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Cover Page Footnote

Ernest W. McFarland Professor of Law, Director, Stanford Center on Ethics. The research assistance of Mariko Hirose is gratefully acknowledged.

MORAL COUNSELING

*Deborah L. Rhode**

INTRODUCTION

Do lawyers have a moral responsibility to provide moral counseling? It depends who you ask. This is not a moment when most audiences need convincing about the need for greater moral responsibility in American business and in the professions that advise it. With estimates of recent financial scandals running as high as \$7 trillion and public trust of management at new lows, a consensus has emerged that *Something Must Be Done*.¹ In a recent poll on public confidence in some twenty major institutions, Americans rated “big business” second to last: Only about one-fifth expressed high levels of confidence.² When asked “how much of the time do you think you can trust the executives in charge of major companies in this country to do what is right,” only one percent said always, and only about a fifth said most of the time; about a quarter said almost never.³ Only ten percent thought that current rules designed to promote responsible and ethical corporate behavior were working “pretty well”; almost half thought they needed “major changes” or a “complete overhaul.”⁴

Lawyers are among the few constituencies in denial about the need for fundamental reform. As William Simon notes, the most frequent response of the profession has been to “circl[e] the wagons” around traditional standards.⁵ The American Bar Association (ABA) has largely resisted efforts to strengthen corporate counsels’ responsibility to prevent client misconduct. It vehemently opposed federal statutory proposals to that end, which were nonetheless enacted with nearly universal congressional

* Ernest W. McFarland Professor of Law, Director, Stanford Center on Ethics. The research assistance of Mariko Hirose is gratefully acknowledged.

1. Peter S. Cohan, *Value Leadership: The 7 Principles that Drive Corporate Value in Any Economy* 4 (2003).

2. Frank Newport, *Military, Police Top Gallup’s Annual Confidence in Institutions Poll*, Gallup Poll Monthly, June 19, 2003, at 32, available at <http://institution.gallup.com/documents/questionnaire.aspx?STUDY=P0306033>.

3. Roper Ctr. for Pub. Opinion Research, *Survey by Los Angeles Times, Mar. 27-30, 2004*, iPoll Databank, Apr. 1, 2004, www.ropercenter.uconn.edu/ipoll.html.

4. Roper Ctr. for Pub. Opinion Research & Peter D. Hart Research Assocs., iPoll Databank, Aug. 29, 2002, www.ropercenter.uconn.edu/ipoll.html.

5. William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 *Fordham L. Rev.* 1453, 1453 (2006).

approval as part of the 2002 Sarbanes-Oxley Act.⁶ The ABA, as well as state counterparts, continues to challenge attempts to expand lawyers' moral oversight responsibilities that might compromise client interests.⁷

On the general subject of moral counseling, the bar's position is more ambivalent. As bar ethics codes have long recognized, ethical considerations may affect how laws are interpreted and enforced, so advice about those concerns may be part of an attorney's general obligation of competent representation.⁸ Accordingly, Model Rule 2.1 of the ABA Model Rules of Professional Conduct provides that "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."⁹ Yet as the comment to that Rule is at pains to point out, lawyers are "not . . . moral advisor[s] as such."¹⁰ And many practitioners are wary of appearing to "pass judgment" on their clients.¹¹

Despite long-standing controversies concerning the role of moral counseling, we know little about its nature, extent, and frequency. In the single empirical survey most directly on point, only two percent of lawyers recalled giving advice on the "public interest."¹² Yet much of the moral counseling that lawyers provide is not presented as such, and may not even be perceived in those terms by lawyers themselves. Indeed, as case histories suggest, many professionals, particularly those in business settings, prefer to cast any ethical advice in pragmatic form.¹³ Conduct that attorneys find ethically objectionable can be more diplomatically packaged

6. Sarbanes-Oxley Act of 2002 § 307, 15 U.S.C. § 7245 (Supp. III 2003); *see also* 17 C.F.R. 205 (2003). The legislation passed with a vote of 423-3. *See* Deborah L. Rhode & Paul D. Patton, *Lawyers, Ethics and Enron*, in *Enron: Corporate Fiascos and Their Implications* 625, 628 (Nancy B. Rapoport & Bala G. Dharan eds., 2004). For bar opposition, *see id.* at 645; Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 Colum. L. Rev. 1236 (2003).

7. For the focus of the ABA Task Force on the Attorney-Client Privilege, *see* Molly McDonough, *Prove It: Task Force Seeks Evidence that Recent Policies Undermine Attorney-Client Privilege*, A.B.A. J., Apr. 2005, at 60. For California and Washington State Bar committees' challenges to the SEC regulations that implement Sarbanes-Oxley requirements, *see* Corps. Comm. of the Bus. Law Section and Comm. on Prof'l Responsibility and Conduct, Cal. Bar Ass'n, Ethics Alert: The New SEC Attorney Conduct Rules v. California's Duty of Confidentiality (2004), *available at* <http://calbar.ca.gov/calbar/pdfs/SEC-ethics-alert.pdf>; Wash. State Bar Ass'n, Background on the Proposed Interim Formal Ethics Opinion 1 (2003).

8. Model Rules of Prof'l Conduct R. 2.1 cmt. 2 (2004) (noting that "[a]lthough a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied").

9. *Id.* R. 2.1.

10. *Id.* R. 2.1 cmt.

11. That view has dominated debates about the formulation and revision of bar ethical standards. For the role of such arguments in the initial drafts of the ABA Model Rules, *see* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589, 620-21 (1985).

12. Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Firm*, 37 Stan. L. Rev. 503, 533 (1985).

13. Robert Jackall, *Moral Mazes: The World of Corporate Managers* 6 (1988).

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. In the long term, attorneys can often argue, "ethics pays"; the value of a reputation for fairness and integrity and the ability to forestall more intrusive regulation will outweigh short-term financial costs.¹⁴

This strategy, however, has its limitations. Not all moral advice can be prudentially framed. If virtue were always its own reward, we would surely see more of it in the business world. As experts on corporate social responsibility note, "ethics counts," but whether it also "pays" depends on social and legal conditions that are sometimes lacking.¹⁵ Much turns on the adequacy of enforcement and penalty structures for harmful conduct, and the strength of peer support for desirable behavior.¹⁶

This essay argues that lawyers have a moral responsibility to provide moral counseling, whether or not it can be packaged in pragmatic terms. Although in today's political climate, this proposition would hardly seem controversial to the general public, it has proven hard to institutionalize among lawyers. Two aspects of this responsibility have been especially problematic. The first is that lawyers, as fiduciaries for clients, have a moral obligation to provide informed, independent, and disinterested legal advice. Although this obligation is widely accepted in theory, it is too seldom realized in practice. A second obligation follows from lawyers' role as officers of the court and fiduciaries for the legal system. Lawyers should counsel clients to comply with the purposes and letter of the law, and with core principles of honesty, fairness, and social responsibility that are central to effective legal processes. This is not an obligation that is well-established even in principle, let alone practice. Yet it is crucial to maintaining a just society, committed to the rule of law, and a profession worthy of regulatory autonomy and public respect.

This understanding of lawyers' moral responsibility is not tied to any single monolithic conception of "the client" as either Holmes's quintessential "bad man" or H.L.A. Hart's "law abiding citizen."¹⁷ Rather, the framework seeks to encompass the broad range of contexts in which

14. For the frequency with which this argument is made, see Deborah L. Rhode, *Where Is the Leadership in Moral Leadership?*, in *Moral Leadership: The Theory and Practice of Power, Judgment, and Policy* 1 (Deborah L. Rhode ed., 2006). For the value of preempting regulation, see Cynthia A. Williams, *A Tale of Two Trajectories*, 75 *Fordham L. Rev.* 1629, 1635-49 (2006).

