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# Behavioral Legal Ethics Lessons for Corporate Counsel

Paula Schaefer

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# BEHAVIORAL LEGAL ETHICS LESSONS FOR CORPORATE COUNSEL

*Paula Schaefer*<sup>†</sup>

## CONTENTS

INTRODUCTION .....	975
I. CONSCIOUSLY HELD CONCEPTIONS AND MISCONCEPTIONS OF A LAWYER'S DUTY WHEN ADVISING A CORPORATE CLIENT ABOUT ITS (POSSIBLY) FRAUDULENT OR CRIMINAL PLANS .....	979
II. BEHAVIORAL LEGAL ETHICS EXPLANATIONS FOR WHY ATTORNEYS MAY NOT ADVISE AGAINST CORPORATE CLIENT CRIME AND FRAUD .....	984
A. <i>The Role of Attorney Self-Interest</i> .....	984
B. <i>Obedience Pressure</i> .....	987
C. <i>Conformity Pressure</i> .....	989
D. <i>Partisan Bias</i> .....	992
III. INFLUENCING BETTER CORPORATE LEGAL ADVICE THROUGH THE LESSONS OF BEHAVIORAL LEGAL ETHICS.....	995
A. <i>Interventions to Combat a Corporate Attorney's Wrongful Obedience and Conformity</i> .....	995
B. <i>Priming Corporate Advisors to Protect the Corporation from Liability</i> .....	997
C. <i>Educating Lawyers About Debiasing Techniques</i> .....	1000
D. <i>Serious Consequences for Attorneys Who Fail to Protect Corporate Clients from Crime and Fraud Liability</i> .....	1001
CONCLUSION.....	1005

## INTRODUCTION

Attorney Timothy Muir served as inside general counsel, and later outside counsel, for Scott Tucker's payday loan business.<sup>1</sup> Tucker's

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<sup>†</sup> Associate Dean for Academic Affairs and Professor of Law, University of Tennessee College of Law. Thanks to Cassandra Burke Robertson and the editors of the Case Western Law Review for the invitation to participate in this Symposium. I also want to thank University of Tennessee College of Law alumna Hayley Jensen who first introduced me to Timothy Muir in the research paper that she submitted for my Behavioral Legal Ethics class, titled: In-House Ethical Dangers: The Perilous Interplay of Professional Duties & Client Loyalties (on file with the author).

1. James Dornbrook, *Still Maintaining Innocence, Payday Lender Lawyer Muir Faces Reckoning*, K.C. BUS. J. (May 11, 2018, 5:01 AM), <https://www.bizjournals.com/kansascity/news/2018/05/11/payday-lender-tim-muir-prison-scott-tucker.html> [<https://perma.cc/AW2E-JEF4>] (describing Muir's

payday loan enterprise, which did business under various names,<sup>2</sup> charged customers illegal interest rates of 600 percent and higher.<sup>3</sup> Loans were set up to automatically renew—a fact that was misrepresented in the required Truth in Lending Act (TILA) forms.<sup>4</sup> The loan payment plans resulted in a \$300 loan costing a consumer \$975, though the TILA forms represented it would cost \$390.<sup>5</sup>

In an effort to escape prosecution and consumer class actions, Muir and Tucker entered transactions with Indian tribes to create the appearance that the tribes owned and operated the payday loan business.<sup>6</sup> The government described Muir as “the architect” of these transactions.<sup>7</sup> The goal was that the payday loan business would avoid liability because the tribes, as sovereigns, would not be subject to state civil and criminal usury laws.<sup>8</sup> In reality, the tribes would play no actual ownership role; they were well-paid for entering the “ownership” agreement and keeping a company computer on the reservation.<sup>9</sup>

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role with the payday loan business as general counsel for about six months and then outside counsel). The court described Muir’s role as the company’s “general counsel since 2006.” *United States v. Tucker*, No. 16-CR-91(PKC), 2017 WL 3610587, at \*1 (S.D.N.Y. Mar. 1, 2017).

2. *Tucker*, 2017 WL 3610587, at \*1 (explaining that numerous payday loan businesses—with names that included Ameriloan, One Click Cash, and others—were owned and operated by Tucker, and shared common employees, computer systems, and office infrastructure as part of AMG Services, Inc.).
3. Government’s Sentencing Memorandum at 1, *United States v. Tucker*, No. 16-CR-91(PKC), 2017 WL 3610587 (S.D.N.Y. Dec. 29, 2017) [hereinafter Sentencing Memorandum].
4. *Id.* at 3.
5. *Id.* at 2–3.
6. Dornbrook, *supra* note 1; Sentencing Memorandum, *supra* note 3, at 3–4.
7. *Tucker*, 2017 WL 3610587, at \*2.
8. In their criminal trial, Muir and Tucker argued that prosecution had failed to state an offense for the collection of an unlawful debt because the debts were lawful in that their interest rates were set by “federally recognized Indian tribes, which have sovereign powers that can be abrogated only through direction Congressional action.” *Id.* at \*1. The treasurer for the Kickapoo Tribe in Kansas testified that the purpose of the business relationship between the tribe and the payday loan business was “to get around the activity of the states establishing more regulations to deal with the payday loan-type businesses.” Dornbrook, *supra* note 1.
9. Dornbrook, *supra* note 1 (explaining testimony from the Kickapoo Tribe’s treasurer that the tribe was guaranteed \$20,000 per month plus a percentage of the proceeds above \$2 million in lending per month, the tribe was the “owner” but did not manage or have any financial obligations to the business, and the tribe’s only obligation was to keep a

Tucker and Muir misrepresented the tribes' interest in the business both in court filings and in interactions with customers.<sup>10</sup> To keep up the charade that the tribes actually owned and operated the business, Tucker and Muir went to elaborate lengths to create a fake record.<sup>11</sup> For example, payday loan employees working in company offices in Overland Park, Kansas were told to lie about where the company was located and were even given weather reports for the places where the tribes were located in case the weather came up during small talk on the phone with customers.<sup>12</sup>

Ultimately, their plan was unsuccessful. The Federal Trade Commission obtained its largest civil court judgment to date—\$1.3 billion—against Scott Tucker and AMG Services, Inc.<sup>13</sup> Tucker and attorney Timothy Muir were charged with and convicted of conspiracy to collect unlawful debts, collection of unlawful debts, wire fraud, money laundering, and Truth in Lending Act (TILA) violations—all related to collection of usurious interest on payday loans.<sup>14</sup> Attorney Timothy Muir was sentenced to seven years in prison,<sup>15</sup> while Scott Tucker was sentenced to sixteen years and eight months.<sup>16</sup> As this Article goes to press in 2019, both Muir and Tucker have appealed their convictions. Their cases are pending before the Second Circuit.<sup>17</sup>

The field of behavioral legal ethics can provide insight into the thinking behind the advice that corporate attorneys like Muir provide or fail to provide their corporate clients.<sup>18</sup> Traditionally, legal ethics

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company computer (that generated financial reports) in the tribe's attorney's office on the reservation).

