbrunsel eds., 1996).

255. See, e.g., ABEL, *supra* note 78, at 100.

256. See Jones & Harris, *supra* note 140; see also Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 FORDHAM L. REV. 809, 828 (1998) (reporting that each group of attorneys "presents itself as a 'victim' of forces over which it has little or no control").

257. See, e.g., Sarat, *supra* note 256, at 822 (reporting attorney's view that "[r]efusal to answer (a discovery request) is not an ethical problem because plaintiffs' counsel can remedy it (through motions to compel)"); see also Yablon, *supra* note 171, at 1624 n.18 ("Lawyers tend to blame discovery abuse on the fact that their opponents act like jerks . . ."); Michael Powell & Lois Romano, *Roman Catholic Church Shifts Legal Strategy: Aggressive Litigation Replaces Quiet Settlements*, WASH. POST, May 13, 2002, at A1 (reporting that lawyers for the church "said some plaintiffs are delusional, while others blame every problem in their life on past abuse by priests").

258. See, e.g., ABEL, *supra* note 78, at 33, 65, 100 (noting that lawyers blame circumstances such as workload, judicial backlog); Lerman, *supra* note 215, at 713–14 (describing lawyers who justified unethical billing practices by pointing to the "unreasonable" billing requirements of their firms).

259. Langevoort, *supra* note 66; see also ABEL, *supra* note 78, at 32 (noting disciplined lawyers' objections to "selective prosecution"); REGAN, *supra* note 13, at 328 ("Lawyers in large firms . . . tend to be skeptical that strict application of the bankruptcy conflict rule serves important ethical purposes.").

260. See, e.g., ABEL, *supra* note 78, at 65 (describing a lawyer who "blamed his personal injury clients for his own failure to pursue their claims"), at 101 (describing lawyer who deceived client because "it would have been very hard for him to understand" and failed to tell another her case had been dismissed (due to his negligence) because "she never asked me specifically"). Billing disputes are often blamed on clients, with attorneys arguing that clients received regular billing statements and should have raised any questions at earlier stages, that big clients can afford to pay more, that aggressively billing big clients allows them to represent other clients who cannot afford them, and that they only billed what they were worth. See, e.g., ABEL, *supra* note 78, at 350–51; Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 258–62 (1999); cf. Lisa G. Lerman, *Scenes From A Law Firm*, 50 RUTGERS L. REV. 2153, 2187–88 (1998).

261. See, e.g., Sarat, *supra* note 256, at 832 (reporting lawyers' consensus "that judges hate to get involved in discovery disputes . . . leaving it to the lawyers to play the discovery game with relatively little supervision").

262. For example, an attorney might tell herself or others that she would have disclosed particular information if the other side had specifically asked about it.



fairness or to other accepted values—for example, notions of lawyers as zealous advocates or creative interpreters of legal rules, rules protecting client confidences, principles of reciprocity or self-defense, or the need to fight against injustice.

*Confirmation bias* also helps us remember aspects of the decision or situation that are consistent with an ethical self-image, rather than the details of any ethical lapse. “If mistakes were made, memory helps us remember that they were made by someone else. If we were there, we were just innocent bystanders.”<sup>263</sup> Such memory effects can result in what ethicist Patricia Werhane has called *moral amnesia* or “an inability to remember or learn from one’s own and other’s past mistakes and to transfer that knowledge when fresh challenges arise.”<sup>264</sup>

All of this can conspire with the pressure to act in ways that are consistent with our own prior behavior,<sup>265</sup> making it difficult to learn from or acknowledge any missteps. Consider again John Gellene, the bankruptcy attorney described in *Eat What You Kill*. Why didn’t he, at some point, recognize his mistake and correct his misstatements to the court?

It likely would have been psychologically stressful for Gellene to do so at this point, however. He had made a prior decision not to disclose the Salovaara and South Street connections. He had publicly proclaimed Milbank’s fitness for the job in the face of an attack. He likely had rationalized his conduct in a way that permitted him to deny that he had done anything unethical. It would be hard at this point to disavow those representations and to reassess that rationalization.<sup>266</sup>

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263. CAROL TAVRIS & ELLIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS 70 (2007).

264. PATRICIA H. WERHANE, MORAL IMAGINATION AND THE SEARCH FOR ETHICAL DECISION-MAKING IN MANAGEMENT 7 (1999). As a result of this sort of self-deception, people can fail to discount their accomplishments for the fact that such successes were gained through unethical means. This can make learning particularly difficult. See Zoë Chance et al., *Temporal View of the Costs and Benefits of Self-Deception*, 108 PROC. NAT’L ACAD. SCI. 15655, 15656 (2011) (finding that participants who obtained high scores by cheating predicted that they would score well on a subsequent test on which they could not cheat).

265. CIALDINI, *supra* note 64, at 57.

266. REGAN, *supra* note 13, at 343; see also Langevoort, *supra* note 66, at 512 (“To blow the whistle now on any common practice or pattern of innovation would raise troubling questions about the prior months or years when the lawyer acquiesced in what was happening. The mind fights such inference.”).

Finally, engaging in unethical behavior can itself change one's perspective on and memory of the relevant ethical standards.<sup>267</sup> When our behavior and our beliefs conflict, one way to reduce the resulting discomfort is to change our beliefs to match our behavior. For example, those who cheat tend to become more lenient in their judgments of cheating, and those who resist cheating become more intolerant of cheating.<sup>268</sup> Also, the effects of *pluralistic ignorance* can mean that as no one speaks up about particular unethical behavior, new norms of ethics begin to emerge that alter attitudes about ethics.

#### IV. WHAT CAN WE DO?

The common prescriptions for ethical failures are to increase the severity and enforcement of applicable sanctions and to pay greater attention to educating attorneys about the relevant ethical rules.<sup>269</sup> But while some ethical failures are the result of deliberate moral reasoning and cost-benefit analysis that lead to an unethical decision and some ethical failures are due to a lack of knowledge of the relevant rules, a range of evidence suggests that many ethical failures occur unconsciously and unintentionally, even where the attorney has basic knowledge of the relevant ethical rules. Thus, individual attorneys and legal employers<sup>270</sup> should take steps that go beyond these common responses, steps that focus on dealing with ambiguities in rules and standards,<sup>271</sup> ethical issues arising out of the agency relationship, the challenges of the adversarial system, the tolls of law practice, the influence of status and power, issues relating to lawyers' practice in groups,

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267. Shu et al., *supra* note 252, at 332; Lisa Shu & Francesca Gino, *Sweeping Dishonesty Under the Rug: How Unethical Actions Lead to Forgetting of Moral Rules*, 102 J. PERSONALITY & SOC. PSYCHOL. 1164, 1168 (2012).

268. See, e.g., Judson Mills, *Changes in Moral Attitudes Following Temptation*, 26 J. PERSONALITY 517, 518 (1958). See generally Leon Festinger & James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. ABNORMAL & SOC. PSYCHOL. 203, 203-04 (1959). Even considering the behavior from the perspective of the person who has acted unethically can affect judgments of ethicality. Shirrit Kronzon & John Darley, *Is This Tactic Ethical? Biased Judgments of Ethics in Negotiation*, 21 BASIC & APPLIED SOC. PSYCHOL. 49, 58 (1999).

269. See, e.g., Monroe Freedman, Foreward, *Ethics, Truth, and Justice in Criminal Litigation*, 68 FORDHAM L. REV. 1371, 1375 (2000).

270. The psychology of ethical decision making and behavior that we review here also has important implications for how we teach about ethics in law schools. For one recent discussion on this subject see Art Hinshaw, *Teaching Negotiation Ethics*, 63 J. LEGAL EDUC. 82 (2013).

271. We do not, in this Article, offer suggestions as to how ethical rules might be changed to better accommodate human psychology. While improvement in the content of the rules is likely possible and desirable, our focus here is on improvements that can be made in the context of the existing ethical rules.

and the difficulties lawyers face in responding to instances in which others fail to act ethically.

### A. *Improving Individual Ethics*

For all the reasons discussed, even attorneys who begin their careers with the purest of motives and the highest of ethical aspirations are at risk for committing ethical infractions. Yet, attorneys can take affirmative steps to minimize the likelihood that they will behave unethically and to create the capacity for ethical courage.<sup>272</sup>

#### 1. Be Aware of the Psychology of Ethics

It is important for lawyers to recognize their susceptibility to bounded ethicality and to have an awareness of the factors that can influence ethical decision making. While many of the phenomena we discuss operate outside of conscious awareness, recognizing their existence makes it possible to take steps to address them.<sup>273</sup> Attorneys can better plan for how to handle ethical dilemmas if they understand that their predictions about how they will react to future ethical issues are not always accurate. Attorneys who understand that unethical decisions are more likely when losses loom can exercise particular caution in those circumstances—such as when they are at risk of losing an important client. Attorneys who understand the nature of the slippery ethics slope can seek to resist the pull of each step. Attorneys who understand that even (or especially) their core values can lead them astray, can be alert for such vulnerability. Attorneys who understand the dynamics of social norms and pluralistic ignorance will be equipped to

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272. See generally THE PSYCHOLOGY OF COURAGE: MODERN RESEARCH ON AN ANCIENT VIRTUE (Cynthia L.S. Pury & Shane J. Lopez, eds., 2010); see also ZIMBARDO, *supra* note 210, at 21–22, 485 (discussing the “banality of heroism” and noting that just as each of us is capable of unethical behavior, so too are we each a “potential hero, waiting for the right situational moment to make the decision to . . . [do the right thing] despite personal risk and sacrifice”); *Psychology & Heroism: Defining Heroism*, HEROIC IMAGINATION PROJECT, <http://www.heroicimagination.org/welcome/psychology-and-heroism> (last visited Sept. 8, 2013).