15. Lynn Sharp Paine, *Value Shift: Why Companies Must Merge Social and Financial Imperatives to Achieve Superior Performance* 30 (2003); see also David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* 6 (2005); Rhode, *supra* note 14, at 19-20.

16. See Paine, *supra* note 15, at 30-31; Vogel, *supra* note 15, at 4; Kimberly D. Krawiec, *Accounting for Greed: Unraveling the Rogue Trader Mystery*, 79 *Or. L. Rev.* 301, 310 (2000); Rhode, *supra* note 14, at 19-20.

17. See generally H.L.A. Hart, *The Concept of Law* 256 (2d ed. 1994); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *Harv. L. Rev.* 457 (1897).

legal counseling occurs. Clients bring to these settings quite different vulnerabilities, desires, and moral sensitivities. Any unitary, preconceived view of their essential human nature cannot capture the diversity of legal practice. Nor can it take account of the complexities of most corporate counseling, in which obligations run to entities, not individuals. What morally responsible lawyers require is not some fixed assumption about clients' ethics, but rather a firm commitment to their own, and a professional culture that reinforces this commitment in practice.

I. THE NEED FOR MORAL COUNSELING

Few would dispute the need for greater checks on client misconduct and the legal profession's too frequent failure to perform this role. Lawyers have been implicated in almost all of the major health, safety, and financial scandals of recent decades.¹⁸ Where controversy centers is on the extent to which more moral counseling could have significantly reduced that misconduct. As the discussion below indicates, in many cases, clients plainly ignored or discounted lawyers' efforts to prevent misconduct, or left them out of the loop of information and decision making that might have permitted such efforts in the first instance.¹⁹ But in other cases, lawyers remained willfully ignorant or made no serious attempt to engage in compliance counseling.²⁰ Whether they would have been successful remains speculative, but both clients and the public deserved an effort.

The same is true in many counseling contexts outside the corporate setting. The stress, acrimony, and financial pressures that can accompany legal disputes often compromise clients' ability to perceive their own long-term interests or the ethical implications of self-serving behavior.²¹ As Elihu Root famously put it, "About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."²² At the very least, lawyers can provide a useful reality check for individuals whose judgment is skewed by self-interest or cognitive biases. And in organizational contexts, attorneys can serve an equally important

18. For a representative list, see Deborah L. Rhode, *In the Interests of Justice* (2000) [hereinafter, Rhode, *Interests of Justice*]; Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 Conn. L. Rev. 1185 (2003); David Luban, *Contrived Ignorance*, 87 Geo. L. Rev. 957 (1999) [hereinafter Luban, *Contrived Ignorance*]; David Luban, *Making Sense of Moral Meltdowns*, in *Moral Leadership: The Theory and Practice of Power, Judgment, and Policy*, *supra* note 14, at 57 [hereinafter Luban, *Making Sense*]; Deborah L. Rhode, *Ethics in Counseling*, 30 Pepp. L. Rev. 591, 602 (2003) [hereinafter Rhode, *Ethics in Counseling*]; William H. Simon, *Wrongs of Ignorance and Ambiguity: Lawyer Responsibilities for Collective Misconduct*, 22 Yale J. on Reg. 1 (2005).

19. See *infra* notes 32, 59 and accompanying text.

20. See, e.g., Gordon, *supra* note 18; Koniak, *supra* note 6; Luban, *Contrived Ignorance*, *supra* note 18; Rhode & Patton, *supra* note 6; Simon, *supra* note 18.

21. See, e.g., Deborah L. Rhode & David Luban, *Legal Ethics* 515-37, 539-40, 708-27 (4th ed. 2004).

22. Philip C. Jessup, 1 Elihu Root 133 (1938).

function by enlisting others, such as independent directors, who may have a more disinterested perspective.

A wide array of research evidence documents the role of cognitive biases in distorting individual judgment on health, safety, and financial matters that may pose ethical concerns. Two related problems involve overconfidence and overcommitment. Those who obtain decision-making positions often have high confidence in their own capacities and judgment.²³ That can readily lead to arrogance, overoptimism, and an escalation of commitment to choices that turn out to be wrong, either factually or morally.²⁴ As a result, individuals may ignore or suppress dissent, overestimate their ability to rectify adverse consequences, and cover up mistakes by denying, withholding, or sometimes destroying information.²⁵ An incremental slide into ever more dubious conduct can readily produce “the boiled frog” problem.²⁶ A frog thrown into boiling water will jump out of the pot. A frog placed in tepid water that gradually becomes hotter and hotter will calmly boil to death.²⁷

A Dilbert cartoon parodies the process in a corporate ethics context. One of the main characters tells his supervisor that he has discovered a “deadly safety flaw” in a company product and wants to know “[w]ho should I inform?”²⁸ The answer comes back: “No one. The stock would plunge and we’d have massive layoffs. Your career would be ruined.”²⁹ “But,” responds the employee, “my negligence could cause the deaths of a dozen customers.”³⁰ To which his boss reassuringly responds, “The first dozen is always the hardest.”³¹

23. Kathleen Hoffman Lambird & Traci Mann, *When Do Ego Threats Lead to Self-Regulation Failure? Negative Consequences of Defensive High Self-Esteem*, 32 *Personality & Soc. Psychol. Bull.* 1179, 1179 (2006); Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron*, 70 *Geo. Wash. L. Rev.* 968, 971 (2002).

24. See Max H. Bazerman, *Judgment in Managerial Decision Making* 37-39 (2002); Martin E.P. Seligman, *Learned Optimism* 100-12 (1990); John M. Darley, *How Organizations Socialize Individuals into Evildoing*, in *Codes of Conduct: Behavioral Research into Business Ethics* 13, 16-25 (David M. Messick & Ann E. Tenbrunsel eds., 1996); Langevoort, *supra* note 23, at 974; David M. Messick & Max H. Bazerman, *Ethical Leadership and the Psychology of Decision Making*, 37 *Sloan Mgmt. Rev.* 9 (1996); Michael B. Metzger, *Bridging the Gaps: Cognitive Constraints on Corporate Control & Ethics Education*, 16 *U. Fla. J.L. & Pub. Pol’y* 435, 475-78 (2005); Barry M. Staw, *Knee-Deep in the Big Muddy: A Study of Escalating Commitment to a Chosen Course of Action*, 16 *Organizational Behav. & Hum. Performance* 27 (1976).

25. See Krawiec, *supra* note 16, at 310; sources cited *supra* note 24.

26. John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor’s Perspective*, 76 *U. Colo. L. Rev.* 57, 93 (2005).

27. *Id.*

28. Scott Adams, *Dilbert* (Jan. 27, 2004) (on file with the author and the Fordham Law Review). I am indebted to David Luban for this cartoon, and for that matter, a great deal more that informs this essay.