10. Sentencing Memorandum, *supra* note 3, at 4.
11. *Id.* at 3–4.
12. Dornbrook, *supra* note 1.
13. Lesley Fair, *Record \$1.3 Billion Ruling Against Scott Tucker and Others Behind AMG Payday Lending*, FED. TRADE COMMISSION: BUS. BLOG (Oct. 4, 2016, 11:19 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2016/10/record-13-billion-ruling-against-scott-tucker-others-behind> [<https://perma.cc/5PBE-MWHH>].
14. Dornbrook, *supra* note 1; Sentencing Memorandum, *supra* note 3, at 1 (stating that Tucker and Muir were convicted of fourteen counts arising from their illegal payday lending scheme).
15. Dornbrook, *supra* note 1.
16. *Id.*
17. Brief for Defendant-Appellant at 1, *United States v. Tucker*, No. 18-1802-CR, 2018 WL 3970222 (2d Cir. Aug. 15, 2018).
18. Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1111 (2013) (asserting that many of lawyers' ethical lapses "result from a combination of situational pressures and all too human modes of thinking").

education has focused on the law governing lawyers.<sup>19</sup> Professional responsibility courses and required attorney ethics continuing legal education classes deal primarily with professional conduct rules and the law of professional liability.<sup>20</sup> The thinking behind this educational approach is that if lawyers know the law, they will act consistent with their ethical and legal obligations.<sup>21</sup>

Behavioral legal ethics adds the perspective of behavioral science to the study of legal ethics.<sup>22</sup> Behavioral science research explains that biases, heuristics, and situational factors can have a powerful influence on ethical decision-making that operates outside of a person's conscious awareness.<sup>23</sup> Thus, behavioral legal ethics provides a new lens through which to view and understand attorney decision-making.

This Article draws on legal ethics and behavioral science to explain what the corporate advisor *should do*, as well as what we have reason to believe he *may do*, when faced with a corporate client's misguided—but potentially lucrative—scheme. Part I starts with the corporate lawyer's consciously held conceptions and misconceptions about duty owed to her corporate client when company executives propose a plan that will create substantial liability for the company—when and if it is caught. This Part focuses on the legal ethics piece, without the behavioral science perspective, and discusses not only what the lawyer should know but what many falsely believe about their duty.

Then, Part II turns to behavioral science and highlights some of the key factors that corporate attorneys are unconsciously influenced by as they try to decide how (or if) to address client conduct that may

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19. Deborah L. Rhode, *Legal Ethics in Legal Education*, 16 CLINICAL L. REV. 43, 44–45 (2009).
  20. *Id.* at 50.
  21. *See generally* Tigran W. Eldred, *Insights from Psychology: Teaching Behavioral Legal Ethics as a Core Element of Professional Responsibility*, 2016 MICH. ST. L. REV. 757, 758–59 (2016) (discussing the effectiveness of teaching behavioral legal ethics).
  22. *Id.* at 759 (explaining that the central idea of behavioral legal ethics is that “unethical conduct is frequently the product of psychological factors that occur largely outside of the conscious awareness of the decision-maker. The result is that well-intentioned lawyers will often be unaware of how their behavior diverges from their own conceptions of themselves as ethical and honest people.”).
  23. *See, e.g.*, JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 70–71 (2012); Jeff Kaplan & Azish Filabi, *Head to Head: A Conversation on Behavioral Science and Ethics*, ETHICALSYSTEMS.ORG (2017), [https://www.ethicalsystems.org/sites/default/files/files/HeadtoHead\\_PDF.pdf](https://www.ethicalsystems.org/sites/default/files/files/HeadtoHead_PDF.pdf) [<https://perma.cc/4MAH-BAJ2>] (explaining that behavioral ethicists study the “situations, mindsets and influences that impact everyday decisions and actions, as well as the psychological processes that are likely to encourage unethical behaviors”).

amount to a crime or fraud. This discussion moves from attorney self-interest, to obedience and conformity pressure, and concludes with partisan bias. While numerous other biases, heuristics, and situational factors can subtly impact any person's decision-making,<sup>24</sup> these are some of the most salient influences for the corporate advisor. Both the consciously held beliefs and unrecognized influences can combine to lead a well-meaning corporate attorney astray. Research reveals that many will fail to advise against corporate misconduct, and some will even become enthusiastic participants in that misconduct.

It is against this backdrop that Part III considers which interventions could lessen the risk of corporate attorneys providing poor advice to company agents on the brink of liability-creating conduct. Again, drawing on legal ethics and behavioral science, this discussion suggests the pressure points—from priming to education—that are most likely to result in positive changes in attorney advice. The Article concludes with thoughts on what corporate attorneys can learn from the Muir case and behavioral legal ethics in order to provide better advice to their corporate clients.

#### I. CONSCIOUSLY HELD CONCEPTIONS AND MISCONCEPTIONS OF A LAWYER'S DUTY WHEN ADVISING A CORPORATE CLIENT ABOUT ITS (POSSIBLY) FRAUDULENT OR CRIMINAL PLANS

An attorney advising a client about planned future conduct has the legal obligation to help a client understand the prospect of legal liability arising from that conduct. As a fiduciary, an attorney's duty of care obligates the attorney to provide the advice that a competent lawyer would provide under the circumstances.<sup>25</sup> The lawyer's legal duties as an advisor are also embodied in professional conduct rules. These rules remind attorneys of the obligation to provide candid advice and to exercise independent professional judgment.<sup>26</sup> The rules further explain that it is the lawyer's obligation to advise against conduct that is criminal or fraudulent.<sup>27</sup> The attorney's role is to help the client

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24. See Robbennolt & Sternlight, *supra* note 18; Eldred, *supra* note 21.

25. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 (AM. LAW INST. 2000) (describing the lawyer's standard of care—to “exercise the competence and diligence normally exercised by lawyers in similar circumstances”—for purposes of liability for professional negligence and breach of fiduciary duty).

26. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2017).

27. *Id.* r. 1.2(d) (prohibiting a lawyer counseling a client to engage in or assisting a client in criminal or fraudulent conduct); *id.* r. 1.2 cmt. 11 (noting that a lawyer also cannot counsel or assist in client's breach of fiduciary duty when client is a fiduciary); RESTATEMENT (THIRD) OF THE

understand the civil and criminal liability that will be incurred *if and when* the conduct is detected—the lawyer should not weigh the possibility of non-detection or profitability of misconduct.<sup>28</sup>

Providing a client with information about the risk of liability allows the client to make an informed decision about future conduct.<sup>29</sup> Conventional wisdom is that, in most cases, the client will follow the lawyer’s advice and thereby avoid liability.<sup>30</sup> But regardless of how the client decides to proceed, the lawyer is legally and ethically prohibited from facilitating a client’s criminal or fraudulent conduct. The law of attorney liability provides that an attorney can be held criminally liable for participation in a client crime<sup>31</sup> and civilly liable for participating in client fraud and client breach of fiduciary duty.<sup>32</sup> Moreover, attorney professional conduct rules require that an attorney withdraw from a representation rather than participate in a crime or fraud,<sup>33</sup> inform the client that the lawyer cannot participate in criminal and fraudulent

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LAW GOVERNING LAWYERS § 94(2) (AM. LAW INST. 2000) (also noting that a lawyer should not advise a client to violate a court order).

28. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 cmt. f (AM. LAW INST. 2000) (explaining that a lawyer should not counsel a client about the “degree of risk that a lawyer violation will be detected or prosecuted”).
29. MODEL RULES OF PROF’L CONDUCT r. 1.4 cmt. 5 (AM. BAR ASS’N 2017) (explaining that adequate communication is necessary for the client to participate in decisions concerning the objectives of the representation and that the adequacy of communication depends upon the kind of advice being provided).
30. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (explaining that the purpose of protecting privileged communications “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice”).
31. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 8 (AM. LAW INST. 2000) (describing lawyer liability for criminal offenses committed in the course of a client representation).
32. *Id.* §§ 51, 56–57 (describing circumstances when attorneys have civil liability to third parties). *See, e.g.*, *Thornwood Inc. v. Jenner & Block*, 799 N.E.2d 756, 768–69 (Ill. Ct. App. 1st Dist. 2003) (allowing client’s business partner’s claim of aiding and abetting breach of fiduciary duty to proceed against client’s lawyer).
33. MODEL RULES OF PROF’L CONDUCT r. 1.16(a)(1) (AM. BAR ASS’N 2017) (requiring an attorney to withdraw when the representation will result in violation of law or professional conduct rules).

conduct,<sup>34</sup> and take steps to ensure that the lawyer's services are not used to facilitate a fraud.<sup>35</sup>

When the client is an organization (rather than a natural person), the lawyer-advisor is obligated to protect the client from itself (i.e., take steps to thwart the client's plan to engage in conduct that will create liability for the client). While a lawyer should try to dissuade a natural person from liability-creating conduct (and has tools at her disposal that may help convince the client),<sup>36</sup> the client is free to make a bad choice.<sup>37</sup> That is not the case for a lawyer's corporate (or other organizational) client.<sup>38</sup> The lawyer's duties of competence and loyalty are owed to the corporation and not to the agents who speak on its behalf.<sup>39</sup> Thus, when those agents plan to engage in criminal or fraudulent conduct that will create liability for or to the organization, the lawyer should not defer to those agents and should instead take steps to protect the corporation from liability.<sup>40</sup> Those steps include taking the matter to higher authorities in the organization<sup>41</sup> and even

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34. *Id.* r. 1.4(a)(5) (requiring attorney to consult with client about limits on the lawyer's conduct when client expects assistance prohibited by professional conduct rules or other law).
35. *Id.* r. 4.1 (prohibiting lawyer making a false statement of material fact to third person or failing to disclose a material fact when disclosure is necessary to avoid assisting in a crime or fraud except as prohibit by the confidentiality rule); *see also id.* r. 1.2, cmt. 10 (describing a lawyer's duties to avoid participating in a crime or fraud); *id.* r. 1.6(b)(2)–(3) (permitting disclosure of client confidences to avoid assisting in or to mitigate the damage of a client crime or fraud in which the lawyer assisted).
36. *See supra* notes 33–35 and accompanying text. For example, if the lawyer tells the client that the lawyer will withdraw from the representation and will disclose the fraud to a third party so that the lawyer can avoid being implicated in the fraud, the client may be persuaded to avoid the fraudulent conduct. *Id.*
37. Paula Schaefer, *Harming Business Clients with Zealous Advocacy: Rethinking the Attorney Advisor's Touchstone*, 38 FLA. ST. U. L. REV. 251, 269 (2011) (explaining that client autonomy may justify allowing a client that is a natural person to make a "self-destructive, liability-creating decision").
38. MODEL RULES OF PROF'L CONDUCT r. 1.13(b)-(c), cmt. 3 (AM. BAR ASS'N 2017).
39. *Id.* r. 1.13(b).
40. *Id.* r. 1.13, cmt. 3 (explaining that lawyers ordinarily must accept company agent's decisions, but not when they engage in conduct that violates an obligation owed to the organization or engages in a legal violation that may be imputed to the organization).
41. *Id.* r. 1.13(b).



going outside of the organization when doing so will protect the corporation from liability.<sup>42</sup>

A common misconception of the corporate advisor's role is that he should be a zealous advocate of any plan that is arguably within the bounds of the law.<sup>43</sup> This is the attorney advisor's "zealous advocacy misconception." The origin of this misconception undoubtedly is the ubiquitous description of lawyer as zealous advocate that can be found in pop culture,<sup>44</sup> the writings of legal ethics scholars,<sup>45</sup> and the preamble of the Model Rules of Professional Conduct.<sup>46</sup> This is not to say that lawyers should never be zealous advocates. In fact, the conception of lawyer as zealous advocate frequently aligns with a lawyer's fiduciary and ethical duty to a client—such as the courtroom advocate making a persuasive argument to the jury.<sup>47</sup> That is why the phrase is found in the Model Rules of Professional Conduct and the writings of legal ethics scholars. It *can* be an appropriate lawyer mantra—but not always.

There is a mismatch between zealous-advocacy-within-the-bounds-of-the-law and the duty of a corporate lawyer advising about possibly fraudulent or criminal conduct. Lawyers advising clients about future conduct fail their clients—and fail to fulfill their legal and ethical obligations to their clients—if they take this simplistic zealous advocate

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42. *Id.* r. 1.13(c); 17 C.F.R. § 205.3(d)(2)(i), (iii). This is often referred to as "loyal disclosure" because the disclosure is in the interest of the organizational client. See Paula Schaefer, *Protecting a Business Entity Client from Itself Through Loyal Disclosure*, 118 YALE L.J. POCKET PART 152, 152 (2009).

43. Schaefer, *supra* note 37, at 252 (quoting corporate attorney Joseph Collins during his criminal trial as testifying: "I have a duty to represent my client zealously"); *Id.* 256–57 (providing evidence that many non-litigators conceive of their role as zealous advocate).

44. From the movie *Cape Fear*:

Sam Bowden: "A lawyer should represent his client . . . ."

Max Cady: "Should ZEALOUSLY represent his client within the bounds of the law."

CAPE FEAR (Universal Pictures 1991); *A Contrarian List: Not the Greatest Legal Movie Lines of All Time*, IRREVERENT LAW. (Feb. 21, 2012), <https://lawmrh.wordpress.com/2012/02/24/a-contrarian-list-not-the-greatest-legal-movie-lines-of-all-time/> [https://perma.cc/M98Q-YFKM].

45. See, e.g., Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1243 (1991) (describing zealous advocacy as the narrative that conveys the ideal of the American legal profession).

