Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock

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There has been no shortage of efforts to improve the ethical conduct of U.S. lawyers. Ethics rules are continuously revised to better guide lawyers’ conduct. Bar applicants are required to pass the Multistate Professional Responsibility Examination in virtually every jurisdiction. 1 State continuing legal education requirements invariably include an ethics component. 2 Federal Rule of Civil Procedure 11, Sarbanes-Oxley and other legislation have been enacted to make lawyers more accountable for their conduct. Insurers have become more involved in risk management to help lawyers avoid ethical problems. 3 Large law firms have hired full-time ethics counsel to help them resolve ethical questions. 4 Conflicts checking and calendar management software are used even in the smallest firms to help avoid ethical lapses. 5 And the list goes on.

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Intuitively, it would seem that some of these efforts must be having some positive effects. As an empirical question, however, it is unclear whether any of these efforts significantly improve lawyers’ conduct. In 2007, almost 120,000 discipline complaints were made against the more than 1.4 million lawyers with active licenses in the U.S.\textsuperscript{6} Since complaints are made for both legitimate and illegitimate reasons—and much lawyer misconduct is underreported or undetected—this number provides little meaningful information about how much lawyer misconduct actually occurs.\textsuperscript{7} Likewise, because disciplinary agencies will not pursue complaints about certain types of misconduct,\textsuperscript{8} and discipline often is private or not imposed at all,\textsuperscript{9} discipline statistics convey only limited information about the nature and extent of lawyer misconduct.

In his new book, \textit{Lawyers in the Dock: Learning from Attorney Disciplinary Proceedings}, Richard Abel looks at lawyer deviance from a different perspective.\textsuperscript{10} He directly examines the records of New York disciplinary proceedings, which “offer an underutilized window on lawyer misconduct.”\textsuperscript{11} He uses six case studies (involving seven lawyers) to explore the social, psychological and structural conditions of lawyer deviance. By carefully examining these discipline matters, Abel reveals the circumstances and motivations that led these lawyers into trouble and the manner in which they conducted themselves once they were caught. He draws heavily on thousands of pages of transcripts, written submissions, and disciplinary opinions, as well as interviews with some of the disciplined lawyers.

Reading the record in some of the cases is like viewing an impending train wreck—obvious to the observer, horrible to watch, but too mesmerizing to avert the eyes. The cases he describes admittedly are not representative of the typical case on the disciplinary docket: Abel deliberately chose “extreme cases” which

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\item \textsuperscript{6} ABA Center for Professional Responsibility, 2007 \textit{Survey on Lawyer Discipline Systems}, Chart 1 (2008), available at http://www.abanet.org/cpr/discipline/sold (last visited May 28, 2009) [hereinafter SOLD]. This figure underreports the number of complaints actually received, as the chart reflects that many complaints to state discipline agencies were ultimately handled by consumer assistance programs and were excluded from the number of reported complaints.
\item \textsuperscript{7} Leslie C. Levin, \textit{The Emperor’s Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions}, 48 \textit{Am. U. L. Rev.} 1, 7-8 n.29 (1998). It is also not possible to discern this information from malpractice claims. Data collected by the National Malpractice Data Center indicate that legal malpractice claims are on the rise. Martha Neil, \textit{As Real Estate Market Sank, Legal Malpractice Claims Rose}, A.B.A. J., Sept. 30, 2008, available at http://abanet.org/news/as_real_estate_market_sank_legal_malpractice_claims_rose (last visited May 28, 2009). The data only reflect the claims reported by insurers and do not reflect the claims against uninsured lawyers. Susan Saab Fortney & Vincent R. Johnson, \textit{Legal Malpractice Law: Problems and Prevention} 11 (2008). The data also do not indicate the number of claims that were actually meritorious.
\item \textsuperscript{8} Leslie C. Levin, \textit{The Case for Less Secrecy in Lawyer Discipline}, 20 \textit{Geo. J. Legal Ethics} 1, 18 (2007).
\item \textsuperscript{9} Levin, supra note 7, at 8.
\item \textsuperscript{10} \textit{Richard L. Abel, Lawyers in the Dock: Learning from Attorney Disciplinary Proceedings} (2008).
\item \textsuperscript{11} \textit{Id.} at 53. The cases were all decided in the First Department, which includes Manhattan and the Bronx.
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were more dramatic. Such cases are arguably “more revealing of motivation,” but this choice limits the ability to generalize from the case studies. Abel recognizes that many more case studies would be needed “before drawing even a tentative map” of the terrain of lawyer misconduct. Nevertheless, as he notes, in several respects the lawyers he studies are very much like the average attorney upon whom discipline is imposed.

The similarities between the lawyers Abel studies and the average disciplined lawyer are that Abel’s attorneys are male, white and mostly middle-aged. The lawyers he studies, like most disciplined lawyers, predominantly practice in solo and small firms and represent individuals or small businesses rather than large organizations. Lawyers who are disciplined often report serious stress in their lives due to personal or financial problems and in half of Abel’s cases, the attorneys suffered from serious physical illness, family problems, or significant financial concerns. Some of the lawyers Abel describes, like other disciplined lawyers, had previously been subject to disciplinary sanctions.

There are, however, some differences between Abel’s cases and the typical discipline matter. Unlike most discipline cases, the cases Abel describes are not simply instances of neglect of client matters or failure to communicate, which are the most common reasons for complaints. Although three of the case studies involve neglect of client matters, the lawyers also engaged in other serious malfeasance. Unlike most discipline cases where sanctions are imposed, which typically result in private admonitions or public reprimands, the lawyers Abel describes received more serious sanctions. Unlike the typical discipline case, most of the disciplinary matters that Abel studies were prolonged, in large part because the lawyers would not—or could not—acknowledge wrongdoing.

Abel provides a rich and textured account of the lives of these lawyers, how they got into trouble, and how they dealt with their situations once others learned what the lawyers had done. Three of the lawyers neglected client matters. David Kreitzer had a volume personal injury practice in which he not only neglected cases, but also engaged in a fraudulent “ten percenter” scheme in which he paid kickbacks to insurance adjusters in order to expedite payment of claims. Joseph Muto neglected immigration cases which had been prepared by “travel agencies”

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12. Id. at 57.
13. Id.
14. Id. at 55.
15. Id. at 54-56.
17. Recidivism among lawyers who receive discipline sanctions is not uncommon, but the actual rate of recidivism is not known. Levin, supra note 8, at 2-3. Among the lawyers Abel studies, one had received four prior admonitions, one had six prior admonitions, and one had received an admonition and had previously been suspended from practice. Abel, supra note 10, at 91, 161-62, 264-65.
18. Abel, supra note 10, at 57.
19. See S O L D, supra note 6, at Chart II.
20. Abel, supra note 10, at 71 passim.
that were engaged in the unauthorized practice of law. That Lawrence Furtzaig neglected some cases and then lied to clients and fabricated documents to cover up his neglect.

Two other matters Abel studies involved fee-related misconduct. In one of those cases, Phillip Byler overreached for his fee in a tax matter and then refused to escrow the contested amount when a dispute arose. The final matter involved overzealous advocacy by Arthur Wiseheart in his handling of privileged documents taken by his client from opposing counsel’s conference table in a contentious sexual harassment case.

By studying individual lawyers engaged in a range of misconduct, Abel has taken on a formidable task. What lessons, if any, can fairly be drawn from these extreme cases? Abel looks to sociological studies of deviance in other contexts to make sense of the lawyer misconduct he chronicles in his case studies. He finds that like other deviants, “no distinctive biologies or biographies destined them for punishment.” The closest analogy he finds is in studies of white collar criminals, who often betray one-shot customers and clients. He further notes that some lawyers deliberately violate ethical rules in the pursuit of profit, but “most drift into such conduct unselfconsciously” and “are genuinely surprised (and outraged) when they are caught.” Like white collar criminals, these disciplined lawyers often contest culpability, blame their victims, and insist no one was harmed.

Abel also recognizes that deviance has powerful psychological motivations. In most of his cases, the lawyers do not see the problems with their misconduct at the time that they are engaging in it and are unable to acknowledge that what they did was ethically problematic even once they find themselves in discipline proceedings. Instead, they engage in “profound self-deception.” It is tempting to ascribe their behavior to personality disorders that make Abel’s lawyers different from the average attorney. And indeed, some of the research concerning lawyers’ personality traits suggests that personality characteristics may account for some of the extreme behaviors that Abel describes. But it appears that many

21. Id. at 105 passim.
22. Id. at 193 passim.
23. Id. at 289 passim.
24. Id. at 389 passim. For ease of reference, a summary of these cases appears in the Appendix. Due to its factual complexity, the details of the sixth case study will not be discussed in this essay.
25. ABEL, supra note 10, at 52.
26. Id. at 52-53.
27. Id. at 53.
28. Id. at 512.
29. Id. at 494. In fact, it may be more accurate to say that they do see the problems with their conduct, but that they avoid acknowledging those problems—even to themselves.
30. As a group, lawyers tend to be more aggressive, competitive and achievement-oriented than the average individual. See S Usan Swaim Daicoff, Lawyer, Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses 26-28 (2004). They may also have less resilience or ego strength than the general population, making them more defensive and hypersensitive to criticism. Larry R. Richard, Herding Cats: The
of the behaviors of his lawyers can be explained by social and psychological processes that affect the decisionmaking and conduct of most human beings.

Abel’s case studies present an extraordinarily valuable opportunity to explore a host of important questions. He frames his inquiry broadly in terms of how and why lawyers betray trust.31 His case studies also permit consideration of more specific questions (some of which he directly addresses). For example, where and why does lawyer misconduct begin? How do lawyers decide how to proceed when a novel ethical problem presents itself in practice? What do these case studies suggest about the value of consulting with other colleagues? Why do these lawyers persist in ethically problematic conduct even in the face of clear evidence that they should not? And perhaps hardest of all—what steps, if any, can be taken to prevent, or at least reduce, the types of lawyer misconduct that Abel so vividly describes?

The case studies also permit consideration of the impact of various psychological processes on lawyers’ ethical decisionmaking and behavior. Psychologists have found that moral behavior is at times disconnected from moral reasoning.32 Situationists argue that when we account for the behavior of individuals, we underestimate the impact of situational or environmental factors and overestimate the importance of “dispositional” factors.33 In addition, cognitive psychologists have shown how psychological biases can unconsciously shape ethical decisionmaking.34 Indeed, much of what I am calling “ethical decisionmaking” is non-conscious.35 Social intuitionists argue that people make many
ethically relevant decisions automatically; they intuitively form a judgment, and then search for justifications for their decisions. If ethical decisionmaking is often a non-conscious process, this has important implications for understanding lawyer misconduct and for attempting to address it.

Rick Abel refers to several psychological concepts in his book to explain the behavior of the lawyers he studies, although he focuses primarily on the sociological literature on deviance to frame his inquiry about why lawyers betray trust. He finds that the behavior of these lawyers can be explained, at least in part, by “greed or need.” He also notes that the most striking trait shared by these lawyers “was their conviction that they were above the law.” Nevertheless, he is cautiously optimistic about the possibility of restoring the public’s trust in lawyers. He considers a number of ways to reduce the opportunities and incentives for lawyers to betray trust.

Lawyers in the Dock provides some wonderful—and painful—insights into lawyer deviance. In this essay, I will consider what additional light some of the psychological literature might shed on Abel’s findings. More specifically, I will consider how social and psychological processes may help to explain the trajectory of lawyer misconduct and some of the specific behaviors that Abel describes. I do so recognizing that legal academics who seek to draw upon the psychological research must proceed with care. Some psychologists have justifiably criticized “secondary users of the psychological research” who would “oversimplify and generalize” those findings. Despite my best efforts, I will no doubt fall into that category. Nevertheless, the psychological literature requires our attention if we wish to understand—and effectively address—lawyer deviance.


37. A BEL, supra note 10, at 25-52. Abel refers, for example, to ego, transference, repression, paranoia and neutralization and cites to some of the psychological literature. Id. at 32-33, 52, 205, 281, 480, 493. For the most part, however, he does not devote extended discussion to the psychological research.

38. Id. at 492.
39. Id. at 495.
40. Id. at 491.
41. Id. at 512-28.
43. I do not mean to suggest that I am the first to undertake this effort. Legal scholars are increasingly turning their attention to the impact of psychological processes on lawyers’ ethical decisionmaking. See, e.g., Donald C. Langevoort, The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases and Organizational Behavior, 63 BROOK. L. REV. 629 (1997); Richard W. Painter, Lawyers’ Rules, Auditors’ Rules and the Psychology of Concealment, 84 MINN. L. REV. 1399 (2000); Andrew M. Perlman, Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology, 36 HOFSTRA L. REV. 451 (2007); Milton C. Regan, Jr., Moral Intuitions and Organizational Culture, 51 ST. LOUIS U. L.J. 941 (2007); Tanina Rostain, Waking Up from
In *Lawyers in the Dock*, various social and psychological processes propel the lawyers down the path to deviance. Abel finds that “[h]abit is their tragic flaw, not inexperience.”44 In Part I of the essay, I will consider how these lawyers came to form their “habits” and the role the legal community plays in helping them do so. I will use Abel’s insights and attempt to build upon them to identify how and where some lawyer deviance begins. In Part II, I will look at research concerning certain psychological biases and other processes that may have affected the lawyers in the case studies. I will first consider how certain self-serving biases may contribute to neglect of client matters. I will then look at how psychological processes may affect the decisionmaking of experienced lawyers when they confront a novel problem in their practices. I will conclude with a discussion of the power of commitment to a course of conduct and the role of self-deception, both of which seemingly cause Abel’s lawyers to persist in deviant behavior. In Part III, I will use the case studies to consider the role that the discipline process may play in perpetuating self-justifying behaviors. Abel identifies this possibility in his book and I will draw upon psychological research to develop his insight a bit further. Finally, in Part IV of the essay, I will consider, in light of the social and psychological processes at play, some strategies to address lawyer misconduct. I will discuss some of Abel’s suggestions and a few thoughts of my own.