273. See NATE SILVER, THE SIGNAL AND THE NOISE: WHY SO MANY PREDICTIONS FAIL—BUT SOME DON’T 366 (2012) (quoting Daniel Kahneman: “‘There’s no way that you can control yourself not to have [the Müller-Lyer] illusion,’ Kahneman told me. ‘You look at [the arrows], and one of the arrows is going to look longer than the other. But you can train yourself to recognize that this is a pattern that causes an illusion, and in that situation, I can’t trust my impressions; I’ve got to use a ruler.’”).

reject the assumption that no one else is bothered.<sup>274</sup> Attorneys who recognize the temptation of post-hoc rationalization can question the reasons they generate for their own behavior.<sup>275</sup> Attorneys who know that *disclosure distortion* may lead them to act more unethically in a situation in which interests conflict can take steps to guard against that result. And, attorneys who are aware that the agency relationship may tempt them to overstep can watch how far they go to try to help their client.<sup>276</sup>

## 2. Make Ethics Salient

“[I]f we are reminded of morality at the moment we are tempted, then we are much more likely to be honest.”<sup>277</sup> Thus, it can be important for attorneys to find ways to include ethical factors in the mix of considerations reviewed in making a given decision,<sup>278</sup> even when the decision does not obviously turn on ethical considerations.

Bringing ethical considerations to the forefront can also help us encourage others to behave ethically. For example, negotiators are less likely to engage in deception when they have recently been reminded of ethical norms.<sup>279</sup> Similarly, negotiators who give reasons for their offers or demands that are in step with fairness norms are more likely to elicit ethical behavior from the other side.<sup>280</sup>

To bring ethics to the fore, individual attorneys can:

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274. For example, the Enron whistleblower, Sherron Watkins, spoke out even though others at Enron acted as if all were well. Nancy B. Rapoport, *Enron, Titanic, and The Perfect Storm*, 71 *FORDHAM L. REV.* 1373, 1379–81 (2003).

275. Tenbrunsel & Messick, *supra* note 67, at 234.

276. See generally Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 *J. EXPERIMENTAL SOC. PSYCHOL.* 565, 565 (2007) (finding that educating people about the limits of introspection reduced the bias blind spot).

277. DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* 289 (2008); see also Mazar et al., *supra* note 36, at 635 (hypothesizing that “when people attend to their own moral standards . . . any dishonest action is more likely to be reflected in their self-concept . . . which in turn will cause them to adhere to a stricter delineation of honest and dishonest behavior”).

278. Kish-Gephart et al., *supra* note 31, at 20 (suggesting that organizations can reduce unethical behavior by “making behavioral norms . . . more prominent and clearly defined”); see also David F. Caldwell & Dennis Moberg, *An Exploratory Investigation of the Effect of Ethical Culture in Activating Moral Imagination*, 73 *J. BUS. ETHICS* 193, 201 (2007).

279. See, e.g., Karl Aquino, *The Effects of Ethical Climate and the Availability of Alternatives on the Use of Deception During Negotiation*, 9 *INT’L J. CONFLICT MGMT.* 195, 200 (1998).

280. See Maurice E. Schweitzer & Donald E. Gibson, *Fairness, Feelings, and Ethical Decision-Making: Consequences of Violating Community Standards of Fairness*, 77 *J. BUS. ETHICS* 287, 287 (2008).

- Reflect regularly on core values. Keeping a journal or engaging in other forms of self-reflection can help keep ethics on the table and can facilitate detection of moments in which decisions challenge those values.<sup>281</sup>
- Keep a reminder of core values front and center. A paperweight, wall hanging, or other memento can be a visual reminder of the standards one wants to uphold.<sup>282</sup>
- Avoid euphemisms.<sup>283</sup>
- Imagine and individualize the people on the other side or the people who will experience the consequences of a decision.<sup>284</sup>
- Bear in mind the long-term reputational consequences—to the individual lawyer and the organization—of unethical conduct.<sup>285</sup>

### 3. Be Self-Critical

It can be helpful for individual lawyers to develop a critical stance toward their own ethics. Given how easy it can be for attorneys to justify a desired course of action or fall into telling clients, colleagues, or supervising attorneys what they want to hear, attorneys should ask themselves whether their advice or ethical decisions would be the same if they were on the other side of the decision. Questioning one's judgments, considering the

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281. See, e.g., Crowley & Gottlieb, *supra* note 102, at 68 (recommending self-reflection activities to help practitioners consider the origin of their personal morals and how they align with the ethics code). Law professor Kate Kruse, who has her students write letters to themselves discussing their core values and ambitions and then returns the letters (unopened) to students when they graduate, reports that students have found the letter helps keep them on their intended path. Professor Jennifer Brown has commenced a journaling project with her students, designed to help them think about their internal values and recall their early goals and values once they become attorneys. Jennifer Gerarda Brown, *Beginner's Wisdom: A Guided Journal for Reflecting Upon the Professional and Personal Lessons of the 1L Year* (unpublished work in progress) (on file with author); see also Alison L. Antes et al., *Applying Cases to Solve Ethical Problems: The Significance of Positive and Process-Oriented Reflection*, 22 ETHICS & BEHAV. 113, 115, 123 (2012); Hugo J.E.M. Alberts et al., *Fighting Self-Control Failure: Overcoming Ego Depletion by Increasing Self-Awareness*, 47 J. EXPERIMENTAL SOC. PSYCHOL. 58, 58 (2011) (finding that self-awareness increases self-control).

282. See ARIELY, *supra* note 277.

283. See *supra* notes 77–78.

284. See *supra* notes 83–85; see also Kish-Gephart et al., *supra* note 31, at 20 (suggesting that organizations can reduce unethical behavior by teaching employees to “learn to associate potential unethical behavior with severe, well-defined harm . . . to a familiar or recognizable victim similar to the actor”).

285. See *supra* note 59 and accompanying text.

opposite,<sup>286</sup> and examining “the justifications that we concoct to rationalize our actions” with a critical eye can help to temper the fading of ethics from decision making.<sup>287</sup>

Similarly, seeking or adopting an outside perspective—ideally before one takes the first step, but also when one finds oneself elsewhere on the slope—can lead to a more nuanced consideration of a decision’s potential ethical implications.<sup>288</sup> Consulting past experience can help one more realistically assess whether a contemplated workload is manageable or whether another case can be competently handled.<sup>289</sup> Considering how a “disinterested” or “disagreeable” observer might evaluate the situation, decision, or conduct, can provide a valuable perspective.<sup>290</sup> Consulting ethics counsel<sup>291</sup> or calling an ethics hotline<sup>292</sup> may contribute to this critical analysis. Attorneys may also find it helpful to consider how a trusted friend or family member might view a particular action—asking themselves, for example, whether they could look a parent in the eyes and explain a particular choice.<sup>293</sup> Similarly, one might be careful not to do anything one would not feel comfortable having made public.<sup>294</sup>

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286. Charles G. Lord, et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1231 (1984); see also Laura J. Kray & Adam D. Galinsky, *The Debiasing Effect of Counterfactual Mind-sets: Increasing the Search for Disconfirmatory Information in Group Decisions*, 91 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 69, 76 (2003).

287. Tenbrunsel & Messick, *supra* note 67, at 234.

288. Rhode, *supra* note 126, at 1320–21; Tenbrunsel & Messick, *supra* note 67, at 231 (recognizing also that the best one may be able to do is to “try to imagine what the other would experience from our own perspective”).

289. See Daniel Kahneman & Dan Lovallo, *Timid Choices and Bold Forecasts: A Cognitive Perspective on Risk Taking*, 39 MGMT. SCI. 17, 24–25 (1993) (discussing the “outside view” as one that takes into account past cases that are similar to the present one).

290. See Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 296 (2006) (discussing the “disagreeable adjudicator”); Lord et al., *supra* note 286, at 1231–32 (finding that considering an “opposite” perspective is effective in reducing biased evaluation). Prior to 2002, the commentary to Rule 1.7 advised that lawyers consider the perspective of a “disinterested lawyer” in evaluating conflicts of interest, but that language was removed as part of the Ethics 2000 revisions to the rules. See MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 5 (2001).

291. See Kimberly Kirkland, *Ethical Infrastructures and De Facto Ethical Norms at Work in Large US Law Firms: The Role of Ethics Counsel*, 11 LEGAL ETHICS 181, 199 (2008) (evaluating the role of ethics counsel).

292. See, e.g., *Ethics Hotline*, ST. B. OF CAL., <http://ethics.calbar.ca.gov/Ethics/Hotline.aspx> (last visited Sept. 10, 2013).

293. In describing decisions to act ethically, many people evoke the notion that they want to be able to “look at themselves in the mirror.” This idea has been attributed to a German ambassador who purportedly resigned rather than provide prostitutes to a royal party, stating “I refused to see a pimp in the mirror in the morning when I shave.” HOWARD GARDNER ET AL., GOOD WORK: WHEN EXCELLENCE AND ETHICS MEET 11 (2001). Consistent with this instinct,

As part of this critical stance, a focus on attentively striving to behave ethically is key. Valuing ethics as part of one's identity helps to sustain ethical behavior when time and cognitive resources are in short supply. That is, one who puts great stock in having a positive moral identity is better equipped to resist the pull towards unethical conduct.<sup>295</sup> Attorneys might prime the importance of ethics to their identity by attending conferences or participating in other groups focused on professional responsibility<sup>296</sup> as well as through the other ways in which they choose to make ethics salient.