46. MODEL RULES OF PROF'L CONDUCT pmb1 ¶¶ 8, 9 (AM. BAR ASS'N 2017).

47. Schaefer, *supra* note 37, at 262–63 (explaining why zealous advocacy in a courtroom is consistent with an attorney's duty to a client and why it is not in the advising context).

view of their role. A zealous advocate of any client scheme that is arguably within the bounds of law will fail to provide the advice a client needs.<sup>48</sup> A client cannot make an informed choice about how to avoid liability if the lawyer-advisor is advocating for the scheme, rather than advising about the risk of liability for the planned course of conduct.<sup>49</sup> For a corporate client whose agents might be interested in the short term gains of fraudulent conduct, the attorney's obligation to advise (rather than to zealously advocate) is critical to the client's interests.<sup>50</sup>

It is important to note an important distinction here. Partisan bias can make it difficult for any lawyer—whether a litigator or an advisor—to objectively judge “the bounds of the law” or the “prospect of legal liability.”<sup>51</sup> Partisan bias will be discussed later in this Article.<sup>52</sup> The zealous advocacy misconception described here is a different problem and unique to the attorney-advisor.<sup>53</sup> A belief or mindset that it is the legal advisor's proper role to zealously pursue (rather than advise against) the client's stated goals unless those goals are clearly illegal is

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48. *Id.* at 258–64 (describing how zealous encouragement of the client's plans—so long as they are within the technical bounds of the law—does not serve the client's interests).
49. *Id.* at 263 (explaining that if a lawyer zealously advocates for a client's agenda, the client may not understand that the plan leaves him vulnerable to liability).
50. *Id.* at 269 (“The entity client, more than any other client, needs a legal advisor to make judgments about what conduct may create legal liability and to protect it from such decisions.”).
51. Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 *IND. L.J.* 1639, 1643–44 (2015) (calling into question the assumption of the dominant theory of legal ethics that lawyers are capable of simultaneously acting as partisans and objectively determining “the line between permissible and impermissible behavior”).
52. *See infra* Part II.D.
53. Some scholars disagree with this view. They would say that all attorneys can and should be zealous advocates within the bounds of the law, and the problem is not with zeal but that some lawyers have difficulty judging “the bounds of the law.” Anita Bernstein, *The Zeal Shortage*, 34 *HOFSTRA L. REV.* 1165, 1172 (2006) (arguing that zeal is not the culprit when attorneys take actions that harm their own clients); W. William Hodes, *We Need More Zealousness, Not Less—But Within the Bounds of the Law*, *RES GESTAE*, Mar. 2001, at 46. But this contrary view misses two key points. First, an attorney advising about *possibly* fraudulent or *possibly* criminal conduct will be unlikely to advise against the conduct if he views his role as being a zealous advocate of anything that is arguably within the bounds of the law. This means that in the absence of a black and white violation of law—which is seldom the case in the corporate world—the corporate advisor will advocate what he should advise against. Second, why should the corporate advisor be advocating, zealously or otherwise? In order for a client to make an informed decision about a course of conduct, the client needs *advice* and not advocacy.

a misconception of the lawyer-advisor's legal and ethical duty. When this twisted conception of duty is combined with some or all of the behavioral factors discussed in the next Part, it is easy to understand why lawyer-advisors sometimes facilitate corporate client misconduct.

## II. BEHAVIORAL LEGAL ETHICS EXPLANATIONS FOR WHY ATTORNEYS MAY NOT ADVISE AGAINST CORPORATE CLIENT CRIME AND FRAUD

A corporate attorney's conscious understanding of his legal and ethical obligations is only part of the story.<sup>54</sup> There are other factors—often working outside of the attorney's conscious awareness—that influence the advice the attorney provides when a corporate client proposes arguably fraudulent or possibly criminal conduct. Drawing on behavioral science research, this Part explores some of the factors that may influence a corporate lawyer to provide bad advice to a client.

### *A. The Role of Attorney Self-Interest*

In *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, Tigran Eldred demonstrates that criminal defense lawyers are unaware that their own self-interest heavily influences the poor representation they provide their indigent clients.<sup>55</sup> These lawyers have a blind spot to perceiving that a conflict of interest—between their interests and that of their clients—is causing their performance to come up short.<sup>56</sup> While it may seem that indigent criminal defense lawyers and corporate advisors would have little in common, that is not the case. Eldred's research is revealing of how self-interest can influence any lawyer to unwittingly provide incompetent representation to a client when the client's interest is misaligned with that of the lawyer.

Eldred explains the importance of a criminal defense lawyer conducting an investigation of the underlying facts,<sup>57</sup> and describes how

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54. In the 2011 article in which I argued that zealous advocacy by legal advisors was not in the corporate client's interest, I stated: "Because many factors contribute to how lawyers represent their business clients, I acknowledge that a shift in thinking away from zealous advocacy is not a panacea." Schaefer, *supra* note 37, at 282. In the present Article, I attempt to address some of those other factors.

55. Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333, 339 (2012) (explaining that attorneys "fail to perceive themselves as unethical in situations in which their own self-interest conflicts with duties owed to others").

56. *Id.*

57. *Id.* at 340–44.

the failure to investigate can have disastrous consequences for clients.<sup>58</sup> Yet, the indigent criminal defense lawyer has little or no personal interest in providing that investigation. Whether an overworked public defender or a lawyer taking a court appointed case with a capped fee, any time dedicated to an investigation is not in the attorney's financial interests.<sup>59</sup> And if the attorney fails to undertake an investigation and the client is harmed, the attorney is unlikely to suffer any adverse consequences (such as malpractice liability).<sup>60</sup> In summary: if the lawyer investigates, it is not beneficial to her personally and if she fails to investigate, there is little to fear. Thus, the attorney's interests in doing little to nothing conflict with the indigent client's interests in counsel conducting an investigation.

But most indigent criminal defense attorneys do not engage in a cold calculation not to investigate because it is in their self-interest. They believe they are providing a quality representation to their clients, even though they are not.<sup>61</sup> Eldred draws on research about the dual processes of human decision-making: automatic processes (those that are “fast, effortless, involuntary . . . and not accessible to introspection”) and controlled processes (“slow, effortful, voluntary, and accessible to introspection”).<sup>62</sup> He explains that an attorney's self-interest influences her professional decision-making automatically, and this happens before her effortful and slower processes of deliberation (about professional conduct obligations) kick in. Eldred concludes: “The result is that the automatic preferences for self-interest will often be the driving force behind a decision, even when the decision maker believes that the choice resulted from an objective evaluation of relevant considerations.”<sup>63</sup>

When the unconscious influence of self-interest combines with situational pressures<sup>64</sup> and “the biased way that people tend to seek out and interpret information,”<sup>65</sup> the indigent criminal defense lawyer may reason that entering a plea deal—despite completing no investigation

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58. *Id.* at 344–47.

59. *Id.* at 348–50.

60. *Id.* at 350–51.

61. *Id.* at 351–52 (concluding that many indigent criminal defense attorneys “are likely to believe that they are making calculations in each case based on what is best for the client”).

62. *Id.* at 360; *see also*, DANIEL KAHNEMAN, THINKING FAST AND SLOW 20–24 (2011) (referring to the automatic processes as “System 1” and the effortful processes as “System 2”).

63. Eldred, *supra* note 55, at 362.

64. *Id.* at 352–56 (describing how informal norms, organizational culture, and obedience pressure can impact attorney decision-making).

65. *Id.* at 362–64.

and engaging in no advocacy on the client's behalf—is in the client's interest. Eldred explains that the indigent criminal defense attorney starts from the view that the self-interested option of no investigation is justified, and then confirmation bias and motivated reasoning influences the attorney to seek out information consistent with this view (i.e., evidence of guilt).<sup>66</sup>

For precisely the opposite reason, attorney self-interest can significantly—but invisibly to the attorneys—influence the poor advice they provide their corporate clients contemplating fraudulent conduct. Corporate executives like Scott Tucker in the payday loan case, hire and consult with attorneys who they hope will help facilitate their money-making schemes.<sup>67</sup> These corporate advisors have an immediate financial incentive to give the corporate client (via that executive) all of the zealous-advocacy-within-the-arguable-bounds-of-the-law the company can afford. Corporate advisors keep their jobs (as inside or outside counsel) when they keep executives happy; they do this by finding ways to implement corporate executives' plans, and not by saying no.<sup>68</sup> In the payday loan case, Timothy Muir made over \$10 million in advising and assisting the payday loan business through the years.<sup>69</sup> While other situational pressures and biases (discussed in the following parts) also play a role, the corporate lawyer's self-interest plays a role in the attorney failing to provide advice that the actual client—the corporation—had an interest in receiving.<sup>70</sup>

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66. *Id.* at 370. Eldred explains that, in a system in which many attorneys start from the premise that their clients are guilty, there is reason to believe counsel will unwittingly seek out evidence of the client's guilt and be skeptical of any contrary evidence. *Id.* at 364, 371–72.

