LAWYERS ON TRIAL

UNDERSTANDING ETHICAL MISCONDUCT

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8. MAKING REGULATION WORK

To paraphrase Tolstoy, good lawyers are all alike; every bad lawyer is bad in his own way.[1] Or consider Hemingway's putdown of his friend and rival. The central character in *The Snows of Kilimanjaro* remembers "poor Scott Fitzgerald and his romantic awe of [the rich] and how he started a story once that began, 'the very rich are different from you and me.' And how someone had said to Scott, 'yes, they have more money.'"[2] Tolstoy cautions against generalization; Hemingway warns it is likely to be banal. Criminologists agree. Criminals are not different from the rest of us, and white collar crime (of which ethical misconduct by lawyers is a subgenre) does not differ greatly from business as usual. Those accused or convicted often make the same complaint: everybody does it—I just happened to get caught.

That is why detailed case studies are at the heart of this book. It is essential to understand what these lawyers did and why they did it.[3] Only then can we look for commonalities across cases, develop hypotheses for quantitative testing, and suggest remedies that transcend unique circumstances. In order to expand the number of instances and see whether jurisdiction matters, I also will refer to the seven New York lawyers described in my earlier book, whose cases are briefly summarized here.

David Kreitzer, a solo practitioner, operated a tort settlement mill, handling well over a thousand claims a year with the help of newly qualified lawyer associates and paralegals. Inevitably, the office missed deadlines and made mistakes. When cash flow became a problem, Kreitzer participated in a scheme to kick back 10 percent of payout to insurance claims adjusters to expedite processing. Joseph Muto filed asylum petitions for undocumented Chinese immigrants on behalf of "travel agencies," which did everything but conduct immigration court hearings. He not only handled 400 cases a year himself but also had a flying phobia, making him miss appearances outside New York. As a result, his clients suffered deportation orders and had to hire other counsel to reopen their cases on the ground of inadequate representation. Lawrence Furtzaig overcame considerable disadvantage to become an equity partner in a highly respected real

1. ANNA KARENINA begins: "Happy families are all alike; every unhappy family is unhappy in its own way."

2. Fitzgerald's story is "The Rich Boy" (1926). The riposte actually had been made by critic Mary Colum to Hemingway, when the author boasted that "I am getting to know the rich." Eddy Dow, Letter to the Editor, NEW YORK TIMES (Nov. 13, 1988).

3. Support for the view that diverse behaviors warrant different responses can be found in Zacharias (2003b).

estate firm. Even billing 2,200 to 2,400 hours, however, he could not keep up with the demands of work, making up a $60,000 loss in one case out of his own pocket and forging documents to hide other mistakes. Benjamin M. Cardozo (a distant collateral relative of the judge) and Deyan Brashich fought successfully to get Babette Hecht several million dollars under her mother's will. But they only presented her with the particular solution that maximized their one-third contingent fee. Brashich went on to overbill Ljubica Callahan, a fellow Serbian immigrant, in her estate dispute. Philip Byler successfully transmuted his good friend James Morgan's Internal Revenue Service (IRS) claim for over $200,000 in back taxes into a $50,000 refund—and then pocketed it as his fee, refusing to escrow the money when Morgan objected. Arthur Wisehart represented Joan Lipin in claiming sexual discrimination and sexual harassment by the general manager of the American Red Cross (ARC) of Greater New York, even hiring her as a paralegal when an ARC blacklist prevented her from getting another job. After the ARC stonewalled all discovery requests for years, it left Lipin's complete file on a conference table during motion practice. She appropriated the four-inch file, which Wisehart used to demand a million dollar settlement. Wisehart relentlessly fought Judge Moskowitz's decision to dismiss the case with prejudice, even accusing the judge of mental incapacity, following her diagnosis and treatment for breast cancer.

This conclusion will explore the similarities and differences among the behaviors of these sixteen lawyers and others who appear in the chapter introductions.

I. THE CASES

A. Solicitation

Scapa and Brown hired Gumban (the ex-cop) and Buchanan to solicit automobile accident victims (paying them amounts partly contingent on the outcome and size of the ultimate settlement). California prohibits that behavior, and the U.S. Supreme Court has upheld such rules.[4] But what is wrong with solicitation? Tort law awards damages in order to compensate victims for their injuries and deter negligence. Despite endless propaganda by insurers and repeat-player defendants about the "tort litigation crisis," we have known for decades that only about one serious accident victim in ten recovers damages.[5] Many victims do not know their rights, how to claim, what it will cost, the likelihood of success, or what they might recover.[6] Defendants already enjoy huge advantages over plaintiffs: by delaying payment, they can force needy accident victims to settle for pennies on the dollar. The anti-solicitation rule aggravates this inequality by letting

4. Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978).
5. Abel (1987).
6. Felstiner *et al.* (1981).

defendants and their insurers aggressively negotiate releases (even in hospital rooms), while forbidding plaintiffs lawyers from approaching potential clients in person or even by telephone.[7] The prohibition is particularly hurtful to those lacking personal contacts with lawyers: the poor, elderly, racial minorities, immigrants, or non-English speakers. Scapa and Brown claimed they had chosen Gumban and Buchanan in order to increase access to justice by Filipinos. Regardless of whether or not that was their real motive, it may have been an effect. Although clients are the source of almost all ethical complaints, the only "client" who complained against Scapa and Brown was the State Bar lawyer they unfortunately solicited. Because law-abiding plaintiffs personal injury lawyers do not solicit, victims reliant on solicitation have a much narrower choice of legal representative. Furthermore, solicitation is a much more efficient way of informing victims of their rights than (constitutionally-protected) advertising,[8] which must be disseminated scattershot to an audience almost all of whom has no present need for a personal injury lawyer. The ban's perversity and hypocrisy are evidenced by the nearly century-long cycle of passive tolerance of ambulance-chasing, periodically punctuated by short-lived moral crusades against it.[9]

Regardless of the merits of allowing solicitation, Scapa and Brown and their employees engaged in many other objectionable practices[10] (partly because of the ban): referring clients to doctors in exchange for kickbacks; colluding with doctors to inflate special damages; having clients sign retainers without seeing lawyers; asserting liens for lawyers fees under *quantum meruit* without regard to effort expended; threatening to seek punitive damages for nonpayment of the lien; using the lien to block insurance company payments and car repairs; and covering up the solicitation by forcing clients to sign false disclaimers. Like other lawyers operating high volume practices,[11] Scapa and Brown delegated much of the work to non-lawyer subordinates without exercising adequate supervision. Indeed, they deliberately treated Gumban and Buchanan as independent contractors in order to create deniability about their actions and thereby claim moral irresponsibility. The cappers enjoyed the autonomy, even passing themselves off as lawyers. (Buchanan had begun law school, and Gumban aspired to become a lawyer.) Some of the lawyers described in the introduction to Chapter 2, "Cops Chasing Ambulances," went further, basically handing over their practices to non-lawyer "administrators" while collecting monopoly rents for doing little or nothing, simply by virtue of possessing a bar admission card. (That they could pay "administrators" $500 a case is some evidence of the size of these rents.) These scenarios evoke Uriah Heep's degradation of Mr. Wickfield in Dickens's

7. Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995).
8. Bates v. State Bar of Arizona, 433 U.S. 350 (1977).
9. E.g., Reichstein (1964; 1965); WARD (1974).
10. In this they resembled Ohralik (1978), *supra*.
11. Engstrom (2009).

David Copperfield. But if lawyers can pay contingent referral fees to other lawyers,[12] why not let them pay laypersons, who can refer cases far more cheaply?

Two of the New York lawyers in my earlier book relied on referrals to operate volume practices. David Kreitzer got his personal injury clients from other lawyers (who either did no personal injury work or felt the cases were not worth their time).[13] Highly skilled litigators like Browne Greene and David Harney (discussed next) get most of the lucrative cases. What is left for lawyers like Kreitzer and Scapa and Brown (e.g., soft-tissue injuries) neither requires great legal skill nor justifies the investment of significant lawyer time. Kreitzer declared that his "philosophy" was "pretty much . . . somewhere down the line we should be able to get some sort of settlement . . . ."[14] As a result, the lawyers delegated much of the work to subordinates. But that inflates overheads, which in turn compel the firms to operate at high volume. Just as Scapa and Brown paid cappers to generate clients, so Kreitzer kicked back 10 percent of the damages to insurance adjusters to accelerate payment. A high volume of low-profit cases also meant poor service: little contact with lawyers, chronic delay, unanswered phone calls, even lost files and missed statutes of limitation. These one-shot clients could not inflict significant reputational damage on the lawyers, who had other sources of business. Indeed, both Scapa and Brown and Kreitzer sought to transform disciplinable misconduct into "mere" incompetence, i.e., to turn crime into tort, for which the appropriate remedy was compensation, not punishment.

The respondents rationalized that other personal injury lawyers also paid lay intermediaries to get cases and kicked back 10 percent to insurers. But most do not. Why did these three lawyers break the rules? The simplest explanation is usually the best: they saw a chance to make much more money and were willing to run the (small) risk of punishment, which they sought to minimize through cover-ups: paying the cappers for "investigation" and having clients sign disclaimers, disguising the 10 percent kickback as a fee for negotiation. With more than a thousand live cases, Kreitzer must have been doing very well. Scapa and Brown acknowledged aspiring to emulate the entrepreneurial success of Jacoby & Meyers. And the lawyers could see nothing wrong with what they were doing. Payments to cappers and insurers came out of the lawyers' fees. Tort victims were not hurt (except by neglect). The complaints that triggered investigations in both states came from insurance companies concerned about fraud.

Joseph Muto also got clients from lay intermediaries (a necessity for many immigration lawyers, who lack the networks, cultural familiarity, and language skills to attract and interact with clients).[15] But like some of the California personal injury lawyers discussed in the introduction to Chapter 2, "Cops Chasing

12. Parikh (2001; 2006–07).
13. Abel (2008: Chapter 2).
14. *Id.*, 96.
15. *Id.*, Chapter 3.

Ambulances," (and unlike Scapa and Brown, and Kreitzer), Muto was controlled by the "travel agencies," rather than vice versa. Unlike Scapa and Brown, and Kreitzer, Muto was a newcomer to this practice, but he was a quick study: by making per diem appearances for other immigration lawyers and imitating colleagues, he quickly learned the (illegal) ropes, adapting other lawyers' paperwork with little or no modification (just as Scapa and Brown borrowed the client "disclaimer" of solicitation). Like other volume practitioners, Muto was overworked, underprepared, and often unreachable. His clients, like those of Scapa and Brown and some of the other personal injury lawyers in the introduction to Chapter 2, were disproportionately drawn from poor, ethnic minority, immigrant communities.