29. *Id.*

30. *Id.*

31. *Id.*

Other biases can similarly compromise ethical reasoning. One involves cognitive dissonance—individuals tend to suppress or reconstrue information that casts doubt on a prior belief or action.³² Such tendencies may lead clients to discount or devalue evidence of the harms of their conduct or the extent of their own responsibility. Such skewed assessments are particularly likely where the victims are distant and diffuse—shareholders and consumers, not identifiable persons.³³

Self-serving biases compound the problem. Social psychology research confirms what common sense and common experience suggest. People have a natural inclination to conflate what is personally advantageous with what is socially just and ethically justifiable.³⁴ Self-interest or conflicts of interest often skew “intuitive judgments,” which are not products of deliberative reasoning.³⁵ Commitment to initial unreflective decisions then entraps individuals in an escalating series of ethically indefensible acts. So too, when decision makers compromise their ethical standards in response to situational pressures, cognitive bias often kicks in, and standards change to justify the behavior.³⁶ A related dynamic involves “ethical fading.”³⁷ In order to avoid a conflict between their interests and principles, individuals are drawn to strategies that bleach out the moral content of their choices. Tendencies such as adopting euphemistic labels for injurious conduct, or understating responsibility for acts of omission, allow the ethical dimensions of decision making to fade from view.³⁸

Organizational structures can also compromise moral judgment. Countless studies document the influence of authority figures and peer pressure in producing actions that individuals find unacceptable under other circumstances. Stanley Milgram’s classic electric shock experiments offer a chilling reminder of how readily the good go bad if someone in a

32. The classic account is Leon Festinger, *A Theory of Cognitive Dissonance* 128-34 (1957). For more recent accounts, see *Cognitive Dissonance: Progress on a Pivotal Theory, in Social Psychology* (Eddie Harmon-Jones & Judson Mills eds., 1999); Metzger, *supra* note 24, at 466-68, 478-79.

33. Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 *Fordham L. Rev.* 983, 1033 (2005); Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 *Soc. Just. Res.* 189, 197 (2004); Deborah A. Small & George Loewenstein, *Helping a Victim or Helping the Victim: Altruism and Identifiability*, 26 *J. Risk & Uncertainty* 5 (2003).

34. Kim, *supra* note 33, at 1030-31; Ziva Kunda, *The Case for Motivated Reasoning*, 108 *Psychol. Bull.* 480, 485 (1990); Messick & Bazerman, *supra* note 24, at 10, 99-100; Metzger, *supra* note 24, at 499.

35. John M. Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 70 *Brook. L. Rev.* 1177, 1181-84 (2005); Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality*, 58 *Am. Psychol.* 697, 697-720 (2003).

36. Metzger, *supra* note 24, at 467. For the classic account, see Elliot Aronson, *The Social Animal* 108 (1972).

37. Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 *Soc. Just. Res.* 223, 224 (2004).

38. *Id.* at 224-28, 230.

seemingly legitimate decision making position demands it.³⁹ Variations of the study also documented the importance of peer influence. When a subject was paired with someone who refused to comply, ninety percent followed suit; when that person uncomplainingly complied, ninety percent of the subjects did so as well.⁴⁰

Other studies on organizational dynamics find similar patterns. Group loyalty often results in ostracism of inconvenient views and preempts the moral candor essential for socially responsible decision making.⁴¹ Diffusion of responsibility and socialization to expedient norms can “protect people from their own consciences.”⁴² In some instances, what psychologists label “pluralistic ignorance” kicks in.⁴³ People who are reluctant to express moral concern because of their insecure or subordinate position in a group may misinterpret the silence of others. No one realizes that their colleagues may be suppressing similar views for similar reasons.⁴⁴

All of these dynamics make individuals more likely to engage in unethical conduct when acting with others. This is especially likely in organizations that place heavy emphasis on loyalty and offer substantial rewards to “team players.”⁴⁵ In too many contexts, a kind of worldly cynicism takes hold, and “conventional morality is widely recognized to be inappropriate, except as public relations stances.”⁴⁶

A famous simulation by Wharton Professor Scott Armstrong illustrates the moral myopia of group decision making. The experiment asked fifty-seven groups of executives and business students to assume the role of an imaginary pharmaceutical company’s board of directors. Each group received a fact pattern indicating that one of their company’s most profitable drugs was causing a significant number of “unnecessary” deaths a year and would likely be banned by regulators in the company’s home

39. When asked to administer electric shocks to another participant in the experiment, about two-thirds of subjects fully complied up to levels marked dangerous, despite the victim’s screams of pain. See Stanley Milgram, *Obedience to Authority: An Experimental View* 3-5 (1974). Yet when the experiment was described to subjects, none believed that they would comply, and estimates of compliance by others were no more than one in a hundred. See *id.* at 27-31; Arthur G. Miller, *The Obedience Experiments: A Case Study of Controversy in Social Science* 13, 21 (1986). For an overview of the Milgram work and its relevance for lawyers, see David Luban, *The Ethics of Wrongful Obedience*, in *Ethics in Practice: Lawyers’ Roles, Responsibilities, and Regulation* 94, 96-97 (Deborah L. Rhode ed., 2000).

40. See Luban, *Making Sense*, *supra* note 18, at 73.

41. M.R. Banaji, Max H. Bazerman & D. Chugh, *How (Un)Ethical Are You?*, 81 *Harv. Bus. Rev.* 856, 864 (2003); Messick & Bazerman, *supra* note 24, at 76.

42. John Braithwaite, *Crime, Shame and Reintegration* 147 (1989).

43. Dale T. Miller & Cathy McFarland, *Pluralistic Ignorance: When Similarity Is Interpreted as Dissimilarity*, 53 *J. Personality and Soc. Psychol.* 298, 298-305 (1987). For applications in the corporate context, see Darley, *supra* note 35, at 1186-87.

44. Darley, *supra* note 35, at 1186-87.

45. Jackall, *supra* note 13, at 31; Darley, *supra* note 35, at 1189-91; Ronald R. Sims & Johannes Brinkmann, *Enron Ethics (Or: Culture Matters More than Codes)*, 45 *J. Bus. Ethics* 243, 247 (2003).

46. Jackall, *supra* note 13, at 6; Kim, *supra* note 33, at 1011, 1019.

country. A competitor offered an alternative medication with the same benefits at the same price but without the serious side effects. More than seventy-nine percent of the boards decided to continue marketing their product and to take legal and political actions to prevent a ban. By contrast, when a different group of individuals with similar business backgrounds were asked for their personal views on the same hypothetical, ninety-seven percent believed that continuing to market the product was socially irresponsible.⁴⁷

Such diffusion of responsibility is often apparent in corporate counseling settings. A well-known example involves the failure of top officials at Salomon Brothers to report or take prompt corrective action against a trader who submitted false auction bids to evade Treasury Department purchase limits. Four executives, including the general counsel, knew of the misconduct and failed to act for several months. 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."⁴⁸ No one lived happily ever after, and the lawyer's abdication of an ethical counseling role was part of the reason.⁴⁹

Equally unhappy endings result from conflicts of interest. Problems frequently arise when organizations can benefit at the expense of their clients. Michael Lewis's *Liar's Poker* offers an example from his training period as a bond salesman at Salomon Brothers.⁵⁰ After an experienced colleague recommended AT&T bonds, he sold some \$3 million to one customer. Their value plummeted, undermining his relationship with the client. Lewis then learned from another salesman that the firm had predicted the drop in value and wanted to unload its inventory on unsuspecting clients. When Lewis protested, the salesman responded, "Look, who do you work for, this guy or Salomon Brothers?"⁵¹

A related set of conflicts involve "principal-agent" problems. These arise in corporate settings where managers' desire to maximize their own income, power, or status encourages decisions inconsistent with the interest of owners and other stakeholders. The problem is particularly apparent where compensation and advancement are too closely tied to short term profits.⁵² Such skewed reward structures help explain the moral meltdowns

47. J. Scott Armstrong, *Social Irresponsibility in Management*, 5 J. of Bus. Res. 185, 185 (1977).

48. *In re Gutfreund*, 51 S.E.C. 93, 98 (1992).