67. *See generally* Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 29 (2009) (discussing the fact that some clients are not seeking legal advice, but rather “legal cover”).

68. Being fired is such an obvious risk for in-house or outside counsel who do not keep executives happy that professional conduct rules give specific guidance to attorney who is fired for engaging in up-the-ladder reporting. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.13(e) (AM. BAR ASS'N 2017).

69. Dornbrook, *supra* note 1, at 3.

70. Professors Richard Moorhead and Rachel Cahill-O'Callaghan reached the same conclusion through their research. Richard Moorhead & Rachel Cahill-O'Callaghan, *False Friends? Testing Commercial Lawyers on the Claim that Zealous Advocacy Is Founded in Benevolence Towards Clients Rather than Lawyers' Personal Interest*, 19 LEGAL ETHICS 30 (2016). Moorhead and Cahill-O'Callaghan surveyed commercial lawyers (both in private practice and in-house) about their values and their “inclinations towards zeal” in representing their corporate clients. They determined that attorneys more inclined to providing a zealous representation were those who were motivated to act in their own interest. *Id.*

In the final analysis, money is a key influence for both groups of lawyers, even though neither would identify it as such. Lawyers representing indigent criminal defendants provide less zealous advocacy because it is not in their financial interest to do so, while corporate advisors provide more zealous advocacy because it is in their financial interest to do so. In both scenarios, the representation provided is not in the client's interest. The indigent criminal defendant needs more advocacy and the corporate client needs more advice about liability and less advocacy.

*B. Obedience Pressure*

An attorney's advice—or lack of advice—about possibly fraudulent or criminal conduct will be influenced by the people who surround the attorney.<sup>71</sup> Obedience research explains the power an authority figure has to influence bad advice. In the case of a corporate attorney addressing planned conduct that may be criminal or fraudulent, the authority figure is likely the corporate executive that the attorney reports to in the professional relationship.

Stanley Milgram's 1960's work on obedience was groundbreaking.<sup>72</sup> His purpose was to determine how far a person would go in carrying out an authority figure's instructions, as those instructions came increasingly into conflict with the person's conscience.<sup>73</sup> In Milgram's experiment, test subjects were told that they were participating in a study concerning punishment's impact on learning.<sup>74</sup> A person in a white lab coat (the authority figure) directed the experiment's subjects to flip a switch that would provide an electric shock to a "learner" (who was strapped to a chair and connected to an electrode) when the learner provided an incorrect answer to a question.<sup>75</sup> The subjects were put in control of a shock generator that contained thirty switches that ranged from 15 volts (marked "Slight Shock") all the way to 450 volts (two switches prior were marked "Danger: Severe Shock" and the final two

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71. Eldred, *supra* note 21, at 766 (explaining "situationism" as the "notion that subtle aspects of the situation play a significant role in how decisions are reached").

72. See, e.g., Jerry M. Burger, *Situational Features in Milgram's Experiment That Kept His Participants Shocking*, 70 J. SOC'Y FOR PSYCHOL. STUDY SOC. ISSUES 489, 489 ("For half a century, the findings from Stanley Milgram's obedience studies have been among the most intriguing and widely discussed data ever to come out of a psychology lab.").

73. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY AN EXPERIMENTAL VIEW 3 (1974).

74. *Id.* Subjects were all men, but were drawn from a variety of backgrounds, including postal clerks, salesmen, laborers, and teachers. *Id.* at 14–16.

75. *Id.* at 3. The learner's task was to memorize a list of word pairs. He would receive a shock if he failed to recall the correct pairing. *Id.*

switches were marked XXX.).<sup>76</sup> The subject was directed to provide shocks of increasing intensity with each incorrect answer.<sup>77</sup> Though the learner was hidden from the subject's view, the subject could hear the learner's increasingly loud and emotional grunts and then screams as he was shocked after each incorrect answer.<sup>78</sup> When the learner pleaded for the shocks to stop, the subject would invariably look to the man in the white lab coat for direction; that man consistently told the subject that the experiment must continue.<sup>79</sup>

Milgram described the chief finding of his experiment as the extent to which the subjects were willing to act against their conscience and defer to the authority figure.<sup>80</sup> The experiment revealed that almost two-thirds of study participants were willing to shock the learner at the direction of the man in the lab coat.<sup>81</sup> In post-experiment interviews, Milgram found that most subjects did not view themselves as responsible for their conduct.<sup>82</sup> Subjects explained they would not have engaged in this conduct themselves but that they did it because they were required to by the authority figure.<sup>83</sup> The situation made subjects more likely to engage in wrongful conduct: they perceived the man in the lab coat and not themselves to be responsible.<sup>84</sup>

In subsequent studies, Milgram described the experiment to numerous individuals and asked them to predict whether they personally would continue the shocks to the end.<sup>85</sup> Not a single person predicted that he or she would comply with the authority figure all the

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76. *Id.* at 20.

77. *Id.* at 3

78. *Id.* at 4.

79. *Id.* at 4; *see also id.* at 21 (describing the language the experimenter used to prod the subject to continue, such as “[t]he experiment requires that you continue” and “[y]ou have no other choice, you *must* go on”).

80. “It is the extreme willingness of adults to go to almost any lengths on the command of an authority that constitutes the chief finding of the study and the fact most urgently demanding explanation.” *Id.* at 5.

81. *Id.* at 5; *see also id.* at 33 (stating that twenty-six of forty subjects obeyed the authority figure, providing shocks to the highest level on the generator).

82. *Id.* at 7.

83. *Id.* at 8.

84. Burger, *supra* note 72, at 495–96 (“Milgram created a situation in which his participants could easily deny or diffuse responsibility for hurting the learner.”).

85. MILGRAM, *supra* note 73, at 27–28. Individuals from three groups were asked for their predictions: psychologists, college students, and middle-class adults of various occupations.

way to the highest level.<sup>86</sup> They predicted that they would disobey because of their sense of justice, empathy, and compassion.<sup>87</sup> In another survey, Milgram asked Yale psychology students to predict the behavior of 100 hypothetical subjects in the study.<sup>88</sup> They predicted that between 0 and 3 percent would shock to the end.<sup>89</sup> Obviously, the numbers from Milgram's experiment do not bear out these predictions. The authority figure wields a tremendous amount of power over most subjects, calling into question the commonly held view that only "bad" people would be obedient under such circumstances.<sup>90</sup>

This obedience research provides insight into why a corporate attorney may fail to advise an authority figure against a fraudulent scheme.<sup>91</sup> For payday loan attorney Timothy Muir, his authority figure was company CEO Scott Tucker.<sup>92</sup> Tucker was the person who had hired Muir in his first job out of law school and the individual who continued to employ Tucker when he started his own law firm.<sup>93</sup> So while the corporation was Muir's actual client, Muir would have looked to Tucker for direction. Milgram's findings suggest it would have been difficult for Muir to say no to Tucker and advise him against his planned conduct.