At the same time, it is also very important to be humble about one's likely success in this endeavor. Given the tendency to be overconfident about our own ethics,<sup>297</sup> attorneys should resist the "reassuring illusion of invulnerability"—the misapprehension that they will always be able to identify and resist the influences that shape behavior.<sup>298</sup> In particular, all else being equal, people who are primed to think of themselves as highly ethical are *more* likely to act unethically (as a result of *moral licensing*) than are those who focus on their own past *unethical* deeds.<sup>299</sup> It is better, then, to admit and remember mistakes, rather than to overestimate one's virtue.<sup>300</sup>

Overall then, striving for ethical success but recognizing one's ethical fallibility may be the best path toward ethical behavior.

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increasing awareness of one's self and values—for example, looking at one's image in a mirror—reduces the incidence of unprincipled behavior. See, e.g., Arthur L. Beaman et al., *Self-Awareness and Transgression in Children: Two Field Studies*, 37 J. PERSONALITY & SOC. PSYCHOL. 1835, 1842 (1979); Edward Diener & Mark Wallbom, *Effects of Self-Awareness on Antinormative Behavior*, 10 J. RES. PERSONALITY 107, 107 (1976); Carl A. Kallgren et al., *A Focus Theory of Normative Conduct: When Norms Do and Do Not Affect Behavior*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1002, 1008–10 (2000); Lynne C. Vincent et al., *Stretching the Moral Gray Zone: Positive Affect, Moral Disengagement, and Dishonesty*, 24 PSYCHOL. SCI. 595, 598 (2013).

294. See Leslie C. Levin, *Immigration Lawyers and the Lying Client*, in LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT, *supra* note 101, at 101–03.

295. Francesca Gino et al., *Unable to Resist Temptation: How Self-Control Depletion Promotes Unethical Behavior*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROC. 191, 199 (2011); Barry R. Schlenker et al., *Moral Identity, Integrity, and Personal Responsibility*, in PERSONALITY, IDENTITY, AND CHARACTER: EXPLORATIONS IN MORAL PSYCHOLOGY, *supra* note 31., at 316; see also Gert Cornelissen et al., *Rules or Consequences? The Role of Ethical Mind-Sets in Moral Dynamics*, 24 PSYCHOL. SCI. 482, 487 (2013).

296. See Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 13 (2009) (suggesting that people often identify with groups and adopt a set of standards that guide behavior).

297. See *supra* Section I.A.

298. ZIMBARDO, *supra* note 210, at 180.

299. Jennifer Jordan et al., *Striving for the Moral Self: The Effects of Recalling Past Moral Actions on Future Moral Behavior*, 37 PERSONALITY & SOC. PSYCHOL. BULL. 701, 702 (2011); see also ZIMBARDO, *supra* note 210; Sonya Sachdeva et al., *Sinning Saints and Sainly Sinners: The Paradox of Moral Self-Regulation*, 20 PSYCHOL. SCI. 523, 524 (2009).

300. Jordan et al., *supra* note 299.

## 4. Plan Ahead

Critical thought takes time and cognitive resources, and as previously discussed, a lack of time and the presence of cognitive stressors can lead to unethical decision making. But attorneys can enhance their ethical behavior by planning ahead and cultivating a set of ethical habits, so that making the right call becomes more automatic.<sup>301</sup>

Because it can be quite difficult to predict how we will handle ethical challenges, we should try to anticipate ethical dilemmas and to specifically plan and rehearse our responses ahead of time—creating *scripts* for ourselves that we can follow when necessary.<sup>302</sup> Engaging in an ethical planning process allows us to step away from the relevant pressures and focus instead on how to rise to one's ethical ideals.<sup>303</sup> Similarly, exploring one's "ethics autobiography"—reflecting on personal values, professional responsibilities, and how they relate, can help establish ethical intuitions and increase awareness of one's ethical weaknesses.<sup>304</sup> Identifying the resources that might be available—for example, in-house ethics counsel, an ethics hotline, or a trusted confidant—can mean that these resources will more likely spring to mind when needed. Anticipating the pressures that are likely to be dominant at the time of the decision can minimize misprediction.<sup>305</sup> And, establishing *implementation intentions*—anticipating concrete triggers and planning specific responses—can help one to act consistently with one's ideals.<sup>306</sup> Imagining and practicing, for example, the

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301. See Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RES. 189, 197 (2004). In particular, some of the effects we have described here—such as the impact of loss frames on ethical decision making—can be moderated when there is less time pressure. Mary C. Kern & Dolly Chugh, *Bounded Ethicality: The Perils of Loss Framing*, 20 PSYCHOL. SCI. 378, 378 (2009). Because busy attorneys will not always have time for extended analysis, it is important to take time to make thoughtful decisions when that is possible and to plan ahead for when it is not.

302. Ann E. Tenbrunsel et al., *The Ethical Mirage: A Temporal Explanation as to Why We Aren't as Ethical as We Think We Are* 37 (Harvard Bus. Sch., Working Paper 08-012, 2009); see also Trope & Liberman, *supra* note 59, at 404.

303. Kivetz & Tyler, *supra* note 59, at 208.

304. Crowley & Gottlieb, *supra* note 102, at 68 (“[I]ncreased insight may enable practitioners to recognize how good intentions can be assets and liabilities and help them detect the direction of this influence in complex ethical situations.”).

305. MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT 154 (2011) (citing Kristina A. Diekmann et al., *An Examination of the Relationship Between Behavioral Forecasts and Interpersonal Condemnation in Two Organizational Conflict Situations* (Univ. of Utah, Working Paper, 2010)).

306. See Peter M. Gollwitzer & Paschal Sheeran, *Implementation Intentions and Goal Achievement: A Meta-Analysis of Effects of Processes*, 38 ADV. EXPERIMENTAL SOC. PSYCHOL. 69, 69 (2006).



specifics of how one will respond when a negotiation counterpart or discovery request asks for information one would rather not disclose, how one will respond when one is asked to do something with which one is uncomfortable, how one will deal with pressures to bill inappropriately, how one will proceed when one suspects that a client has not been candid or when a client asks the attorney to lie, or how one will act when one observes a colleague behaving unethically, can make it much easier to follow through with those plans.<sup>307</sup>

To reduce the possibility of unwittingly sliding into problematic behavior, it can be helpful to identify concrete behaviors that can serve as warnings that a line may be crossed.

Set yourself some telltale sign—something that you *know* is wrong. Write down on a piece of paper: “I will never backdate a document.” Or “I will never let a co-worker get blamed for something that was my fault.” Or “I will never paper a deal that I don’t understand.” Or “I will never do anything that I couldn’t describe to my dad while looking him in the eye.” Pick your telltale sign carefully—and, the moment the alarm rings, evacuate the building.<sup>308</sup>

One immigration lawyer “recalled that his mentor in his first job taught him ‘that the minute that fraud comes up, you show people the door.’”<sup>309</sup> Similarly, it can be helpful to identify warning signs of less egregious missteps.

Because we feel inclined to act in ways that are consistent with our previous actions, making a commitment to an ethical course of conduct—particularly an active or public commitment—can help us stay the course.

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307. See G. Richard Shell, *Bargaining with the Devil Without Losing Your Soul*, in WHAT’S FAIR: ETHICS FOR NEGOTIATORS 57, 71–73 (Carrie Menkel-Meadow & Michael Wheeler eds., 2004) (discussing ways to respond to questions without lying). In similar ways, crafting a strategy in advance for how one might disobey authority might channel disobedience. Lee Ross and Richard Nisbett propose the following “thought experiment”:

Suppose that the experimenter had announced at the beginning of the session that, if at any time the teacher wished to terminate his participation in the experiment, he could indicate his desire to do so by pressing a button on the table in front of him. We trust the reader agrees with us that if this channel factor had been opened up, the obedience rate would have been a fraction of what it was. The converse of this is that the absence of such a ‘disobedience channel’ is precisely what condemned Milgram’s subjects to their hapless behavior.

ROSS & NISBETT, *supra* note 153, at 57.

308. Luban, *supra* note 171, at 369.

309. Levin, *supra* note 294, at 102.

Thus, one might “precommit to [an] intended ethical choice by sharing it with an unbiased individual whose opinion you respect and whom you believe to be highly ethical”<sup>310</sup> or one might write down a set of ethical commitments.<sup>311</sup>

Finally, planning ahead can sometimes help one to eliminate potential problems—such as conflicts of interest. For example, one might avoid a certain type of fee agreement in a particular case. Or, one can decline to provide counsel when one’s judgment might be compromised. “No ethically sensitive (or even reasonably prudent) attorney should follow the example of Vinson & Elkins, which agreed to review the propriety of Enron transactions in which its own services had been used.”<sup>312</sup> Similarly, if one believes an organization does not operate ethically, one may choose not to work there.<sup>313</sup>

### 5. Recognize and Confront Others’ Unethical Conduct

Many of these same strategies can help attorneys notice and respond to potential ethical missteps by clients, colleagues, or supervisors. But, we have seen that it can be quite difficult to recognize others’ unethical conduct and that group settings often make it even harder to recognize unethical conduct, due to the pressures of phenomena such as *social conformity*, *pluralistic ignorance*, and the *illusion of transparency*.<sup>314</sup> To fight against these phenomena, attorneys should make ethics salient, exercise critical thought, and remind themselves that others’ silence is not necessarily an endorsement of particular behavior.