What remedial measures do these behaviors suggest? First, as a torts teacher for 40 years, I have long believed that the costs of operating a fault-based system far outweigh the benefits, at least with respect to automobile accidents, where drivers are about equally likely to be victims or tortfeasors.[16] No-fault would compensate victims quickly and cheaply, while eliminating virtually all the problems discussed above. But the plaintiffs' bar has repeatedly blocked that reform. Similarly, comprehensive medical insurance would make accident victims less dependent on tort claims and render their repeat-player loss insurers (subrogated to the claims of insureds) more equal adversaries of liability insurers. (Indeed, the same insurer often would be on both sides.) Second, I have argued that lawyers should be allowed to solicit clients, subject only to the usual consumer protection rules against harassment, overreaching, and misrepresentation.[17] That would eliminate the State Bar Court hearing judge's sole rationale for punishing Scapa and Brown: the competitive advantage they obtained over law-abiding attorneys. The most recent U.S. Supreme Court opinion on the subject upheld Florida's limitation on lawyers writing to tort victims on the ground that the State Bar claimed this damaged the legal profession's reputation.[18] But the evidence of any causal nexus with this obviously anticompetitive rule is extremely suspect. Third, all the cases discussed above clearly demonstrate that the legal profession's restrictive practices, which construct arbitrary boundaries between lawyer and non-lawyer work, create irrationalities and inefficiencies. Much of what is protected by the lawyers' monopoly could be performed far

16. Abel (1990).

17. Abel (1987).

18. Florida Bar (1995), *supra*. Other states continue to seek to restrict truthful lawyer advertising. Karen Donovan, *Street Scene; Some Lawyers Ranked 'Super' Are Not the Least Bit Flattered,* NEW YORK TIMES C6 (Sept. 15, 2006) (New Jersey attacked "New Jersey Super Lawyers" magazine); Karen Donovan, *New York Law Firms Struggle With New Restrictions on Advertising,* NEW YORK TIMES C5 (Mar. 2, 2007); Dirk Johnson, *Look at This Ad, but Don't Get Any Ideas,* NEW YORK TIMES 4 p.14 (May 13, 2007) (Chicago banned billboard featuring sexy woman and man and advising, "Life's short. Get a divorce.").

more cheaply by non-lawyers, and arguably just as competently. Most other countries narrowly limit that monopoly to court appearances. There is very little technical legal work involved in processing automobile accident settlements. Indeed, the very insurers who complained about lawyers using laypersons to approach accident victims themselves use non-lawyer claims adjusters to secure releases.[19] Automobile clubs negotiated accident claims for their members until barred from doing so; union representatives long have helped members claim workers compensation. Recently, lay claims agents have represented all kinds of personal injury victims in the United Kingdom.[20] We would do much better to jettison rent-seeking professional self-regulation for the discipline of the market, and where it fails, the state.

But even if all those reforms were implemented (a political impossibility), I remain troubled by the willingness of these lawyers to flagrantly disregard the law and evade responsibility for doing so. I return to that concern below.

B. Fees

That lawyers practice to earn money—and the more the better—is neither surprising nor dishonorable. As the New York lawyer Benjamin M. Cardozo said in my earlier book about his efforts on behalf of the beneficiary of a multimillion dollar trust: "I don't work for nothing. Not with this kind of money involved."[21] The problems arise from *how* fees are determined. Market economies view supply and demand as the appropriate mechanism to set prices. But that assumes free competition. Lawyers struggled long and hard to professionalize precisely in order to restrict competition.[22] Indeed, one of the bar's first actions, once it gained the power, was to set minimum fees and discipline lawyers who undercut them. In the thirty-five years since the Supreme Court ruled that fee schedules violate antitrust laws,[23] there has been very little price competition. Even when lawyers quote hourly fees, they will not (and often cannot) specify in advance how many hours they will spend. House counsel for large corporations may force firms to engage in beauty contests and bid for projects; but individuals find it almost impossible to compare the fees of potential lawyers. Indeed, David Harney was openly resentful of a client who dared to "shop" her case.

Personal injury victims confront unique problems in controlling fees. First, they are unusually vulnerable and needy; one-shot litigants dependent on repeat-player lawyers. The clients of Greene and Harney had suffered medical catastrophes, rendering them permanently disabled. Almost no such victim could afford to pay hourly fees for the necessarily complex and lengthy representation.

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19. Ross (1970).
20. Abel (2003: 230–33).
21. Abel (2008: 284).
22. I have made this argument in previous books. ABEL (1988; 1989; 2003).
23. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

The contingent fee solves that dilemma. It also *purports* to align the economic interests of lawyers and clients.[24] The problem is that all lawyers charge virtually identical percentages, regardless of the risk of losing, and most accept only sure winners. The time they invest bears no relationship to the rewards they reap. Indeed, some lawyers charge "contingent" fees even if there is no contingency, e.g., no-fault payment of medical expenses or life insurance. For a client dissatisfied with the lawyer's performance, the costs of switching horses in midstream are high and include duplication of effort, loss of advantage in litigation, and the emotion invested in a "white knight." Although a client is legally entitled to discharge a lawyer at will, lawyers routinely refuse to surrender files, fail to sign substitution forms, and assert liens unjustified by the work done, billing the cost of generating a form each time it is merely copied.

The massive market failure problem created by professional self-regulation has largely been ignored. Lawyers widely flouted the New York law requiring them to register contingency fee agreements when settling cases.[25] California's Medical Injuries Compensation Reform Act (MICRA) is virtually the only example of meaningful fee regulation, perhaps because it was enacted in response not to the personal injury victims who paid the fees but to the overwhelming political pressure from the insurers, hospitals, and doctors they sued. Greene, Harney, much of the personal injury bar, and many other lawyers were outraged by the law. I fully share their criticisms. Rising medical malpractice premiums are attributable to a combination of medical errors and falling returns on insurers' investments.[26] There is no principled case for regulating lawyers fees in medical malpractice cases but not other tort claims. A constitutional challenge was entirely appropriate, even admirable. But the California Supreme Court rejected it, and the U.S. Supreme Court declined to review.

In light of that defeat, the respondents' actions are deeply troubling (especially those of Harney, who persisted even after the State Bar had found Greene guilty). They disregarded their obligation to inform clients about Section 6146 of MICRA, as well as its Section 6147 mandate to give clients a written retainer explaining the Section 6146 limits. They presented settlements to probate court without informing the judge of Section 6146. They asked clients to waive Section 6146 without urging them to get independent legal advice; and they continued that practice even after the California Supreme Court predictably declared that a statute intended to protect clients from lawyers could not be waived by clients at the lawyer's behest. Harney argued that his fee could not be contingent, either because he would never take a losing case (in which case his "contingent" fee was unjustified) or because the outcome was no longer uncertain once he had

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24. *But see* Schwartz & Mitchell (1970).

25. Rosenthal (1974).

26. Tom Baker, *Liability = Responsibility*, NEW YORK TIMES (July 12, 20.09); HUNTER *et al.* (2009).

won! Harney sought to claim in *quantum meruit* and then simply stopped writing fee agreements, both in defiance of the explicit language of Section 6147. The respondents argued that MICRA should be presumed unconstitutional, although *all* statutes are presumed constitutional until declared otherwise. They drew comfort from the fact that other lawyers and even some judges disregarded the law.[27] Most troubling of all, they continued to maintain the invalidity of MICRA after a final decision that it was constitutional. Emulating the Sun King, these eminent lawyers apparently believed *la loi, c'est moi,* meaning, *I* am the court of last resort; if I believe the law is bad, then it cannot be the law. Like Caesar, Harney referred to himself in the third person (exceeding even the Roman Emperor's egoism by using all three names). Both respondents (especially Harney) displayed contempt for the State Bar Court, treating its decision even to hear their cases as *lèse majesté.* When asked why he did not discuss Section 6146 with his clients, Harney sneered, "I don't spend my time on silly conversations."

How could *lawyers* do this? The paradoxical answer is: That is exactly what lawyers do. Law schools teach students to argue both sides of every case. Lawyers then spend their entire professional lives manipulating the law to their clients' advantage. In the process, lawyers necessarily develop an entirely instrumental, strongly positivist conception of law. They become Oliver Wendell Holmes's quintessential "bad men,"[28] strategizing how to avoid the law until the cost is raised too high. That is one reason why the law school professional responsibility course poses a unique pedagogic challenge.[29] It is the only occasion when law students, who have been rewarded everywhere else for their skill in sophistry, pilpul, must take the law seriously as an end not just a means, accepting their obligation to obey its spirit, not just its letter.

The prominence of these two personal injury lawyers—who had attained the pinnacle of the professional hierarchy—also may have shaped their behavior.[30] They saw themselves as indispensable champions of medical malpractice victims, describing who deserved their clients' gratitude by virtue of the unique skills they had acquired, the effort they invested, and the stunning victories they achieved. By invoking Section 6146 after the case was won, those clients (egged on

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27. Both respondents claimed vindication in the fact that they lost by just one vote: MICRA in the California Supreme Court, Greene in the Review Department. But of course that is all it takes.

28. Holmes (1897).

29. Pipkin (1979).

30. Hubris may also explain the behavior of other recently disgraced prominent lawyers like Dickie Scruggs, *see* Richard Fausset, *Katrina lawyer charged with bribery,* Los Angeles Times (Nov. 29, 2007); Nelson D. Schwartz, *Court Intrigue for the King of Torts,* New York Times §3 p1 (Dec. 9, 2007), and William Lerach, *see* Michael Parrish, *Leading Class-Action Lawyer Is Sentenced to Two Years in Kickback Scheme,* New York Times (Feb 12, 2008).

by envious, lesser lawyers) had treacherously sprung a trap. Just as Scapa and Brown saw themselves as targets of an insurance industry vendetta, so Greene and Harney claimed persecution by insurers and medical care providers, deriding MICRA as the "anti-David Harney" act (intended to discourage him and other highly qualified lawyers from handling medical malpractice cases) and denouncing the State Bar for using an insurance industry lobbyist as a witness.

My two New York fee cases display some striking parallels. Cardozo and Brashich failed to inform Babette Hecht about the fee implications of alternative resolutions of a trust dispute or to tell the surrogate court what they had already been paid, when requesting additional fees.[31] Byler simply appropriated as his fee the entire Internal Revenue Service (IRS) refund he had obtained for James Morgan and then constructed an account of his hours and chose an hourly rate that coincidentally produced exactly that amount.[32] All four cases involved vulnerable clients: victims of catastrophic torts, an impoverished elderly woman dependent on a contested trust, and a taxpayer facing an IRS demand for hundreds of thousands of dollars. In each case, the lawyers had won what they viewed as an extraordinary windfall, namely, huge tort damages, the division of a multimillion dollar trust corpus, and the transformation of an enormous tax deficiency into a substantial refund. Claims that the fees were undeserved, advanced late in the day by ungrateful clients, who were provoked by grasping inferior lawyers, denied the entire edifice of professional self-esteem these lawyers had constructed. Each lawyer felt that this "found money" was *his* as much as his client's because the lawyer had wrested it from a formidable adversary by the exercise of great skill and effort.[33] Like Greene and Harney, Byler insisted there was no fee dispute because Morgan could have no legitimate complaint about the fee. But this sense of entitlement coexisted uncomfortably with the subterfuges all four lawyers used to hide their fees from scrutiny.

The commonality across subject matters is not accidental. Individuals who are not wealthy retain lawyers only on the rare occasions in which some aspect of their lives is capitalized: the capacity to work and enjoy is diminished by physical injury, a life's savings are inherited, the government claims taxes for several years, a lengthy marriage ends with divorce, an immigrant is threatened with deportation, or an accused is facing serious criminal charges. All the lawyers expected—and initially enjoyed—gratitude for their achievements. Its replacement by ingratitude—and in Byler's case bitter enmity—strengthened the lawyers' convictions that they deserved their fees. Accused of taking advantage of their clients, they retorted that the ungrateful clients were taking advantage of them.

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31. Abel (2008: Chapter 5).

32. *Id.*, Chapter 6. For a fictionalized account of bill-padding, *see* STRACHER (1998).

33. Like Harney, Byler wrote about himself in the third person in his response to my account of his case. Abel (2008: 367–73).

But such emotional inversions by clients are the exception. In most cases, the pervasiveness, intensity, and persistence of gratitude make it unlikely that clients will enforce fee limits. This is particularly true during an ongoing lawyer-client relationship (as Stewart Macaulay generalized about contractual relationships decades ago).[34] Just as the clients of Greene and Harney waited to invoke Section 6146 until they had won, so Byler precipitated the fee dispute only after pocketing his client's tax refund. The clients of Cardozo and Brashich declined to seek fee refunds even after their cases ended; the only complainants were the surrogate and disaffected relatives. It was other lawyers who urged Greene's and Harney's clients to invoke MICRA, which underlines how essential it is for clients to get legal advice about fees independent of the lawyers who charge them. But Greene and Harney deeply resented the lawyers who advised their clients to assert the Section 6146 limit. Cardozo misrepresented to his client and her adult children that the surrogate would not hear their fee objections. And Byler was furious when his client, James Morgan, sought the advice and intercession of his brother, the noted legal ethics scholar, Thomas Morgan.