### *C. Conformity Pressure*

A decade before Milgram's obedience experiments, Solomon Asch studied the impact of conformity (or "social pressure") on human behavior.<sup>94</sup> In Asch's experiment, a subject and a group of six to eight

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86. *Id.* at 28 (noting that of 110 respondents, all believed they would disobey the authority figure at some point prior to the final switch).

87. *Id.* at 30.

88. Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL SOC. PSYCHOL. 371, 375 (1963).

89. *Id.*

90. MILGRAM, *supra* note 73, at 5 (explaining that a commonly offered explanation is that only "monsters, the sadistic fringe of society," would inflict a shock at the most severe level).

91. Other behavioral legal ethics scholars have used Milgram's obedience research to explain wrongful obedience of new attorneys working under the direction of a senior attorney. *See generally* Catherine Gage O'Grady, *Wrongful Obedience and the Professional Practice of Law*, 19 J. L. BUS. & ETHICS 9 (2013); *see also* Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451 (2007).

92. Dornbrook, *supra* note 1, at 2.

93. *Id.*

94. Solomon E. Asch, *Opinions and Social Pressure*, SCI. AM., Nov. 1955, at 31 (Nov. 1955).



confederates were told to pick which of three lines on one card matched the length of a single line on another card.<sup>95</sup> The difference between the lines was not subtle: the correct answer was always readily apparent.<sup>96</sup> The group was told this was an experiment in visual judgment, but in reality, the purpose of the experiment was to determine whether and to what extent the subject would follow the group if the group picked the obviously wrong answer.<sup>97</sup>

As instructed, in the first two rounds, the confederates picked the correct matching line, and the experiment's subject followed suit.<sup>98</sup> But in most subsequent rounds,<sup>99</sup> all of the confederates picked the (obviously) wrong line.<sup>100</sup> Despite the clear error, the subjects agreed with the majority's wrong answer 36.8 percent of the time.<sup>101</sup> In a video of a modern recreation of Asch's experiment, the subjects' facial expressions reveal obvious discomfort as they choose whether to pick the wrong line in order to conform to the group.<sup>102</sup>

In interviewing the subjects after the experiment, Asch was interested in understanding the reasons some subjects never conformed to the group's wrong answer, while others consistently deferred to the majority.<sup>103</sup> Many of the subjects who acted independent of the majority explained that they did not feel pressured by the group because they were confident in their own judgment.<sup>104</sup> For the conformists, many explained their conduct by stating that they had decided that the majority must be right.<sup>105</sup> Others stated that they followed the group because they did not want to ruin the results of (what they believed to

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95. *Id.* at 32.

96. *Id.* (providing example of what the subjects were shown); *see also id.* at 32-33 (stating that in ordinary circumstances, an individual matching the lines would make a mistake less than 1 percent of the time).

97. *Id.* at 32.

98. *Id.*

99. The confederates unanimously pick the incorrect answer in twelve of eighteen rounds. *Id.*

100. *Id.*

101. *Id.* at 33.

102. The video shows the subjects' facial expressions in response to the experiment beginning two minutes into the video. *Follow the Leader*, YOUTUBE, (July 23, 2013), <https://www.youtube.com/watch?v=ME4lOsQzcIE> [<https://perma.cc/NC92-QHVB>] (showing the video originally created by Dateline NBC in 1997).

103. Asch, *supra* note 94, at 33.

104. *Id.*

105. *Id.*

be) the experiment.<sup>106</sup> Asch found most unsettling that some of the conformists admitted that they followed the majority to hide what they perceived as a defect in themselves.<sup>107</sup>

Subsequent iterations of Asch's experiment revealed that even a small number of confederates unanimously picking the wrong answer influenced the subject.<sup>108</sup> If the size of the confederate group was three or larger, the subjects conformed at a similar rate.<sup>109</sup>

Asch's research should be particularly concerning for lawyers. For Asch's subjects, the stakes were low—the subjects likely did not know the other participants in the study and had no ongoing relationship with them.<sup>110</sup> Further, the right answer was black and white, and they still felt pressured to choose the wrong answer selected by the majority.<sup>111</sup> For a corporate lawyer addressing possibly fraudulent or criminal conduct, the group (with whom she feels pressure to conform) might be fellow attorneys or other decision makers at the corporation. When handling the corporate client's lucrative but possibly fraudulent plan, the lawyer's interest in pleasing the group is higher than that of Asch's subjects. Further, for the corporate advisor, more ambiguity surrounds which answer is "right." This ambiguity makes it even easier for the lawyer to justify picking the majority's preferred answer.

In an interview following his conviction, Timothy Muir discussed the conformity pressure he faced, as a recent law school graduate, when he began working for Scott Tucker's payday loan company.<sup>112</sup> Muir explained, "There was no job description when I started [in 2006, as a 2004 law school graduate]. I joined a very large legal team that [Tucker] had retained through the years."<sup>113</sup> In defending his role in a letter to

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106. *Id.* Asch described another group of the conformists as "suspect[ing] that the majority were 'sheep' following the first responder or that the majority were victims of an optical illusion." Asch concluded: "Nevertheless, these suspicions failed to free them at the moment of decision." *Id.*

107. *Id.*

108. *Id.* at 34.

109. *Id.* (explaining that when a single individual answered incorrectly, it had little impact on the subject; when two confederates answered incorrectly, the subjects conformed 13.6 percent of the time; when the confederate group expanded to three, conformity jumped to 31.8 percent; further increases in group size did not have a significant impact on conformance of the subject).

110. *Id.* at 32 (explaining that the participants in the experiment were male college students from three institutions of higher learning).

111. In Asch's words, the subject "finds himself unexpectedly in a minority of one, opposed by a unanimous and arbitrary majority with respect to a clear and simple fact." *Id.*

112. Dornbrook, *supra* note 1, at 2–3.

113. *Id.* at 2.

the Kansas City Business Journal, Muir “profess[ed] that he simply followed the lead of other attorneys before him and operated in good faith that his actions met the legal standard.”<sup>114</sup> While Muir does not use the words “conformity pressure,” the description he provides matches Asch’s findings.<sup>115</sup> Because all of the other attorneys agreed that the client’s conduct was legal, he simply followed the lead of the group.

*D. Partisan Bias*

Partisanship can detract from a person’s ability to objectively judge the facts. Anyone who has ever watched a football game with a fan of the other team understands partisan bias: a person’s alliance causes him to perceive and interpret facts (such as the justness of a penalty) in a way that favors his team.<sup>116</sup> It is difficult for a fan to be objective.<sup>117</sup> And while it is easy to see that lack of objectivity in a fan for the other team, it can be close to impossible to see it in yourself.

Partisan bias—and other biases—impact how people filter and interpret information.<sup>118</sup> A person’s partisanship influences a person to give attention to facts that are favorable to his preexisting beliefs.<sup>119</sup> Thereafter, partisan bias influences how that information—that was noticed as most relevant—is interpreted.<sup>120</sup> In the final analysis, two people can observe the same facts but because of their partisan views they will pay attention to different facts as most important and interpret those facts favorably to their partisan position.