Of course, even once attorneys have recognized questionable ethical actions involving clients, colleagues, or supervisors, it can also be particularly difficult to critique or challenge that behavior. Instead, it is tempting to withhold criticism from clients, colleagues, and supervisors, particularly in a workplace where collegiality is valued. But, attorneys should remind themselves that taking a critical stance better serves the client or colleague than does letting them blithely slide down a slippery ethical slope. Moreover, raising ethical concerns need not result in nasty confrontations. Instead, it is possible that the “[c]onduct that attorneys find

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310. BAZERMAN & TENBRUNSEL, *supra* note 305, at 156. Thus, one might plan, with colleagues, law school classmates, or others, how one will respond to specific ethical challenges.

311. See Crowley & Gottlieb, *supra* note 102, at 68 (discussing the benefits of journaling).

312. Rhode, *supra* note 126, at 1334.

313. See MATHER ET AL., *supra* note 212, at 124–27.

314. See *supra* Section II.F.

ethically objectionable can be more diplomatically packaged as unduly risky, as something that will not play well with jurors, government regulators, the media, or the general public. By the same token, the moral high road can also be portrayed as desirable for prudential reasons,<sup>315</sup> important to the reputation of the client, lawyer, organization or profession, or as a means of forestalling regulation.<sup>315</sup> Admittedly, such characterizations are not always possible or sufficient, and in some instances attorneys will have to be more blunt—serving the client, organization, or colleague by providing a reality check. In extreme circumstances, the attorney may even be required to withdraw from a representation or report a client or colleague's improper act.<sup>316</sup> Again, planning ahead can facilitate doing the right thing in these difficult circumstances.

### B. Enhance Organizational Ethical Culture

Legal organizations cannot assume that law schools have taught junior attorneys everything they need to know about legal ethics, nor about reporting any problems they may find.<sup>317</sup> “To assume that any 20-year-old of good general character can function ethically in professional situations is no more warranted than assuming that any logical 20-year-old can function as a lawyer without special education.”<sup>318</sup> Similarly, legal organizations cannot assume that more senior lawyers know all that is necessary to prevent unethical behavior. Indeed, their very seniority and experience can contribute to the fading of ethics. Thus, organizations need to help all lawyers engage with ethics on an on-going basis.

The ethical culture of a firm, company, agency, or practice group is an important determinant of how ethically the attorneys within that entity will behave.<sup>319</sup> Importantly, the ethical culture of an organization depends not

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315. Rhode, *supra* note 126, at 1318–19.

316. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2010).

317. For example, Harvard grads “almost uniformly felt that their ethics training in law school had done little to prepare them for the issues they now confront as practicing attorneys.” Robert Granfield & Thomas Koenig, “*It's Hard to be a Human Being and a Lawyer*”: *Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice*, 105 W. VA. L. REV. 495, 508 (2003).

318. LINDA K. TREVIÑO & KATHERINE A. NELSON, MANAGING BUSINESS ETHICS: STRAIGHT TALK ABOUT HOW TO DO IT RIGHT 15–16 (2007) (quoting James Rest, *Moral Judgment: An Interesting Variable for Higher Education Research*, paper presented at the Annual Convention for the Association for the Study of Higher Education (1987)).

319. See, e.g., Caldwell & Moberg, *supra* note 278, at 199–202; Muel Kaptein, *Developing and Testing a Measure for the Ethical Culture of Organizations: The Corporate Ethical Virtues Model*, 29 J. ORGANIZATIONAL BEHAV. 923, 923 (2008) (discussing characteristics of ethical

only on its expressed ethical codes and policies but also far more broadly on its systems and practices.<sup>320</sup> Just as group norms may have a negative impact, so too may group norms set the stage for attorneys to do the right thing.<sup>321</sup> Lawyers who observe others within the organization engaging in ethical behavior (particularly those seen as experts<sup>322</sup> and those with whom they work closely)<sup>323</sup> and who observe that the organization rewards ethical

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climate: clarity of expectations, congruent signals, sufficient time/resources/systems, transparency, discussability, sanctionability); Kish-Gephart et al., *supra* note 31, at 21; James C. Wimbush & Jon M. Shepard, *Toward An Understanding of Ethical Climate: Its Relationship to Ethical Behavior and Supervisory Influence*, 13 J. BUS. ETHICS 637, 638 (1994) (defining ethical climate as a set of “stable, psychologically meaningful, shared perceptions employees hold concerning ethical procedures and policies existing in their organizations”); *see also* Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941, 942 (2007) (stating that culture “helps establish what is considered legitimate or unacceptable in an organization”). *See generally* MATHER ET AL., *supra* note 212; EMMANUEL LAZEGA, *THE COLLEGIAL PHENOMENON: THE SOCIAL MECHANISMS OF COOPERATION AMONG PEERS IN A CORPORATE LAW PARTNERSHIP* 255 (2001).

320. In fact, research on the effects of codes of conduct alone has yielded mixed results. A recent meta-analysis concluded that the “existence of a code of conduct had a trivial connection with unethical choice.” Gary S. Weaver & Linda K. Treviño, *Compliance and Values Oriented Ethics Programs: Influence on Employees’ Attitudes and Behavior*, 9 BUS. ETHICS Q. 315, 316–18 (1999) (finding, however, a “strong negative link . . . between code enforcement and unethical choice”). Other research has found that having a code of conduct or other set of ethical strictures at the forefront of one’s mind when making a decision can lead to more ethical decision making. *See, e.g.*, Mazar et al., *supra* note 36, at 635 (suggesting that dishonesty increases as attention to standards for honesty decreases); *see also* Robert C. Ford & Woodrow D. Richardson, *Ethical Decision Making: A Review of the Empirical Literature*, 13 J. BUS. ETHICS 205, 216 (1994) (reviewing studies); Terry W. Loe et al., *A Review of Empirical Studies Assessing Ethical Decision Making in Business*, 25 J. BUS. ETHICS 185, 194 (2000) (reviewing studies); O’Fallon & Butterfield, *supra* note 210, at 117–31 (reviewing studies). For exploration of the meaning of organizational culture generally, *see* Susan S. Silbey, *Legal Culture and Cultures of Legality*, in *SOCIOLOGY OF CULTURE: A HANDBOOK* 470 (John R. Hall et al. eds., 2010).

321. *See, e.g.*, Levin, *supra* note 17, at 316 (finding attorney ethics to be influenced more by communities of practice than by the rules); Linda K. Treviño et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CAL. MGMT. REV. 131, 131 (1999) (“A firm’s approach to ethics and legal compliance management has an enormous impact on employees’ attitudes and behaviors.”). For a discussion of the influence of norms found in communities of practice, *see* Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 809–13 (2000).

322. *See generally* CARL I. HOVLAND ET AL., *COMMUNICATION AND PERSUASION: PSYCHOLOGICAL STUDIES OF OPINION CHANGE* (1953); Carl I. Hovland & Walter Weiss, *The Influence of Source Credibility on Communication Effectiveness*, 15 PUB. OPINION Q. 635, 647 (1952).

323. Gary R. Weaver et al., “Somebody I Look Up To:” *Ethical Role Models in Organizations*, 34 ORGANIZATIONAL DYNAMICS 313, 316–17 (2005); *see also* David M. Mayer et al., *How Low Does Ethical Leadership Flow? Test of a Trickle-Down Model*, 108 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1, 8 (2009) (finding that ethical leadership at higher levels influences employee behavior through its effect on mid-level

behavior are likely to make more ethical decisions themselves. Consider how two different prosecutors describe the culture within their offices and the messages those cultures send about ethics. The first culture emphasizes winning:

“The trial atmosphere is that you’re there to win and have to win. That was really pushed, not a spoken rule but there was that pressure. You got it from the supervisor, his boss and those around you. It’s celebrated when you win.” In other words, regardless of what the chief prosecutor says to the public or within the office about the importance of procedural fairness, prosecutors get the message that winning at trial is the key to career success and that fair-process values are comparatively unimportant.<sup>324</sup>

In contrast, consider how another prosecutor describes the tone set by the district attorney in his office:

As prosecutors we’re not just out to win but to see that justice is done. We follow the principle that full disclosure is better in order to protect the process and the people subject to the process. Our office provides full disclosure and by adhering to the idea that we want to see justice done we protect the process and avoid wrongful convictions.<sup>325</sup>

Different ethical climates can push behavior in different directions. But, while it is important to promote ethical behavior, it is also important to promote ethical behavior for the right reasons. It turns out that *instrumental* ethical climates grounded in not getting caught, self-interest, or individual advancement tend to be associated with a greater likelihood of unethical behavior as compared to ethical climates based on *benevolence* or concern for clients, colleagues, or social justice.<sup>326</sup> Thus, whereas a culture of “eat what you kill” might be a fertile breeding ground for unethical behavior, climates based on *principles* or rules and standards tend to be associated with more ethical behavior.<sup>327</sup>

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supervisors). See generally Melissa S. Anderson et al., *What Do Mentoring and Training in the Responsible Conduct of Research Have To Do with Scientists’ Misbehavior? Findings From a National Survey of NIH-Funded Scientists*, 82 ACAD. MED. 853 (2007).