### I. LEARNING NORMS FROM THE COMMUNITY

The attorneys described in *Lawyers in the Dock* demonstrate many of the patterns of socialization and decisionmaking that scholars have reported when studying lawyers in a variety of practice contexts. As Abel notes, Jerome Carlin interviewed New York City lawyers in the 1960’s and concluded that office settings, colleagues, and clients have a significant effect upon their views of ethical norms.45 Carlin found that lawyers who worked in offices with ethically permissive climates had the highest rate of violations and that the longer a lawyer was a member of an established office, the more the lawyer’s behavior conformed to the ethical climate of the office.46 Lawyers who represented individuals and small businesses had more opportunities to exploit clients and more temptations to violate bar norms than other lawyers.47 Since then, studies repeatedly have shown that office colleagues, other attorneys, and clients affect lawyers’ ethical

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44. ABEL, *supra* note 10, at 496.
46. Id. at 98.
47. Id. at 66-73.
views (and in some cases, their conduct) in a variety of other practice settings.\textsuperscript{48}

This section will review some of the research describing how lawyers learn bar norms from the lawyers around them, as well as lessons from social psychology as to why this occurs. Abel’s case studies are then used to consider briefly how the social world within which the lawyers found themselves seems to have shaped their understanding of norms—and led some of them into deviant behavior.

A. LAWYER SOCIALIZATION TO PRACTICE NORMS

Lawyers learn from other lawyers. They learn through direct instruction, conversations they overhear, and from observation of the lawyers around them.\textsuperscript{49} Moreover, the communities of practice within which they operate—\emph{i.e.}, the groups of lawyers with whom they interact and to whom they compare themselves—shape their understanding of practice norms.\textsuperscript{50} In their study of divorce lawyers, Lynn Mather, Craig McEwen, and Richard Maiman found that the communities of practice within which these lawyers worked encouraged the norm of the reasonable lawyer.\textsuperscript{51} The norm of “reasonableness” also permeated the local professional community of legal aid lawyers when dealing with judges, opposing counsel, and clients.\textsuperscript{52} Cooperativeness, courtesy, and trust were hallmarks of the country lawyers that Donald Landon studied and the community of lawyers imposed informal sanctions against those who did not comply with those norms.\textsuperscript{53} In the large law firm setting, the community may be a single firm department or practice group, from which younger lawyers learn the norms of aggressive discovery practice.\textsuperscript{54}

Social psychology helps to explain why this occurs. Ralph Hertwig notes that “[s]ocial learning—of which imitation is an example—allows individuals to learn about their environment without engaging in potentially hazardous learn-
ing trials or wasting large amounts of time."\(^{55}\) Depending upon the circumstances, the learned behavior may be that exhibited by the majority, by the most successful individuals, or by the nearest individual. When this behavior and legal rules diverge, observing and copying behavior will result in rule violation.\(^{56}\)

But imitation is not the only social process at work. The psychological pressure on individuals to conform to the behavior of a group can be powerful. A group is more effective at inducing conformity if (1) it consists of experts; (2) the members are important to the individual; or (3) the members are comparable to the actor in some way.\(^{57}\) It is not difficult to see how experienced lawyers transmit their norms and induce compliance with them, especially when a lawyer is new to practice and relatively inexperienced.

Indeed, lessons learned from the community when the individual is a relative newcomer may have an especially strong impact. Abel draws on Jason Ditton’s *Part-Time Crime: An Ethnography of Fiddling and Pilferage*,\(^{58}\) which describes how the community within which bread salesmen work conveys and inculcates the acceptability of the norm of “fiddling” (stealing from customers) during early training.\(^{59}\) As Abel notes, “new salesmen were quickly and inescapably socialized into fiddling” by supervisors who “offer frank and open descriptions of the fiddle.”\(^{60}\) Although they are initially surprised by their willingness to engage in the fiddle, after doing so for awhile, their position “hardens.”\(^{61}\) Later on, bread salesmen adopt guilt reduction techniques to account to themselves for their behavior, including seeing themselves as victims.\(^{62}\)

Not surprisingly, the early experiences of lawyers in practice can also have a powerful impact on their ethical decisionmaking. Mentors and other colleagues encountered early in practice convey lessons about practice norms that can continue to affect lawyers even after the relationship has ended. The ethical decisions made early in practice may not be re-examined.\(^{63}\) The long-lasting impact of these early experiences—or the “hardening” to use Ditton’s term—can be explained, in part, by psychological processes that are further described in Part II below.

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56. *Id.*
60. *Id.* at 46-47 (quoting Ditton, *supra* note 58, at 36).
61. Ditton, *supra* note 58, at 34.
B. THE IMPACT OF COMMUNITY ON ABEL’S LAWYERS

The impact of early experiences in practice can be seen in Abel’s case studies. For example, Lawrence Furtzaig began law practice in a real estate firm where he quickly learned that he had to answer his own questions and solve his own problems. His direct supervisor was not “easy to ask for either input or additional help” and “[t]here was no one else to ask for help.”64 His firm was a place where “[w]ords were few and far between. Consequences were large.”65 It was also a “pressurized place” where Furtzaig billed between 2,200 and 2,400 hours per year. When Furtzaig encountered a difficult problem with ethical implications, six years after bar admission and while he was a non-equity partner, he did not seek advice from more seasoned lawyers. Furtzaig’s client, a landlord, was involved in a rent strike in which the tenants’ claims were meritorious, but one tenant was demanding a remodeled kitchen before agreeing to pay rent arrears. The landlord resisted the request because of fear that the remodeling would reveal lead paint contamination in the apartment.66 Furtzaig began to avoid working on the matter.67 He failed to restore two of the cases to the trial calendar after tenants failed to pay rent arrears, notwithstanding their agreement to do so. Furtzaig may have been concerned that if he restored the cases to the calendar, he could not assert at trial that the apartments were in good condition without committing fraud. He did not discuss this ethical question or his neglect with his client or his colleagues. He believed his supervisor “would just say deal with it.”68 Consequently, he later admitted, “I lied and I paid the money [to the client] myself,” a total of $60,000.69 The pattern of not asking for help, neglecting cases, and then lying to clients or courts to cover up his neglect was repeated in ten to fifteen other matters over a ten-year period before he was caught and suspended from practice.70

Joseph Muto learned from the people with whom he first worked when he moved to New York City that high volume practices and work with non-lawyer “travel agents” was an accepted norm (among some lawyers) in the immigration field.71 Travel agencies in Chinatown often file immigration papers and perform other legal services for undocumented immigrants and then hire lawyers—who had had no previous contact with their immigrant “clients”—to appear in court.72 Muto’s first employer in the immigration field worked with travel agencies, and

64. Abel, supra note 10, at 194.
65. Id.
66. Id. at 195.
67. Id. at 201.
68. Id. at 195.
69. Id.
70. In re Furtzaig, 762 N.Y.S.2d 335 (1st Dept. 2003).
71. Muto had unsuccessfully practiced other types of law in upstate New York before moving to New York City. Abel, supra note 10, at 160-61.
72. Id. at 105-06, 109-10, 113, 178-79.
when he left that firm, he continued to work with travel agencies, as he had learned to do from office colleagues.\textsuperscript{73} This behavior is consistent with the research showing that the attitudes and behaviors of peers in the workplace affect an individual's ethical behavior and that the frequency and intensity of interactions with peers can make their influence stronger.\textsuperscript{74}

David Kreitzer’s story reveals another instance in which a disciplined lawyer learned practice norms from other lawyers that did not conform with substantive law or ethical rules. Kreitzer learned from another lawyer with whom he had dealings about the ten percent scheme, in which personal injury lawyers paid middlemen and insurance adjusters a kick back to expedite settlement of claims.\textsuperscript{75} As he explained, “In hindsight, my head was in the ground. It was an improper thing to do. But at the time other attorneys [were] doing it. I did not believe . . . that there was anything wrong—other than maybe some ethical violations.”\textsuperscript{76} In essence, Kreitzer permitted the norms of the lawyers around him to shape—or at least help justify—his view of permissible conduct.

These three accounts suggest how and when some lawyer deviance begins. They do not, however, explain why some lawyers engage in deviant behavior and why others do not. For instance, in Muto’s case, Abel describes another immigration lawyer, Jan Allen Reiner, who testified for disciplinary counsel at Muto’s hearing, about conducting a different sort of practice near Chinatown that did not rely on travel agencies or a high volume business.\textsuperscript{77} This may be because Reiner started out in a different type of immigration practice than Muto and learned different practice norms or because his involvement in an immigration bar association affected his views of acceptable practices.\textsuperscript{78} It is also possible that personality differences account for some differences in behavior. For example, conscientiousness is one of the “big five” dimensions of personality,\textsuperscript{79} and Muto’s neglect of client matters may be due, in part, to his personality. Abel’s case studies suggest, however, that experiences in practice with other attorneys can also influence the conduct of some lawyers long after they first occur.

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\item \textsuperscript{73} Id. at 120-21, 163, 179-80.
\item \textsuperscript{74} Treviño et al., supra note 32, at 966.
\item \textsuperscript{75} Abel, supra note 10, at 92-93. Twenty-one lawyers, including Kreitzer, were ultimately charged with this conduct, which allegedly involved $19 million in insurance payments.
\item \textsuperscript{76} Id. at 93. Kreitzer’s comment suggests that he views “ethical violations” as rule violations. This is a common usage of the term “ethical” by lawyers. \textit{See} Levin, supra note 48, at 311 n.5.
\item \textsuperscript{77} Id. at 93. Id. at 108-09, 177-78.
\item \textsuperscript{78} Abel notes that Reiner belongs to an immigration bar association. Id. at 178. That bar association, which is known as the American Immigration Lawyers’ Association (“AILA”), serves an educative and socializing function for its members. \textit{See} Levin, supra note 49, at 430. Reiner started out in immigration practice with his father, who was a former president of AILA, and he attributes the care that he demonstrates in practice to his detail-oriented father and to his administrative law professor, who taught him the importance of creating the strongest possible record at trial. Telephone Interview with Jan Allen Reiner, solo practitioner, in New York, NY (Feb. 9, 2009).
\end{itemize}
II. PSYCHOLOGICAL BIASES, NOVEL QUESTIONS, AND THE POWER OF COMMITMENT

Thus far, the discussion of ethical decisionmaking has focused in broad strokes on the legal community’s impact on the conduct of lawyers. Psychologists are also interested in internal decisionmaking processes. They have attempted to break down the decisionmaking process into component parts in order to better understand it. Psychologists often rely on a four-part framework which consists of moral awareness, moral judgment, moral motivation (to act), and moral behavior. They disagree about the content and timing of the first two parts—and their relationship to the third—and there is increasing uncertainty about whether the process is well-ordered. Indeed, some psychologists argue that moral reasoning is used to justify behavior after it occurs.

The research also suggests that various psychological processes that help to maintain self-esteem play an important role in lawyers’ ethical decisionmaking and their professional misconduct. Indeed, much of the conduct Abel uncovers in his research can be explained by these processes. After describing some of these psychological processes, I will use Abel’s case studies to consider how they may lead to the neglect of client matters which, as previously mentioned, is the most common reason for discipline complaints. The case studies also provide an opportunity to consider how these psychological biases may operate when experienced lawyers confront a novel question in practice. I will then draw on some of the psychological research to identify the processes that cause these decisions to “harden” once commitment to a course of action occurs.