The impact of partisanship on lawyers’ interpretation of information is readily apparent in experiments focusing on lawyers (and law students). The research reveals that partisanship makes it difficult

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114. *Id.* at 3.

115. *See* Asch, *supra* note 94, at 34 (noting that “[w]hen consensus comes under the dominance of conformity, the social process is polluted and the individual at the same time surrenders the powers on which his functioning as a feeling and thinking being depends”).

116. Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL SOC. PSYCHOL. 129, 129–30 (1954) (describing an experiment in which fans of Dartmouth and Princeton were asked to watch footage of a football game between their teams and count the rule violations of each team, rate each flagrant or mild, and judge which team started the rough play).

117. *Id.* at 130–32 (describing the stark differences between how each group of fans interpreted the rule violations and rough play in the game).

118. Robertson, *supra* note 67, at 6–10.

119. *Id.* at 7–8.

120. *Id.* at 9.

for a lawyer to filter and interpret information objectively.<sup>121</sup> One study found that law students who participated in a moot court competition overwhelmingly perceived that their assigned side had the better case.<sup>122</sup> In another study, subjects were asked to play the role of attorney for plaintiff or defendant in determining the settlement value of a case.<sup>123</sup> Even though both sides received identical information, those who were randomly assigned to play the plaintiff predicted an award substantially higher than that predicted by the defendant.<sup>124</sup> In a study involving lawyers making predictions about the value of their cases, researchers compared attorney predictions with actual outcomes.<sup>125</sup> The research revealed that lawyers, regardless of years of legal experience, were overconfident in their predictions.<sup>126</sup>

It is worth noting that partisan bias can be a powerful, positive tool for a lawyer. Take the example of a litigator. If partisan bias cements her firm belief in her client's interpretation of the facts, then she may become a better advocate in the courtroom. Not being able to see the possibility that the opponent is right may make it easier to point out to the jury all of the flaws in the opponent's position. Of course, such partisanship makes it difficult for the litigator to advise the client of the weaknesses in its case or to provide a neutral assessment of whether the client should settle.<sup>127</sup> But on the whole, there is undoubtedly a benefit in the litigator's partisan bias.

For the corporate advisor, though, partisan bias can make it more difficult for him to do his job. It is essential that the advisor be able to make a judgment about the prospect of liability for a planned course of conduct in order to competently advise a client. If the corporate advisor's bias inhibits her ability to recognize the risk of liability, she

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121. *Id.* at 10.

122. Zev J. Eigen & Yair Listoken, *Do Lawyers Really Believe Their Own Hype and Should They? A Natural Experiment*, 41 *J. OF LEGAL STUD.*, 239, 239–42 (2012).

123. Robertson, *supra* note 67, at 8 (citing George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 *J. LEGAL STUD.* 135, 145–46 (1993)).

124. *Id.* at 8.

125. Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 *PSYCHOL., PUB. POL'Y, & L.* 133, 133 (2010).

126. *Id.* at 144.

127. Robertson, *supra* note 67, at 8–9 (explaining that partisan bias research reveals that lawyers with identical information place significantly different values on their clients' cases, which means these lawyers will provide misleading and unhelpful settlement advice to their clients).

will be less likely to provide the client the advice it needs.<sup>128</sup> While the lawyer's partisanship and loyalty are owed to the corporation and not company executives,<sup>129</sup> the evidence—research and anecdotal—reflects that corporate advisors play the role of partisan of *company executives* who want a proposed course of conduct to be legal.<sup>130</sup>

Finally, it is noteworthy that the advisor's partisan bias problem is different from the zealous advocacy problem discussed earlier.<sup>131</sup> Even the lawyer who properly views her role as an advisor responsible for protecting the client from serious liability will find it difficult to recognize the risk that conduct may be fraudulent or criminal because of partisan bias.<sup>132</sup>

While it is impossible to know the impact of partisan bias on Timothy Muir's advice, the hallmarks of it are present in his case. When Muir discussed his conduct with a reporter after his conviction, he still did not recognize that he had engaged in illegal conduct.<sup>133</sup> The reporter described Muir as believing "he was wrongly convicted."<sup>134</sup> Muir insisted: "All of my [payday loan] clients, and myself, believed wholeheartedly in the legality of their business model."<sup>135</sup> If Muir is to be believed, partisan bias could explain why he was unable recognize an alternate interpretation of the facts—that the payday loan companies were engaged in fraudulent conduct. If partisanship blinded him to that possibility, it would have been impossible for him to provide the advice his clients needed in order to avoid liability.

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128. *See supra* Part III.

129. MODEL RULES OF PROF'L CONDUCT r. 1.13(a) (AM. BAR ASS'N 2018) (explaining that the organization is the client).

130. This partisanship favoring executives is undoubtedly a product of other topics discussed in this Article: attorney self-interest and obedience pressure. Suggestions for how advisors could be guided in reconceptualizing partisanship and the corporate client's interests are discussed in Part III. *See supra* Part III.

131. *See supra* notes 43–53 and accompanying text.

132. *See Dornbrook, supra* note 1, at 1, 3. Of course, for the advisor who views her role as a zealous advocate, she has a double burden of bias and zeal that weighs against her ability to make an independent judgment that the client should be dissuaded of engaging in a course of conduct that is likely fraudulent or criminal. *See id.*; *supra* notes 43–53 and accompanying text.

133. Dornbrook, *supra* note 1, at 1, 3.

134. *Id.* at 1.

135. *Id.* at 3.

### III. INFLUENCING BETTER CORPORATE LEGAL ADVICE THROUGH THE LESSONS OF BEHAVIORAL LEGAL ETHICS

Understanding that a variety of factors influence a corporate advisor's conscious and unconscious thought processes, where are the "pressure points" at which a change might result in improved advising? Drawing on law and behavioral science, this Part suggests that attorneys might be influenced to better protect their corporate clients through introducing additional authority figures, priming, education, and changes in attorney consequences for those who fail to protect their corporate clients. This discussion considers which of the various stakeholders—corporations, rule makers, and the attorneys themselves—is in the best position to leverage our knowledge of attorneys' motivation and thought process.

#### *A. Interventions to Combat a Corporate Attorney's Wrongful Obedience and Conformity*

Both Milgram and Asch identified a similar situational factor that can reduce wrongful obedience and conformity. They found that the introduction of additional dissenting voices—peers in the case of conformity or a competing authority figure in the case of obedience—changed the subject's behavior.<sup>136</sup>

In one of numerous variations on Milgram's original experiment, the subject (the individual tasked with shocking the "learner") was given competing instructions from two authority figures—each in a lab coat and each apparently playing a similar role in conducting the experiment.<sup>137</sup> When the learner loudly protested at the 150-volt level, the experimenters provided the subject with contradictory commands.<sup>138</sup> One told him that he must continue the experiment, while the other told the subject the experiment has to stop.<sup>139</sup> Of twenty subjects, eighteen immediately ended the experiment, one ended the experiment at the following volt level, and one had already stopped

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136. MILGRAM, *supra* note 73 at 105–07; Asch, *supra* note 94, at 34.

137. MILGRAM, *supra* note 73 at 105–06 (explaining that the two "experimenters" alternated reciting instructions, were seated behind a control table, and actively recorded the responses). *Id.* at 107–08 (describing the efforts made to equalize the experimenters' apparent authority).