324. Ellen Yaroshefsky & Bruce A. Green, *Prosecutors’ Ethics in Context: Influences on Prosecutorial Disclosure*, in LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT, *supra* note 101, at 286–87.

325. *Id.* at 282.

326. Kish-Gephart et al., *supra* note 31, at 12–13.

327. *Id.* at 3, 6; see also Weaver & Treviño, *supra* note 320 (comparing values-based and compliance-based ethics programs). See generally Bart Victor & John V. Cullen, *The Organizational Bases of Ethical Work Climates*, 33 ADMIN. SCI. Q. 101 (1988).

### 1. Discuss and Model Ethical Behavior

Whether at trainings, lunches, or by the water cooler, open discussion of ethics offers attorneys opportunities to grapple with thorny ethical issues, primes attorneys to more automatically consider ethics in their own decision making, creates an atmosphere that encourages attorneys to seek guidance from others when they encounter ethical dilemmas, and helps demonstrate to employees that ethics matter. Openly discussing ethics in organizations is associated with more ethical conduct<sup>328</sup> and tends to have positive effects on “employee commitment, the perception that it’s acceptable to deliver bad news, the belief that employees would report an ethics violation, and [the belief] that decision making is better because of the ethics/compliance program.”<sup>329</sup>

The stories that get told around the office send messages about what is valued. These messages can either reinforce or undermine the more formal ethics policies of the organization.

[I]n one [prosecutor’s] office with an open file policy, a laudatory story about a prosecutor’s compliance with the policy to the office’s strategic disadvantage had entered office lore: Several different prosecutors recounted it independently. . . . Prosecutors told the story in the office to convey the importance of complying with the full disclosure policy, even at the cost of a conviction, because doing so furthers the office’s broader mission to do justice.<sup>330</sup>

Such epic stories need to be told. But so too do stories that describe ethical behavior that is less visible—stories that highlight the normalcy and value of such acts. Because others’ unethical conduct is more noticeable than their ethical conduct,<sup>331</sup> not highlighting routine ethical behavior can reinforce the perception that unethical behavior is more normal and

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328. Treviño et al., *supra* note 65, at 967.

329. Treviño et al., *supra* note 321, at 143. In contrast, when firms discourage discussion of ethical issues they may minimize any value that could otherwise have been produced by ethics training sessions or rules. “An oil company employee asked if he could bring an ethical problem to a meeting of divisional presidents. Their immediate response was, ‘If he wants to talk ethics, let him talk to a priest or a psychiatrist. The office is no place for it.’ Imagine what employees would think of a formal ethics/compliance program in such an environment.” *Id.*

330. Yaroshefsky & Green, *supra* note 324, at 281–82; *see also* Scott Killingsworth, *Modeling the Message: Communicating Compliance through Organizational Values and Culture*, 25 GEO. J. LEGAL ETHICS 961 (2012) (discussing the relationships among communication, culture, and compliance).

331. *See generally supra* note 276 (discussing the interpersonal ethics blind spot).

acceptable than it really is.<sup>332</sup> And we have seen that attorneys may ultimately adjust their own values and practices to be consistent with what they incorrectly believe to be the norms of their peers.<sup>333</sup>

These stories and discussions should communicate *why* ethical rules and practices are important—for example, that ethical behavior in the prosecutors' office is important for due process reasons and to maintain the respect of the public. People seek to make decisions they can *justify*<sup>334</sup>—to themselves and to others—and are more likely to follow rules that they believe in and support, than they are to abide by those that they view as an imposition.<sup>335</sup>

Respected role models within the organization can demonstrate that ethics are valued and how to successfully approach practice ethically.<sup>336</sup> Leaders who treat others in a fair and respectful manner, hold themselves to high and consistent ethical standards and communicate those standards to others, accept responsibility for their own errors, demonstrate ethical awareness and a commitment to ethics even while being concerned about business concerns, remain open to input and feedback, and hold others accountable for their ethical decisions contribute to an overall climate that

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332. See, e.g., Michael E. Brown et al., *Ethical Leadership: A Social Learning Perspective for Construct Development and Testing*, 97 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 117, 120 (2005) (“[P]rivately or stoically carrying out ethical actions may be insufficient to focus attention on ethical conduct.”); see also Robert B. Cialdini, *Descriptive Social Norms as Underappreciated Sources of Social Control*, 72 PSYCHOMETRIKA 263, 263 (2007).

333. See *supra* notes 220–221 and accompanying text (discussing *pluralistic ignorance*). Entities may also encourage their attorneys to network with attorneys outside the firm with respect to ethics issues. While confidentiality concerns will prevent attorneys from sharing the details of a situation with others outside the firm, there may be ways, particularly in a high tech world, for attorneys to network to discuss ethics with one another anonymously. Kim, *supra* note 9, at 1074–75.

334. See, e.g., Christopher K. Hsee, Jiao Zhang, Fang Yu & Yiheng Xi, *Lay Rationalism and Inconsistency Between Predicted Experience and Decision*, 16 J. BEHAV. DECISION MAKING 257, 267 (2003); Eldar Shafir et al., *Reason-Based Choice*, 49 COGNITION 11, 14 (1993). Jury researchers have also found that providing an explanation of the reasons underlying a rule can help jurors comply with the requirements of the rule. See, e.g., Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513, 557–59 (1992); Duane T. Wegener et al., *Flexible Corrections of Juror Judgments: Implications for Jury Instructions*, 6 PSYCHOL. PUB. POL'Y & L. 629, 646 (2000); Roselle L. Wissler et al., *The Impact of Jury Instructions on the Fusion of Liability and Compensatory Damages*, 25 LAW & HUM. BEHAV. 125, 134–35 (2001).

335. See *supra* notes 109–112.

336. See Linda K. Treviño & Stuart A. Youngblood, *Bad Apples in Bad Barrels: A Causal Analysis of Ethical Decision-Making Behavior*, 75 J. APPLIED PSYCHOL. 378, 382 (1990) (finding that vicarious reward influenced outcome expectancies which were associated with ethical decision making). See generally ALBERT BANDURA, SOCIAL LEARNING THEORY (1977).

values ethics.<sup>337</sup> By modeling good ethical behavior, key figures in the organization will also help develop junior attorneys' *schemas* for what it means to be a successful attorney.<sup>338</sup> In this way, legal organizations can help their attorneys rid themselves of an image—shaped in part by images of lawyers in popular culture—of attorneys as unethical and replace that image with a more positive view of attorneys' ethics.

All those who are visible and credible within the organization must model ethical behavior and take seriously their role of transmitting ethical norms.<sup>339</sup> They must both “walk the talk” and “talk the walk”—making sure that behavior is consistent with other messages about ethics.<sup>340</sup>

In a highly competitive environment of intense focus on the bottom line, employees need to know that the executive leaders in their organization care about ethics at least as much as financial performance. An ethical leader makes it clear that strong bottom-line results are expected, but only if they can be delivered in a highly ethical manner.<sup>341</sup>

Ethical neutrality or silence is not sufficient. Role models need to publicly enact the organization's ethical mission through their words and

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337. See, e.g., Brown et al., *supra* note 332, at 120 (finding that ethical leadership is associated with outcomes such as a greater willingness to report unethical conduct); Mayer et al., *supra* note 323, at 3–7; Mitchell J. Neubert et al., *The Virtuous Influence of Ethical Leadership Behavior: Evidence From the Field*, 90 J. BUS. ETHICS 157, 165–67 (2009); Linda K. Treviño et al., *A Qualitative Investigation of Perceived Executive Ethical Leadership: Perceptions From Inside and Outside the Executive Suite*, 56 HUM. REL. 5, 14, 18–20 (2003); Weaver et al., *supra* note 323, at 316; Wimbush & Shepard, *supra* note 319, at 642; see also Kish-Gephart et al., *supra* note 31, at 21 (reporting a meta-analysis that found that a strong ethical climate, including strong ethical role models, was associated with less unethical behavior); Marshall Schminke et al., *The Effect of Leader Moral Development on Ethical Climate and Employee Attitudes*, 97 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 135, 147 (2005).

338. See *supra* note 153 and accompanying text (defining “schema”).

339. See Brown et al., *supra* note 332, at 130; Michael E. Brown & Linda K. Treviño, *Ethical Leadership: A Review and Future Directions*, 17 LEADERSHIP Q. 595, 601–02 (2006) (suggesting importance of seeing “reinforcement of ethical behavior (i.e., ethical leaders get ahead, unethical leaders do not)”); see also Robert S. Rubin et al., *Do Ethical Leaders Get Ahead? Exploring Ethical Leadership and Promotability*, 20 BUS. ETHICS Q. 215, 223 (2010). Bar disciplinary authorities, too, have a role to play in communicating acceptable norms. See Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 739 (2003) (“[W]hen rule violations that are visible or well-known go unsanctioned, such failure to prosecute undermines the professional standard as a credible threat. It encourages other lawyers to violate the particular standard or the codes as a whole.”).

340. Michael E. Brown & Marie S. Mitchell, *Ethical and Unethical Leadership: Exploring New Avenues for Future Research*, 20 BUS. ETHICS Q. 583, 584 (2010) (also exploring the notion of “unethical leadership”).