A. PSYCHOLOGICAL BIASES AND LAWYER MISCONDUCT

Many cognitive and social psychologists now believe that human reasoning is routinely reliant on heuristics and biases. A heuristic is a strategy that people use when making decisions with limited time and information. It is a simplifying strategy or rule of thumb used to help them cope with a complex environment. In certain situations, heuristics lead to systematic biases that deviate from the “correct” answer. The terms “heuristic” and “bias” are often

81. See supra note 35.
82. See supra note 36 and accompanying text; see also Regan, supra note 43, at 953.
83. See supra note 18 and accompanying text.
84. Thomas Gilovich & Dale Griffin, Introduction—Heuristics and Biases: Then and Now, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 1, 6-7 (Gilovich et al. eds., 2002).
86. See MAX H. BAZERMAN & DON A. MOORE, JUDGMENT IN MANAGERIAL DECISION MAKING 6 (8th ed. 2009).
used interchangeably although the former describes a *process* of thinking and the latter is an *outcome* that reflects a systematic error in judgment. \(^8\)

Many psychologists also believe that the relatively effortless, reflexive, and intuitive mental processes that are embodied in heuristics and biases are one part of “dual process” or “two systems” models of cognition. The first system is intuitive, quick, and associative. The second system involves intentional mental processes that are more deliberate and taxing. \(^9\) Intuition can be overridden by the second mode of thinking in the performance of unfamiliar tasks, the processing of abstract concepts, and the deliberate application of rules. \(^9\) For example, a lawyer who is aware that she is confronting an ethical question might engage in the more deliberate second mode of thinking to resolve it. Complex cognitive operations that are part of system two reasoning migrate to system one reasoning as proficiency and skill are acquired. \(^9\)

How does this relate to ethical decisionmaking and behavior? Psychologists now believe that conscious deliberation plays a relatively minor role in shaping behavior \(^9\) and that much of what we might call ethical decisionmaking is non-conscious. \(^9\) Even if the individual is intentionally making a decision, he is often not cognizant that an ethical issue is presented. \(^4\) There are a variety of reasons why this may occur, especially in the work place. Certain decisions may not be viewed in “ethical” terms when they are made, but rather as a business decision. \(^9\) Incrementalism—*i.e.*, the tendency to take small steps that eventually cross ethical lines—may cause individuals to cross those lines without consciously realizing it. \(^9\) Routinization of a practice removes discrete “decision points that might trigger reflective thought[s].” \(^9\) Once a decision has been made—regardless of whether it was conscious or non-conscious—people may use moral schemas or “scripts” to help them organize their thinking and determine how to address a similar issue in the future, without any further conscious

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90. Kahneman & Frederick, supra note 89, at 50.
91. Id. at 51.
92. See Regan, supra note 43, at 943 (citing John A. Bargh & Tanya L. Chartrand, *The Unbearable Automaticity of Being, 54 AM. PSYCHOLOGIST* 462 (1999)).
93. See supra notes 34-35 and accompanying text.
94. See Regan, supra note 43, at 949, 953; Treviño et al., supra note 32, at 961-62.
95. See Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior, 17 SOC. JUST. RES. 223 (2004). This is consistent with my own findings when I interviewed solo and small firm lawyers that they often did not think of the ethical issues they encountered in those terms. Levin, supra note 48, at 335-36.
decisionmaking about how to proceed. These schemas or scripts may be activated in work settings and “depress the triggering of moral reasoning processes.”

To complicate matters, even when people are consciously engaged in decisionmaking, they are not objective information processors. The ego has been compared to a totalitarian state “in which unflattering or undesirable facts are suppressed in the interest of self-enhancement” and people write their “own history by altering [their] memories to make them consistent with these self-flattering beliefs.” This occurs because people need to see themselves as good and reasonable, and subconsciously distort evidence to bolster or maintain a positive self-image. The maintenance and enhancement of self-esteem has been described as “a fundamental human impulse.” Enhanced self-esteem has positive functions, which include increasing the individual’s motivation to “undertake projects and persevere in...his goals.” The desire to enhance self-esteem helps explain the evidence “that people tend to recall their successes more than their failures and have self-serving...recollections...of their past performances.” Indeed, it helps to explain a host of biases that skew perceptions when people look at themselves and the outside world.

Overoptimism and overconfidence are two such self-serving biases. For example, it has been repeatedly demonstrated that people are unrealistically

98. Jerome L. Singer & Peter Salovey, Organized Knowledge and Personality: Person Schemas, Self Schemas, Prototypes, and Scripts, in PERSON SCHEMAS AND MALADAPTIVE INTERPERSONAL PATTERNS 35 (Mardi J. Horowitz ed., 1991); see also Treviño & Weaver, supra note 35, at 160-61. A schema is a general knowledge structure that permits an individual to “[i]dentify stimuli quickly, cluster them into manageable units, fill in information and select a strategy in order to solve a problem or reach a goal.” Singer & Salovey, supra at 35. A script is a type of schema that can involve a sequence of events in well-known situations. Id. at 40; Richard Nisbett & Lee Ross, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 34 (1980).

99. Treviño et al., supra note 32, at 956.

100. Loewenstein, supra note 96, at 221.


103. Benabou & Tirole, supra note 102, at 871; see also C. R. Snyder, Collaborative Companions: The Relationship of Self-Deception and Excuse Making, in SELF-DECEPTION AND SELF-UNDERSTANDING: NEW ESSAYS IN PHILOSOPHY AND PSYCHOLOGY 36 (Michael W. Martin ed. 1985).

104. See Bazerman & Moore, supra note 86, at 90, 93; Benabou & Tirole, supra note 102, at 977.

105. Benabou & Tirole, supra note 102, at 874, 885.

optimistic about their own futures. As Max Bazerman notes, “we persist in believing that we can accomplish more in a day than is humanly possible, and we seem immune to the continual feedback that the world provides on our limitations.” Overoptimism causes people to believe that they can control uncontrollable events and to overestimate the extent to which their actions can guarantee a certain outcome.

People are also more confident in their judgments than is warranted by objective facts. Overconfidence has been found in a variety of experts, including lawyers, and especially where the issues were personally relevant. The more difficult the prediction, the more likely people are to feel overconfident about their predictions. Overconfidence may cause people to think they are making good choices and do not need to reconsider how to approach a decision they have previously made. This is significant because confidence is thought to control action.

Overconfidence and overoptimism may also account for what has been described as the planning fallacy, which is the tendency for people to be overoptimistic about when a project will be completed. The planning fallacy occurs because people rely on their best-case plans for a project and disregard past experience. For example, students will confidently believe that they will complete a current assignment well before the due date even when their past practice has been to finish assignments later than they expected. When people plan, they look at the specific tasks that must be completed and possible factors in the future that may interfere with the plan, but they do not consider all the

108. BAZERMAN, supra note 107, at 66.
109. Id. at 67; Benabou & Tirole, supra note 102, at 874.
111. Willem A. Wagenaar & Gideon B. Keren, Does the Expert Know? The Reliability of Predictions and Confidence Ratings of Experts, in INTELLIGENT DECISION SUPPORT IN PROCESS ENVIRONMENTS 87, 100-01 (Erik Hollnagel et al. eds. 1986); see Derek J. Koehler et al., The Calibration of Expert Judgment: Heuristics and Biases Beyond the Laboratory, in HUMAN RATIONALITY: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, supra note 84, at 706.
116. Id. at 252.
scenarios that may unfold or their own past history performing similar tasks. 117 Not surprisingly, optimism is higher when the deadline for completion is more distant in time. 118

These cognitive biases may have affected the judgment of Furtzaig, Muto, and possibly Kreitzer, who all neglected client matters. For example, Muto had a high volume immigration practice, which he claimed included more than 500 pending matters. 119 He did not turn away cases. 120 It would be obvious to an objective observer that Muto could not possibly handle that many matters competently on his own, and not surprisingly, he missed court appearances and filing deadlines. 121 Nor could he have reasonably expected to retain all of his filing dates and court appearances in his head, 122 but overoptimism and overconfidence in his own abilities may have caused him to believe otherwise. Likewise, his willingness to take on cases in New Orleans, Houston and San Francisco—notwithstanding his deep-seated flying phobia that repeatedly prevented him from boarding planes 123—may also be explained, at least in part, by these self-serving biases.

I do not mean to suggest that the neglect described in Lawyers in the Dock was solely due to overoptimism and overconfidence. Muto was relatively new to immigration practice and lacked the training and administrative skills to manage a volume practice on his own. 124 Moreover, as Abel observes, these lawyers were motivated by “greed or need.” 125 Muto’s desire to make money no doubt led him to take more cases than he could handle. In Furtzaig’s case, his desire to succeed at his law firm—and to support his wife and triplets—caused him to uncomplainingly accept cases that he did not have the time to handle. Abel’s case studies do not suggest, however, that Muto and Furtzaig were primarily motivated to neglect the cases due to indifference or avarice. Furtzaig was “recognized by colleagues, clients, firm employees and adversaries for his honesty, incisive intelligence, excellent lawyer skills and hard work.” 126 Abel’s account suggests that Muto genuinely wanted to help his immigrant clients. 127 It appears that in

117. Id. at 253-54.
118. Id. at 264.
119. ABEL, supra note 10, at 106.
120. Id. at 166, 177.
121. Id. at 116-17.
122. According to Abel, “[Muto] did not know what an office diary was.” Id. at 172.
123. Id. at 137-140, 173, 177. Muto’s therapist testified at the disciplinary hearing that she had seen him 75 times for his flying phobia, often “at the airport, where you’ve fully believed you could get on an airplane.” Id. at 140.
124. Muto first worked for another immigration lawyer for about six months before he left to set up his own practice. Id. at 105.
125. Id. at 492.
126. Id. at 199.
127. Id. at 143, 166, 176. Kreitzer may present a different case. Kreitzer had over one thousand active cases, worked seven days a week, and was treated for esophageal cancer during part of the relevant time period. ABEL,
their cases and in other cases of lawyer neglect, the inability to step back and view the situation less optimistically and more objectively may be explained, at least in part, by these psychological biases.

B. LAWYER RESPONSES TO NOVEL PROBLEMS

Abel’s case studies provide a rare opportunity to trace the decisionmaking of experienced lawyers who encounter novel ethical problems in practice. By “novel,” I mean problems the lawyers themselves have not previously faced. Novel problems are not the source of most discipline complaints, but the ways in which these problems are approached and resolved are important because the resolution of a novel problem may provide a schema or script for how a lawyer handles similar situations in the future. Every lawyer confronts novel ethical problems at points in his or her career. Understanding how lawyers confront these problems may provide clues as to how they might be assisted to better resolve those problems in the future.

The novel ethical questions faced by Abel’s lawyers were varied. Furtzaig had to decide what to do when his client rejected a settlement demand (remodeling a kitchen) because it might reveal lead paint contamination in an apartment; the client’s decision apparently led to a series of events that culminated in Furtzaig’s failure to restore the case to the court’s docket. Byler encountered a novel situation when helping a friend with a tax shelter problem on a reduced fee basis; a fee dispute arose when Byler used the client’s tax refund to pay himself, and it escalated when he refused to escrow the disputed funds. Similarly, Wisehart encountered a novel problem when a client unexpectedly took opposing counsel’s privileged documents from a conference table; he ran into trouble when he attempted to use the documents to his client’s advantage.

In each case the lawyers engaged in conscious decisionmaking, but they resolved the novel questions incorrectly. In all three cases, their first mistakes were made without consultation with ethics experts and seemingly without consideration of the applicable ethical rules. To the extent they subsequently sought advice from other lawyers, the advice was apparently incomplete or flat-out wrong. The biggest problem, however, was not the advice received, but the self-interested prism through which the lawyers viewed the facts.

Psychological research reveals that this is not surprising, because when there is a conflict between an individual’s interest and those of others, the individual will favor himself. Perceptions and expectations are biased in a self-serving manner.

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*supra* note 10, at 71-72, 74-75, 103. Overoptimism about his ability to deal with his caseload during his illness may have contributed to his neglect. Nevertheless, Abel’s description of Kreitzer’s practice suggests that he did not intend to do much work on most of his cases and may have been motivated more by greed than by psychological biases. *Id.* at 96.

128. *See supra* note 98 and accompanying text.
called egocentrism. This bias causes people who are exposed to identical information to interpret it in ways that favor themselves. Egocentrism allows people to believe that it is fair for them to have more of a given resource than an independent observer would judge. Egocentrism also causes individuals to overstate the role that they have played in events in which they have participated.

Egocentrism also helps to explain why “people tend to conflate that which is personally beneficial with what is fair and moral.” Individuals first determine their preference for an outcome on the basis of self interest and then justify this preference on the basis of “fairness” by differentially weighting factors in a manner that favors their self-interest. When there is ambiguity about the consequences of alternatives, people will rationalize taking the option that is personally preferable as opposed to the one that is ethically more justifiable.

Once people reach a conclusion that coincides with their intuitions or their self-interest, they tend to pay more attention to information confirming the correctness of the decision than negative information. Indeed, overconfidence in decisionmaking arises from the tendency people have to recruit reasons from memory that confirm their hypotheses. This is part of the confirmation bias, which causes individuals to pick out information that confirms or supports their tentative decisions and reject or downplay evidence that does not.

Philip Byler’s behavior illustrates a host of self-serving biases that guided his decisionmaking when confronted with a novel situation. Byler was faced with ambiguous facts concerning whether his client had knowingly agreed to give his full tax refund to Byler in gratitude for Byler’s handling of his case—and Byler interpreted the situation in a manner that aligned with his own interests. Byler had orally agreed to a flat fee of up to $20,000 if he needed to litigate a tax shelter issue for James Morgan, a family friend. When it turned out that not only did Byler not have to litigate with the IRS over Morgan’s claimed $180,000 tax deficiency, but his negotiations might produce a refund, Morgan allegedly told

129. See, e.g., Bazerman, supra note 107, at 70-72; Daniel T. Gilbert & Joel Cooper, Social Psychological Strategies of Self-Deception, in SELF-DECEPTION AND SELF-UNDERSTANDING, supra note 103, at 75.
130. See Bazerman & Moore, supra note 86, at 94; Moore et al., supra note 35, at 7-8.
131. See Rachlinski, supra note 106, at 1172.
132. See Loewenstein, supra note 96, at 221.
133. Id. at 222.
134. Bazerman & Moore, supra note 86, at 94.
135. Id. at 82; Plohus, supra note 87, at 234.
136. Koehler et al., supra note 111, at 692; Plohus, supra note 87, at 234.
him, “if we do get a check, keep it.” At that point, neither thought the likelihood of a refund was great or knew the amount of any possible refund.