These diverse cases suggest a variety of solutions. First, tort is not the only, or necessarily the best, response to medical malpractice (just as it is not to automobile accidents). Sweden opted for no-fault compensation decades ago, with results that seem to please patients and doctors (if not lawyers).[35] Second, if we preserve tort (as seems politically compelled in the short run), the contingent fee is not the only mechanism for financing litigation, and may not be the best.[36] Greene, Harney, Cardozo, and Brashich all had contingent fees (and Byler felt entitled to take 100 percent of the refund). It is hard to justify these fees in terms of market principles. There are several other funding mechanisms, including legal aid (which covered personal injury in Britain until recently) and fee shifting and legal expense insurance (which now fund personal injury litigation there through conditional fees, which pay a premium for success but not a percent of damages).[37] Third, if we retain contingent fees, the legal profession should create mechanisms by which clients could get independent advice before signing retainers. Lawyers could be encouraged to compete in charging lower percentages. Fee agreements might be made public documents, exposing them to criticism. Ex post remedies can help (if they are less desirable): Many bar associations operate fee dispute mediation programs.[38] Britain has an elaborate process for costing the value of a lawyer's services (as American courts do on the

34. Macaulay (1963).

35. Rosenthal (1988).

36. Kritzer (1998) concludes that lawyers generally do better by charging contingent rather than hourly fees. For a study of clients' views about alternative funding methods, *see* Moorhead & Cumming (2009).

37. Abel (2003: Chapter 8).

38. *E.g.*, Lebovits (2009).

infrequently when statutes authorize fee shifting). None of these proposals, however, addresses the misplaced sense of entitlement displayed by these lawyers.

C. Conflicts of Interest

Corporate law firms have elaborate mechanisms for identifying and handling potential conflicts of interest among their clients who are large, numerous, and diverse.[39] For this reason, professional responsibility courses devote considerable attention to conflicts problems. But large firm lawyers rarely are disciplined, and the solo and small firm practitioners (who are disciplined) rarely are accused of conflicts of interest between clients. Some practices are unlikely to encounter inter-client conflicts: divorce, personal injury, housing. Perhaps for this reason, many practices simply disregard the issue.[40]

All lawyers, however, encounter another kind of conflict—between themselves and their clients. The claims of overcharging discussed above are one, unavoidable, example. Two cases in this book arose out of another instance, namely, the temptation of lawyers to betray clients. For Crane, the betrayal involved his employer Sega; for Twitty, it was his colleague's client Lopez. Whereas the typical conflict of interest problem is the possibility that a lawyer's loyalties may be divided between *clients*, here the problem is the *lawyer's* self interest, specifically, Crane's in earning royalties from sublicensing Sega's games for home computers and Twitty's in minimizing the effort needed to earn his $150,000 retainer from Escobedo by arranging a deal for co-accused Lopez.[41] Each lawyer convinced himself he was actually benefiting the client—:Crane got Sega royalties it otherwise would not have earned; Twitty was trying to get Lopez a deal Tarlow would not negotiate. In order to do this, each lawyer had to blind himself to his own interest. And though both lawyers claimed purity of motive, they indulged in secrecy and deceit. Crane involved his friend Depew, concocted shell corporations, backdated documents, created aliases, and impersonated voices. Twitty secretly approached the prosecutor, (Lyons), participated in the negotiations between Lyons and Lopez and Escobedo, and sought to conceal all this from Tarlow. Similarly, Dale (described in the introduction to Chapter 6, "Serving Two Masters") covertly sought to persuade a represented criminal defendant charged with arson and homicide to provide evidence for tenants suing the building owner, in exchange for help in securing lenient punishment and early parole. The deceptions emerged accidentally. Crane's activities came to light when a sublicensee questioned a game's copyright, Twitty's when Rosenthal told Tarlow. Both Twitty and Dale undermined the represented client's trust in his own lawyer. Several respondents blamed other lawyers. Crane claimed to

39. Shapiro (2002); Griffiths-Baker (2002).
40. Levin (2004–2005).
41. *See* Eldred (2009).

have heeded the more experienced Depew. Twitty implicated Lyons. Crane criticized Sega for ignoring the potential home computer market for its games. Twitty disparaged Tarlow for refusing to represent clients in negotiations. Crane was unusual (among my nine California lawyers) in fully admitting his misconduct and promptly disgorging the profits of his scheme (one of the seven New York lawyers also did so). But Crane then offered, in mitigation, an elaborate autobiography of childhood trauma, inexperience, and present suffering (economic, marital, emotional, and professional).

In each of these cases, the rules were clear and clearly violated. A lawyer should not have a pecuniary interest in a client's business. If the lawyer does, the interest should be fully disclosed and the client advised to seek independent counsel about the conflict. That would have precluded Crane's deceit. A lawyer must not deal with a represented party without the consent of that party's lawyer. That would have precluded Twitty's secret intervention. But since rules are not self-enforcing, it is important to consider why these lawyers violated them and what could be done to discourage noncompliance. Crane sought an easy road to riches. Had he done so as an entrepreneur, and succeeded, society would have applauded. Instead, he abused his insider position as house counsel. Requiring lawyers to disclose to their firms and employers all outside business interests would inhibit the abuse of inside information. Twitty wanted to plead his client Escobedo (an easy way to earn his $150,000 retainer); Lyons's insistence on a package deal and Tarlow's refusal to negotiate frustrated Twitty's goal. If Tarlow's derogatory reference to James "Dump Truck" Twitty is accurate, the latter's behavior was not unusual. Hence, part of the problem may be the perverse incentives of fees: hourly fees encourage lawyers to run up the meter; package fees motivate them to minimize effort. Public defenders do not suffer from these distortions, but secure salaried employment encourages shirking.[42] Whatever the justification for allowing prosecutors to meet privately with defendants whose representation is funded by a third party, there is no justification for the lawyer of a co-defendant doing so. Perhaps judges should routinely conductvoir dire of defendants to explore whether this is happening.

D. Fraud

Because the division of labor (of which lawyers are a prominent example) is founded on trust,[43] fraud represents a serious threat (clearly evidenced by the cases discussed in the introduction to Chapter 5, "Reaching for the Brass Ring"). Brazil's one unambiguous fraud was also his most trivial, namely, misusing his secretary's notary seal and forging her signature after business hours—despite the fact that she would have notarized the document the next day. But all his transac-

42. *See, e.g.*, McConville & Mirsky (1986–87).

43. I develop this claim in Abel (2008: Chapter 1).

tions with Collins and Hom were tainted by fraud, which also seems to have infused his previous employment and enterprises. Indeed, as was true of many of the other lawyers I studied, the behavior disciplined expressed a long-standing pattern. By 1988, Interbank Mortgage Corporation was juggling more transactions than it could fund, forcing Brazil (who effectively was the company, even though he owned only 10 percent) to seek money or security from one deal in order to finance the next, the same behavior that is found in check-kiting, embezzling, and Ponzi schemes. Had he been able to keep all the balls in the air, nobody might have been the wiser. But as soon as one brick in the edifice fell, the entire structure collapsed.

Brazil's motive was transparent: he *was* his financial achievements. (His mother and brother denied he was motivated by greed; and Brazil sought to deflect that accusation to Hom; but Brazil clearly saw money as the index of his success.) Failure meant annihilation to him, just as it had to the New York lawyer Lawrence Furtzaig, who actually contemplated suicide when it became clear his partners would discover how he had deceived them.[44] Indeed, none of the sixteen disciplined lawyers I studied was a slacker. On the contrary, they inverted Thorstein Veblen's *Theory of the Leisure Class,* displaying conspicuous production rather than consumption.[45] (Competition to bill the most hours is common among large firm associates.) Kreitzer, Muto, Furtzaig, Brashich, Byler, and Wisehart, whose behavior was discussed in my earlier book, were all workaholics. So too were Scapa and Brown, Greene and Harney, Crane and Depew, Twitty, and Damer, the attorneys considered herein. It is striking that the two most extreme examples—Brazil and Furtzaig—had been abandoned by their fathers as children and then assumed the paternal role in both their families of origin and families of procreation. Brazil supported his stepdaughter and continued to care for his wife even after they separated. Furtzaig supported his wife and triplets. Many of these lawyers invoked their hard work to justify the rewards they believed they deserved, as well as the corners they cut to capture those rewards. They made other arguments against punishment. Their own superegos had already judged them harshly. They advanced rationalization commonly offered by white collar criminals in their pleas for lenience: because they had climbed so high, they had fallen further. Like Crane, Brazil sought to transmute fraud into bad judgment. Just as Crane sought mitigation by disgorging the profits of his deceit (and Greene and Harney returned the excess fees, if under duress), so Brazil based a similar plea on promises of restitution to Hom (which he never fulfilled). A high proportion of the sixteen lawyers invoked personal obligations and tragedies: Kreitzer (cancer), Muto (the death of his mother and cousin, and his wife's disability), Furtzaig (the birth of triplets), Cardozo

44. For "more than a couple of years . . . I'd been staring at my window considering jumping out . . .." Abel (2008: 199).

45. Veblen (1925).

(old age), Brashich (caring for his disabled mother, grandmother, and seriously ill daughters), Scapa and Brown (distracted by a wedding), Crane (the childhood deaths of his mother and father), Brazil (his wife's mental breakdown and his stepdaughter's dropping out of school), and Damer (his mother-in-law's death). Like many others, Brazil claimed to feel remorse—but it was really just regret at being caught.

As in previous cases, the frauds Brazil committed were patently wrong—indeed, criminal. The problem is that if the threat of criminal punishment does not deter, professional discipline is unlikely to do so. These lawyers seemed unable to admit the possibility of being wrong. They were not unique in this, and perhaps not even extreme. Once people commit to a course of conduct they find it easy to lose perspective. The remedy, clearly, is to elicit the less interested judgments of others. But Brazil would not take advice or guidance; he had left several previous enterprises for that reason and created Interbank so he could run it himself. Furtzaig, the New York lawyer, felt unable to consult his senior partner because he could not bear to disappoint that surrogate father. Condemning his mother-in-law for medicating herself "to the point of zombieism, just completely non-functioning as a human being," he declared, "I hate to believe that I need help."[46] (The reactions of these two fatherless men were mirror images: Furtzaig sought a father substitute; Brazil became his own father, rejecting all others.) Both cases suggest that collective practice structures can be antidotes to poor individual judgment, especially if the collectivity is responsible for its members' misconduct.

E. Excessive Zeal

This, for me, is the most troubling category of lawyer misconduct.[47] Its victim is the legal system, not individuals. And the behavior is morally ambiguous: how to distinguish zeal from zealotry.[48] After all, we exhort lawyers to engage in "zealous advocacy," praising those who confront the worst odds and take the greatest risks, even when they fail. Clarence Darrow and William Kunstler were folk heroes. Damer and Yagman (in California), and Wisehart (in New York) were highly competent, dedicated lawyers. Whereas the fourteen other lawyers in my two books often acted selfishly, Damer was pursuing the interests of his client (and others) who had been overbilled by the Sterns firm, and Wisehart was using evidence (which he believed his adversary should have produced in discovery) to support a strong case for sexual harassment and discrimination. (The similarities between these lawyers' behaviors, despite the enormous differences in their

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46. Abel (2008: 200).

47. Doctors exhibit analogous behavior. Laurie Tarkan, *Arrogant, Abusive and Disruptive—and a Doctor*, NEW YORK TIMES D1 (Dec. 2, 2008).

48. Zacharias (2009a) contrasts the "integrity ethics" that restrain zeal from the rules of the lawyer's role.

backgrounds and the subject matters of the underlying cases, strengthen my conviction that this is a behavioral syndrome.)[49] Whereas the other lawyers flouted, evaded, or distorted the law and then tried to cover up their misconduct, these two lawyers openly sought to enforce the law. Both had smoking gun documents. Damer's showed that that the Sterns firm routinely padded expenses, Wisehart's revealed that the ARC executive director was a serial sexual harasser. The boundary beyond which zeal becomes excessive is uncertain and inevitably colored by (often strong) feelings for and against the parties, their causes, and their lawyers. Champions of unpopular causes (like Stephen Yagman) protest against being targeted for judicial sanctions and bar discipline; and evidence often supports such charges.[50] The Ninth Circuit ultimately upheld his right to voice strong criticisms of judges. Stephen Keim, discussed in the introduction to Chapter 7, "Championing the 'Defenseless' and 'Oppressed,'" courageously exonerated his client, Dr. Mohamed Haneef, of suspicion in the terrorist bombings in London and Glasgow—only to suffer a disciplinary investigation as a result.