49. The result was a major financial crisis when the threat of a public investigation ultimately forced disclosure. The firm's share price plummeted, many clients withdrew their business, a government lawsuit imposed almost \$300 million in penalties and the president and the CEO were forced to resign. See Paine, *supra* note 15, at 9-12.

50. Michael Lewis, *Liar's Poker* 164-67 (1989).

51. *Id.* at 167.

52. David Skeel, *Icarus in the Boardroom: The Fundamental Flaws in Corporate America and Where They Came From* 152-55 (2005); Rhode, *supra* note 14, at 31-32.

on display in cases like Enron and its predecessors during the savings and loan crisis of the 1990s.⁵³

Where were the lawyers? asked federal judge Stanley Sporkin in one of those savings and loan debacles.⁵⁴ Similar questions are being asked about counsel in the latest spate of scandals. Although there is much we do not know, what evidence is available suggests that lawyers missed all too many opportunities to advise boards of directors and top decision makers about serious ethical concerns and to avoid pedigreeing transactions that were, at best, on the fringes of fraud.⁵⁵ As these examples suggest, the ultimate justification for an ethical dimension to legal counseling is that there is no alternative; often, no one besides a lawyer is in a position to identify and prevent actions that pose significant threats to the public welfare. If attorneys fail to play that role, then, as David Luban notes, illegal and injurious actions can “fly beneath enforcement’s radar for years on end.”⁵⁶ What kind of counseling is necessary and what gets in the way deserve closer analysis.

II. OBLIGATIONS TO CLIENTS: INFORMED, INDEPENDENT, AND DISINTERESTED ADVICE

Lawyers’ obligation to provide informed, independent, and disinterested counsel confronts obstacles on two levels. Even with the best of intentions, attorneys, like any decision makers, are subject to cognitive biases, peer pressures, and information barriers that compromise counseling responsibilities. Attorneys are also subject to common human temptations to give priority to their own financial, reputational, and related interests when they conflict with those of clients. Although these problems are by no means unique to legal practice, what is distinctively disturbing about the bar’s response is its failure to develop organizational and regulatory structures that could check the worst abuses.

53. Bethany McLean & Peter Elkind, *The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron* (2003); Sims & Brinkmann, *supra* note 45, at 250-51. For a general overview of the Enron fall, see Kroger, *supra* note 26, at 69-84; *see also* Langevoort, *supra* note 23, at 972. For general discussion of the savings and loan crisis, see sources cited in Rhode & Luban, *supra* note 21, at 287-97, and William H. Simon, *The Kaye Scholer Affair: The Lawyers’ Duty of Candor and the Bar’s Temptations of Evasion and Apology*, 23 *Law & Soc. Inquiry* 243, 246-51 (1998). For an account of the biases leading to lawyers’ complicity, see Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers’ Responsibility for Clients’ Fraud*, 46 *Vand. L. Rev.* 75 (1993).

54. *Lincoln Sav. & Loan Ass’n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990).

55. *See* sources cited *supra* note 53.

56. David Luban, Professor, Georgetown Univ. Law Ctr., *A Different Nightmare and a Different Dream*, Paper Presentation at the Fordham University School of Law Symposium: *The Internal Point of View in Law and Ethics* (Feb. 10, 2006). For the reasons that other professionals fail as gatekeepers and the rationale for requiring lawyers to serve that function, see John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 *Colum. L. Rev.* 1293, 1305-07 (2003).

A. *Informed Advice*

Lawyers' efforts to provide informed advice face challenges along two dimensions. As decision makers, lawyers are subject to the same cognitive biases as clients. As agents, they may lack access to key information, either because clients do not provide it or cannot afford the strategies necessary to obtain it.

For example, once lawyers have undertaken to help a client realize a certain objective, commitment biases and tendencies to reduce cognitive dissonance may lead them to discount evidence that should raise ethical concerns.⁵⁷ Psychological research and case histories consistently find that simply assigning individuals to take an advocacy position increases their personal support for that position.⁵⁸ As a result, lawyers who receive such assignments may undervalue information inconsistent with client objectives.

A further problem involves the fragmentation of information. The size and structure of bureaucratic institutions and the complexity of the issues involved may work against informed ethical judgments. In many of the recent scandals, as well as earlier financial, health, safety, and environmental disasters, a large number of the upper-level participants, including lawyers, were not well informed.⁵⁹ In some instances, the reason may have been willful blindness: Keeping one's eyes demurely averted is a handy skill, particularly when the alternative might be civil or criminal liability.⁶⁰ In other cases, the client's leaders did not want informed advice; they wanted legal pedigrees for transactions, and the less said about them, the better.⁶¹ In a third category of cases, the problem has had more to do with organizational structures and practices. Work is allocated in ways that prevent key players from seeing the full picture, and channels for expressing concerns about the information that is available are inadequate. Shooting the messenger was the standard response to unwelcome tidings in

57. See Langevoort, *supra* note 53, at 95-105; sources cited *supra* notes 24 and 32.

58. For a general review of social psychology literature as it relates to advocacy, see Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 Vand. L. Rev. 1499 (1998); Donald C. Langevoort, *Ego, Human Behavior and Law*, 81 Va. L. Rev. 853 (1995); and David Luban, *Integrity: Its Causes and Cures*, 72 Fordham L. Rev. 279 (2003). For case histories, see Lon L. Fuller, *Philosophy for the Practicing Lawyer*, in *Principles of Social Order* 285-87 (Kenneth I. Winston ed., 1981); 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 (2003).

59. Kroger, *supra* note 26, at 97, 98; Luban, *Making Sense*, *supra* note 18, at 70; Messick & Darley, *supra* note 24, at 14-15; Jeffrey Sonnenfeld & Paul R. Lawrence, *Why Do Companies Succumb to Price Fixing?*, in *Ethics in Practice: Managing the Moral Corporation* 184, 191 (Kenneth R. Andrews & Donald K. David eds., 1989).

60. Luban, *Contrived Ignorance*, *supra* note 18, at 976-80; Simon, *supra* note 18, at 15-17; Luban, *supra* note 56.

61. See Gordon, *supra* note 18, at 1201; Luban, *Contrived Ignorance*, *supra* note 18, at 979; Simon, *supra* note 18, at 17-20.

cases like Enron, and ultimately, it was not just the messenger who paid the price.⁶²

Related problems arise when clients cannot afford the kind of factual investigation and legal research necessary for effective counseling. In the vast majority of cases involving indigents, crushing caseloads or ludicrously low statutory fees make adequate representation an unaffordable luxury.⁶³ Court-appointed counsel with dockets four to eight times the ABA's recommended ceiling often advise defendants on plea agreements with only minutes of consultation and no factual investigation.⁶⁴ "Cooling out" the client is a common technique: Defendants' expectations are revised downward to spare overworked or undercompensated attorneys the risk of trial.⁶⁵ The price is paid in human liberty. In civil contexts, the United States spends only about \$2.25 per person annually on legal aid, which comes nowhere close to meeting the needs of the seventh of the population poor enough to qualify for assistance.⁶⁶ At these resource levels, triage is inevitable, and extensive counseling is more often an aspiration than an achievement. Similar problems can arise in representation of other clients of limited means where the financial stakes do not justify adequate preparation. A little knowledge may be a dangerous thing, but it too often is all either lawyers or clients feel able to afford.