Morgan, who was working in South Africa at that time, met with Byler in June 1994 and left him with a bank deposit ticket and a signed blank check, the purpose of which was disputed. While Morgan testified he did this to pay for any tax deficiency, Byler claimed it was to enable Byler to deposit the tax refund and to then pay himself with the refund. When a $52,917 tax refund check arrived in October 1994, Byler deposited the check in Morgan’s account and used the blank check to pay himself almost the entire amount. After the check had cleared, Byler wrote to Morgan explaining what he had done. He believed it “fair” to take the refund even though he had never told Morgan that the refund might exceed $50,000. Abel’s account makes clear that Byler had no doubt about the “fairness” of his actions. When Morgan disputed Byler’s right to the refund, Byler was adamant that he was entitled to the money, and he refused to deposit the funds into an escrow account.

Byler viewed this as a novel situation and it was—for him. As he stated in the disciplinary hearing, “I was handling banking documents I had never handled before in that way . . . .” He was “uncomfortable” because “I had never been given this kind of payment mechanism before.” He spoke with Louis Lauer, his “older, old fashioned colleague of the last four years” immediately after the June 1994 conversation between Byler and Morgan. Lauer, who was of counsel to the same small firm as Byler, recalled being concerned whether the refund would be adequate to cover the outstanding work—for a result that he thought was “extraordinary”—but testified that with respect to the deposit ticket and the blank check, he “didn’t know how [Byler] could do that.” It is possible that Lauer didn’t clearly express his concerns or that Byler did not hear them because of the confirmation bias. Byler may have only attended to feedback that confirmed his conclusions and failed to register Lauer’s reservations.

Before Byler sent the October 1994 letter to James Morgan explaining what he had done with the refund, he asked Louis Lauer, as well as Byler’s wife (who was also a lawyer) to review the letter. They “fully agree[d]” with the letter. Byler also spoke with Lauer about his decision not to put the money in escrow once he learned that Morgan disputed his right to the funds. Byler testified that he did not put the funds in escrow because he thought that doing so would be an admission

139. Id. at 293.
140. Id. at 293-95.
141. Id. at 294-95.
142. Id. at 296.
143. Id. at 297-98.
144. Id. at 299-304.
145. Id. at 301.
146. Id. at 318.
147. Id. at 301.
of guilt.\textsuperscript{148} He claimed that “I did rely on the advice of Lou Lauer... it was a
difficult situation because I don’t handle client funds, I don’t have an escrow
... so it’s a foreign matter to me...”\textsuperscript{149}

Byler made a serious error in his handling of client funds. Although it is hard to
believe that he was unfamiliar with the rules requiring the scrupulous treatment
of disputed funds,\textsuperscript{150} it is conceivable that he never learned them. During his first
dozen years in private practice, he worked in large firms,\textsuperscript{151} where he probably
was not required to personally maintain a client trust account. His subsequent law
practice may not have required him to hold client funds. After the dispute arose,
he received unsolicited advice from a legal ethics expert—Thomas Morgan,
James Morgan’s brother\textsuperscript{152}—but he flatly rejected the advice that the money must
be deposited in a trust account.\textsuperscript{153} Byler’s thinking was no doubt influenced by
the fact that he needed the money.\textsuperscript{154} Self-serving biases—including the
confirmation bias and overconfidence in his judgments—caused Byler to
continue down the disastrous path on which he had embarked.

Arthur Wisehart’s case involved a truly novel question with which lawyers are
not typically faced, \textit{i.e.}, what \textit{does} a lawyer do when a client surreptitiously takes
opposing counsel’s privileged documents off a conference room table in a
hard-fought sexual harassment lawsuit? When this question arose for Wisehart,
there was no clear answer to that question.\textsuperscript{155} Upon learning during a lunchtime
deposition break that his client, Joan Lipin, had spent an hour reading documents

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148. & Id. at 328-30. It is also possible that Byler could not do so because it would acknowledge that he had
been wrong, and Byler could not accept the possibility of mistake or criticism. \textit{See generally} Richard, \textit{supra}
note 30, at 3 (describing lawyer hypersensitivity to criticism).
\hline
149. & Id. at 330.
\hline
150. & The New York Code of Professional Responsibility states:

\begin{quote}
Funds belonging in part to a client or third person and in part presently or potentially to the lawyer or
law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or
law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed
by the client or third person, in which event the disputed portion shall not be withdrawn until the
dispute is finally resolved.
\end{quote}

\textit{N.Y. LAWYER’S CODE OF PROF’L RESPONSIBILITY DR 9-102(B)(4)[1200.46].} Byler’s later explanation for not
placing the funds in a special account was that there was no “dispute” with the client because Morgan could not
rightly claim the funds.
\hline
151. & \textit{ABEL, supra} note 10, at 290.
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152. & Thomas D. Morgan is a law professor at George Washington Law School and a well-known legal ethics
scholar. At the time of the dispute, he had already authored one of the most widely used casebooks on pro-
fessional responsibility. \textit{THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIO- 
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153. & While the advice was prescient, it was also threatening, which probably contributed to Byler’s failure to
heed it. Thomas Morgan warned concerning the need to escrow the money that “[i]f you do not follow that
procedure in your practice you are playing Russian Roulette with your career.” \textit{ABEL, supra} note 10, at 308.
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154. & Id. at 325.
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155. & It was not until 1992 that the American Bar Association opined on the obligation of a lawyer who
inadvertently obtained privileged documents belonging to an adversary. \textit{See} ABA Comm. on Ethics and Prof’l
Responsibility, Formal Op. 92-368 (1992). Moreover, the answer to that question has changed over time. \textit{See},
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\caption{Legal references and notes for the article.}
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that she said were left in front of her on a conference table by opposing counsel Weil Gotschal & Manges ("WGM"), Wisehart’s first reaction was “that she had the right to do that. That they were right in front of her.” Wisehart immediately told Lipin that “he had had a federal case by which his client had been going through documents that had been produced” and found a smoking gun document and “by the nature of that the privilege had been waived.” He continued to rely on that case to justify his right to read and use WGM’s documents, even though there is an obvious distinction between inadvertent delivery of documents to a party and the surreptitious removal of documents from opposing counsel’s conference table. Wisehart subsequently attempted to use the documents to extract a settlement from the opposing side and refused to relinquish them. While Wisehart ultimately encountered more discipline problems because of the way in which he litigated the issues thereafter, his approach to the ethical issue concerning the privileged documents is instructive.

Although Wisehart thought he knew the answer to the novel question, he had Lipin—who recently had also been working for him as a paralegal—copy approximately 200 pages of material and place copies in sealed envelopes so that he could get a second opinion before reading them. He did, however, allow Lipin to take home a copy of the documents to continue reading them, thinking they might have been the documents that WGM had been ordered (but refused) to produce in the case. He spent part of the weekend researching the legal status of the documents based on his understanding of what the documents contained. He then called two attorneys to get a second opinion about how best to proceed, but they declined to become involved. On his third attempt, he contacted Ned Purves, who had referred the client to Wisehart, and was of counsel to Wisehart’s firm. Together, Byler and Purves opened the envelope and read the documents which were both clearly privileged and embarrassing for WGM’s clients. Wisehart and Purves subsequently met with WGM lawyers and told them that Lipin was keeping a copy over which he had no control and which she might release to the press. Wisehart further outlined a proposed settlement—which

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156. A. Abel, supra note 10, at 401.
157. Id. at 402-03.
158. Id at 406, 409-11.
159. Id. at 403.
160. Id at 403-04.
161. Id. at 404, 461, 483.
162. Id. at 390.
163. Id. at 406-07. The documents included memoranda written by WGM attorneys to the files about meetings and interviews they conducted with employees of their client. Id. at 401, 410. The documents further revealed information about an affair between the General Manager of WGM’s client and a subordinate and other statements revealing that the client was engaged in ongoing sexual harassment of female executives. Id. at 407.
164. Id. at 409.
was immediately rejected—and WGM demanded the return of all copies of the papers. Wisehart refused to comply.

At the time of the misconduct that led to discipline, Byler and Wisehart were experienced lawyers. They had graduated from Harvard and Michigan Law Schools, respectively, had both worked early in their careers in “white shoe” law firms, and had never before been disciplined. Both reached out for some help when they confronted a novel problem, but not far enough. They only talked with individuals who had some stake in the outcome of the matter and not to impartial ethics experts. In Byler’s case, he spoke to his wife and to a lawyer who was affiliated with his law firm. In Wisehart’s case, he spoke with a colleague who was in a position to obtain a referral fee if the case ended favorably. It may be that they subconsciously reached out to people who would confirm their initial self-interested judgments. While Wisehart initially conducted some research on the question of what to do with the “sealed” documents, he ensured he would learn what was in the documents by allowing his client to take a set home and read them. Various self-serving biases appear to have affected the decisionmaking of both of these lawyers, including overconfidence in their predictions about how their judgments would ultimately be viewed by others. They also evaluated ambiguous evidence in a self-serving fashion in order to reach a conclusion that favored them. In Byler’s case, he interpreted Morgan’s statement, “if we do get a check, keep it” to mean that he could later write a check to himself for more than $50,000, even though they had no idea that this large a sum might be refunded at the time Morgan made the statement. In Wisehart’s case, he interpreted a situation where documents were left out on a conference table to support the conclusion that WGM had deliberately placed them in front of Lipin for her to find. The lawyers justified their self-serving decisions by using “fairness” and other reasoning that favored them. They seemed to be unaware of their self-serving biases and they declined to reconsider the wisdom of their decisions, to their serious detriment.

C. THE POWER OF COMMITMENT AND SELF-DECEPTION

Abel found that “[o]nce these lawyers committed themselves to an action, they found it difficult to change course.” The power of commitment to a course of action helps to explain the persistence of undesirable conduct once it first occurs

165. Id. at 410-11.
166. Id. at 290, 300, 315, 449, 457.
167. Id. at 403-04. Indeed, Disciplinary Counsel argued that even before reading the documents and talking to Purves, “[Wisehart] already has a plan. He’s going to use these documents to attempt a settlement” favorable to Ms. Lipin. He further observed, “[e]very opportunity Mr. Wisehart had to seek the conservative safe plan, he disregarded it.” Id. at 455-56.
168. Id. at 494.
and the “hardening” of unethical behavior that Ditton reported. Moreover, once a belief is formed, it can be difficult to erase. Various psychological processes prevent people from rethinking most of their decisions once a decision is made. People use scripts and other forms of cognitive simplification so they do not constantly rethink their decisions. People may also lack the motivation to revisit their choices due to self-serving biases. Overconfidence and overoptimism may cause people to believe they are making good decisions and do not need to rethink how to approach a problem they have already resolved.

Commitment to a prior decision may also occur because people want to view themselves as good and consistent decisionmakers. This is due to their need to see themselves—and to be seen by others—in a positive light. This need helps to explain why managers who commit to a project are motivated to focus on the project’s upside more than its downside risks and will resist acknowledging that a mistake has been made. Indeed, people have a tendency to escalate their commitment to a previously decided course of action. Bazerman describes “nonrational escalation” as the “degree to which an individual escalates commitment to a previously selected course of action to a point beyond which a rational model of decision making would prescribe.”

Once a person commits an unethical act—even reluctantly—cognitive dissonance makes it easier to continue the behavior. Cognitive dissonance theory suggests that the pressure people feel to behave consistently will often lead them to bring their beliefs in line with their behavior. For example, engaging in deviant behavior such as shoplifting has been shown to soften the moral evaluation of the behavior and enhance the acceptance of rationalizations for it, thereby facilitating future deviance. As Elliot Aronson has noted, “[i]f you want people to soften their moral attitudes toward some misdeed, tempt them to perform the misdeed.” Once a person performs a misdeed, the individual will gradually develop an increasingly entrenched view that the conduct being

169. See supra note 61 and accompanying text.
171. See supra note 98 and accompanying text; Langevoort, supra note 43, at 639-40.
172. Rachlinski, supra note 106, at 1222.
173. Id. at 1220.
175. Langevoort, supra note 43, at 642.
176. BAZERMAN & MOORE, supra note 86, at 101-03; Moore et al., supra note 35, at 8.
177. BAZERMAN & MOORE, supra note 86, at 102.
178. PLOUS, supra note 87, at 30; Gilbert & Cooper, supra note 129, at 84; Ashforth & Anand, supra note 35, at 29.
180. Aronson, supra note 57, at 203.
Self-deception also permits people to continue on an unethical course without consciously recognizing the consequences of their actions. Self-deception includes “avoidance of the truth [and] the lies that we tell to . . . ourselves.” 182 Ann Tenbrunsel and David Messick argue that self-deception is an important part of the process of “ethical fading,” which causes individuals to no longer “see” the moral components of their decisions. Through self-deception, the moral implications of a decision fade, allowing individuals to continue to behave unethically and at the same time, not realize they are doing so. 183 By avoiding or disguising the moral implications of a decision, individuals can behave in a self-interested fashion and still cling to the belief that they are ethical. 184 This self-deception is accomplished through, *inter alia*, the use of euphemistic language to describe unethical conduct, 185 “psychological numbing” that comes from repetition of behavior, routinization that results in the loss of “ethical coloration,” and self-biased errors in perceptual causation that permit people to distance themselves from the ethical issue. 186