Law school teaches students to advance every possible argument, no matter how unpromising it may seem; issue-spotting exams reward such inventiveness. A lawyer who refrains from trying a tactic, however unlikely, may commit malpractice. But the fundamental justification for every legal system is to resolve disputes in which both parties are convinced they are right. That is possible only if lawyers follow the rules of the game. Even if (especially if) they disagree about everything else, lawyers must agree on procedure; those who cut procedural corners gain an unfair advantage and compromise the system's integrity and the legitimacy of its outcome. These lawyers refused to follow procedures. Damer disobeyed a judge's order sealing a settlement, Wisehart sought leverage for a settlement by using opposing counsel's papers, which his client (who was also his paralegal) took from a conference room table without permission.[51]

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49. Damer had been an undergraduate and law student at University of San Francisco and always practiced alone or in a small firm; Wisehart had obtained a B.A., LL.B. and M.P.A. from Michigan and been an associate at Chadbourne Parke, house counsel to American Airlines, and general counsel for REA, before starting a two-person practice.

50. Garbus & Seligman (1976); Harvard Civil Rights-Civil Liberties Law Review (1970); New York University Law Review (1974); Moliterno (2005).

51. Harvard Law Professor Charles Nesson suffered a $675,000 judgment against his client, Joel Tenenbaum, for illegally downloading and sharing 30 songs without paying. He advanced a "fair use" defense against the advice of experts, who were proved right when the judge ruled against it. He urged Tenenbaum to admit his actions "because it's the truth," and Nesson wanted a principled victory. Tenenbaum felt Nesson did an "absolutely brilliant job." A blogger called Nesson "my new HERO." Nesson now insists the issues are "teed up beautifully for higher courts." Anyhow, "Law in the court of public opinion is what shapes law in the courts and the real world." John Schwartz, *Tilting at Internet Barrier, a Stalwart Is Upended,* New York Times A1 (Aug. 11, 2009).

Once lawyers commit such a transgression, they typically aggravate the offense, multiplying procedural objections, moving to recuse unsympathetic judges, taking every possible appeal, naming opposing counsel and judges as defendants in new lawsuits, and constructing elaborate conspiracy theories to explain away subsequent defeats. This is a paranoid style, which produces an account of the world that cannot be falsified because each inconsistent piece of evidence is fitted into the existing schema.[52] There was always some truth in these lawyers' accusations. For instance, Chiantelli's order did exceed his authority; after Damer refused to surrender his files for fear of their destruction there was a fire in Chiantelli's courtroom (apparently because he was violating the no-smoking rule); the selection of New York judges is deeply politicized (as Wisehart claimed). Moreover, sometimes the lawyers' tactics worked. Yagman got Judge Real disqualified in the Settles case, and Wisehart forced Judge Moskowitz to recuse herself.

These lawyers used a scattershot approach, seemingly unable to distinguish between important and unimportant issues, cogent and frivolous arguments. Constant hyperbole undermined their credibility. Their behavior transformed the initial sympathy of judges (Goldhammer for Damer, Moskowitz for Wisehart) into antipathy. Goldhammer warned Damer: not to "threaten a judge." Moskowitz took umbrage when Wisehart threatened to appeal her rulings. Some lawyers pursued the cause even after their client told them to stop. Examples are Damer, as well as Regan in the introduction to Chapter 7. Although these lawyers initially justified their conduct in terms of loyalty to client, they ended up disparaging the clients' capacity to make decisions. Some even misrepresented their clients' identity (Maloney and Virsik in the introduction to Chapter 7).

Why do some lawyers transgress procedural rules, especially unambiguous ones like those broken by Damer and Wisehart? Perhaps it is related to the nature of the case. The unpopularity and jeopardy of criminal defendants may encourage strong identification by their lawyers, whose loyalty has led them to put a perjurious witness on the stand,[53] refuse to disclose the whereabouts of a homicide victim to her grieving parents,[54] conceal the murder weapon,[55] or pass information from a jailed client in violation of court orders.[56] Lawyers for organized crime may be overzealous in order to get repeat business. Cause lawyers embrace the ends of their clients, which they see as transcending the individual case.[57]

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52. Shapiro (1999: Chapter 3).

53. Green (2007); Asimow & Weisberg (2009).

54. Melinkoff (1973).

55. Commonwealth v. Stenhach, 356 Pa.Super. 5, 514 A.2d 114, appeal denied, 517 Pa. 589, 534 A.2d 769 (1987).

56. Julia Preston, *Lawyer in Terror Case Apologizes for Violating Special Prison Rules*, NEW YORK TIMES (Sept. 29, 2006).

57. Scheingold & Sarat (2004).

Are there character traits that predispose lawyers to excessive zeal? Whereas law school teaches students to tolerate ambiguity—uncertain facts, indeterminate law, and subjective values—these lawyers saw the world in black and white. For many lawyers, experience breeds cynicism about the possibility of attaining justice; but decades of practice just intensified these lawyers' outrage about injustice. They were right about everything, and everyone else was wrong (perhaps they had to think this because their conspiracy theories would collapse otherwise). They demonstrated their inerrancy by cataloguing others' mistakes.[58] Both Damer and Wisehart refused to confess error, although doing so probably would have let them escape any penalty. Damer compared himself to Washington, Lincoln, and Kennedy. Every fight was David against Goliath. These lawyers felt persecuted by opposing counsel and judges and betrayed by friends—and then provoked those responses, perhaps to confirm their world view. They courted martyrdom. Damer was briefly jailed for contempt and claimed to fear being jailed again if he ever ventured before Chiantelli. Wisehart defied Judge Moskowitz, saying, "If you are going to send me to The Tombs because I want to be heard, you go ahead and do it."[59] They constructed their outsider status and gloried in it. They said and seemed to believe that the legal system would collapse if they did not prevail. (The State Bar mirrored this apocalyptic view in the belief that the legal system would collapse if they were not disciplined.)

These lawyers expressed strong emotions towards clients, adversaries, opposing counsel, and judges. Psychotherapists spend years seeking insight into how feelings may distort their understanding of patients. Lawyers rarely exhibit such self-knowledge. Damer and Wisehart were strongly protective of their female clients (precisely, the countertransference psychotherapists are trained to recognize). They displayed many of the markers of a paranoid style, such as the inability to accept external authority, hyperconsciousness of rank, and acute sensitivity to rebuff.[60] Many lawyers develop a strong personal antipathy toward their opponents, such as the way Greene and Harney regarded doctors and their insurers, or the feelings of Cardozo and Brashich about the large firm lawyers representing their client's estranged brother. or Byler's fury at Thomas Morgan's intervention on behalf of his brother James.

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58. Damer sent me twenty pages of e-mail in rebuttal, correcting every typo of an early draft of Chapter 7. Byler wrote a six-page page rebuttal in my earlier book, attacking my "mediocre dishonest professor's tale, told for the purpose of a cover up. . . ." Abel (2008: 367).

59. Abel (2008: 436). Richard Fine, a lawyer, chose three months of solitary confinement in an 8-foot by 13-foot cell for contempt rather than comply with a judge's order. Victoria Kim, *Lawyer takes a stand from his cell,* Los Angeles Times (June 7, 2009). Fine had been disbarred in February 2009 for behavior similar to, if more extreme than, that of Damer and Wisehart. Kenneth Ofgang, *Supreme Court Orders Disbarment of Attorney Richard I. Fine,* Metropolitan News-Enterprise 1 (Feb. 12, 2009).

60. Shapiro (1999: Chapter 3).

Damer and Wisehart took hostility to another level. Damer's anger at the Sterns firm seems to have antedated the Seward case and persisted long after it concluded. Wisehart also had clashed with Weil Gotshal before representing Joan Lipin; and Stephen Yagman's battles with judges lasted for decades. Damer and Wisehart seemed to resent the wealth and prestige of opposing counsel. Wisehart believed his Weil Gotshal adversaries were laughing at him. Damer claimed the bailiff had told Denebeim (who had betrayed him), "[T]he judge is just letting [Damer] go on and on so he will go crazy and attack somebody and then I can shoot him." Damer was "moved... to tears" by the eulogy a judge offered for his recently deceased mother-in-law—"she loved nothing better than a good fight for a just cause"—perhaps because he did, too.

Insofar as these behaviors express deeply ingrained character traits, little can be done to discourage them. The disciplinary process is unlikely to be an effective deterrent. Both Damer and Wisehart saw it as another element in a vast conspiracy, which just strengthened their determination to continue fighting. Are there structural remedies? One justification for the English divided profession, which required that clients first retain solicitors, who alone could brief barristers, was to create distance between litigants and those who advocate for them in court. The English Bar also followed the "cab rank rule," obligating barristers to take any case they were competent to handle. It was not uncommon for a barrister to prosecute in the morning and appear for the defense in a different case that afternoon. But now the Crown Prosecution Service has assumed that role, and professional and even lay clients have direct access to barristers. In any event, the cab rank rule always was more honored in the breach than the observance. In the United States, clients demand total fidelity, and some lawyers feel wedded to causes, not just clients.[61] Excessive zeal by a few lawyers may be a price worth paying for such loyalties.

II. COMMON CAUSES

I believe my twelve narratives confirm the need for caution in generalizing about unethical lawyers. The behaviors are fundamentally different. They do not express a common pathology. Ethical rules, however appropriate for *judging* conduct, are useless for understanding it. Nevertheless, my previous book identified behavioral traits shared by the seven New York lawyers, transcending the offense. The nine California lawyers offer a further opportunity to explore these generalizations (which ultimately have to be tested quantitatively).

61. Scheingold & Sarat (2004).

A. Protestations of Innocence

Virtually all these lawyers maintained their innocence to the very end: all but Furtzaig in New York and Crane in California. This tends to be true of white collar criminals generally, who (unlike ordinary criminals) do not see themselves as deviants or outlaws and claim (often accurately) that many others behave the same way. The disciplinary process merely intensified the lawyers' convictions of their own righteousness. Any remorse they voiced was either a hypocritical pretense to mitigate the penalty or an expression of regret at having been caught. They may be more cautious about being discovered in the future, but there was little evidence of rehabilitation. Indeed, Brazil persisted in committing similar frauds, for which he ultimately went to prison.

B. Experience

The behavior was not caused by inexperience. In New York, only Muto was new to the game (immigration), and even he had been admitted more than a decade earlier. In the Sega computer game licensing case (Chapter 4, "Playing Games with Sega"), Depew had been admitted four years and Crane three. Nevertheless, Depew cautioned Crane against "usurpation of corporate opportunity" (but then joined him in committing it). All the other lawyers (including those in the chapter introductions) had many years, often decades of experience. Ethical misconduct is *learned* behavior;[62] it is not the product of ignorance. Kreitzer learned from other personal injury lawyers (and crooked claims adjusters), Muto from other immigration lawyers (and "travel agencies"), Scapa and Brown from other ambulance chasers (from whom they borrowed the cover-up disclaimer), Greene and Harney from other lawyers and even judges, Crane from Depew, and Twitty from the prosecutor. Byler and Wisehart both asked colleagues for counsel—and got bad advice. Brazil had been the ultimate authority in his role as California Commissioner of Real Estate.