B. *Independent and Disinterested Advice*

Bar ethics codes and related case law have long proclaimed clients' right to independent and disinterested counsel. Rules of professional conduct include detailed prohibitions on conflicts of interest, including bans on representation of a client where "there is a significant risk" that the lawyer's assistance will be "materially limited" by the obligations to other clients, third parties, or by the lawyer's own "personal interest[s]."⁶⁷ Such prohibitions are notoriously underenforced. Despite their best intentions, lawyers inevitably have loyalties to peers, supervisors, and employing organizations that can compromise independent judgment.

Obvious problems arise from the principal-agent conflicts noted earlier. Ethical rules insist that lawyers employed or retained by organizations represent the organization.⁶⁸ But as Simon notes, although attorneys recognize in principle that "the corporation is not the same thing as its management," in practice "they have no clear conception of what else it

62. See Sims & Brinkmann, *supra* note 45, at 252-53.

63. Deborah L. Rhode, Access to Justice 61-63, 122-28 (2004); Rhode & Luban, *supra* note 21, at 309-10, 844-46.

64. Rhode, *supra* note 63, at 126-28.

65. The phrase comes from Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 Law & Soc'y Rev. 15, 28 (1967).

66. Rhode, *supra* note 63, at 106.

67. Model Rules of Prof'l Conduct R. 1.7(a) (2004).

68. *Id.* R. 1.13 (2004).

could be."⁶⁹ Financial realities dictate that lawyers generally act in ways acceptable to the individuals responsible for their employment. Only in a very narrow range of circumstances, involving legal violations likely to injure the organization, do attorneys have any obligation to question management decisions.⁷⁰ In other circumstances, according to the ABA's Model Rules, lawyers "ordinarily" should abide by those decisions even if "their utility or prudence is doubtful."⁷¹ Such standards, coupled with all the psychological pressures for group loyalty and obedience to authority noted earlier, can readily work against independent advice.

Similar conflicts of interest can arise in other contexts in which lawyers are retained and compensated by third parties, rather than clients. Insurance and organized crime cases are common illustrations. In theory, lawyers counseling defendants owe them undivided allegiance on matters such as whether to accept a settlement or plea agreement. In practice, lawyers who give no thought to how their representation will sit with employers are likely to need another line of work.⁷²

Other reputational concerns, whether conscious or unconscious, can similarly skew attorneys' advice. Case studies of lawyers working in small towns or handling small consumer claims have found that these practitioners frequently curtail their representation; counseling clients to accept a modest settlement avoids antagonizing the business community likely to supply or refer future work.⁷³ Criminal defense lawyers' need to maintain good relationships with prosecutors and judges may affect their recommendations to individual clients.⁷⁴ Public interest lawyers who take a case in part to gain public visibility and establish an important precedent may have difficulty providing impartial advice about the merits of a quiet settlement or a partial remedy.⁷⁵ Ideological differences between clients and counsel can compound the problem. As Derek Bell once observed, "Idealism, though perhaps rarer than greed, is harder to control."⁷⁶

69. Simon, *supra* note 5, at 1454.

70. Model Rule 1.13(b) provides that if the lawyers know of a possible legal violation that might be "imputed to the organization" and is "likely to result in substantial injury to the organization," they must proceed "as is reasonably necessary in the best interest of the organization," which may include a report to its highest governing body. Model Rules of Prof'l Conduct R. 1.13. The Sarbanes-Oxley Act of 2002 requires lawyers for organizations that issue public securities to report material legal violations up the chain of command. See Sarbanes-Oxley Act of 2002 § 307, 15 U.S.C. § 7245 (Supp. III 2003); see also 17 C.F.R. 205 (2003).

71. Model Rules of Prof'l Conduct R. 1.13 cmt. 3.

72. For such conflicts of interest, see Model Rules of Prof'l Conduct R. 1.7, 1.8; Rhode & Luban, *supra* note 21, at 562-68, 580-82.

73. Donald D. Landon, Country Lawyers: The Impact of Context on Professional Practice 136, 142 (1990); Richard Abel, *Revisioning Lawyers, in Lawyers in Society: An Overview* 1, 6 (Richard Abel & Philip Lewis eds., 1995); Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 Law & Soc'y Rev. 115, 136-41 (1979).

74. See Rhode, *supra* note 63, at 128.

75. See Rhode & Luban, *supra* note 21, at 646-48, 652-55.

76. Derek A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470, 504 (1976).

But coping with greed poses its own set of challenges. The fee structure of private practice frequently pits lawyers' financial interests against those of their clients. Lawyers billing at hourly rates may benefit from expanding work to fit the time available, and their advice about productive litigation strategies or early settlements may reflect those biases. Attorneys working on contingent fees have different incentives but no less risk of conflicts of interest. Their objective lies in gaining the "highest possible return on their work"; their clients' goal is the "highest possible recovery."⁷⁷

The point of these examples is not to compile an exhaustive catalogue of potential lawyer-client conflicts. Rather, it is to underscore an obvious but often overlooked point: In some sense, *all* counseling is moral counseling. Fiduciary obligations to clients pose responsibilities on lawyers to suspend their own interests. In this respect, the counseling process has an ethical dimension even when it has no explicitly ethical content. Failure to provide informed, independent, and disinterested advice is a moral failure demanding a moral, as well as regulatory, response. What that entails will, of course, depend on context. Part IV suggests a number of general strategies, which emphasize the need for lawyers, both individually and collectively, to pay more attention to the forces that impair advice. Total objectivity and full information are unattainable ideals, but neither have we reached the limit of what is realistic to expect from a self-regulating profession.

III. OBLIGATIONS TO THE PUBLIC: COUNSELING AS A COMMON GOOD

Although American lawyers have long acknowledged some obligations beyond those to clients, the extent of those obligations in the counseling context has been subject to dispute. Bar ethics codes and related legal prohibitions impose only minimal demands. Lawyers may not, for example, knowingly assist the perpetration of fraud on a tribunal or a third party; they may not counsel individuals to give false testimony or to unlawfully conceal or destroy evidence.⁷⁸ But beyond these basic prohibitions, the bar's rules of professional conduct impose no ethical responsibilities in counseling. The farthest they go, as noted earlier, is *permission* for lawyers to include moral considerations as part of their advice and to report probable legal violations to higher authorities. What is most instructive is what is missing. The Model Rules do not suggest that lawyers even *should* include ethical concerns, encourage legal compliance, or advise their clients to adhere to standards of honesty, fair dealing, and social responsibility. The recently enacted Sarbanes-Oxley legislation supplements lawyers' internal reporting obligations but does not impose broader ethical obligations.⁷⁹

77. Rhode, *Interests of Justice*, *supra* note 18, at 175.

78. Model Rules of Prof'l Conduct R. 3.4 (2004).

79. See *supra* text accompanying notes 5-7. The inadequacies of the legislation have been widely noted in Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Legal and*

Nor does much of the leading commentary on counseling reinforce such obligations. According to one influential “client-centered” approach, lawyers should raise considerations that implicate a client’s ethical values but should refrain from introducing their own values. The premise is that respect for individual dignity and autonomy demands deference to the client’s objectives. Unless their decision “violates the law or is clearly immoral . . . client values [should] prevail.”⁸⁰ This approach is problematic on multiple levels. As a factual matter, lawyers may not have a good grasp of a client’s values, particularly before they raise moral considerations. When the client is an organization, there is no authoritative way of determining its values. Stakeholders have multiple, often competing interests, and for reasons noted earlier, managers’ concerns are not necessarily a good proxy for those of their employer.