It is therefore not surprising that Abel found that once the lawyers he studied committed themselves to an action, “they found it difficult to change course” and sometimes engaged in “profound self-deception.” 187 Thus, once Kreitzer started down the path of a high volume practice that included participation in the ten percenters scheme, he apparently did not consider turning back and continued to pay a middleman, even after he knew he was under investigation. As he subsequently explained, “my head was in the ground.” 188 Muto’s continued willingness to work with travel agencies—even once he left his original employer—can be explained by the fact that he had already engaged in this form of practice and did not reconsider the wisdom of his choice, even though he was aware that immigrants were often ill-served by travel agencies. 189

Furtzaig’s case also illustrates the power of commitment to a course of conduct and the self-deception that permits it to continue. Furtzaig had worked hard in a highly pressurized office environment to become a non-equity partner in his law firm. When he failed to restore two cases to the calendar—either because of neglect or because he was simply uncertain about how to deal with them—he faced

182. Tenbrunsel & Messick, supra note 95, at 225.
183. *Id.* at 223, 224.
184. *Id.* at 225.
185. For instance, the term “aggressive” litigation tactics may obscure the fact that the tactics are also unethical. See generally *Id.* at 226 (noting that accountants engage in “aggressive” accounting practices, not illegal ones).
186. *Id.* at 226-31; Ashforth & Anand, *supra* note 35, at 11-14; Bandura, *supra* note 34, at 196, 199.
188. *Id.* at 93.
189. *Id.* at 178.
an enormous problem. Psychological research shows that when confronted with the choice between a guaranteed loss of income and status and the chance of a more severe penalty in the future, people opt for the risky but less certain option.190 Thus, it is not surprising that when Furtzaig was confronted with the choice between a guaranteed loss of face within the firm (and possibly loss of the chance of becoming an equity partner) versus the speculative possibility of later being caught, he chose to take his chances and cover up the problem. It was no doubt less difficult for Furtzaig to conceal his neglect the next time it occurred. He subsequently hid his neglect in several other cases by forging documents and lying to his clients.191 He later noted, “[i]n retrospect, of course, I couldn’t hide it. It was stupid. It was absurd to even think that I could.”192 It appears that overconfidence, the power of commitment, and self-deception were all at work in Furtzaig’s case.193

III. LAWYER DISCIPLINE, PSYCHOLOGICAL PROCESSES, AND DISCIPLINE CULTURE

As Rick Abel notes, in order to continue their deviant behavior, the lawyers he studied constructed an “alternative reality” in which they operated.194 He found that the lawyers often did not see the problems with their own conduct and blamed other people when things went wrong. For example, Joseph Muto convinced himself not only that his failure to file papers on time or to appear in court for his clients was not his fault, but also that he was providing a great, low-cost service to immigrants in Chinatown.195 Similarly, Philip Byler believed that he was entitled to take money from his client’s tax refund in “fair payment” for his services, even after he received dire warnings about the consequences of his failure to escrow the disputed funds.196 Commitment to a course of conduct and self-deception allowed these behaviors to persist. Once these lawyers became involved in lawyer discipline proceedings, their judgments often became even more distorted.

191. See supra note 70 and accompanying text.
192. ABEL, supra note 10, at 198.
193. Furtzaig reported that he was suicidal when his deception was first revealed and possibly for couple of years before that. Id. at 198-99. While this suggests that Furtzaig may have been aware that what he had been doing was wrong, his quoted comment suggests that self-deception enabled him to believe that he would be able to conceal his wrongdoing.
194. Id. at 494.
195. Id. at 166-67, 176.
196. Id. at 297.
A. PSYCHOLOGICAL PROCESSES AND LAWYER DISCIPLINE

Abel observes that for most of the lawyers he studied, the discipline process intensified self-righteousness.\textsuperscript{197} It is important to remember that he selected “extreme” cases and that the intense self-righteousness these lawyers displayed is part of what made them “extreme.” But in some respects, their conduct is not surprising. There is evidence that lawyers may have less resilience and ego strength than the general population, making them more defensive and hypersensitive to criticism.\textsuperscript{198} Moreover, most people have a powerful desire to view themselves in a positive light and are motivated to behave in ways that maintain their self-esteem.\textsuperscript{199} Self-esteem is seriously threatened once a lawyer finds himself in discipline proceedings.

Psychological research confirms that when things go wrong, many people look for someone else to blame. As Charles Snyder noted, “excuses have typically been conceived as mechanics for deceiving other people,” but they are “also aimed at the internal audience of oneself.”\textsuperscript{200} Excuse making is a common strategy for reconciling the conflict between a person’s belief that he is a good person and the fact that he is responsible for a negative outcome.\textsuperscript{201} When people commit bad deeds, they frame the facts to try to convince themselves that the deed was not so bad or attribute the responsibility to others.\textsuperscript{202} The worse the event, “[t]he greater is our desire to find an evildoer behind the act—particularly an evildoer who does not implicate us.”\textsuperscript{203}

People use reframing strategies to shift blame and to maintain self-esteem. These strategies include underestimating the harm they have done, derogating the victim so that it is not a negative act to hurt a “bad” person, or derogating the source of the negative feedback (e.g., a judge who considers a lawyer’s behavior problematic).\textsuperscript{204} Blaming adversaries or circumstances also serves self-exoneration purposes. As Albert Bandura explains:

In this process, people view themselves as faultless victims driven to injurious conduct by forcible provocation. Punitive conduct is, thus, seen as a justifiable reaction to belligerent provocations . . . . Victims then get blamed for bringing suffering on themselves. Self-exoneration is also achievable by viewing one’s harmful conduct as forced by compelling circumstances rather than as a

\textsuperscript{197} Id. at 507. The sole exception among the lawyers Abel describes was Furtzaig, who did not deny his wrongdoing. Id. at 205.
\textsuperscript{198} See supra note 30.
\textsuperscript{199} See supra notes 101-105 and accompanying text; BAZERMAN & MOORE, supra note 86, at 90; Leary & Downs, supra note 102, at 129.
\textsuperscript{200} Snyder, supra note 103, at 35.
\textsuperscript{201} Id. at 37.
\textsuperscript{202} Benabou & Tirole, supra note 102, at 885.
\textsuperscript{203} Benforado & Hanson, supra note 33, at 325.
\textsuperscript{204} Snyder, supra note 103, at 38-39.
personal decision. By fixing blame on others or on circumstances, not only are one’s own injurious actions excusable, but one can feel self-righteous in the process.  

In addition, the argument that “everyone is doing it” (used by Muto and Kreitzer in their discipline proceedings) not only suggests that the act is not so bad, but it also lessens the sense of responsibility for the act.

This type of reframing and blaming to preserve a positive self-image can be seen in many of the responses by Abel’s lawyers to the suggestion that they engaged in misconduct. For example, Byler attacked his client Morgan and portrayed him as “ungrateful” and “dishonest” when Morgan first suggested that Byler had wrongfully taken the tax refund for himself. Byler continued to derogate the victim in the disciplinary proceedings, portraying him as a “chronic tax evader,” who had committed a “breach of trust,” and was “trying to destroy my career and my ability to support my family.” When Departmental Disciplinary Committee (“DDC”) Counsel staff attorney Mady Edelstein recommended a private admonition, Byler wrote a letter to DDC chief counsel to reject the recommendation and complain about Edelstein’s “mistaken and sometimes jaundiced view” of the matter. This pattern of attacking the decisionmaker who provided negative feedback on Byler’s conduct continued throughout the disciplinary process, when Byler attacked members of the hearing panel and others for being “out of touch with the law,” for being “biased,” and for “twisting and distorting facts.” Byler’s defense was marked by voluminous and intemperate filings. As Abel notes: “He was the injured party, who had been ‘unfairly attacked,’ ‘put in an unfair situation,’ and ‘didn’t think it was right’ . . . . He wasn’t responsible.” Byler was not, however, simply engaged in excuse making for an audience; this excuse making also seems aimed at preserving Byler’s own self-image.

Studies of accountability—i.e., the expectation that individuals will be called upon to justify their conduct to others—also suggest why lawyers become entrenched in their positions during the discipline process. As Philip Tetlock explains, “[a]ccountability is a critical norm-enforcement mechanism—the social psychological link between individual decision makers on the once hand and

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205. Bandura, supra note 34, at 203.
206. Abel, supra note 10, at 102, 171.
207. Snyder, supra note 103, at 42.
208. Abel, supra note 10, at 306, 313.
209. Id. at 316, 353.
210. Id. at 314.
211. Id. at 357-58.
212. Id. at 360 (emphasis in original).
social systems on the other.” Tetlock’s social contingency model of accountability predicts self-justifying thinking when decisionmakers are accountable to a skeptical or hostile audience for actions that are not reversible or are implausible to deny.

Tetlock’s studies have shown how a minor change in the timing of accountability can determine whether an individual engages in pre-emptive self-criticism (to consider the wisdom of proceeding with an activity) or the strategy of “defensive bolstering” (once a decisionmaker has already acted on the decision). He observes that “[o]nce people had publicly committed themselves to a position, a major function of thought became generating justifications for those positions.” Subjects were less likely to concede legitimacy to other points of view and generated more reasons why they were right and why critics were wrong.

This research may help to explain Byler’s behavior as well as Wisehart’s conduct concerning the privileged documents his client removed from a conference table. Once Wisehart decided to read the documents and then use them to try to extract a settlement in a hotly contested litigation, he became publicly committed to a course of conduct for which he was accountable. After that point, he generated self-justifying explanations for his position: He initially blamed opposing counsel, arguing that the documents were left deliberately for his client to see, and he vilified WGM for not previously producing the documents. Once decisionmakers started to conclude that Wisehart had behaved improperly, he then began to attack them personally. Thus, he argued that Justice Karla Moskowitz was unable to decide a contempt motion against him dispassionately because she was biased and dealing with breast cancer; he argued that federal judge Leonard Sand should recuse himself when Wisehart’s efforts to replead his dismissed state court claims in federal court were rebuffed; he argued that the chair of the Disciplinary panel should recuse himself because of “malice” and some perceived conflict of interest; and he argued that Chief Justice Kaye of the New York Court of Appeals was biased due to her relationship with Justice Moskowitz.

Abel finds parallels between Wisehart’s behavior and what David Shapiro calls the “paranoid style.” Shapiro describes the paranoid as one who “looks at the

214. Id. at 583, 586.
215. Id. at 587.
216. While far-fetched, Wisehart’s view that the documents had been deliberately placed where his client would see them was shared by his client and the referring lawyer, and therefore not completely delusional.
217. Id. at 428-29, 434, 438, 444-47, 451, 466. Wisehart attacked the decisionmakers in other cases, id. at 475, but he did it with particular ferocity in this case.
world with fixed and preoccupying expectation, and he searches repetitively, and only, for confirmation of it.” 219 Not surprisingly, he loses a sense of proportion. It is not clear, however, whether Wisehart previously displayed a paranoid style or gradually developed one in this case because of the situation in which he found himself and the psychological processes at work. 220 Wisehart already believed that the underlying sexual harassment suit was not fairly litigated because of WGM’s obstructionist litigation tactics. 221 He was probably correct in that assessment. 222 This sense of unfairness was no doubt exacerbated when his client’s strong sexual harassment lawsuit was dismissed due to Wisehart’s mis-handling of the privileged documents. In light of this perceived unfairness, it is not altogether surprising that he had difficulty accepting the decisions against him when he was defending himself in disciplinary proceedings.

Abel finds parallels between the conduct of white collar criminals and disciplined attorneys, who often remain convinced of their own innocence. 223 I suspect that disciplined lawyers’ reactions may be typical of a broader segment of society. Many people resort to blame and excuse making when confronted with evidence of their own misconduct. They deny causing harm, attack their accusers, and resort to other techniques to minimize their responsibility for their conduct. 224 While some of the lawyers Abel describes displayed extreme forms of this behavior, the genesis of much of their conduct can be explained by common psychological processes.


220. Shapiro describes paranoid characters as those in whom “paranoid traits of suspiciousness are both pervasive and longstanding.” Suspiciousness as a mode of thinking is “chronic and habitual.” Id. at 55. It is not possible to determine from the case studies whether Wisehart had long displayed this mode of thinking or began to demonstrate it once his self-esteem was under attack. Although Wisehart unsuccessfully brought recusal motions in some other litigations—suggesting the possibility of a paranoid style—it is not clear whether that conduct actually reflected a paranoid style in those cases or a calculated litigation strategy.

221. A BEL, supra note 10, at 393-97. Abel notes that Wisehart may have harbored “the resentment common among small firm practitioners toward the resources, pretensions and condescension of Wall Street giants” like WGM. Id. at 480. He may be correct, but it appears the resentment went deeper than that because of the “Rambo litigator approach” employed by the large law firm. Id. at 394.

222. At one point, the judge chastised WGM’s lawyers after they made what she viewed as an unnecessary motion stating, “I am going to start imposing costs. You get paid if you make these motions, right, you bill your client, and I don’t think the plaintiff’s counsel can do that. So I don’t think it is fair to motion somebody to death so that the person can’t continue a case.” Id. at 393.