C. Rule Ambiguity

Nor was the behavior caused by rule ambiguity. Of course, there are ambiguous ethical rules: professional responsibility casebooks and legal scholars focus on them.[63] But the rules in these cases were clear, as I believe they are in most disciplinary proceedings (they certainly were in the hundreds I read in New York and California). The neglect committed by Kreitzer and Muto was extreme. Kreitzer's 10 percent scheme was clearly illegal, and he persisted after being charged! Similarly, Furtzeig's forgery of court papers and Brazil's misuse of his secretary's notary stamp were inexcusable. Cardozo and Brashsich had a clear obligation to present their client with the fee implications of alternative

62. Levin (2004–2005). On the importance of mentors, *see* Kay & Wallace (2009).
63. For an 800-year history of ethical rules, *see* Andrews (2004).

trust settlements. Byler could not simply appropriate the tax refund and clearly had to escrow it when Morgan protested. Wisehart had to give the Weil Gotshal papers to the judge to determine his right to use them. Scapa and Brown clearly broke the law against solicitation. Greene and Harney clearly violated MICRA. Crane could not disguise his identity from his employer when proposing a deal. Brazil could not deceive Hom when borrowing money. Twitty could not arrange for Lopez to negotiate with the prosecutor without asking Tarlow. Damer could not defy Chiantelli's order.

D. Greed

The behaviors reflect greed more than need. None of the lawyers suffered the kind of poverty we associate with street crime. None was a substance abuser. Brazil rightly feared his deals would fall through unless he raised more money, but he had initiated them. *All* the lawyers were pursuing money, some hoping for greater wealth than they had ever enjoyed. In New York, Kreitzer operated a settlement mill processing well over a thousand cases a year, Muto bragged of earning $4,000 a week from immigration cases, much of it for pro forma appearances. Furtzaig had become an equity partner in a boutique real estate firm. Cardozo and Brashich claimed a huge contingent fee for resolving a multimillion dollar trust dispute. Byler appropriated his client's entire $53,000 IRS refund as a fee. Wisehart stood to earn a contingent fee from substantial compensatory and possible punitive damages for sexual discrimination and harassment. In California, Scapa and Brown were emulating Jacoby & Meyers. Greene and Harney insisted on their usual fees in defiance of MICRA. Crane anticipated huge profits from licensing Sega's computer games for home use. Brazil believed that municipal bond defeasance could earn him millions. Twitty saw persuading Lopez to cop a plea as an easy way to earn his $150,000 retainer from Escobedo. Even Damer hoped to be lead attorney in a class action against Sterns for bill padding.

E. Psychic Rewards

Most lawyers are not just interested in money. They also want the psychic reward of helping clients and the gratitude that often follows. Tort lawyers obtain essential compensation for accident victims; Kreitzer bonded with at least some of his clients. Muto derived enormous satisfaction from fighting deportation proceedings and basked in the thanks he received from clients when walking through Chinatown with his daughter on Sundays. Furtzaig was concerned to please an extremely demanding senior partner (and father surrogate). Babette Hecht called Cardozo her "knight in shining armor." Ljubica Callahan was deeply dependent on Brashich, another Serbo-Croatian-speaking immigrant. James Morgan told Byler that it felt "like a divine gift to have a friend like you in this hour of need and I am very grateful for your help."[64] Wisehart not only took Joan Lipin's case

64. Abel (2008: 290).

for a contingent fee and invested untold hours in fighting Weil Gotshal over discovery but also hired her as a paralegal when the American Red Cross blacklist made her unemployable. Scapa and Brown claimed to be increasing access to justice for Filipino Americans. Greene and Harney vociferously maintained that clients with difficult cases should be grateful to have such extraordinary lawyers and believed those clients were—until lesser lawyers interfered. Crane felt Sega should be grateful he had earned royalties for the company that would not otherwise have been received (even though he had to employ deceit because of the company's inability to recognize a business opportunity). Brazil constantly harped on the effort he took to conclude Collins's loans and the usurious interest greedily demanded by Hom. Twitty insisted he had done Lopez a favor by arranging a negotiation with the prosecutor, in which Tarlow refused to participate. Maria Seward lavished praise on Damer (until she replaced him with Denebeim and accepted the defendants' offer).

> Throughout this whole ugly business, I have come to really appreciate, more and more, your awesome and prodigious skills, which are being utilized on my behalf and, perhaps, ultimately for many others who have been abused by some members of the San Francisco legal community . . .. John and I are both very grateful to you and your office for bringing to bear so much talent and experience.

F. Accounts

All these lawyers constructed accounts to justify or at least excuse their behavior.[65] Kreitzer, Muto, and Scapa and Brown declared they were increasing access to justice, and future clients would suffer if the lawyers were suspended or disbarred. Furtzaig believed (probably correctly) that his senior partner would not accept any explanations for the failure to evict tenants or collect rent—and (clearly erroneously) that this could be covered up indefinitely. Cardozo and Brashich convinced themselves they had negotiated the best—indeed, the only—resolution of the trust dispute. Byler justified a right to the entire tax refund by claiming an hourly rate he had not regularly charged and concocting a bill based on hours that deviated from his own "Red-book entries." Wisehart insisted that Weil Gotshal had left its papers on the conference table to entrap him—and also that he was legally entitled to appropriate them. Greene and Harney adamantly maintained that MICRA either did not apply or was unconstitutional. Crane contended he had fulfilled his fiduciary duty to Sega by presenting the licensing deal, even if he had concealed his identity. Brazil asserted that Collins had prevented the loans from being financed and greed had led Hom to make bad investments. And Damer persistently claimed to represent the class of Sterns's victims, even though he had no client. Several "neutralization devices" recurred in multiple cases.[66]

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65. Scott & Lyman (1968). Hall & Holmes (2009) argue that lawyers have an elevated tendency toward and capacity for rationalization; *see also* Hall (2010).

66. Matza (1964).

These lawyers sought to commute crime to tort by transmuting ethical failing into technical incompetence or bad judgment and making or offering restitution. They blamed others, such as clients, lawyers with whom they had collaborated in the misconduct, opposing counsel, counsel of co-accused, subordinates, employers, and judges. They believed they were above the law in each of the following: Kreitzer in operating the ten percent scheme, Muto in failing to follow routine procedures, Furtzaig in forging legal documents, Cardozo in misrepresenting that the surrogate would not review his fee, Byler in appropriating the tax refund and then denying that Morgan's objection constituted a dispute, Wisehart in appropriating the Weil Gotshal papers and using them to demand a settlement, Scapa and Brown in buying cases from cappers, Greene and Harney in persistently flouting MICRA after it had been upheld, Crane in deceiving his employer, Brazil in appropriating his secretary's notary stamp and forging her signature, Twitty in secretly arranging Lopez's meeting with the prosecutor, and Damer in defying Chiantelli's order.

G. Habitude

The behavior was not aberrational. Lawyers in disciplinary proceedings often contend that they have suffered a momentary lapse in judgment (caused by financial embarrassment, marital discord or family problems, substance abuse, or some other extrinsic factor). On the contrary, most of the conduct in these twelve cases was chronic. Kreitzer had built up his settlement mill over many years. Muto consistently neglected all his clients. Furtzeig just dug himself deeper as he took on more work and covered up errors with greater deceit. After Brashich was charged with misconduct toward Babette Hecht, he behaved similarly toward Ljubica Callahan—and actually cited his earlier performance as a defense in the later proceeding. Byler had clashed with other clients over bills. Wisehart (like Yagman) had systematically sought to recuse unsympathetic judges. Scapa and Brown deliberately constructed their Bay Area satellite office on ambulance chasing. Greene and Harney evaded or defied MICRA in multiple cases. Crane sought to license to competitors games he knew were covered by the same copyright, continuing even after he was laid off by Sega. Brazil had clashed with previous employers and partners and then defrauded other clients after being disciplined. According to Tarlow, Twitty had "dumped" other clients. Damer's behavior in the disciplinary proceeding replicated the behavior he had exhibited in the case with Sterns. Character is destiny. Habits are hard to change. Once these lawyers committed to an action, they found it difficult to change course.[67]

67. Atul Gawande (2010) offers persuasive evidence that simple checklists can change habitual behavior by doctors.

III. CURES

In recapitulating the cases at the beginning of this chapter, I emphasized their differences and proposed responses specific to each category. The common causes I identified in the previous section—convictions of innocence and self-righteousness, extensive legal experience, violations of clear rules, the combination of greed and a desire to be helpful and appreciated, rationalizations, and perseveration—hardly encourage optimism about the possibility of changing behavior. One response would be resignation about an inevitable few bad apples in any barrel. I reject that. We do not know how many bad apples are inevitable—if any. And rot spreads. Lawyer misconduct sets a bad example, teaching others how to cut corners and encouraging them to believe they can do so with impunity. I will conclude, therefore, with some thoughts about reforms that might reduce ethical misconduct and how to achieve them.

Let me start with self-regulation, where I began this book.[68] Cases heard by the State Bar Court represent the tip of the proverbial iceberg, the apex of a typical litigation pyramid, whose base is the "dark figure" of actual misconduct.[69] We know that attrition occurs at each level. Some merely reflects false positives, acceptable behavior requiring no correction. But many missing cases signify underenforcement, most of which is attributable to the failure to bring misconduct to the attention of the State Bar. What could be done to increase the proportion of misconduct investigated? Almost all complaints come from clients, their friends and relatives, or the opposing party.[70] Could we encourage more clients to complain? Many already are strongly motivated to do so, including the personal injury victims neglected by Kreitzer, the Chinese immigrants neglected by Muto (especially because disciplinary complaints were a prerequisite to reopening their deportation orders), and the clients overcharged by Byler, Greene and Harney, and Twitty or defrauded by Brazil. (Even some of these clients were motivated or guided by lawyers.) Nevertheless, a great deal of lawyer misbehavior will never be exposed by clients. Furtzaig successfully hid his failures from clients for years, even paying $60,000 from his own pocket to do so. Babette Hecht continued to defend Cardozo even after being told of his misconduct; Ljubica Callahan declined to claim the money Brashich was ordered to pay her.

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68. For yet another skeptical view of self-regulation, *see* Perlman (2003). For a convincing argument that tax lawyers have acted collectively to outlaw abusive shelters, *see* Rostain (2006b).

69. For a recent study of Canadian lawyer self-reports of their behavior, *see* Wilkinson *et al.* (2000); Mercer *et al.* (2005).

70. Between 75 and 80 percent of complaints to the Intake Unit in 1996, 1997, and 2000 came from the client or a close friend or relative and another 3 to 10 percent from the opposing party. State Bar of California (2001b: Attachment 8).

Joan Lipin, who appropriated the Weil Gotshal papers, was hardly going to encourage Wisehart to surrender the smoking gun that might win her case.

Although San Francisco automobile accident victims were surprised to be contacted by Gumban and Buchanan before accident reports were publicly available, most were happy to be told that a lawyer was interested in their cases. Even large corporations like Sega and Paramount might not have uncovered Crane's deceit if greed had not led him to sublicense what was effectively the same program to two competitors. Having asked Twitty to arrange a meeting with the prosecutor, Lopez was hardly going to complain. And Maria Seward had little interest in enforcing Judge Chiantelli's sealing order (although she may have worried that the settlement would be set aside). We can generalize from these cases that clients often are ignorant of the law, unable to observe the lawyer's behavior, and indifferent to or even complicit in ethical violations.

The study cited above also found that only 4 percent of complaints were filed by lawyers (about equally divided between opposing and successor counsel). That should not be surprising, given the "blue wall" covering up police misconduct, the reluctance of doctors to report malpractice by others,[71] or the conspiracy to conceal sexual abuse by priests.[72] My twelve cases confirmed lawyers' reticence and help to explain it. Lawyers who earned fees by referring personal injury cases to Kreitzer were not going to accuse him of neglect, nor were those who also gave insurance agents 10 percent kickbacks to accelerate settlement. Other immigration lawyers who depended on "travel agents" were not going to endanger that lucrative arrangement by accusing Muto of doing so. Opposing counsel who benefited from the incompetence of Kreitzer and Muto were not going to complain; but it is striking that even successor counsel, seeking to reopen deportations on the ground of Muto's inadequate representation, were reluctant to file the indispensable disciplinary complaints.[73] The lawyers fighting Cardozo and Brashich over Babette Hecht's trust were not privy to her fee

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71. On the difficulty and reluctance of doctors to expose even unlicenced imposters, *see* Collins & Pinch (2005: chapter 2). A 1961 study found that only 30 percent of surgeons would be willing to testify against a surgeon who had removed the wrong kidney. *Medical Economics* (Aug. 28, 1961). Although the situation has improved in the last half century, a 2010 study found that about a third of physicians still did not agree with the professional commitment to report those who are significantly impaired or incompetent; and a third of those who knew an incompetent colleague did not report this. DesRoches et al., *Physicians' Perceptions, Preparedness for Reporting, and Experiences Related to Impaired and Incompetent Colleagues,* 304 *JAMA* 187 (2010).