341. TREVIÑO & NELSON, *supra* note 318, at 166.



their actions, including criticizing, disciplining, or even firing those who do not act consistently with the ethical mission.<sup>342</sup> When New York Governor Andrew Cuomo fired the director of the State Office of Emergency Management for deploying government workers to clear his personal driveway during Hurricane Sandy,<sup>343</sup> Cuomo sent a strong message to all state employees that unethical self-dealing would not be tolerated.

## 2. Educate About Ethics

On-going ethics education and self-evaluation are key elements of a culture that is open about ethics. Ethics training must make ethical standards clear and avoid sending mixed signals. Clear rules can result in more ethical behavior and more willingness to confront ethical misconduct.<sup>344</sup> Organizations, however, need to go beyond teaching the Rules of Professional Conduct or other ethical rules and standards and acknowledge that most difficult ethical dilemmas arise when important principles conflict. Thus, just as when learning to write, negotiate, engage in trial practice, or conduct legal analysis, lawyers need to learn how to think about the problems they will encounter and acquire specific skills to address them.<sup>345</sup>

Organizations should equip attorneys to stand firm in the face of ethical challenges by teaching them about the psychological factors that inform decision making processes and set the stage for ethical missteps. Effective training will also familiarize lawyers and their supervisors with potential indicia of ethical misconduct and should address the mechanisms for and

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342. *Id.* at 292–303.

343. Danny Hakim, *Cuomo Fires Emergency Office Chief for Misusing Workers in Hurricane*, N.Y. TIMES, Nov. 8, 2012, at A15.

344. *See, e.g.*, Kaptein, *supra* note 317, at 924–25. One commentator has opined that military attorneys who were uncomfortable with the Military Commission Act adopted in the wake of the 9/11 terrorist attacks were willing and able to speak out against it, even though they operated within the authoritative context of the military, because they had been trained so effectively to take responsibility for fair application of the law. McNeal, *supra* note 33, at 139. At the same time, clearer rules can make employees less likely to report the problem *outside* the organization. *See* Kaptein, *supra* note 319, at 924–25.

345. Disciplinary authorities, too, ought to consider education about the psychology of ethics as a component of discipline or as part of a set of measures aimed at prevention. Common approaches to ethical violations include disbarment, suspension, reprimand, and ethics education. *See generally* A.B.A. STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS (1979); Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1 (1998). None of these responses adequately addresses the psychological susceptibilities that we identify here, nor are they likely to build ethical resilience.

benefits of reporting misconduct.<sup>346</sup> Training can be used to help attorneys develop implementation intentions<sup>347</sup> and to make explicit ethical commitments. To be effective, trainings need to avoid vague generalities and instead address the kinds of ethical issues that are most likely to arise in the particular settings. Focusing on actual issues that have come up in the organization in the past is one way to make the training more directly meaningful.

Role playing may help make ethical temptations more concrete and allow opportunities for thinking about specific alternative responses. In addition, such practice can strengthen attorneys' moral "muscles," focus their attention on the need to exercise self-control at times of depletion, motivate them to do so, and, thus, increase their capacity to resist temptation.<sup>348</sup>

One of us frequently asks law students to engage in a negotiation exercise as part of a class on negotiation ethics. Even though the students are primed to focus on ethical concerns (the very topic of the class is negotiation *ethics* and the relevant ethical rules and contract doctrines are assigned as reading prior to class), many students engage in conduct that their counterparts find problematic. Students on each side often lie or fail to disclose information that the other side believes is "material." Whereas each side is often able to justify their conduct—explaining, for example, that the other side "didn't ask," or that their client did not want them to disclose the information—their opponents are typically outraged and feel they have been lied to. Exploring these reactions can help attorneys understand the consequences of their ability to justify their own conduct.<sup>349</sup>

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346. Marcia P. Miceli et al., *A Word to the Wise: How Managers and Policy-Makers Can Encourage Employees to Report Wrongdoing*, 86 J. BUS. ETHICS 379, 385 (2009).

347. See *supra* note 306 and accompanying text.

348. While resisting unethical behavior may deplete capacity in the short term, it can be possible to strengthen it in the long term. See generally Roy F. Baumeister et al., *The Strength Model of Self-Control*, 16 CURRENT DIRECTIONS IN PSYCHOL. SCI. 351 (2007); Mark Muraven et al., *Longitudinal Improvement of Self-Regulation Through Practice: Building Self-Control Strength Through Repeated Exercise*, 139 J. SOC. PSYCHOL. 446 (1999); Martin S. Hagger et al., *Ego Depletion and the Strength Model of Self-Control: A Meta-Analysis*, 136 PSYCHOL. BULL. 495 (2010).

349. Ethics educators Linda Treviño and Katherine Nelson recommend an exercise that presents participants with ethical dilemmas related to their work that do not have clear answers. Participants discuss the problems in groups, present their course of action, are challenged by a devil's advocate, and are scored on their responses. Participants can then appeal to a board of senior colleagues with whom they can discuss the problems. In addition to providing an opportunity to engage with each other about difficult ethical dilemmas, the exercise facilitates ethical communication between people at different levels of the organization, and by including senior colleagues on the "appeals board" signals that the conversations are worth having. TREVIÑO & NELSON, *supra* note 318, at 233–35.

Finally, the attitude organizations convey when conducting ethics training is critically important. To encourage a principled rather than an instrumental ethical culture,<sup>350</sup> training should communicate the value of ethics and the principles underlying the relevant ethical requirements.<sup>351</sup> Organizations that convey that ethics training is a required inconvenience—just a box to be checked on the CLE form or window dressing to be displayed for particular audiences—seriously diminish the value of the training.

### 3. Encourage Learning From Mistakes

The challenges of learning from ethical mistakes<sup>352</sup> affect legal organizations as well as individual lawyers. One study of how ethics were handled in law firms found that “information regarding the nature of the problems or questions, and how they are resolved was rarely, if ever, fed back into the firm. Both associates and partners seemed unaware of the extent of reported (or unreported) problems, questions, or violations of ethical standards.”<sup>353</sup> Yet, when there is no feedback, learning will suffer,<sup>354</sup> and this may lead to further deterioration in the entity’s ethical norms.

The mindset with which one approaches mistakes can make a tremendous difference for the ability to learn from them. Specifically, those with a *fixed mindset* see mistakes as an indication of incompetence or stupidity, react to them with anger or depression, and therefore miss out on opportunities to learn and improve. But those with a *growth mindset* see mistakes as opportunities to learn how to do better.<sup>355</sup> Thus, part of establishing an ethical culture is to inculcate a learning or growth orientation to dealing with mistakes—providing and embracing opportunities for self-criticism.

In this vein, organizations may want to establish processes to help attorneys learn from ethical missteps. For example, consider how Penn State University hired former FBI Director Louis Freeh and his staff to conduct a report on Penn State officials’ response to the reports of child

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350. See *supra* notes 326–327.

351. See *supra* notes 326–327, 334–335.

352. See *supra* Part III.

353. Messikomer, *supra* note 14, at 760.

354. See Chip Heath et al., *Cognitive Repairs: How Organizational Practices Can Compensate for Individual Shortcomings*, 20 RES. ORGANIZATIONAL BEHAV. 1, 29 (1998).

355. CAROL DWECK, MINDSET: THE NEW PSYCHOLOGY OF SUCCESS 6–7 (2007). See also Julie A. Oseid & Stephen D. Easton, “*And Bad Mistakes, I’ve Made Few*”: *Sharing Mistakes to Mentor New Lawyers*, \_\_ ALBANY L. REV. \_\_ (forthcoming 2014), available at <http://papers.ssrn.com/abstract=2337241>.

abuse by Assistant Football Coach Jerry Sandusky. The resulting report found that Penn State officials had made numerous missteps and suggested that specific reforms be made to avoid such lapses in the future.<sup>356</sup> While not all organizations can afford—nor do all issues require—such a large-scale investigation, organizations would be well advised to appropriately explore what led an attorney to overstate her hours, borrow trust fund money, omit crucial information from a filing, or fail to consider evidence of a defendant’s innocence.

#### 4. Protect Attorneys From Cognitive, Temporal, and Financial Stresses

Cognitive and temporal overloads tend to increase the likelihood that attorneys will engage in unethical conduct.<sup>357</sup> Although some of these stresses seem inherent to many legal jobs, their connection to ethical problems should give firms an incentive to provide attorneys with sufficient support staff, effective software, and office systems and structures to help prevent and catch problems.<sup>358</sup> Firms can also strive to treat their attorneys humanely, and to schedule work in a reasonable fashion. Even providing exercise opportunities to employees<sup>359</sup> may pay ethical dividends. While all of these steps have costs, so too do ethical mistakes.

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356. Brad Wolverton, *Penn State’s Culture of Reverence Led to ‘Total Disregard’ for Children’s Safety*, CHRON. HIGHER EDUC., July 12, 2012, <http://chronicle.com/article/Penn-States-Culture-of/132853>; see also, e.g., Terry Frieden, *Fast and Furious Report Finds DOJ Management Failures*, CNN.COM (Sept. 19, 2012, 2:13 PM), <http://news.blogs.cnn.com/2012/09/19/fast-and-furious-report-finds-doj-management-failures> (describing DOJ report about a year-long investigation that uncovered widespread failures at the BATF); cf. David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 21, 2012, <http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html> (describing how Wal-Mart executives shut down an investigation that started to “unearth[] evidence of widespread bribery” in Mexico).