223. Id. at 508-09.

224. It is possible to think of many politicians, sports figures and movie celebrities who engage in this behavior. A recent example includes former Detroit Mayor Kwame Kilpatrick, who perjured himself at a civil trial in order to hide his wrongdoing, including his extramarital affair with his chief of staff. Kilpatrick initially denied wrongdoing, minimized the significance of what he had done, claimed selective prosecution, and blamed others for improperly producing the text messages that revealed his perjury. See, e.g., Remarks by Kilpatrick, lawyer at news conference, DETROIT NEWS, Mar. 25, 2008; Robert Snell, Webb to Challenge Text Messages, Kilpatrick attorney says release may be illegal, DETROIT NEWS, Mar. 26, 2008, at 6A.
B. THE CULTURE OF THE LAWYER DISCIPLINE PROCESS

Psychological research suggests why the tendency for some lawyers to self-justify is especially strong once they find themselves in disciplinary proceedings. Not only do lawyers want to maintain a positive self-image, they wish to be seen as good lawyers by their peers who sit on the discipline hearing panels. Lawyers may quickly conclude, however, that the process is hostile and unfair. Their sense of unfairness is probably exacerbated when they represent themselves in those proceedings and there is no one to provide a check on their self-serving biases.

Even before lawyers are drawn into disciplinary proceedings, the discipline process is not viewed in a positive light by many lawyers. The process in New York is slow and byzantine, provoking high anxiety for those who are awaiting disposition of complaints that have been filed against them. As one lawyer stated:

I got a complaint. It is easy to get a complaint in this business, and it is stressful, it’s not like—there are some of us that do bad things, and I am not saying that there is no need for it, but it is a really—you don’t even understand how stressful that it is. That is like very stressful. You can’t even do any work it’s so stressful.226

New York lawyers have described their dealings with the DDC—even when they were not sanctioned—with some bitterness.227 The process is not transparent, the committee members are sometimes officious, the sanctions are inconsistent, and the entire process is often not perceived as fair.

The perception that the lawyer discipline process is unfair is particularly prevalent among solo and small firm lawyers. These lawyers receive more than ninety percent of all discipline, even though they comprise only about forty-five percent of all practicing lawyers.229 The reasons for this are complex and may not reflect actual bias in the discipline system, but solo and small firm practitioners often think otherwise.230 As one small firm New York lawyer stated:

[When you look at them, when you read the decisions as I do, it’s a disproportionate number of solo guys who get nailed and I don’t believe in a heartbeat that Wall Street guys are so much more ethical. I don’t believe that

225. The panels are composed mostly of lawyers. In some of the cases Abel describes, all of the panel members were lawyers.
226. Levin, supra note 48, at 372.
227. Id.
228. ABEL, supra note 10, at 505; Levin, supra note 8, at 6.
they notarize legitimately every document that goes in their [papers]. I don’t believe that they don’t futz around with escrow money or you know—not intentionally, not bad stuff, but this little stuff. I think the solos—they get killed. Killed.231

The belief that the discipline system is not fair is problematic, because the perception that a process is fair has been linked to decision acceptance.232 In other words, when third party decisions are viewed as fairly made, people are more willing to accept them as just.233 Procedural justice includes the perceived quality of the decision making process and the interpersonal treatment by authorities.234 In order to gain voluntary acceptance of decisions, it is also important for people to believe that the motives of legal authorities are trustworthy.235

It appears that some of Abel’s lawyers were unable to accept the decisions rendered in their disciplinary proceedings because they perceived the process as unfair. Wisehart expressly raised the unfairness of the process, noting the DDC’s failure to discipline Sullivan & Cromwell attorneys for somewhat similar misconduct a few years earlier in In re Beiny.236 Indeed, in the Beiny case, Sullivan & Cromwell was disqualified after it improperly obtained privileged documents through deliberate deceit,237 but no lawyer from the white shoe firm was disciplined. In 1993, when New York’s Appellate Division affirmed dismissal of Lipin’s sexual harassment case because of the mishandling of WGM’s documents, it noted that the behavior with respect to obtaining those documents had not been premeditated as it had been in Beiny.238 Wisehart’s lawyer argued in connection with Wisehart’s disciplinary proceeding that no Sullivan & Cromwell lawyer had been disciplined in Beiny and that:

It therefore appears that the targets of such self-initiated proceedings by staff counsel are predominantly small firm practitioners such as Mr. Wisehart rather than large firm lawyers who nevertheless are compensated exorbitant amounts and are shown to have skated on thin ice with respect to ethical violations. The result is denial of equal protection and due process for Mr. Wisehart . . . 239

231. Levin, supra note 48, at 372.
235. Tyler & Huo, supra note 233, at 7, 58.
237. Id. at 483-85.
238. Abel, supra note 10, at 440.
239. Id. at 453.
Claims of unfair treatment of solo practitioners in the disciplinary process permeated Wisehart’s discipline submissions. In light of the perceived unfairness, it is unsurprising that Wisehart was unwilling to accept the recommended sanction and pursued a third litigation in federal court in which he named, *inter alia*, the chair of the DDC hearing panel and continued to complain about a “conspiracy” to destroy small firm lawyers.

Muto also believed he was the victim of an unfair discipline process. He claimed selective prosecution, pointing to the fact that other immigration lawyers in the community had “extensive involvement” with travel agencies but had not been disciplined for assisting the unauthorized practice of law. Although Muto conveniently ignored the fact that he was also charged with serious neglect of client matters, he did have a point. New York authorities had been turning a blind eye for years to the fact that Chinatown’s travel agencies were engaging in the unauthorized practice of law and that some immigration lawyers were helping them do so. Indeed, when I interviewed New York City immigration lawyers in 2006, some reported with frustration that they had attempted to complain—to no avail—to the New York attorney general’s office, the district attorney’s office and the DDC about travel agencies. Moreover, the fact that some lawyers worked with travel agencies was obvious and well-known by immigration judges. As one lawyer noted, “it’s not hard to spot.” He continued:

They take these people in groups around to the courtrooms, and you will see them walking in groups, with a Chinese person who’s not an attorney, who is the leader, who is from the agency, taking them around. And you’ll see these people also handing files to the lawyer outside the courtroom.

The failure to discipline other lawyers for working with travel agencies no doubt contributed to Muto’s view of himself as a victim.

Several of the lawyers Abel describes—including Byler (at times), Kreitzer, and Muto—also committed one of the biggest mistakes that can be made in a disciplinary case: they represented themselves during the discipline proceedings. This is not uncommon, as many of the lawyers subject to discipline are solo and small firm practitioners who cannot afford the cost of legal representation. But the results can be disastrous. For example, Byler was his own worst enemy in the disciplinary process. He parlayed a case that could have been resolved with a private admonition into one that resulted in more than a one-year suspension from practice. During the discipline proceedings, he was incapable of doing

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240. Id. at 454-55.
241. Id. at 466, 469.
242. Id. at 105-06, 171.
244. The sanction imposed was a one-year suspension, but because Byler was unable to express remorse when he applied for reinstatement, the actual period of suspension was longer. ABEL, supra note 10, at 334, 337, 342-48.
for himself what lawyers are paid to do—which is to step outside of the situation and critically consider how he might be perceived by the hearing panel. He could not even behave like a lawyer and instead, interrupted panel members, evaded their questions and disregarded their rulings on numerous occasions. Reading about Byler's self-defense in the hearing leaves no serious doubt that his failure to understand the culture of the First Department Disciplinary Committee, and his inability to accept any responsibility for his actions, contributed in large part to his suspension from practice.

As Abel notes, once lawyers are found to have engaged in wrongdoing, they are expected to engage in a degradation ceremony by expressing remorse during the penalty phase of disciplinary proceedings. At this point, the disciplinary system expects and rewards unambiguous displays of contrition. Abel observes, however, that the disciplinary process “is profoundly und conducive to repentance.” This is because the penalty phase follows the guilt phase—sometimes immediately. Attorneys are expected to lay aside their well-developed adversarial instincts at this point. Some of Abel’s lawyers—who genuinely believed themselves to be good lawyers and good people—could not express remorse. Their need to preserve self-esteem and their sense of unfairness prevented them from participating in a degradation ceremony, resulting in more serious sanctions.

IV. LESSONS AND RECOMMENDATIONS

What lessons can be drawn from Lawyers in the Dock? As Abel reports, no single profile emerges of the deviant lawyer. Nevertheless, a few important lessons can be drawn from his stories. First—and least surprising—the case studies tend to reconfirm that attorneys in practice can have a significant impact on the ethical behavior of other lawyers. Attorneys transmit norms and in some cases, directly contribute to deviant behavior. A second lesson concerns the role that psychological processes can play in leading lawyers into deviant behavior. This can be seen in the case of lawyers who neglect client matters, overoptimistically believing that they can meet their professional commitments, notwithstanding—

245. Id. at 299-300, 322-26.
246. Id. at 31-36, 359.
247. This view is reflected in the disciplinary decisions and in ABA Standards for Imposing Lawyer Sanctions, which makes “refusal to acknowledge wrongful nature of conduct” an aggravating factor and remorse and “timely good faith effort to make restitution or to rectify consequences of misconduct” mitigating factors in the decision to impose discipline sanctions. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.22 (g); 9.32 (d), (l) (1991).
248. As Abel notes, lawyers are “trained to be fighters and are rewarded for their ferocity and intransigence.” Abel, supra note 10, at 507. It is therefore not surprising that some have difficulty letting go of this training when they find themselves in disciplinary proceedings.
249. Id.
250. Id.
ing the evidence to the contrary. The role of psychological processes can also be seen in the behavior of the experienced lawyer who confronts a novel question in practice. Once the lawyers publicly commit to a course of conduct, psychological processes explain why they do not deviate from it. A third lesson provided by Abel’s work concerns the ways in which the discipline process causes some lawyers to cling fiercely to the belief that they have done nothing wrong, even in the face of contrary evidence. Abel’s description of lawyers inhabiting an “alternative reality” begins to capture what occurs.\textsuperscript{251} This behavior can be both bizarre and profoundly self-destructive.

A final lesson that can be derived from \textit{Lawyers in the Dock} is that the impact of lawyers’ situations and psychological processes have been insufficiently incorporated into our efforts to address lawyer misconduct. Lawyer regulation in the U.S. relies heavily on a combination of education about the ethical rules and discipline or civil liability. Abel’s lawyers did not land in discipline proceedings because of ignorance of the relevant ethical rules. Muto knew that he was not supposed to neglect matters. Kreitzer knew that he was not permitted to engage in a ten percenter scheme. Furtzaig knew he was not supposed to lie to his clients or the court. Additional education about the ethical rules would have been unlikely to change their self-interested conduct. Likewise, the threat of discipline seems to have little deterrent effect on some lawyers. Kreitzer and Muto had previously been disciplined on more than one occasion. Byler was warned that he was playing “Russian Roulette” with his legal career,\textsuperscript{252} but he could not change course because psychological biases prevented him from acknowledging—even to himself—that he had done anything wrong.

In light of these lessons, I agree with Abel that some of the approaches currently taken to regulate lawyer conduct miss the mark.\textsuperscript{253} Tinkering with the language of bar rules and mandatory CLE (in its current form) are unlikely to have much impact on individual lawyers who frequently encounter situations that put their own interests at odds with the interests of their clients. This is especially true because many lawyers do not recognize that they are making ethical decisions and even when they do recognize such decisions, they fail to consult the ethical rules.\textsuperscript{254} Abel is also pessimistic about the impact of education and lawyer sanctions, and while I am less pessimistic,\textsuperscript{255} I agree that they have not been very effective in their current form. It is clear that in order to better protect the public

\textsuperscript{251.} See supra note 194 and accompanying text.
\textsuperscript{252.} See supra note 153.
\textsuperscript{253.} Abel, supra note 10, at 492, 513, 528.
\textsuperscript{254.} Levin, supra note 48, at 359, 368-69.
\textsuperscript{255.} Abel, supra note 10, at 512. For the reasons described below, I think that education may help moderate some of the psychological biases that can lead to misconduct. I also think that in some cases, greater willingness to impose incapacitating sanctions (i.e., suspension and disbarment) may be the only way to protect the public from lawyers who are recidivists and cannot be taught to stop repeating their mistakes.
from lawyer misconduct, some changes in approach are needed. Some of Abel’s suggestions, plus a few of my own, are discussed below.