Moreover, from an ethical standpoint, an unqualified priority on client interests is impossible to justify, particularly when the client is an organization. Why should the autonomy and dignity only of clients matter? A corporation’s “right” to maximize profits through unsafe or misleading—but imperfectly regulated—methods can hardly take ethical precedence over other individuals’ right to be free from reasonably avoidable risks. As gatekeepers in imperfect legal processes, lawyers have obligations that transcend those owed to any particular client. Honesty, trust, and fairness are collective goods; neither legal nor market systems can function effectively if lawyers assume no social responsibility for the consequences of their counseling role.

A. Lawyers’ Resistance

In resisting broader social responsibilities in counseling, lawyers raise two primary objections. The first is that it is not their role. Where clients’ rights are at stake, they deserve a zealous advocate, not a super ego or government watchdog. Lawyers’ function is to defend, not judge, those they represent; they have no standing or special expertise to impose their view of the “public interest.” A second claim is that casting lawyers in the role of ethical gatekeepers will discourage the trust and candor from clients that is essential to effective representation. The result will be less compliance counseling, not more. These arguments have been extensively criticized elsewhere, and for present purposes, a brief review of their central weaknesses should suffice.⁸¹

Ethical Duties of Lawyers After Sarbanes-Oxley, 49 *Vill. L. Rev.* 725 (2004); *Developments in the Law—Corporations and Society*, 117 *Harv. L. Rev.* 2169, 2227, 2246 (2004) [hereinafter *Developments*]; Kim, *supra* note 33, at 1048-52.

80. David A. Binder et al., *Lawyers as Counselors: A Client Centered Approach* 280, 282 (2d ed. 1991). For similar views and a critique, see Rhode, *Ethics in Counseling*, *supra* note 18, at 604-14.

81. Rhode, *Interests of Justice*, *supra* note 18, 53-58, 110-14; Gordon, *supra* note 18, at 1204-07.

The claim that “it is not the lawyer’s role” is an assertion, not an argument, and begs the question at issue: What should that role be? Nor can arguments based on clients’ right to zealous advocacy be transposed to counseling contexts where the customary checks on advocacy are absent. Unlike adversarial proceedings, confidential counseling sessions provide no opportunities for challenges by opposing advocates and evaluation by impartial adjudicators. The power balance in these sessions is quite different than in criminal or civil proceedings involving vulnerable individuals and powerful opponents, where arguments for zealous advocacy are strongest.⁸²

The claim that lawyers have no monopoly on determining the “public interest” and no right to impose it has an appealing air of humility, but it miscasts the role in question. Effective counselors offer advice; they do not impose it. Nor do they adopt the tone aptly conveyed by a *New Yorker* cartoon that portrayed two monks striding in cloisters as one insisted, “I too am holier than thou.” Lawyers cannot claim to be the final arbiters of the public interest, but they have some expertise relevant in assessing it. They are certainly in a position to advise on what would satisfy the purpose and spirit, as well as letter, of the law.⁸³ And because lawyers may have less personal stake than a client in a particular course of action, they may be in a better position to provide an impartial evaluation of its ethical consequences and social legitimacy.⁸⁴

Moreover, to give moral advice is not to impose it. In many instances, reasonable views can differ, and attorneys can appropriately defer to clients who must live with the consequences. Even in other circumstances, where the moral case seems to the lawyer clear and compelling, the moral response will simply be withdrawal. As I and others have argued at length elsewhere, much depends on the relative harms to the client and third parties and on the attorney’s capacity to avert them.⁸⁵ In these cases, the result is not to impose the attorney’s view, but only the psychological and financial costs of finding other counsel. That may, at least, trigger a useful reconsideration of the decision. Even in circumstances in which internal or external whistleblowing seems the only ethically defensible course, lawyers may not be imposing their views but simply alerting others of the possible

82. David Luban, *Lawyers and Justice: An Ethical Study* 58-66 (1988); see Rhode, *Interests of Justice*, *supra* note 18, 55-56; Geoffrey Miller, *From Club to Market: The Evolving Role of Business Lawyers*, 74 *Fordham L. Rev.* 1105, 1127 (2005).

83. For the importance on counseling that extends to the purposes, not just the literal terms, of the law, see William H. Simon, *Introduction: The Post-Enron Identity Crisis of the Business Lawyer*, 74 *Fordham L. Rev.* 947, 953 (2005); see also Robert Gordon, *The Independence of Lawyers*, 68 *B.U. L. Rev.* 1 (1988); Gordon, *supra* note 18, at 1197-1207.

84. For the need for lawyers to present their own ethical views in the course of moral engagement with clients, see Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 *Geo. J. Legal Ethics* 225, 269 (2006). For a discussion of the value of framing arguments in terms of their social legitimacy, see Donald C. Langevoort, *Someplace Between Philosophy and Economics: Legitimacy and Good Corporate Lawyering*, 75 *Fordham L. Rev.* 1615 (2006).

85. Rhode, *Interests of Justice*, *supra* note 18, at 67.

need to respond. Given the strong prudential interests cutting against both withdrawal and whistleblowing, it is unrealistic to suppose that reinforcing these responsibilities will result in rampant moral imperialism by the bar.

Lawyers' additional claim, that broader social obligations will discourage client confidences, rests on equally unsupported empirical assumptions. What little evidence is available casts doubt on the bar's most apocalyptic predictions.⁸⁶ Even if one assumes that clients might be reluctant to confide in potential whistleblowers, it does not follow that they would feel similarly about counselors who would maintain confidences. Many individuals now provide sensitive information without a clear or accurate understanding of the scope of existing protections. That is particularly true in corporate counseling, where employees cannot be sure that their statements will be protected; the privilege belongs to the organization, not to them personally, and is often waived during government investigations.⁸⁷ Even those clients who might like to withhold compromising information may be unable to do so, whatever the risks of disclosure. Many individuals will not know what material would be legally damaging, their lawyer will have other sources for such information, or their need for informed legal assistance will outweigh the concerns about confidentiality. Historical, cross-cultural, and cross-professional data make clear that practitioners have long provided assistance on sensitive matters without sweeping protections against disclosure.⁸⁸ "Businesses routinely channeled compromising information to attorneys before courts recognized a corporate privilege and most European countries manage without one now."⁸⁹

B. *Lawyers' Interests*

Although the bar typically invokes the interests of clients and the public when resisting broader ethical obligations, the interests of lawyers play more than a walk-on role. It is obviously inconvenient, both financially and psychologically, to have responsibilities beyond those to clients who are footing the bill. That has always been true, but increased competition has exacerbated the problem. Particularly in corporate contexts, lawyers face growing pressure to demonstrate "value added" by providing assistance that translates into short-term profits.⁹⁰ Corporate clients, who are facing increased competition in their own markets, have responded by parceling out more discrete projects based on competitive considerations rather than

86. For a sample of the arguments, see Rhode, *Interests of Justice*, *supra* note 18, at 111; Simon, *supra* note 18.

87. Simon, *supra* note 83, at 949.

88. Rhode, *Interests of Justice*, *supra* note 18, at 111.

89. *Id.*

90. Kim, *supra* note 33, at 1016; Miller, *supra* note 82, at 1123; Robert L. Nelson & Laura Beth Nielson, *Cops, Counsel, & Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 *Law & Soc'y Rev.* 457, 466 (2000); Robert Eli Rosen, *Risk Management and Corporate Governance: The Case of Enron*, 35 *Conn. L. Rev.* 1157, 1169 (2003).

long-term relationships. That, in turn, has compromised lawyers' ability to provide candid, informed counseling that may include unwelcome messages about what law and social responsibility require.⁹¹

Competitive pressures within, as well as among, law firms have pushed in similar directions. Advancement, status, and compensation increasingly depend on attorneys' capacity to attract and retain lucrative clients.⁹² That makes it correspondingly harder to jeopardize or withdraw from representation on ethical grounds. Clients' growing tendency to reward both in-house and outside lawyers with bonuses or equity interests can provide additional incentives for counseling that props up short-term earnings at the expense of other values.⁹³

A final consideration that undercuts greater social responsibilities in counseling involves civil liability. When client misconduct surfaces, attorneys with deep pockets are an attractive litigation target. Concern about third-party lawsuits is the elephant in the room when bar ethics rules are debated. Understandable though that concern may be, it is scarcely conducive to an unbiased assessment of the public interest in counseling standards. Any serious attempt to institutionalize greater moral responsibility will require greater pressure from sources outside the organized bar.