357. See *supra* Part II.D.

358. For example, firms can provide systems for screening and dealing with conflicts of interest. See, e.g., SHAPIRO, *supra* note 128, at 289–307 (describing firms without systems or using systems that rely on lawyer memory to catch conflicts). Relying on memory to flag conflicts is fraught with peril. *Id.* at 344; see also Kaptein, *supra* note 319, at 925 (identifying “feasibility” as a dimension of ethical culture—“unethical conduct occurred when employees lacked adequate or sufficient time, budgets, equipment, information, and authority to fulfill their responsibilities”).

359. See, e.g., *Workplace Health Promotion: Physical Activity*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/workplacehealthpromotion/implementation/topics/physical-activity.html> (describing benefits of providing exercise opportunities to employees) (last visited Oct. 25, 2013).

Even when it proves impractical to limit cognitive and temporal stresses, organizations should urge their attorneys to do those tasks that involve ethical challenges when they are most fresh, rather than most depleted.

Whenever they face tasks that afford opportunities to cheat, managers may benefit by scheduling these tasks when they are fresh and well rested (e.g., not after a long flight). Similarly, managers may benefit from arranging tasks to reduce the likelihood that their employees will face ethical decisions when their self-regulatory resources are depleted.<sup>360</sup>

Firms can also take steps to relieve the economic pressures that may lead attorneys to cross ethical lines. While organizations cannot fully protect their attorneys from financial problems, they may be able to provide financial counseling, short term low interest loans,<sup>361</sup> or information on how to access other sources of psychological or financial assistance (such as through a local bar association).

##### 5. Structure Rewards to Encourage Ethical Behavior

Organizations should do what they can to reward conduct that promotes ethics<sup>362</sup> and to judge decisions based on the quality of the underlying decision making *process* rather than solely on the ultimate *outcomes*.<sup>363</sup> In other words, firms need to figure out ways to reward attorneys who engage in the kinds of conduct and decision making processes that are most likely to lead to the most effective *and* ethical strategies. While it may be more difficult to look beyond hours, wins, and fees to assess lawyering, it is important to avoid rewarding unethical attorneys.

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360. Gino et al., *supra* note 181, at 200. When depleted, attorneys can do their best to revive themselves by taking a rest, having a snack, going for a short walk, or meditating.

361. See Levin, *supra* note 17, at 387 (advising that firms should “try to limit the situations in which lawyers are overwhelmed by their financial circumstances or case loads and to provide for more outside support for handling these situations when they arise”).

362. See Kim *supra* note 9, at 1053 (suggesting companies regulate compensation to decrease self-interest); John M. Darley, *The Dynamics of Authority Influence in Organizations and the Unintended Action Consequences*, in SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS, *supra* note 195, at 40 (“[I]ncentive systems have an elevated status for communicating what the organization ‘really wants’ and ‘really values.’ In a world in which talk is regarded as cheap, bonuses, promotions, and other tangible marks of valuing are what really matter.”); John M. Darley, *How Organizations Socialize Individuals into Evildoing*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS, *supra* note 254, at 25 (“Corporations that put in place a corporate ethics code and do not consider its relationship to existing corporate practices and bonus and promotion systems seem to me to be engaging in window dressing of a particularly cynical sort.”).

363. Baron & Hershey, *supra* note 83, at 574.

Consider the positive messages sent in the following environment:

One CEO of a financial services firm was very serious about identifying and rewarding people who lived his organization's values. He challenged his executives to bring him stories of employees who were doing the right things in the right way, who were models of the culture. He collected these stories and sent personal, handwritten thank-you notes to those model employees. While a phone call might have sufficed, employees were so thrilled with his written recognition and praise that they displayed his notes in their offices. Those framed notes sent a rather loud message to other employees about what kind of behavior was valued at high levels. Of course, they also helped spread word of the 'heroes' and their deeds.<sup>364</sup>

Consider also the messages sent by a firm that provides attorneys with a pay bonus for billing 1,800 hours, and an even greater bonus for billing each additional 1,000 hours. Such an incentive scheme is likely to tempt even the most ethical of attorneys to round up her hours, double-bill a few hours to multiple clients, or perhaps "borrow" some hours from a future billing period. Or, consider a prosecutor's office that provides kudos or promotions to those prosecutors with the highest conviction rates. While these practices can be defended as encouraging "hard work," it is clear that they can also incentivize unethical conduct. Entities that take the trouble to reward attorneys based on a broader set of accomplishments will likely be repaid with more ethical work habits.<sup>365</sup>

## 6. Encourage Ethical Reporting

No matter how hard organizations try to prevent unethical conduct, lapses may occur and will need to be addressed. Understanding the thought processes that decision makers go through before reporting an ethical violation can help organizations identify the measures that they can take to ensure that employees will make reports of ethical misconduct when appropriate. A potential reporter must:

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364. TREVIÑO & NELSON, *supra* note 318, at 181–82.

365. See Kirkland, *supra* note 236, at 615 (quoting Interview with General Counsel No. 4, at 38 (2007–2008) (on file with author)) (“[describing reports of] statistics collected by malpractice insurers that show a correlation between firms’ compensation systems and firm risk profiles. One general counsel explained, ‘The liability insurers will tell you the closer you are to a ‘lock step’ compensation system, the safer your profile. The closer you are to an ‘eat what you kill’ system the riskier the profile—the greater the number of claims.’”); see also John M. Darley, *Setting Standards Seeks Control, Risks Distortion*, 32 PUB. AFF. REP. 3, 5 (1991) (describing the distorting effects of criteria-control systems).

- (1) recognize that a violation has occurred;
- (2) decide that the infraction warrants intervention;
- (3) decide that the observer is responsible for taking action on the matter;
- (4) identify what responsive actions are available; and
- (5) conclude that the benefits of reporting the violation outweigh the costs.<sup>366</sup>

Measures that take these steps into account are likely to be most effective in encouraging reporting. For example, ethical training and culture can help attorneys recognize that an ethical violation has occurred and warrants intervention.<sup>367</sup> In addition, organizations can make clear that ensuring organization-wide ethical compliance is part of attorneys' job responsibilities and will benefit the organization.<sup>368</sup> Attorneys may hesitate to "tattle" on their peers if they feel they are stepping outside their role, but will more likely report problems if such reporting is considered part of their job, and if they know that reporting is designed to benefit the organization.<sup>369</sup>

Organizations can also encourage attorneys to raise ethics issues by providing specific and multiple channels through which individuals can dissent and raise questions.<sup>370</sup> Multiple channels for reporting allow employees to choose one with which they are comfortable.<sup>371</sup> As one possible reporting channel, some large firms now have outside or in-house ethics counsel, an ethics committee, or an ethics ombudsperson who can

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366. See Marcia P. Miceli et al., *Who Blows the Whistle and Why?*, 45 INDUS. & LAB. REL. REV. 113, 115 (1991); see also Michael E. Roloff & Gaylen D. Paulson, *Confronting Organizational Transgressions*, in SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS, *supra* note 195, at 57–60 (dividing the prefrontation process into "Sense-Making" and "Action Formation").

367. See *supra* Section IV.B.2 (discussing appropriate ethical training).

368. Employees are more likely to report perceived ethical problems internally when they view such reporting as part of their assigned role. Jessica R. Mesmer-Magnus & Chockalingam Viswesvaran, *Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation*, 62 J. BUS. ETHICS 277, 286 (2005); Marcia Parmerlee Miceli & Janet P. Near, *The Relationships Among Beliefs, Organizational Position, and Whistle-Blowing Status: A Discriminant Analysis*, 27 ACAD. MGMT. J. 687, 696 (1984); see also Miceli et al., *supra* note 366, at 123; Linda Klebe Treviño & Bart Victor, *Peer Reporting of Unethical Behavior: A Social Context Perspective*, 35 ACAD. MGMT. J. 38, 47 (1992); Bart Victor et al., *Peer Reporting of Unethical Behavior: The Influence of Justice Evaluations and Social Context Factors*, 12 J. BUS. ETHICS 253, 258 (1993).

369. Victor et al., *supra* note 368, at 258.

370. Kurt Lewin, *Group Decision and Social Change*, in READINGS IN SOCIAL PSYCHOLOGY 330 (Guy E. Swanson et al. eds., 1952) (focusing on shaping behavior by using *channel factors*—relatively minor changes in the relevant situation—that can have a significant influence on behavior by leading or "channeling" people in a particular direction).

371. Miceli et al., *supra* note 346, at 388.

serve this role.<sup>372</sup> While lawyers in such a role may share some incentives with others in the firm,<sup>373</sup> they may be more removed from the immediate pressures of at least some ethical situations. Because such counsel will not be directly involved with the client, case, or deal at issue, she may be more objective than the attorney directly affected and thus less tempted to counsel unethical actions.<sup>374</sup> For example, when exploring a potential conflict of interest, ethics counsel can consider the matter as a part of the firm's interests and larger book of business rather than leaving the decision to the attorney for whom the potential conflict may represent significant new business.<sup>375</sup> In addition, consulting ethics counsel can be designated as an accepted part of the entity's practice and the attorney's role.<sup>376</sup>

Organizations must not only provide the channels for reporting, but also ensure that reporting leads to outcomes that are perceived to be appropriate. When employees believe that their ethical reports are likely to be taken seriously, they are more likely to make such reports.<sup>377</sup> While organizations will have to find a balance between treating reports of real wrongdoing seriously and not "rewarding the gadfly or chronic low performer seeking to

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372. See generally Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559 (2002); Elizabeth Chambliss, *The Professionalization of Law Firm In-House Counsel*, 84 N.C. L. REV. 1515 (2005–2006); Jonathan D. Glater, *In a Complex World, Even Lawyers Need Lawyers*, N.Y. TIMES, Feb. 3, 2004, <http://www.nytimes.com/2004/02/03/business/in-a-complex-world-even-lawyers-need-lawyers.html?pagewanted=all&src=pm>.