A. TRAINING AND INDIVIDUAL DEBIASING

The psychological biases that contributed to the situations in which Abel’s lawyers found themselves cannot be avoided simply by telling lawyers about their biases. Individuals fail to accurately estimate the influence of cognitive biases on their own decisionmaking or to develop defenses against them.256 Moreover, people “overestimate the extent to which they can control their judgment and feelings.”257 Egocentrism is unconscious and even when individuals are told about the bias in experimental settings, the information does not affect how they assess decisions that would benefit them.258

Attempts to teach individuals how to overcome their biases have yielded mixed results. When assessing their own biases, people tend to overvalue their introspections (which are often inaccurate) as compared to their behavior.259 They also tend to think they are less susceptible to bias than their peers.260 In one study, however, when participants learned that introspective information is generally a poor source of information about influences on human judgment and action, they no longer showed a tendency to deny their relative susceptibility to bias.261 Training about the processes underlying the perseverance of false beliefs also has been shown to eliminate the effect of those beliefs in some situations.262 But whether training actually improves judgment in natural settings is unclear.263

There is no well-established protocol for debiasing human judgments. Psychologists suggest that in order to overcome biases, an individual must have awareness of the bias, the motivation to correct it, and some “awareness of the direction and magnitude of the bias.”264 An individual’s knowledge that he or she will be held accountable for a decision may increase motivation to overcome bias.265 In addition, individuals need a program of training with personalized

256. Tyler & Blader, supra note 233, at 67; Bernard Fischoff, Debiasing, in Judgment Under Uncertainty: Heuristics and Biases 428, 430-32 (Kahneman et al. eds., 1982); Loewenstein, supra note 96, at 216.
257. Wilson & Brekke, supra note 170, at 126.
258. Loewenstein, supra note 96, at 224.
260. Id. at 575-76.
261. Id. at 576.
262. Ross et al., supra note 137, at 886-87.
264. Wilson & Brekke, supra note 170, at 130. The latter is required because individuals tend to overcorrect or undercorrect for their biases when they are unaware of how much they are biased and therefore how much they need to calibrate their responses. Id. at 131-32.
265. Tetlock, supra note 213, at 592.
feedback on their performance in order to improve judgment.\textsuperscript{266} It appears, moreover, that different biases may require somewhat different debiasing techniques.\textsuperscript{267}

Bazerman suggests that in order to debias decisionmakers, it is necessary first to “unfreeze” their decision processes and then change them. This requires describing the specific judgmental deficiencies, explaining the root of these deficiencies, and providing reassurance that the deficiencies should not be viewed as a threat to self-esteem.\textsuperscript{268} Once unfreezing occurs, decisionmakers need to learn to take an “outsider’s view” on decisionmaking rather than the “insider’s” view.\textsuperscript{269} For example, the “outsider” view sees that a project will take longer than the insider estimates because the outsider looks at the situation and past behavior. The outsider is also less optimistic.\textsuperscript{270}

Hanson and Benforado note that recommendations that people “step back” or look at the “other side” may have limited effect, because cognitive biases may cause them to think they have been open to other information, even when they have not.\textsuperscript{271} And they may be correct. Lawyers are trained in law school to look at all sides of a problem and to anticipate the arguments and priorities of the opposing side. When the problem relates to their own interests and their own conduct, however, Abel’s case studies suggest that their training often deserts them.

Another way to address this problem may be to literally incorporate an outsider into the decisionmaking process. While people are not good at questioning their own judgments, others may be able to do this for them in “moral conversation.”\textsuperscript{272} One way to counteract biased thinking by lawyers may be to encourage them to have conversations with others about ethical issues. Many solo and small firm lawyers already rely on informal advice networks to answer their questions in practice.\textsuperscript{273} If lawyers are trained to reach out to relatively disinterested members of their networks—or others—when they confront ethical issues, this

\begin{itemize}
\item \textsuperscript{266} Fischhoff, supra note 256, at 437; but see Katherine L. Milkman et al., How Can Decision Making Be Improved, HBS Working Paper 08-102, available at http://www.hbs.edu/research/pdf/08-102.pdf (last visited May 28, 2009).
\item \textsuperscript{267} For example, the confirmation bias may be overcome by asking questions in a way that encourages consideration of disconfirming evidence. PLOUS, supra note 87, at 239. Debiasing for overconfidence may require receiving feedback on a large sample of responses and being told about one’s own performance. Fischhoff, supra note 256, at 437.
\item \textsuperscript{268} BAZERMAN & MOORE, supra note 86, at 189-90.
\item \textsuperscript{269} Id. at 191, 193-95; Milkman et al., supra note 266, at 5-6. A similar view has been voiced by Thomas Gilovich, who suggests that compensatory mental habits like the habit of thinking more broadly may help combat certain biases. THOMAS GILOVICH, HOW WE KNOW WHAT ISN’T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE 186 (1991).
\item \textsuperscript{270} BAZERMAN & MOORE, supra note 86, at 194.
\item \textsuperscript{271} Benforado & Hanson, supra note 33, at 335-36.
\item \textsuperscript{272} Regan, supra note 43, at 959.
\item \textsuperscript{273} Sara Parikh, Professionalism and Its Discontents: A Study of Social Networks in the Plaintiffs’ Personal Injury Bar (2001) (unpublished Ph.D. dissertation, University of Illinois) (on file with author); Leslie C. Levin,
may help debias their thinking and improve their decisionmaking.\textsuperscript{274} It is important, however, that the other lawyer not already be engaged in similar behavior.\textsuperscript{275}

One way to encourage this conduct is to incorporate lessons from social and cognitive psychology into legal training.\textsuperscript{276} Learning about psychological biases is important not just because it may improve lawyers’ own decisionmaking, but because it may help lawyers better understand and counsel their clients. At a minimum, law students should be instructed about the most common biases that present problems for lawyers and the human tendency to believe (incorrectly) that these biases are easily controllable. For example, law students should learn about egocentrism and the confirmation bias. They should be taught about how the biases of overoptimism and overconfidence can lead lawyers astray in a variety of contexts. Law students should also learn about the importance of looking at external information—including their own past performance—when making predictions about the future. In addition, since debiasing is difficult for an individual who is cognitively taxed,\textsuperscript{277} students also should be taught that they need adequate time and opportunity to consider the impact of their work environment and situation on their decisions. Students should be further instructed to reach out for advice before they make a decision, and to seek advice from lawyers who have no interest in the outcome of their decisions, rather than from those who are likely to agree with them out of self-interest.

There are opportunities in law school for this type of training. Readings about psychological biases can be introduced during orientation and can be illustrated through simulations that elicit the biases in the students. Lessons about the problems posed by these biases can be revisited in law school professional responsibility courses where the facts of cases can be examined for the purpose of identifying the lawyers’ psychological biases at work. In these courses, the benefits of ethical conversations with “outsiders” also can be modeled through class discussions of difficult ethical issues.\textsuperscript{278} Clinical law teaching also provides teaching moments when the benefits of obtaining disinterested advice from the

\textsuperscript{274} Of course, lawyers will only reach out if they recognize that they are facing an ethical issue. Abel’s book, as well as psychological research, suggests that this is more likely to occur when a novel question is raised than in other situations.

\textsuperscript{275} I am grateful to Rick Abel for this observation.

\textsuperscript{276} See Samuels & Casebeer, supra note 33, at 73-87.

\textsuperscript{277} See, e.g., Daniel T. Gilbert et al., \textit{On Cognitive Busyness: When Person Perceivers Meet Persons Perceived}, 54 J. PERSONALITY & SOC. PSYCHOL. 733 (1988); Benforado & Hanson, supra note 33, at 333, 343.

\textsuperscript{278} One way to do this is to describe a problem that raises ethical issues, ask students to “vote” with respect to how a matter should be resolved, encourage class discussion of their views, and then take a revote. This exercise can illustrate how moral conversation can improve ethical decisionmaking. The Armani and Belge (“buried bodies”) case is a good vehicle for this exercise because it elicits moral intuitions that are sometimes significantly affected by ethical conversation.
larger group may help shape better (and less biased) decisions by student teams who are representing a particular client. The clinics also provide good opportunities to discuss the impact of psychological biases on a whole range of lawyer and client decisionmaking. Debiasing training through simulations could also be offered in the same setting. 279 Similar lessons can be carried over into bridge-the-gap training and could also be incorporated in mandatory ethics CLE, although they are unlikely to have the desired impact unless debiasing techniques are taught experientially. 280

Bar associations could also provide some assistance with these efforts. Local and specialty bar associations—which often enjoy credibility with many solo and small firm lawyers 281—could provide hotlines for lawyers to call when they have ethical questions. Some bar associations already provide this service but they should be better advertised and expanded to provide faster and more reliable responses. 282 Discipline agencies could also encourage lawyers to reach out to “outsiders” when they have ethical issues. They could do so by publishing a policy which states that if a lawyer contacts a bar association ethics hotline for advice, fully discloses the relevant facts, and follows that advice, it will be treated as a significant mitigating factor in any subsequent discipline proceeding. 283

One other idea that deserves consideration is to focus more on training lawyers with respect to law office management skills. 284 Early training is especially

279. It seems clear that debiasing training must occur in the context of individual or small-group simulations or real world experiences rather than in lectures. One difficulty of educating students about bias is that it is essential to expose their own biased thinking, which can be uncomfortable under the best of circumstances and especially when it occurs in the presence of other classmates.

280. See, e.g., Fischoff, supra note 256, at 437 (describing some of necessary conditions for debiasing training); see also supra notes 256, 258 and accompanying text.


282. In Manhattan, the New York City Bar (formerly the Association of the Bar of the City of New York) maintains such a hotline but many solo and small firm lawyers do not belong to that organization and would not think to contact that bar association if they had a question. The New York County Lawyers’ Association also has an ethics hotline, but it is not well-advertised.

283. Recently a California court rejected a lawyer’s claim that she should not be sanctioned because she had contacted an ethics hotline for advice, but in that case it was unclear whether the lawyer had provided all relevant information to the hotline attorney during the call. Wallis v. PHL Assocs., 86 Cal. Rptr. 3d 297, 303-04 (Cal Ct. App. 2008). One way to create a permanent record and avoid the problem presented in Wallis would be to require that the lawyer lay out the facts upon which the advice is sought in an email.

284. Abel argues that lawyers would benefit from being trained like surgical residents. He is no doubt correct. During their medical training, surgeons are socialized to report errors quickly, take responsibility for them and learn from mistakes. ABEL, supra note 10, at 510-11. The legal profession’s closest analog to the hospital setting is law school legal clinics, which are not adequately funded to provide all bar applicants with sufficient training. The next closest institutional training experience can be found in large law firms. Unfortunately, unlike surgeons, solo and small firm lawyers—who receive the most discipline—do not remain in an institutional setting with clearly defined routines and expectations once they enter practice. The challenge for many of these lawyers is that they are essentially working—and learning the norms of practice—on their own.
important because the early lessons can stay with lawyers long after they are first absorbed. Muto, who did not even know about office diaries, is an example of a lawyer who might have benefited from law office management training. All lawyers who go into solo or small firm practice—regardless of their years of practice—should be required to attend bridge-the-gap programs or CLE with a law office management component that would instruct them about how to responsibly manage their staffs, their phone calls, and their caseloads. This training will not debias lawyer thinking, but it could educate lawyers about measures that may help them avoid future discipline.

B. CHANGES IN THE LAWYER DISCIPLINE SYSTEM

Abel’s case studies also suggest that changes in the discipline system should be considered to reduce the tendency of the discipline process to trigger self-destructive behavior that is costly to the system and to the lawyers themselves. For example, local and specialty bar associations could provide volunteers who are familiar with the discipline process to meet with lawyers who receive discipline complaints in order to help the lawyers understand the culture of the disciplinary authority and decide how best to proceed. These volunteers could provide an “outsider’s” perspective that might help lawyers view their own conduct in a more objective light. This type of free assistance is provided by the Queensland Law Society to solicitors who receive discipline complaints.

While some lawyers may be reluctant to contact the bar association because they do not want to share complaint information with a peer, the experience in Queensland—where about one-third of the solicitors who receive complaints consult with the volunteers—suggests that lawyers will avail themselves of the opportunity. This type of service is especially important for solo and small firm practitioners, who often cannot afford their own counsel but may need help overcoming counterproductive behavior that can be triggered by psychological processes.

Another way to reduce some of lawyers’ self-justifying behaviors might be to directly address the perception that the discipline system is inherently unfair in its treatment of solo and small firm lawyers. The secrecy of New York’s discipline process undoubtedly contributes to this view. Unlike many jurisdictions, New York...
York’s DDC publishes no public report of its activities, and it is impossible even to determine how many complaints against solo and small firm lawyers are received and how many are disciplined. Moreover, the composition of the DDC may contribute to the sense of unfairness. More than sixty percent of the lawyers who sit on the First Departmental Disciplinary Committee appear to be large firm lawyers, even though such lawyers rarely appear before the DDC and comprise only about twenty percent of all practicing lawyers. In Muto’s and Byler’s cases, two of the three lawyers on the hearing panels were large firm lawyers, which may have contributed to their view that the process was biased against them.

C. OTHER REGULATORY CHANGES

In light of the uncertainty about effective debiasing techniques—and the fact that some lawyers will not want to change their self-interested decisionmaking—it is also important to identify other measures that will protect the public from lawyer misconduct. In Lawyers in the Dock, Abel offers several suggestions for changes that will increase public protection, starting with mandatory malpractice insurance. He believes it is “unconscionable” that legal malpractice insurance is not required in the United States in order to practice law. I agree with his assessment. While Australia, Canada, and the United Kingdom have long required lawyers to carry malpractice insurance, bar resistance to mandatory insurance continues unabated in the U.S. Admittedly, mandatory malpractice insurance offers incomplete protection. In some of Abel’s cases—as is true in many discipline matters—the availability of malpractice insurance would have made no

288. Some data about the DDC’s activities appear in an annual report published by the New York State Bar Association, but that report provides very limited information. See COMM. ON PROF’L DISCIPLINE, N.Y. STATE BAR ASS’N, ANNUAL REPORT ON LAWYER DISCIPLINE IN NEW YORK STATE FOR THE YEAR 2006.

289. This information, like much discipline-related information in the First Department, is not published, but my review of DDC letterhead from July 2004 revealed that there were 24 large firm lawyers on the Committee and 15 lawyers who worked in all other practice settings.

290. New York lawyers in firms of over 50 lawyers make up about 17% of all active New York lawyers. CARSON, supra note 229, at 162-63. The concentration of large firms in Manhattan makes it likely that the percentage of large firm lawyers is somewhat greater than 17% in the First Department.

291. In Muto’s case, panel members included Bernard Lipshie, a partner at Stroock & Stroock & Lavan and Justin Feldman, a partner at Kronish Lieb Wiener & Hellman. Abel, supra note 10, at 169. In Byler’s case, hearing panel member Phillip Forlenza was a partner at Patterson, Belknap Webb & Tyler and Robert Haig was a partner at Kelly, Dye & Warren. Id. at 316, 318.