IV. STRATEGIES FOR REFORM

Improving the climate for moral counseling will require strategies on both the individual and institutional level. Lawyers need to assume more personal responsibility for providing informed, independent, and disinterested advice to clients. Such advice should include considerations that serve societal as well as client interests. Rather than asking only whether a given course of conduct is arguably legal, lawyers should ask: "Is it fair?" "Is it honest?" "Is it socially legitimate?" "Does it thwart the purpose of the law or pose unreasonable risks?" The regulatory and organizational structure of practice must provide more support and incentives for lawyers to meet these standards in counseling and more sanctions for those who do not.

To that end, individual lawyers need to become more effective monitors of their own advice. Because so many biases operate on subconscious levels, it is often difficult for individuals to gauge the factors that may skew judgment. The problem is compounded in circumstances of moral ambiguity, where values are in conflict, facts are contested or incomplete, and realistic options are limited. Yet while there may be no indisputably "right" answers, some will be more right than others—more informed by

91. Rhode, *Interests of Justice*, *supra* note 18, at 30; Miller, *supra* note 82, at 1117-18, 1121-26.

92. Miller, *supra* note 82, at 1121-26.

93. Kim, *supra* note 33, at 1005-07. For equity interests, see Rhode & Luban, *supra* note 21, at 664.

available evidence, more consistent with widely accepted principles, and more responsive to all the interests at issue.

Although there are no wholly adequate correctives for cognitive biases, it can help to make individuals more aware of compromising influences and to provide them with more strategies and opportunities to evaluate their own reasoning.⁹⁴ For example, David Luban suggests that when lawyers' advice reaches the result that a client wants, they should ask themselves whether the advice would be the same if the client asked the identical question but wanted a different outcome.⁹⁵ Robert Gordon proposes that lawyers consider whether a fair minded, fully-informed observer, or a judge committed to serving the law's societal objectives, would find their position persuasive.⁹⁶ Many business ethics experts suggest a variation on those questions: "How would it feel to defend that position on the evening news?"⁹⁷ Under those tests, much of the legal advice that lawyers provided in cases like Enron could not have passed muster.⁹⁸

However, neither will such tests always be sufficient. Given the influence of self-serving biases even when lawyers are aware of the effects, it is also important to build in opportunities for a second opinion.⁹⁹ Everyone's moral compass benefits from external checks. 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.¹⁰⁰ More lawyers should be willing to consult their organization's ethics committees, or suggest that clients seek another view on matters where the lawyers' own interests are strongly implicated. More attorneys should also be prepared to confront colleagues or blow the whistle on conduct that fails to satisfy minimum ethical standards. Much of the problematic counseling that occurred in recent scandals was the product less of conscious venality than of moral insensitivity or indifference. Too many lawyers failed to

94. Bazerman, *supra* note 24, at 3, 168-70; Robert B. Cialdini, *Influence: Science and Practice* 90, 134, 196 (4th ed. 2004); David Luban, *Integrity: Its Causes and Cures*, 72 *Fordham L. Rev.* 279, 304-05 (2003); Metzger, *supra* note 24, at 547-59; Rhode, *supra* note 14, at 36-37, 47-50.

95. Luban, *supra* note 56.

96. Gordon, *supra* note 18, at 1211.

97. For variations on these questions and the evening news inquiry, see Paine, *supra* note 15, at 225-26; Linda Klebe Treviño & Gary R. Weaver, *Managing Ethics in Business Organizations: Social Scientific Perspectives* 298 (2003). For business lawyers questioning whether information requires disclosure, Simon proposes a test that asks whether a reasonable investor would be influenced by the information. Simon, *supra* note 5, at 1466 n.47; Simon, *supra* note 18, at 7.

98. For critical reviews of legal advice in Enron, see Cramton, Cohen & Koniak, *supra* note 79; Gordon, *supra* note 18; Milton C. Regan, Jr., *Teaching Enron*, 74 *Fordham L. Rev.* 1139, 1162-80, 1186-1202 (2005); Simon, *supra* note 18, at 5-11.

99. For a discussion of individuals' tendency to deny that self-serving biases apply to them, even when confronted by research, see Max H. Bazerman & George Loewenstein, *Taking the Bias Out of Bean Counting*, 2001 *Harv. Bus. Rev.* 28; Kim, *supra* note 33, at 1029.

100. Rhode & Patton, *supra* note 6, at 635-36; Simon, *supra* note 18, at 29.

appreciate or acknowledge the points at which personal interests and professional responsibilities diverged. Too many failed to raise uncomfortable questions with clients and colleagues.

The reasons for those failures underscore problems in institutional design and suggest a range of possible responses. Legal employers need to integrate ethical considerations into all organizational functions, including performance reviews and advancement and compensation decisions. Many standards that government regulators and compliance experts have developed for business organizations are equally applicable to legal employers. For example, under the Federal Sentencing Guidelines, corporations can reduce culpability for criminal offenses by promoting "an organizational culture that encourages ethical conduct and a commitment to compliance with the law."¹⁰¹ That, in turn, requires providing appropriate incentives and disciplinary sanctions, as well as opportunities for employees to seek ethical guidance and make confidential reports of possible misconduct. Upper-level personnel must have ethics training and must periodically evaluate compliance programs.¹⁰²

More protections for whistleblowing are equally critical. One lawyer who became unemployable after bearing unwelcome tidings summarized the prevailing culture: "People think whistle-blowers are great, but they don't necessarily want one in their organizations."¹⁰³ Because the personal costs of reprisals are particularly great for in-house counsel, who are dependent on a single client, some experts have recommended changes in organizational governance structures. One proposal is to make lawyers accountable to independent directors rather than management.¹⁰⁴ How effective this would prove in practice is open to debate, but further experimentation and evaluation of reform strategies should be a key priority. In essence, employers must create more safe spaces for voicing ethical concerns and provide more tangible rewards for ethical conduct.

Government policymakers and bar regulatory authorities also must supply more support and pressure for morally responsible counseling. One obvious example involves greater financial resources for court-appointed counsel, who now cannot afford to provide effective representation. Sustained political and legal challenges to state funding structures are part of the answer; so is additional pro bono assistance in time and money from the private bar.¹⁰⁵ Another context in which additional positive reinforcement is necessary involves whistleblowing. Increased statutory and common law protection against reprisal could encourage lawyers who

101. U.S. Sentencing Guidelines Manual § 8B2.1(a)(2) (2005).

102. *Id.* § 8B2.1(b)(2)(B).