72. A nurse who reported the misconduct of a doctor to the Texas Medical Board was criminally prosecuted for "misuse of official information," although the jury took less than an hour to acquit. She is now suing for damages for the prosecution and for being fired. Sack, *Nurse to Stand Trial for Reporting Doctor,* New York Times §1 p14 (Feb. 2, 2010); Sack, *Whistle-Blowing Nurse Is Acquitted in Texas,* New York Times (Feb. 12, 2010).

73. Abel (2008: 121).

arrangements. Lawyers who do not chase ambulances may suffer a disadvantage but rarely know what their illegal competitors are doing. All plaintiffs lawyers detested MICRA, if only some defied or evaded it; the mystery is why defense lawyers condoned violations of a law for which they had lobbied. Other lawyers would find it almost impossible to observe a lawyer defrauding his own employer (as Crane did Sega) or client (as Brazil did Collins and Hom). Twitty successfully conspired with Lyons to conceal the prosecutor's negotiations with Lopez from Tarlow; it was only when Lyons mistakenly told Rosenthal that the latter felt an obligation to inform Tarlow. Thus, although lawyers certainly know the ethical rules better than clients and perceive some behavior invisible to clients, there is much that even they do not see and a variety of reasons why they do not complain about what they do observe. Those reasons include indifference, complicity, material advantage, and a disinclination to encourage other lawyers to complain—perhaps about them.[74]

The relatively rare situations in which lawyers do file complaints are equally revealing. Furtzaig's firm reported him in order to limit its liability to clients. Byler had the misfortune to overcharge the brother of Thomas Morgan, a leading authority on legal ethics. Similarly, Gumban and Buchanan made the mistake of capping a State Bar lawyer. The Weil Gotshal lawyers were already furious at Wisehart and eager to take advantage of his ethical violation, thereby winning a case they probably would have lost on the merits. Lawyers sought to earn contingent fees by recovering the amounts Greene and Harney had charged in violation of MICRA. The Sterns firm had ample reason to seek revenge against Damer (whether or not they wanted to have "his ticket pulled"). All these lawyers complained for personal reasons—monetary, professional, emotional—not just out of civic responsibility.

The California study found that judges filed less than one percent of complaints.[75] Judge Baffa's explanation for why he uncritically approved Greene's fee in disregard of MICRA is telling:

> I looked at what was accomplished. In my mind you are not going to get any recovery at all unless you have a good lawyer to effect it for you. Without the lawyer, you get nothing, and frankly I happen to like lawyers and I like to protect them with their fees.

All judges once were lawyers. Before being elevated to the bench, most practiced with the very lawyers who committed misconduct, often for decades. Many judges continue to socialize with their former colleagues, who have appeared before them in the past and are likely to do so again in the future. But even if

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74. For suggestions about how to encourage associates to blow the whistle, *see* Long (2009).

75. On the role of judges in promulgating ethical standards, *see* Zacharias & Green (2009b).

judges were less sympathetic to lawyers, they still would have missed much of the misconduct in my twelve cases—deceit by Furtzaig, Crane and Brazil, Byler's overcharging, and ambulance chasing by Scapa and Brown.

The unusual situations in which judges did complain help us to understand these exceptions. Immigration judges filed grievances against Muto out of solicitude for those they would have to deport because of his incompetence and anger that he had wasted their time and displayed insufficient deference.[76] Surrogate judges are responsible for protecting the interests of vulnerable clients like Babette Hecht and Ljubica Callahan. By telling Judge Moskowitz that a cancer diagnosis and treatment had rendered her mentally incompetent, Wisehart made her recuse herself but also provoked her to complain. Judge Patel was outraged by U.S. Attorney General Thornburgh's arrogance in asserting that Department of Justice attorneys could not be bound by ethical rules (even those adopted by federal courts)[77]—and at Twitty for suggesting that Lyons meet privately with Lopez. And Judge Chiantelli was angry enough at Damer's defiance to jail him for contempt.

Could we increase the proportion of misconduct reported to the State Bar? Clients might be given further incentives to complain. Other jurisdictions not only punish unethical lawyers but also make them compensate clients for inadequate professional services.[78] When I broached this idea to the Professional Discipline Committee of the New York City Bar, members peremptorily dismissed it with the argument that clients already file far too many unwarranted grievances. And resistance by lawyers has forced other jurisdictions to curtail the circumstances in which compensation is paid.[79] Lawyers could be compelled to carry malpractice insurance, making it more likely that damages would be paid (and hence that claims would be filed). Although virtually all other countries do this, the only American state to require insurance is Oregon. A 1988 survey of more than 12,000 California lawyers suggested that only 17 percent were insured.[80] Most state bar associations have even refused to mandate that lawyers tell clients whether they are insured. We saw California's struggle over that in Chapter 1, "The Politics of Self-Regulation." The Virginia State Bar Council voted

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76. The federal government has considered giving immigration judges greater power to discipline lawyers who appear before them. Richard B. Schmitt, *Immigration lawyers' misconduct targeted in federal proposal,* Los Angeles Times (Aug. 23, 2008).

77. On the authority of federal courts to regulate lawyers, *see* Zacharias & Green (2003).

78. Canada, Australia, and the U.K. Paton (2008).

79. Haller (2009).

80. The survey sampled nearly 2,000 defense lawyers, nearly 3,000 plaintiffs lawyers, 3,400 lawyers with disciplinary complaints, and more than 4,000 random lawyers. Of the 89 percent who responded, only 17 percent (1801) reported their annual premium, suggesting that the rest were uninsured. Donna M. Hamlin and Craig Harkins, *Final Report: State Bar of California Questionaire [sic] on Professional Liability Insurance* (1988), in Fellmeth (1988a: Exhibit G).

down a reporting requirement 60–11 in 2008.[81] Any effort to encourage lawyers to report their colleagues raises concerns that such complaints will become strategic weapons in litigation and negotiation, as has happened with sanctions motions. Perhaps lawyers could be given incentives for turning themselves in, as the Treasury Department has done in its efforts to enforce Foreign Assets Control.[82] I find it hard to imagine judges reporting much more misconduct.[83]

Most reform proposals focus on the disciplinary process.[84] As I showed in Chapter 1, California has witnessed repeated cycles of exposé, reform campaign, incremental change, and reversion to routine.[85] In 1929, the year after it was created, the State Bar investigated an impressive 1,531 lawyers. But the numbers fell steadily over the next two decades, to less than a tenth of that number in 1948, despite the enormous growth of the legal profession (see Table 1). The State Bar closures forced by the legislature and Governor in the late 1980s and late 1990s also drastically cut the number of complaints (see Table 2). (Similar cycles can be seen in response to activities as diverse as nursing,[86] hospitals,[87] and yoga instruction[88]—and as I write, most urgently in financial markets.) The recurrent criticism is that too few complaints result in significant punishment.

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81. 77 U.S. LAW WEEK 2307 (Oct. 17, 2008).

82. 31 CFR Part 501 (8.8.08). I am grateful to Prof. Perry Bechky, University of Connecticut Law School, for this.

83. Greenbaum (2009).

84. *E.g.*, Cagle *et al.* (1999).

85. The classic work is Cohen (1972). For revisions, *see* Goode & Ben-Yehuda (1994); McRobbie & Thornton (1995); Hunt (1997); Ungar (2001); Hunt (1999); Garland (2008).

86. Charles Ornstein and Tracy Weber, *Nurses license renewal stiffened,* LOS ANGELES TIMES (Oct. 11, 2008); Charles Ornstein and Tracy Weber, *New rules for nurses,* LOS ANGELES TIMES (Oct. 24, 2008); Tracy Weber and Charles Ornstein, *Panel slow to act on nurses' crimes,* LOS ANGELES TIMES (Nov. 2, 2008); Charles Ornstein and Tracy Weber, *Health staff background checks lag,* LOS ANGELES TIMES (Dec. 30, 2008); Tracy Weber and Charles Ornstein, *Board takes no public action against some King/Drew nurses,* LOS ANGELES TIMES (July 12, 2009); Charles Ornstein, Tracy Weber and Maloy Moore, *When Caregivers Harm: Problem nurses stay on the job as patients suffer,* LOS ANGELES TIMES (July 12, 2009); Tracy Weber and Charles Ornstein, *Schwarzenegger sweeps out nursing board,* LOS ANGELES TIMES (July 14, 2009); Charles Ornstein and Tracy Weber, *California nursing board's executive officer resigns,* LOS ANGELES TIMES (July 15, 2009); Michael Rothfield, *New California nursing board members sworn in,* LOS ANGELES TIMES (July 16, 2009); Tracy Weber and Charles Ornstein, *Loose reins on nurses in drug abuse program,* LOS ANGELES TIMES (July 25, 2009); Michael Finnegan and Charles Ornstein, *Nursing board seeks to triple enforcement staff,* LOS ANGELES TIMES (July 28, 2009); Tracy Weber, Charles Ornstein and Rong-Gong Lin II, *Schwarzenegger vows to boost patient protections,* LOS ANGELES TIMES A1 (Aug. 13, 2009).

87. Alex Berenson, *Weak Oversight Lets Bad Hospitals Stay Open,* NEW YORK TIMES A1 (Dec. 8, 2008).

88. A.G. Sulzberger, *Yoga Faces Regulation, and Firmly Pushes Back,* NEW YORK TIMES A1 (July 11, 2009).

The remedy usually proposed is to shift regulatory responsibility from the profession to the state.[89]

Historical data confirm that lawyer discipline in California exhibits high levels of attrition, especially at the early stages of the process.[90] During the State Bar's first two decades, only a third to a tenth of investigations led to notices to show cause (NTSCs), whose numbers steadily declined from a high of 367 in 1928 to just 19 in 1948 (see Table 1). The Board of Governors dismissed a large proportion of NTSCs, and the Supreme Court consistently rejected the Board's recommendations to disbar lawyers. There were fewer than ten disbarments in 17 of the 21 years, averaging just six a year. In the last 30 years, complaints have stayed relatively constant, perhaps because Intake consistently classifies two to four times as many of the calls its receives as inquiries (see Table 2). A very high proportion of complaints are dismissed: from 1987 to 2008, dismissals outnumbered complaints 120,250 to 92,489.[91] Between 1987 and 1995, dismissals were two to five times as numerous as Statements of the Case (and 19 times as frequent in one aberrational year). During the last two decades, NTSCs fell within a fairly narrow range: 241–584 (see Table 4).[92] By contrast, other dispositions generally were twice as common (although the ratio declined from more than 3:1 in 1997 to about 1:1 in 2007). When one alternative disposition (admonitions) was eliminated, its place was taken by directional letters, which in turn gave way to warnings and resource letters. This is not necessarily a bad thing: Much lawyer misconduct is handled better by non-punitive remedies. Like NTSCs, State Bar Court filings fell within a fairly narrow range, rising from 527 its first year to 1,182 and then falling back to about 600 at the end of the period, averaging 748 (see Table 5). (In both instances, this constancy is probably attributable to institutional capacity.) Although annual disbarments fluctuated wildly from none to 89, they averaged 45 (compared with just 6 in the State Bar's first 20 years) and were greatly outnumbered by suspensions. Only a small fraction of cases filed led to those two serious penalties. At the same time, less than 10 percent of cases were dismissed, suggesting that the Office of Trial Counsel (OTC) prosecuted few false positives.