292. Abel, supra note 10, at 513. As he notes, the sole exception is Oregon, which requires its lawyers to purchase malpractice insurance. Id. at 63. A few other jurisdictions require lawyers to reveal whether they have malpractice insurance, but this information is not always readily accessible to the public. Id.

293. See, e.g., Alan Cooper, VSBS Sinks Mandatory Insurance, VA. LAW. WKLY., Oct. 27, 2008 (reporting that Virginia Bar Council rejected mandatory malpractice insurance for lawyers). By way of contrast, malpractice insurance must be carried by attorneys in other common law countries including Australia, Canada and the United Kingdom. See, e.g., Abel, supra note 10, at 501; Legal Profession Act, 2003 (NSW, Austl.), sec. 403, 406; Legal Profession Act, R.S.B.C. secs. 23 (1) (c); 30 (7) (1998).
The clients often could not afford litigation, did not wish to sue, or in one case, would have had no legal basis for doing so. Nevertheless, malpractice insurers help lawyers improve their office systems and practices in an effort to reduce claims experience. Moreover, in some cases, malpractice recoveries would help to make clients whole.

Abel also sees benefits to requiring lawyers to work in multi-lawyer firms rather than solo practices, because they “would have reputational interests in preventing misconduct and a financial incentive in ensuring minimum quality.” He suggests that it is more likely that there would be standardized practices (e.g., electronic calendaring systems) in multi-lawyer firms. He further notes that discipline against law firm partners might create incentives within organizations to improve behavior. Although I believe that solos should be strongly encouraged to have a “back up” arrangement with another lawyer to provide coverage in case of illness or incapacitation, I question the value of requiring lawyers to work in multi-lawyer firms. A growing number of solo lawyers work from their homes, both to keep their overhead low and for quality of life reasons. A requirement that they join multi-lawyer firms would either end this practice or (more likely) result in firm affiliations in name only. Moreover, there is little evidence that working in a multi-lawyer firm would avert most unethical behavior. Kreitzer, Furtzaig and Byler were all affiliated with law firms. Muto worked with travel agencies in a small firm even before he became a solo lawyer. Many small firms operate essentially like a collection of solo lawyers, with attorneys practicing in different areas, making it unlikely that the partners can cover each other’s matters or that they are even aware of how the other firm lawyers are conducting their practices. The prevalent use of LLP’s also reduces potential liability for a partner’s misconduct. While making lawyers subject to discipline for their partners’ misconduct might create incentives to improve systems within law firms, as a practical matter, the imposition of discipline for a partner’s misconduct is rare; it would need to increase dramatically before an affiliation requirement could be expected to have any effect.

Finally, I agree with Abel that private discipline sanctions should be eliminated and that more should be done to publicize lawyer discipline information.

295. Abel, supra note 10, at 525.
296. Id. at 518.
298. Levin, supra note 273, at 867.
299. Only New York and New Jersey provide for the imposition of discipline against a law firm. On occasion, discipline has been imposed against a law firm or against a lawyer for another partner’s wrongdoing under ethical rules governing supervisory lawyers, but those decisions are exceedingly rare.
300. Abel, supra note 10, at 509. As I have previously argued, even discipline complaints against lawyers should be publicized once there has been a finding of probable cause. Levin, supra note 8, at 29-32, 49-50. Permitting access to discipline complaints once probable cause is found may help to avoid situations—like
Although some states have made significant progress in publicizing lawyer discipline sanctions on websites, many states lag far behind in that effort. In New York, there is no website that contains information about the “public” sanctions imposed on lawyers and lay people would be hard-pressed to determine how to obtain this information. I am less optimistic than Abel, however, that publicity will serve as a deterrent to misconduct, at least for lawyers like those he describes in his case studies. Abel’s lawyers often believed they were behaving ethically, and they would have been unlikely to consider the possibility that their conduct would result in a published discipline sanction. Even when they were aware, like Kreitzer, that they were engaging in unethical conduct (in his case, the ten percenter scheme), overconfidence and overoptimism led them to believe they would not be caught. Instead, lawyer discipline information should be publicized in ways that permit members of the public to easily access this information so that they can better protect themselves when choosing their lawyers.

V. CONCLUSION

When gazing through this window into lawyer misconduct, the question naturally arises: why do some lawyers engage in misconduct and others do not? The case studies do not answer this question. Nor do the psychological processes described in this essay. Many lawyers work in pressurized environments like the one Furtzaig confronted, but they do not deal with them by neglecting cases, forging documents, and lying to clients. Many lawyers manage their practices (including high volume practices) without neglecting client matters as did Muto and Kreitzer; other lawyers know about travel agencies and ten percenter schemes, but they do not become involved with them. Many lawyers face financial difficulties but do not, like Byler, take client funds to pay themselves what they think is “fair.” Why some—but not all—lawyers engage in misconduct requires further study, and may never be fully understood.

Nevertheless, Lawyers in the Dock takes us several steps closer to understanding how some lawyers reason when representing their clients and how psychological processes can distort their judgments. More work is needed in order to

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301. Id. at 20-21.
302. The New York Office of Court Administration website only reveals that a New York lawyer is currently suspended, disbarred or delinquent in registering. In an effort to determine what would be required to obtain a lawyer’s discipline history, I called the First Departmental Discipline Committee and after waiting on hold for about ten minutes, I was told to call the Character and Fitness Committee to inquire about a particular lawyer’s public discipline history. The man who answered seemed surprised by my request, but then provided me with the information.
304. Notwithstanding efforts by criminologists, they have thus far been unable to explain why one individual commits crimes when most others do not. See id. at 32, 492.
understand these processes, both as they occur in solo and small firm lawyers and in lawyers who work in larger organizations. Even though our understanding is imperfect, it is not too soon to consider how to better protect the public. At a minimum, more thought should be given to socializing all lawyers into ethical practices through clinical and post-graduate training.305 In addition, teaching lawyers about the non-conscious processes that can cause them to make erroneous decisions and act in self-serving ways is important so that they can recognize this behavior in their colleagues even if they cannot always see how it affects their own judgments. If it is possible to do so effectively, debiasing techniques should be taught, not only to protect the public, but to improve all types of predictions and decisions that lawyers make in practice. Training lawyers to seek out the “outsider’s” perspective when they are making decisions can also improve their decisionmaking.

It is important to acknowledge, too, that even if debiasing can be effectively taught—and this is a big “if”—it is only a partial solution. As Abel notes, most law students want (and need) to make money as lawyers and it can be difficult to do so in solo and small firm practices.306 The clients of solo and small firm practitioners are especially vulnerable to breaches of trust by their lawyers; some self-interested decisionmaking by their lawyers will inevitably occur. Mandatory malpractice insurance would provide some measure of protection, but not for all clients or in all instances of wrongdoing. It is therefore critically important to teach the public how to find a good lawyer when a legal problem arises in their lives. This requires alerting the public to the need to check lawyers’ histories before entering into retainer agreements. It also means that information about lawyers’ discipline histories must be made easily accessible to the public in a form that can be readily understood. These measures cannot avert all lawyer misconduct, but they will better protect the public from the lawyers in the dock.

APPENDIX

David Kreitzer was a graduate of John Marshall School of Law and was admitted to practice in 1974. He had one to four associates during the relevant period and a personal injury practice with over 1000 cases. In 1993 and 1995, he was charged with neglect of fourteen cases. The neglect spanned from 1981-1995. He was later charged with failure to adequately supervise his associates and was indicted for engaging in a ten percenter scheme, which involved payments to a middleman to expedite resolution of thirteen different insurance claims. In 1999 he pled guilty to one count of second degree commercial bribery, a misdemeanor.

305. As noted, Abel believes that there is much to be learned from the medical profession in this regard. Id. at 509-14; see also supra note 284.
306. Abel, supra note 10, at 492.
At the disciplinary hearing, he blamed others for the neglect. The hearing panel found neglect in nine matters and misrepresentation in one other matter. In mitigation, Kreitzer presented evidence that he was treated for Hodgkin’s disease in 1976 and esophageal cancer in 1989-90. He previously had received four admonitions. He was suspended for three years in 1997, but after the court considered the misdemeanor conviction, he was disbarred in 2001.307

Joseph Muto was a graduate of the University of Bridgeport Law School. He was admitted to practice in 1987 and began practicing immigration law in Manhattan’s Chinatown in 1997. He started working as a solo practitioner in 1998 and had 450-500 active matters. In 2001, he was charged with neglecting numerous client matters, assisting the unauthorized practice of law by working with travel agents, mismanaging his escrow account and failing to report his address. Disciplinary counsel claimed that he did not have an office and that in most cases he never met directly with clients because he had been retained by travel agents. A flying phobia prevented him from appearing in some out-of-town cases. Muto denied many of the allegations, blaming some of his clients, and claiming that he provided high quality, low-cost representation. His mother had been diagnosed with terminal cancer in September 1998, which he claimed prevented him from appearing in some matters. His self-representation was characterized by the Referee as displaying “general disorganization and a kind of ad hoc scatterbrained approach” as well as “an air of delusion about it.” Muto previously had received an admonition for neglecting ten cases and had been suspended from practice in 1994. In 2002, he was disbarred.308

Lawrence Furtzaig was a graduate of New York Law School and was admitted to the bar in 1986. He began working at a boutique real estate litigation firm before law school and continued to work at the 30-lawyer firm after graduation. He became a non-equity partner in 1990 and an equity partner in 2000. He billed between 2200 to 2400 hours per year. In 1992, he failed to restore two cases to the court’s calendar and paid the client $60,000 to conceal what had occurred. From 1992 through 2001, he was untruthful in another ten to fifteen cases, at times forging documents and lying to clients to conceal his neglect. He was charged with misconduct involving five clients and nine matters in 2002. He admitted all the charges but claimed severe depression as a mitigating factor in the disciplinary proceedings. He also noted his responsibility as the sole support for his wife and young triplets and that he had no previous discipline. In 2003, he was suspended for five years.309

307. Id. at 71-72, 76, 90-94.
308. Id. at 105-06, 160, 167, 172.
309. Id. at 193-95, 199-200, 202-03.
Benjamin N. Cardozo and Deyan Brashich were graduates of NYU Law School. Cardozo was admitted to practice in 1942 and Brashich was admitted in 1965. They were solo practitioners in separate practices, but worked together on a Surrogate’s Court matter. In the early 1990’s, they convinced their client to accept a settlement that favored them in the distribution of attorneys’ fees over the interests of their client. They also sought additional fees from the Surrogate’s Court, failing to disclose their fee arrangement with their client, which had already resulted in a payment to them. They were charged in 1997 with dishonesty, fraud, deceit or misrepresentation, conduct prejudicial to the administration of justice and personal conflict of interest. Cardozo, who was 84, had never previously been disciplined. He received a public censure. Brashich had received six prior admonitions for neglect. He submitted evidence of significant family difficulties, including the serious illness of his daughter and his mother’s incapacitating stroke. He received a public censure but was later suspended for one year due to a subsequent complaint that arose out of his representation of another client and related to the charging of an illegal or excessive fee.310

Philip Byler, a graduate of Harvard Law School, was admitted to practice in 1977. He worked at a small firm during the relevant period. In 1992, he agreed to help a friend with a tax shelter problem for which the IRS was claiming the client owed $180,000. Although Byler initially (and orally) agreed to do the work for a maximum of $20,000, he later claimed that his client had told him that if there was a tax refund, he could keep it. When an unexpectedly large refund was received in 1994, Byler transferred the money to his own account and then told the client. The client disputed Byler’s right to do so but Byler refused to escrow the funds. There was evidence that Byler was having financial difficulties at the time. His client complained to the Disciplinary Committee and Byler was offered a private admonition, which he rejected. He was then charged with failing to maintain intact a client’s funds and failing to pay funds due to a client. His defense in the disciplinary proceedings was marked by voluminous filings, the continual insistence that he had acted correctly, and attacks on his client. The panel found that “the evidence surrounding the critical factual disputes is inconclusive” but that Byler had an obligation to escrow the disputed refund. Byler had never previously been disciplined but the panel found that Byler’s “self-righteous position . . . so out of touch with reality” was an aggravating factor. In 2000, he was suspended for a year.311

Arthur Wisehart was a University of Michigan Law School graduate and was admitted to the bar in 1955. He was a solo practitioner during the relevant period.

310. Id. at 259, 264, 266-70, 274, 279.
311. Id. at 289-90, 314-16, 322, 333-34.
In 1991 his client removed opposing counsel’s privileged documents from a conference table during a deposition in a sexual harassment litigation. Wisehart read the documents, used them to attempt to extract a settlement and when the court dismissed the sexual harassment case, Wisehart made a series of offensive charges against the presiding judge and others in an effort to get them to recuse themselves. In 1996, he was charged, *inter alia*, with dishonesty, conduct prejudicial to the administration of justice, disregarding a tribunal ruling, undignified or discourteous conduct degrading to a tribunal and knowingly making false accusations relating to a judge. He claimed in the disciplinary proceedings that he had acted appropriately and in his submissions, he attacked opposing counsel, judges and members of the hearing panel. He had never before been disciplined. In 2001, at the age of 72, he was suspended from practice for two years.\(^{312}\)

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312. *Id.* at 448-49, 456, 476-77.