103. John Gibeaut, *Telling Secrets*, ABA J., Nov. 2004, at 73 (quoting Susan W. Ausman). For the problems faced by whistleblowers and the inadequacy of current protections, see Rhode & Luban, *supra* note 21, at 403-09; Kim, *supra* note 33, at 1064-65.

104. Kim, *supra* note 33, at 1055-63.

105. Rhode, *supra* note 63, at 142-43.

would like to do the right thing, but not if the professional price is prohibitive.¹⁰⁶

A related cluster of reforms should center on strengthening ethical standards and enforcement structures. One step in the right direction would be enhanced gatekeeping requirements for corporate counsel, such as the reporting-out rule that the SEC considered as part of its Sarbanes-Oxley regulations, but withdrew in the wake of massive bar opposition. The proposed rule would have required attorneys to inform regulators of material violations of securities law and fraud on the Agency.¹⁰⁷ As many ethics experts note, such a mandatory reporting standard could help slow the "race to the bottom" that an increasingly competitive legal culture encourages.¹⁰⁸

More stringent ethical requirements and oversight systems are also urgently needed for indigent defense counsel. Standards governing effective assistance of counsel are a conceptual embarrassment, and enforcement ranges from minimal to nonexistent.¹⁰⁹ Both courts and bar disciplinary organizations must become much more willing to hold appointed counsel accountable for counseling that fails to meet basic standards of competence.

For its part, the legal academic community should assume more responsibility for promoting moral responsibility. Despite the importance of moral counseling, we know far too little about how best to secure it, and do far too little to educate our students about what can undermine it.¹¹⁰ The few works on the subject written by and for practitioners tend to be long on platitudes and short on data. Even in the best scholarly circles, more ink is spilled on the value of values than on empirical research suggesting how best to realize them in practice.

Similar gaps are apparent in law school curricula. Most schools relegate issues of professional responsibility to a single course that too often offers

106. See Kim, *supra* note 33, at 1064-65; Gibeaut, *supra* note 104, at 73; Rhode & Luban, *supra* note 21, at 403-09.

107. One version of the noisy withdrawal rule appears at Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71670, 71673 (proposed Dec. 2, 2002) (to be codified at 17 C.F.R. 205). For a discussion of opposition, see 68 Fed. Reg. 6324, 6329 (proposed Feb. 6, 2003) (to be codified at 17 C.F.R. 205). A second version appears at 68 Fed. Reg. 6324, 6328 (proposed Feb. 6, 2003) (to be codified at 17 C.F.R. 205). The final rule does permit an attorney to make a noisy withdrawal to prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors. 17 C.F.R. 205.3(d)(2)(i) (2005). Many state confidentiality rules prohibit disclosure under such circumstances, and the issue of whether federal regulations preempt state ethical codes is now under dispute. See W. Bradley Wendel, Professional Responsibility: Examples and Explanations 79-82 (2004).

108. Coffee, *supra* note 56, at 1306-07; Cramton, Cohen, & Koniak, *supra* note 79, at 816; *Developments*, *supra* note 79, at 2246; Miller, *supra* note 82, at 1129-30.

109. Rhode, *supra* note 63, at 131-37.

110. For gaps in research, see Rhode, *supra* note 14, at 51-53; Treviño & Weaver, *supra* note 97, at 339. For gaps in professional ethics education in law schools and business schools and strategies for improvement, see Metzger, *supra* note 24, at 438-49, 555-59; Rhode, *supra* note 14, at 47-51.

“legal ethics without the ethics.”¹¹¹ Students learn bar ethical rules but gain little insight about their moral foundations and limitations. Silence in the core curricula also sends the wrong message. Ethical questions arise in all fields of legal practice and need to be treated accordingly in legal education. For faculty to suggest that matters of professional responsibility are someone else’s responsibility encourages future practitioners to do the same. Adequate treatment of these concerns should involve fewer shopworn homilies, and more concrete strategies for recognizing cognitive biases, providing effective advice, and building regulatory structures that will promote those objectives.

To design those structures will also require more systematic information about what works in the world. We know that many legal employers have institutionalized ethics education and ethics committees. What we do not know is whether these initiatives demonstrably affect ethical conduct. To the extent that evaluation occurs, it generally involves asking participants to rate their satisfaction with an educational experience.¹¹² It would be far more useful to know whether they do anything differently as a result. Similar inquiries should focus on corporate governance systems and legislative reforms such as the Sarbanes-Oxley requirements. We cannot improve the climate for moral counseling without a broader base of knowledge and more effective efforts to convey it in educational settings.

Finally, we need more public accountability for professional performance. Obvious though this point seems, it is widely rejected in the legal community. Whenever the prospect arises, the banner of professional independence is unfurled. The post-Enron skirmishes between governmental policy makers and the organized bar are no exception.¹¹³ In warning lawyers not to capitulate to public calls for reform, Lawrence Fox insists, “We are not in the business to win Miss Congeniality awards.”¹¹⁴ My reading of the polls suggests no danger on that score. We could, however, aim to win more public confidence that we are satisfying our own ethical standards. As the preamble to the ABA Model Rules notes, the lawyer is not only a representative of clients, but “an officer of the legal system and a public citizen having special responsibility for the quality of justice.”¹¹⁵ This sometimes entails giving advice that is not what the client wants, but is rather what the client needs and the public deserves. More attorneys need to take that obligation seriously in practice as well as principle.

111. Rhode, *Interests of Justice*, *supra* note 18, at 200 (quoting William Simon, *The Trouble with Legal Ethics*, 41 J. Legal Educ. 65, 66 (1991)); *see also* Vischer, *supra* note 84, at 271 (arguing for a fuller discussion of the moral implications of legal practice in law school).

112. Treviño & Weaver, *supra* note 97, at 339.

113. *See supra* note 6 and accompanying text.

114. Lawrence J. Fox, *The Fallout from Enron: Media Frenzy and Misguided Notions of Public Relations Are No Reason to Abandon Our Commitment to Our Clients*, 2003 U. Ill. L. Rev. 1243, 1247.

115. Model Rules of Prof'l Conduct pmb. (2004).

For that to happen, more public and governmental involvement is necessary in the design of bar regulatory standards and enforcement structures. Given all the cognitive biases noted earlier, no occupational group, however well intentioned, can fully appreciate the points at which societal and professional interests diverge. We do not lack for constructive proposals to increase lawyers' accountability.¹¹⁶ The challenge lies in building a constituency that demands them.

In Jean Renoir's searing film *The Rules of the Game*, the comic philosopher Octave suggests that "the one thing which is terrible," and accounts for so much misery in the world, is that "everyone has their own good reasons."¹¹⁷ Lawyers have many. For all their lapses in moral counseling, attorneys generally have a justification. What they may not have, however, is the capacity to recognize their own tunnel vision and the self-serving biases that make personal expedience seem professionally defensible. External perspectives are critical. Part of our professional responsibility is to identify strategies for enlisting them. Occasions like this Symposium are a useful contribution to that process and a reminder of our own responsibilities in the effort.

116. For a sample, see Rhode, *Interests of Justice*, *supra* note 18, at 161-65, and Deborah L. Rhode, *In the Interests of Justice: A Comparative Perspective on Access to Legal Services and Accountability of the Legal Profession*, 56 *Current Legal* 93 (2003).

117. Jean Renoir, *Rules of the Game* 53 (John McGrath & Maureen Teitelbaum trans., 1997).