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89. Paton (2008); Terry (2008) (regulation of lawyers as "service providers"). For a recent proposal to strengthen state regulation of corporate lawyers in the U.K., *see* Smedley (2009). Zacharias (2009a) argues that self-regulation is a "myth" because lawyers already are heavily regulated by the state.

90. HALT: An Organization of Americans for Legal Reform gave California a D+ in its 2006 Report Card on Lawyer Discipline and a D– for "Adequacy of Discipline Imposed," ranking it 45th out of 50 states.

91. Data are missing for three of those years.

92. Excluding a low of 174 in 1999 because of partial closure and a high of 603 in 1991 because of an earlier closure.

After reading 200 State Bar Court cases, I believed that penalties were sufficiently severe. Six of the seven New York lawyers I studied never returned to practice; although six of the nine California lawyers continued or resumed practice, they were not disciplined again.[93] American criminal justice seeks to compensate for its failure to apprehend most offenders by punishing a few severely, as exemplified by rigid sentencing guidelines, the Rockefeller drug laws, three-strike rules, and the death penalty. But there is no evidence that harsher punishments were necessary to deter these lawyers from recidivism or would have discouraged others from following their example. Although many lawyers sheepishly admit that the first things they read in professional journals are the disciplinary reports—the equivalent of gossip columns—there is no evidence that they draw the conclusion that these lawyers got away with murder. For most targets of complaints, the disciplinary process *is* the punishment.[94] They consider the financial cost, emotional stress, loss of self-esteem, and harm to professional reputation devastating.[95] (Shakespeare has Iago use the last consequence to inflame Othello's jealousy.)[96] Publicizing accusations might be an additional deterrent, but it would also increase the harm to innocent lawyers from false positives.[97] Every study of deterrence concludes that the certainty of punishment is far more effective than severity. We should direct our attention to increasing

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93. I do not disagree with the view advanced by Robert Fellmeth that a relatively small number of lawyers—he estimated one to two thousand—are chronic offenders, responsible for a disproportionate share of client complaints. Fellmeth (1989b: 20).

94. Feeley (1979).

95. For an analysis of the potential influence of reputation on ethical behavior, *see* Zacharias (2008). Punishment for scientific misconduct, surprisingly, did not necessarily end careers. Redman & Merz (2008).

96. Good name in man and woman, dear my lord,
Is the immediate jewel of their souls.
Who steals my purse steals trash; 'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.
OTHELLO, Act 3, scene 3, lines 155-61.

97. In June 2008, the Internal Revenue Service announced that it would publish more frequent and extensive accounts of disciplinary actions against attorneys and other professionals. *OPR Announces Disciplinary Sanctions With New Format Describing Misconduct,* 105 DAILY TAX G-1 (June 2, 2008). I am grateful to Professor Dennis J. Ventry, U.C. Davis Law School, for this. For a prediction that disciplinary procedures will become more transparent, *see* Zacharias (2003a). A study of the Los Angeles County Sheriff's Department found that complaints against deputies, whether or not proven, strongly predict future misconduct. Winton, *System for Identifying Problematic Deputies Works Well, Report Says,* LOS ANGELES TIMES A3 (Sept. 9, 2009).

the proportion of misconduct subjected to regulatory scrutiny rather than inflicting exemplary punishments on a few highly visible miscreants.

A variety of other responses have been considered. Most involve state action.[98] Legal scholars devote a great deal of energy to refining ethical rules.[99] But there was little ambiguity about whether rules had been broken in my twelve cases (or in the dozens more in the chapter introductions in both books, or the several hundred decided over the course of a decade, which I read in each jurisdiction). There is a lot of truth in the folk wisdom many professional responsibility instructors offer students: if you have to ask whether it's ethical, it probably isn't. Legal educators call for more education (surprise!).[100] But there is no evidence that either the American Bar Association's requirement of education in professional responsibility starting in 1973 (in response to Watergate), or the Multistate Professional Responsibility Examination following soon thereafter, has made lawyers more ethical. Almost all the lawyers I studied were convicted of ethical misbehavior decades after graduating; it is hard to imagine what difference law school could have made. Most lawyers treat mandatory continuing legal education—especially in ethics—as a pointless obligation.[101] I saw no evidence that ignorance of the rules explained the misbehavior of the twelve lawyers I studied. Could entry barriers screen out future rule breakers?[102] The Gluecks' proposal in the 1950s to identify juvenile delinquents before they committed any crime effectively discredited that strategy.[103] Character and fitness committees have abused their authority by discriminating against ethnic minorities and other outsiders;[104] they have demonstrated no ability to exclude unethical lawyers.

If state action seems unpromising, what about the market? There is evidence that patient input improves the outcome of medical care.[105] Clients are the most effective monitors of at least some forms of lawyer misconduct, as well as competence.

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98. For a discussion of the relative merits of regulation by courts, legislatures, and the market *see* Barton (2003).

99. For thoughtful studies by philosophers of the basis of ethical rules, see Luban (2007); Carle (2008); Markovits (2008).

100. E.g., Economides & Rogers (2009); Rhode (2009). Evans & Palermo (2005) find that education has "zero impact." Corbin (2005) finds that experienced practitioners adapt to their environment.

101. For a skeptical view of the ability of MCLE to inculcate "judgment," *see* Wendel (2009); for a more enthusiastic view, *see* Hellman (2010).

102. Barton (2001); Levine & Pearce (2009).

103. Glueck & Glueck (1950).

104. Auerbach (1976: 125-28); Rhode (1985: 499).

105. Karen Barrow, *Armed With Knowledge, Driven to Fight,* NEW YORK TIMES F5 (Sept 23, 2008); Denise Grady, *Shorter Radiation For Cancer of the Breast,* NEW YORK TIMES F1 (Sept. 23, 2008) (Dr. Anthony Zietman, Harvard Medical School: "Patients have to speak up"); cf Rosenthal (1974).

(Of course, clients can also encourage misbehavior, as Joan Lipin did Wisehart's.) Part of the reason why large firm lawyers rarely are disciplined is that their corporate clients keep them in line. The individual clients in my twelve cases found it difficult to do so, both because of their ignorance and vulnerability and because they were one-shot customers, lacking the economic clout of repeat-player corporate (and very wealthy individual) clients. Could this be changed? Medicare regulates quality as well as price, in part by refusing to pay for additional services needed to correct provider error.[106] Physicians are ahead of lawyers in advertising competitive prices.[107] Personal injury victims (like those of Kreitzer, Scapa and Brown, and Greene and Harney) could be collectivized through loss insurance, which would simultaneously make them whole and subrogate their (repeat-player) insurers to their claims.[108] Immigrants might join ethnic associations, which would retain lawyers (that actually is the origin of the earliest legal aid societies).[109] Unlike their nineteenth-century counterparts, however, many immigrants today are illegal (e.g., Muto's Chinese clients). And some of the clients in my twelve cases defy collectivization: sexual harassment victims (Lipin), trust beneficiaries (Hecht), taxpayers (Morgan), criminal accused (Lopez—except through organized crime), legal malpractice victims (Seward). Lawyers can be disciplined by third-party payers: franchise law firms, state legal aid, and legal expenses insurers. Hyatt Legal Services (a franchise operation) excludes lawyers with disciplinary complaints and requires members to carry $100,000 in malpractice insurance.[110] But there are very few disciplinary complaints against legal aid lawyers (despite many questions about their competence and zeal). And unlike clients in Germany (and England since the Courts and Legal Services Act 1999), few Americans have legal expenses insurance.[111]

Could we make the market work better by improving the information available to clients before they retain lawyers? The internet certainly facilitates this.[112]

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106. Kevin Sack, *Medicare Won't Pay for Medical Errors*, NEW YORK TIMES (Oct. 1, 2008). The American Hospital Association and the Joint Commission are considering which of a new set of infection control guidelines they will use in accrediting hospitals. Kevin Sack, *Infection Control Guidelines Issued*, NEW YORK TIMES A15 (Oct. 9, 2008).

107. Lisa Girion, *Doctors' list puts a price on care*, LOS ANGELES TIMES A1 (May 28, 2007) (HealthCare Partners Medical Group, California's largest private practice, serving more than 500,000, put the price for 58 common procedures on its website).

108. But since we do not even effectively require *liability* insurance, it in hard to imagine mandating that everyone, including the poor, must carry loss insurance. Still, universal health care would be a step in the right direction.

109. Abel (1985).

110. http://www.legalplans.com/attorneys.html. I am grateful to Prof. Perry Bechky, University of Connecticut Law School, for bringing this to my attention.

111. This traditionally was a fringe benefit negotiated by unions; but the proportion of workers who belong has fallen to 12 percent.

112. Abel (2006–07).

I am confident that fewer clients would have retained Kreitzer or Muto had they known about the lawyers' neglect, or Scapa and Brown had they known about their ambulance chasing. Furtzaig's firm immediately fired him in order to protect its reputation. Ljubica Callahan might have had second thoughts about Brashich (despite the ethnic connection) had she known how he and Cardozo had treated Babette Hecht. Morgan might not have turned to Byler had he known about his good friend's earlier fee disputes with clients. Sega would never have hired Crane had they known his propensity for deceit. The clients of Greene and Harney might have insisted that they comply with Section 6146, even if that meant losing those lawyers as a result. Collins and Hom might have steered clear of Brazil had they known of his prior conduct. But information has limits. Zagat's, Craigslist, and Yelp have succeeded because consumers believe that the experience of their fellows offers useful insights into quality (if professionals have their doubts).[113] There are increasingly sophisticated efforts to measure the quality of health care.[114] But any meaningful index must control for inputs. That has been a strong objection to the use of test scores to measure teacher effort and efficacy.[115] Controlling inputs is even more difficult in evaluating legal services.[116] Clients must want and be able to use the information; too much is as useless as too little. Hecht refused to acknowledge Cardozo's betrayal. Lopez sought Twitty's intercession with the prosecutor. Lipin urged Wisehart to keep and use the purloined papers. Seward could discharge Damer but could not stop him from defying Chiantelli's order—purportedly in her name. And lawyers like Wisehart, Damer, and Yagman court a reputation for (over)zealous advocacy. But several current efforts suggest these obstacles can be overcome.[117] Avvo rates 1.3

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113. Donald G. McNeil, Jr., *Eat and Tell,* New York Times D1 (Nov. 5, 2009); Steve Lohr, *The Crowd Is Wise (When It's Focused),* New York Times §3 p.4 (July 19, 2009).

114. Steve Sternberg and Jack Gillum, *"Double failure" at USA's hospitals,* USA Today (July 9, 2009); Centers for Medicare & Medicaid Services, New Ratings for America's Hospitals Now Available on Hospital Compare Web Site (July 9, 2009); www.hospitalcompare.hhhs.gov; Lisa Girion, *California hospitals graded on death rates,* Los Angeles Times (1.22.09); OSHPD Research Brief #1, *Mortality in California Hospitals, 2006* (Nov. 2008). For an argument that baseball statistics should be adapted to measure the performance of medical care providers, advanced by an odd trio, see Billy Beane, Newt Gingrich, and John Kerry, *How to Take American Health Care From Worst to First,* New York Times A31 (Oct. 24, 2008) (Beane is a former Major League player and currently general manager and minority owner of the Oakland Athletics). Paul O'Neill, Secretary of the Treasury from 2001 to 2002, advocates "a prompt, detailed and hard-headed study of every example of error, infection and other waste in five major medical centers." Paul O'Neill, *Health Care's Infectious Losses,* New York Times A19 (July 6, 2009).

115. Jennifer Medina, *Teachers to Be Measured Based on Students' Standardized Test Scores,* New York Times B3 (Oct. 2 2008).

116. Rosenthal (1976); Carlson (1976).

117. Ward (2010). But one disgruntled lawyer has sued Avvo; and the Florida Bar continues to prohibit client testimonials. *See also* Berenson (2001).

million lawyers, using publicly available information on years in practice, work history, professional recognition and prior discipline, as well as client reviews; its website receives 2 million visits a month. The Association of Corporate Counsel has posted 1,800 member evaluations of outside counsel. Martindale-Hubbell introduced client ratings in 2009.