373. Kirkland, *supra* note 70, at 188, 192 (explaining that "ethics counsel see their jobs as finding ways to take on as much new work as they can without running afoul of the ethics rules" and that they "struggle to find ways to say yes even when there is a conflict"); Suchman, *supra* note 101, at 864 (describing interview with lawyer at a firm at which the "ethics committee" was called the "No Business Committee").

374. Ronald D. Rotunda, *Why Lawyers are Different and Why We are the Same: Creating Structural Incentives in Large Law Firms to Promote Ethical Behavior—In-House Ethics Counsel, Bill Padding, and In-House Ethics Training*, 44 AKRON L. REV. 679, 704 (2011).

375. See, e.g., SHAPIRO, *supra* note 128, at 363–64. Ethics counsel who are compensated directly for their special role tend to take the position more seriously and see it as less burdensome than do those ethics counsel who are asked to do the job on top of their other duties. See Chambliss & Wilkins, *supra* note 372, at 572–73. Because attorneys are subject to group pressures and may become committed to positions they have taken, fresh perspectives can be helpful. Langevoort, *supra* note 33, at 113 (suggesting rotating personnel as a means to encourage more ethical behavior).

376. Rotunda, *supra* note 374, at 706.

377. Miceli et al., *supra* note 346, at 388–89 (employees are less likely to report perceived ethical problems if they don't think anything will or can be done to rectify the problem); see also Kaptein, *supra* note 319, at 927 (finding that "sanctionability" is positively associated with confrontation of unethical behavior and reporting to management and negatively related to external whistleblowing).



distract attention, . . . [or] wasting time on frivolous complaints,<sup>378</sup> it is important to investigate claims fully and fairly.

When the organization finds a complaint to be legitimate, it should take prompt action to address the concern and communicate that action to the reporter. This action should focus not only on any “bad apples” who have acted unethically, but also on correcting any systemic problems.<sup>379</sup> Sometimes it will also be appropriate to publicize instances in which reporting led to positive change, while at the same time being careful to protect confidentiality and not to spark retaliation. Providing feedback to reporting attorneys about the actions taken also encourages continued reporting.

A client did not want to disclose a particular document; instead, he wanted to get rid of it. I told the senior associate, and he told me that the partners did not want to know about it. However, I did not like that result. I wrote a legal memorandum politely describing the problem and discussing the case law requiring us to turn over the document. I sent it to the partners who promptly overruled the senior associate and turned over the document. Later, one of the partners called me in his office and thanked me for what I had done. “We could have gotten into a problem over that,” he said. The partner was promoting the right culture.<sup>380</sup>

When the organization ultimately finds that a report was *not* well founded, it is equally important to provide feedback to the attorney reporter. This feedback should include clarifying what conduct is unethical and what conduct the company believes should be reported.<sup>381</sup>

Finally, it is also important to assure attorneys that they will be protected rather than punished for reporting possible ethical issues.<sup>382</sup> Fear of retaliation reduces the likelihood of internal reporting.<sup>383</sup> It is not that people “expect or want a reward for doing the right thing. They just don’t want to be punished for it.”<sup>384</sup> Of course, it is critically important to ensure that the protections that organizations provide to attorneys are “real” and not just

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378. Miceli et al., *supra* note 346, at 388.

379. *Id.* at 389.

380. Rotunda, *supra* note 374, at 703.

381. Miceli et al., *supra* note 346, at 388–89.

382. See Miceli et al., *supra* note 366, at 115; see also, e.g., Kim, *supra* note 9, at 1064–71 (suggesting that companies offer better whistle-blower protection).

383. David M. Mayer et al., *Encouraging Employees to Report Unethical Conduct Internally: It Takes a Village*, 121 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 89, 89 (2013).

384. TREVIÑO & NELSON, *supra* note 318, at 281.

window dressing that is ignored when promotion, compensation, and retention decisions are made.<sup>385</sup>

Certain employees may be more likely to report perceived ethical problems than others. For example, employees are more likely to report ethical problems internally when they have greater commitment to their job, higher job satisfaction,<sup>386</sup> and feel they are treated fairly.<sup>387</sup> Thus, organizations that are interested in encouraging ethical reporting by their attorneys will also want to focus more generally on their attorneys' workplace satisfaction. Because more junior employees are generally less likely to report perceived ethical problems, organizations may want to focus on helping these more junior attorneys recognize what misconduct needs to be reported, understand the organization's commitment to ethics, know how to report,<sup>388</sup> and feel secure in reporting ethical issues. More junior employees are likely to feel more vulnerable and, thus, may need greater assurances.<sup>389</sup>

## 7. Monitor Ethics

Finally, organizations can and indeed are required to take steps to monitor the ethical performance of their attorney employees.<sup>390</sup> Given the very human ways in which people can fall prey to ethical temptations, entities should not assume that attorneys are behaving ethically, but should instead develop systems to provide checks on behavior—whether by using software to monitor billing patterns, having colleagues double-check what discovery or due diligence is produced, reviewing how attorneys conduct negotiations, or monitoring how attorneys prepare their clients for depositions or trial. It is most important to monitor situations in which attorneys, due to cognitive or temporal depletion or structural temptations,

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385. *Id.* at 280 (“The organization’s treatment of whistle-blowers is a relevant reward system concern and a frequent source of misalignment.”).

386. Mesmer-Magnus & Viswesvaran, *supra* note 368, at 286; Miceli et al., *supra* note 366, at 123.

387. Victor et al., *supra* note 368, at 259.

388. Mesmer-Magnus & Viswesvaran, *supra* note 368, at 293–94.

389. More accomplished, more competent employees are more likely to blow the whistle on perceived ethical problems. Marcia P. Miceli & Janet P. Near, *Individual and Situational Correlates of Whistle-Blowing*, 41 PERSONNEL PSYCHOL. 267, 275 (1988); Miceli et al., *supra* note 366, at 123.

390. MODEL RULES OF PROF'L CONDUCT R. 5.1 (“A partner in a law firm . . . shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”); *see also* Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 276 (1994).

are most likely to engage in ethical misconduct.<sup>391</sup> As noted earlier, when ethical improprieties are found, organizations should discipline attorneys found to have behaved inappropriately, determine whether systemic changes should be made, and provide appropriate feedback to the community.

While structural systems to monitor ethical performance are perhaps necessary, research has found that intrinsic motives, identification with the rules of the organization, and believing that the organization is legitimate tend to have a greater effect on rule following (and a *commitment* to following the rules) than do perceptions of the likelihood of detection and the nature of the likely sanctions.<sup>392</sup> Thus, even as they build systems to help attorneys avoid missteps, organizations should act in ways—enacting fair processes and treating attorneys fairly—that help attorneys see the entity as legitimate and as embodying values that are congruent with their own.<sup>393</sup> Of particular importance are providing opportunities for input into organizational policies, making decisions in a neutral fashion using transparent and objective criteria, making decisions that treat people consistently and respectfully, and providing explanations for decisions reached.<sup>394</sup> Developing such procedures can reap a variety of benefits:

First, in a culture where transparent procedures are voluntarily embraced, the self-policing mechanisms that will thrive in the organization will be more likely to expose wrongdoing in its infancy. . . . Second, a culture in which rule-following is the expected norm and cynicism is low will be a far less comfortable environment for those who would prefer to break the rules. And finally, in a culture in which rule-following is the accepted norm, scoundrels and cheats will be far less likely to ascend to the positions of power in which they can do significant damage.<sup>395</sup>

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391. Brown & Treviño, *supra* note 339, at 602; Gino et al., *supra* note 181, at 200; *see also* Langevoort, *supra* note 33, at 101–04 (suggesting that firms watch for red flags).

392. Tom R. Tyler & Steven L. Blader, *Can Businesses Effectively Regulate Employee Conduct? The Antecedents of Rule Following in Work Settings*, 48 ACAD. MGMT. J. 1143, 1153 (2005); *see also* Tom R. Tyler et al., *The Ethical Commitment to Compliance: Building Value-Based Cultures*, 50 CAL. MGMT. REV. 31, 32 (2008).

393. Tyler et al., *supra* note 392, at 33.

394. *Id.* at 38.

395. TOM R. TYLER, WHY PEOPLE COOPERATE: THE ROLE OF SOCIAL MOTIVATIONS 117 (2011).

## V. CONCLUSION

*“[T]o understand all is not to forgive all . . . [b]ut . . . to understand all may well put us on guard against doing the unforgivable.”*<sup>396</sup>

While research into the psychology of legal ethics is ongoing,<sup>397</sup> current knowledge can help individual attorneys and organizations employing those attorneys resist the pull of unethical behavior. Having learned that “[a]ttributing blame solely to flawed individuals or corrupt organizations rarely captures the subtleties of how ethical misconduct occurs,” and instead “offers false reassurance that only moral deviants, not ordinary people, engage in such behavior,”<sup>398</sup> we are better equipped to fight against the slide into misconduct.

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396. Luban, *supra* note 204, at 116.

397. Empirical research should build on our analysis to further explore how the ethical decision making of attorneys compares to that of other actors.

398. REGAN, *supra* note 13, at 294.