Another reason why large firm lawyers are not disciplined is that their firms exert control.[118] (Of course, collectivities can foster or cover up misconduct as well as prevent it.[119]) Partners (liable for malpractice) would be unlikely to tolerate the behavior of Kreitzer, Muto, Brazil, or Twitty. Indeed, Furtzaig's firm promptly fired him. In his reply to my chapter, Muto praised the "ideal" "structure" of his non-lawyer job at the New York State Department of Human Rights.[120] Had Byler been a partner, rather than of counsel, he might have had to follow the firm's policies with respect to written retainers and escrowing client funds, especially after a fee dispute. But Cardozo and Brashich (while not partners) cooperated in overcharging Hecht; and Scapa and Brown collaborated in chasing ambulances. Both Greene and Harney were partners in highly respected firms. And if compelled to partner, I can imagine Wisehart, Damer, and Yagman seeking out other overzealous lawyers or compliant subordinates.

None of the proposals discussed in this chapter is a panacea. But the amount of lawyer misconduct might be reduced by all of them—encouraging more complaints by clients, lawyers, and judges; compensating inadequate professional service; mandating malpractice liability insurance; publicizing misconduct earlier and more widely; giving potential clients better information about the price and quality of legal services; limiting rules against solicitation to preventing fraud and overreaching; making lawyers fees transparent; involving third-party payers in controlling lawyer performance; and increasing the incentives for firms to do so. The problem is not knowing what to do. In April 1988, California State Bar Monitor Robert Fellmeth made the following recommendations.[121]

(1) Consortium on competence.
(2) Alcohol and substance abuse program.
(3) Malpractice insurance.
(4) Mandatory continuing education.
(5) Specialization/retesting.
(6) Client trust fund monitoring.
(7) Consumer trust fund.
(8) Written fee agreements.
(9) Client disclosure agreements.

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118. Richmond (2007–08); Chambliss (2006; 2009).
119. Regan (2004); Rostain (2006a); Alfieri (2006).
120. Abel (2008: 191).
121. Fellmeth (1988a: 61).

It is profoundly discouraging to see how little had been done to implement his suggestions in the succeeding twenty-one years. The problem is lack of political will. As Chapter 1 showed, the State Bar acts—reluctantly—only when journalists expose a scandal and the government threatens to seize regulatory power or not approve State Bar dues. The clients subject to lawyer abuse are difficult if not impossible to organize for the same reason that the market leaves them vulnerable: they are dispersed, and their problems with lawyers are infrequent. Politicians occasionally are attracted to lawyer-bashing as a populist strategy but rarely stick with the issue long enough to ensure that reforms are effected and implemented. Innovative entrepreneurs might compete to offer individual clients cheap, competent, ethical services if regulators stopped obstructing them.[122]

122. Seron (1996); Van Hoy 1997). *See* Clementi (2004).

TABLE 1 DISCIPLINE DURING THE STATE BAR'S FIRST TWO DECADES[1]

Year	1928	1929	1930	1931	1932	1933	1934	1935	1936	1937	1938
Investigations	1072	1531	960	750	490	394	444	626	247	160	287
NTSC	367	132	178	84	75	77	123	101	77	85	73
BoG dismissed	337	90	125	58	45	36	76	55	42	51	37
BoG private reproval	0	3	14	8	7	10	6	7	5	6	6
BoG public reproval	12	20	11	4	3	3	8	7	8	5	3
BoG recs suspension	7	7	15	10	13	17	20	19	14	11	12
BoG recs disbarment	11	12	13	4	7	11	13	13	8	12	15
SC dismissed	0	0	0	4	0	1	1	2	2	1	2
SC reproved	0	0	0	1	1	1	0	0	0	0	0
SC suspended	0	15	16	18	12	13	23	19	15	12	11
SC disbarred	0	14	8	5	3	8	9	9	14	10	5
Resignations	1	2	7	2	7	9	1	9	12	14	8

[1]Blaustein & Porter (1954: Table 23).

Year	1939	1942	1943	1944	1945	1946	1947	1948
Investigations	382	158	190	122	128	171	181	148
NTSC	86	37	51	27	26	30	48	19
BoG dismissed	54	7	26	12	7	21	33	10
BoG private reproval	7	2	6	1	4	3	0	1
BoG public reproval	5	4	2	3	5	2	5	1
BoG recs suspension	8	17	9	10	8	2	3	7
BoG recs disbarment	12	7	8	1	2	2	2	0
SC dismissed	1	1	0	1	1	1	0	1
SC reproved	0	0	0	1	0	0	0	0
SC suspended	11	12	10	9	8	5	4	7
SC disbarred	13	5	8	4	2	0	3	0
Resignations	6	6	4	2	3	0	0	2

TABLE 2 INTAKE[1]

Year	1977	1978	1979	1980	1981	1982	1983	1984	1985	
Complaints	5,238	5,321	5,875	6,357	6,946	7,779	8,094	8,329	7,981	
Year	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995
Inquiries		11,081	17,462	19,767	20,143	20,754	21,741	20,625	17,534	15,957
Complaints	8,574	7,542	4,376	5,267	5,980	6,447	8,181	7,247	6,642	6,119
Dismissals[2]		8,831	3,356	4,350	4,318	4,451	5,165	4,638	4,426	5,134
Statement of Case		465	1,273	1,747	1,484	1,420	1,319	1,200	1,671	993
Ratio of Dismissals to SoC		19	2.6	2.5	2.9	3.1	3.9	3.9	2.6	5.2

[1] 1984–86 from California Auditor General (1988: Table B-3); 1987–88 from Gallagher (1993: Tables 1 and 2); 1988–89 from State Bar of California (1990b: 23); later figures from Annual Reports on the State Bar of California Discipline System.
[2] From 2003: Inquiries closed.

	1996	1997	1998	1999	2000	2001	2002	2003	2004
Inquiries	15,327	15,164	8,040	8,405	10,846	11,138	11,784	11,947	12,383
Complaints	6,048	5,811	1,876	2,055	4,033	3,929	4,176	2,969	3,770
Dismissals	3,308	3,438	2,861	2,355				10,609	10,477

	2005	2006	2007	2008
Inquiries	11,620	11,647	11,739	11,664
Complaints	3,196	3,151	3,010	2,802
Dismissals	9,962	11,079	10,647	10,845

TABLE 3 COMPLAINT ALLEGATIONS[1]

Year	1988	1989	1990	1991	1992	1993	1994	1995	1996
Performance	5,404	5,964	5,404	5,477	6,073	6,438	6,795	6,198	4,577
	43%	39%	39%	40%	36%	35%	35%	35%	35%
Handling of funds	1,726	2,748	2,988	2,892	3,608	3,305	2,557	2,153	1,838
	14%	18%	21%	21%	21%	18%	13%	12%	14%
Duties to clients	2,255	2,893	2,021	1,910	2,440	3,744	3,428	3,481	2,110
	18%	19%	14%	14%	14%	20%	18%	20%	16%
Personal behavior	1,586	1,560	1,479	1,244	1,954	1,874	2,493	1,935	1,356
	13%	10%	11%	9%	12%	10%	13%	11%	10%
Interference with justice	675	967	778	858	1,268	1,213	1,847	1,327	987
	5%	6%	6%	6%	8%	7%	10%	7%	8%
Fees	685	806	699	550	784	865	1,440	1,439	1,082
	5%	5%	5%	4%	5%	5%	7%	8%	8%
Duties to State Bar	49	284	335	492	455	544	479	719	870
	0.4%	2%	2%	4%	3%	3%	2%	4%	7%
Professional employment	173	131	282	271	300	390	388	529	332
	1%	1%	2%	2%	2%	2%	2%	3%	3%
Total	12,553	15,353	13,986	13,694	16,882	18,373	19,427	17,781	13,152

[1]From Annual Reports on the State Bar of California Discipline System.

Year	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Performance	5,209	2,345	6,251	3,407	3,178	4,097	38%	35%	37%	34%	35%	34%
	38%	41%	34%	35%	34%	34%						
Handling of funds	1,626	763	2,781	1,205	1,155	1,559	8%	10%	11%	11%	12%	10%
	12%	13%	15%	12%	12%	13%						
Duties to clients	2,370	908	3,084	1,464	1,564	1,753	15%	16%	16%	15%	15%	15%
	17%	16%	17%	15%	17%	15%						
Personal behavior	1,290	557	1,845	996	1,062	1,529	14%	12%	10%	12%	10%	10%
	9%	10%	10%	10%	11%	13%						
Interference with justice	1,047	369	1,421	995	962	1,202	12%	9%	9%	11%	10%	11%
	8%	6%	8%	10%	10%	10%						
Fees	1,172	541	1,690	918	940	1,230	11%	12%	11%	11%	13%	14%
	9%	9%	9%	9%	10%	10%						
Duties to State Bar	832	242	1,185	575	438	511	0%	4%	5%	5%	4%	5%
	6%	4%	6%	6%	5%	4%						
Professional employment	213	57	202	108	85	170	1%	1%	1%	1%	1%	1%
	2%	1%	1%	1%	1%	1%						
Total	13,759	5,782	18,459	9,668	9,384	12,051						

TABLE 4 OTC DISPOSITIONS[1]

Year	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
Admonition	69	118	54	60	119	89	42	58	2	1	
Directional letter							156	916	607	555	601
Agreement in lieu of discipline		2	11	50	125	94	117	162	110	103	138
Resignation with charges pending	50	68	81	92	96	108	103	84	101	93	115
Stipulated discipline	47	48	41	67	122	110	115	162	152	92	99
Warning letter			353	550	620	546	492	658	883	650	915
Notice to show cause	241	266	316	376	603	444	444	471	512	522	584
Resource letter											

Year	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Admonition											
Directional letter	206	6	0	0	0	172	0	0	0	0	0
Agreement in lieu of discipline	82	19	35	76	39	36	42	39	25	28	32
Resignation with charges pending	51	68	93	102	88	86	82	63	84	93	63
Stipulated discipline	44	36	221	137	146	154	217	168	136	99	115
Warning letter	423	21	0	0	69	1	331	286	232	131	247
Notice to show cause	248	174	383	309	402	298	405	347	369	319	369
Resource letter		413	401	117	98	19	16	30	23	9	35

[1] From Annual Reports on the State Bar of California Discipline System

TABLE 5 STATE BAR COURT PROCEEDINGS[1]

Year	1984	1985	1986	1987	1988	1989	1990	1991	1992
Disciplinary cases filed				527	622	707	691	1,182	938
Dismissal	31	56	37	58	36	38	72	111	93
Private reproval	48	59	19	23	20	28	41	80	100
Public reproval	23	33	35	29	31	46	40	34	71
Suspension	95	82	86	123	133	221		64	30
Disbarment	18	25	38	56	69	89	9	47	34
Resignation							26	89	157
Year	1993	1994	1995	1996	1997	1998	1999	2000	2001
Disciplinary cases filed	904	1,007	977	901	956	432	468	762	745
Dismissal	143	155	120	153	139	120	83	45	42
Private reproval	119	122	97	99	119	79	31	74	122
Public reproval	71	56	67	55	66	33	21	44	50
Suspension	52	52	53	45	54	34	44	50	378
Disbarment	40	36	40	26	26	1	9	0	59
Resignation	135	122	118	85	130	54	55	67	113

[1]1984–89 from Gallagher (Table 4) and State Bar of California (1990b: 28, 33); later figures from Annual Reports on the State Bar of California Discipline System. The figures for 1990–2000 indicate only interim suspensions; I have excluded those for failure to pass the PRE. Starting in 2005 there is a single statistic for all reprovals. Changes in categories make some numbers suspect.

Year	2002	2003	2004	2005	2006	2007	2008
Disciplinary cases filed	772	664	750	633	639	561	610
Dismissal	32	41	55	45	58	34	37
Private reproval	62	69	106	144	96	95	67
Public reproval	44	61	65				
Suspension	306	258	287	261	250	170	245
Disbarment	50	71	67	58	71	66	63
Resignation	77	80					