138. *Id.* at 105–06.

139. *Id.* at 106 (explaining that the experimenters directed their remarks not to one another but to the subject; a transcript of the exchange starts with one stating, "[w]e'll have to stop," which was followed by the other experimenter responding, "[t]he experiment requires that we go on. Please continue, teacher.").

prior to the disagreement between the experimenters.<sup>140</sup> Milgram noted that some subjects spent time trying to determine, unsuccessfully, which of the two experimenters was the boss.<sup>141</sup> Based on the results of this variation on the basic experiment, Milgram concluded that because there was not a “higher” authority to follow, the subject was unable to proceed.<sup>142</sup>

Asch also introduced dissenting voices into later iterations of his experiment.<sup>143</sup> Recall in Asch’s original experiment, the subject was faced with defying the unanimous crowd if he were to pick the correct answer to the line matching problem.<sup>144</sup> In a subsequent twist, Asch introduced one individual into the group who chose the right answer.<sup>145</sup> Even though the vast majority still selected the wrong line, the additional individual did not and that helped the subject ignore the majority and pick the correct line.<sup>146</sup>

To an extent, attorney professional conduct rules are constructed to take advantage of some of Milgram’s and Asch’s lessons about additional voices’ impact on authority and conformity. First, on the topic of conformity, Model Rule of Professional Conduct 1.6(b)(4) allows an attorney to reveal confidential information to secure legal advice about compliance with his professional conduct obligations.<sup>147</sup> Thus, an attorney is allowed to seek another dissenting voice that might embolden her to defy the group. Of course, like Asch’s subjects, the attorney must recognize that the group is (or may be) wrong before the attorney would take this step of seeking another opinion.

Second, Model Rule of Professional Conduct 1.13(b) attempts to interpose competing authorities, making it easier for the corporation’s attorney to defer to someone who wants to stop the criminal or fraudulent conduct.<sup>148</sup> One of the problems with the current rule is that it is so complex and ambiguous it may be difficult for attorneys to

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140. *Id.* at 107.

141. *Id.*

142. *Id.* at 111 (explaining that within an authority system, when there are contradictory commands, the subject determines who is in charge and follows that person’s direction, and if that is not possible, “action cannot proceed.” In other words, Milgram did not conclude that the subject followed the direction that he preferred, but rather that the subject stopped because there was not a higher authority to follow).

143. Asch, *supra* note 94, at 34.

144. *Id.* at 32.

145. *Id.* at 34.

146. *Id.* (noting that subjects answered incorrectly only one fourth as often under this variation as against the unanimous and wrong majority).

147. MODEL RULES OF PROF’L CONDUCT r. 1.6(b)(4) (AM. BAR ASS’N 2017).

148. *Id.* r. 1.13(b).

understand that the goal is protecting the client. The following discussion on priming addresses these issues and suggests some edits to Rule 1.13(b) that will clarify the attorney's role.

*B. Priming Corporate Advisors to Protect the Corporation from Liability*

Research on priming reveals the powerful influence that words (and images, ideas, gestures, and more) can have on human behavior—all outside the conscious awareness of the actor.<sup>149</sup> For example, if a person reads the word “eat” and is then asked to create a word from the fragment “SO\_P,” she is more likely to complete the word as “SOUP” than “SOAP.”<sup>150</sup> She will do the opposite if exposed to the word wash before engaging in the completion exercise.<sup>151</sup> In his book *Thinking, Fast and Slow*, Daniel Kahneman explains that priming activates associated thoughts and ideas, and that this thinking is automatic, silent, and hidden from our conscious selves.<sup>152</sup>

Priming studies provide fascinating evidence of how even the subtlest forms of priming can influence human conduct. Asking subjects to look at cartoons while holding a pencil in their mouths will influence them to think the cartoons are more or less funny depending on whether the pencil forced a “smile” or a “frown.”<sup>153</sup> Voters who cast their ballots in schools are more likely to support initiatives seeking funding for schools.<sup>154</sup> Experiment subjects who are exposed to words that evoke images of the elderly—bald, gray, wrinkled, and Florida—are primed to think about old age, which in turn primes them to walk more slowly when they walk to a new location.<sup>155</sup>

Particularly pertinent to the issue of priming attorneys, a number of studies reveal the impact of priming on ethical decision-making. For example, office coffee drinkers are more likely to contribute to the office coffee fund when photos of eyes are placed above the coffee maker than when photos of flowers adorned the wall.<sup>156</sup> Less cheating occurs when students are primed to think about (and affirm a commitment to)

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149. KAHNEMAN, *supra* note 62, at 52–58.

150. *Id.* at 52.

151. *Id.*

152. *Id.* at 50–52.

153. *Id.* at 54 (unknown to the subject of the experiment, the pencil forces a “frown” when the eraser end is held in the mouth and a “smile” when the pencil is held in the middle with the eraser to the right and the point to the left).

154. *Id.* at 55.

155. *Id.* at 53.

156. *Id.* at 57–58.



honesty before completing a task or exam.<sup>157</sup> Further, a number of studies reveal that priming subjects with money poses a danger to ethical decision-making.<sup>158</sup> For example, in one experiment subjects who were exposed to money-related words were substantially more likely to indicate (in a later portion of the experiment) that they would engage in unethical behavior in hypothetical scenarios.<sup>159</sup>

At least three groups—rule makers, companies, and attorneys—should consider how priming could (and already does) influence a corporate attorney’s advice about seemingly lucrative, but potentially criminal, conduct. First, these groups should study the priming that is already occurring. For example, if a corporation keeps its stock price front and center—whether on the company website, in messaging directed to employees, or even (as it was at Enron) displayed in the building<sup>160</sup>—the company and its attorneys should recognize the impact that prime may have on legal advice. Attorneys bombarded with messages about company finances may be primed to help the corporation engage in misconduct that is profitable in the short term.<sup>161</sup>

Rulemaking committees should consider the possibility that professional conduct rules are already priming attorney behavior. A corporate attorney faced with questionable conduct may consult the up-the-ladder reporting provision of Rule 1.13.<sup>162</sup> In addition to suffering from complex and often ambiguous language,<sup>163</sup> the rule references the company’s “best interests” and prompts the attorney to consider whether conduct is “likely to result in substantial injury” to the organization.<sup>164</sup> Even though the goal is encouraging attorneys to take concerns of misconduct to higher authorities in the organization, the

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157. DAN ARIELY, *THE (HONEST) TRUTH ABOUT DISHONESTY* 41–45 (2012).
158. Francesca Gino & Cassie Mogilner, *Time, Money and Morality*, 25 *PSYCHOL. SCI.*, 414, 414 (2014) (explaining research that reveals that when people focus on money, they act in self-interested ways, such as cheating); KAHNEMAN, *supra* note 62 at 55 (providing examples of how priming with money “produce[s] some troubling effects”).
159. Maryam Kouchaki et al., *Seeing Green: Mere Exposure to Money Triggers a Business Decision Frame and Unethical Outcomes*, *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 53, 55 (2013).
160. PETER ELKIND & BETHANY MCLEAN, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* (2004).
161. *See generally* KAHNEMAN, *supra* note 62, at 55–56 (describing the effects of priming people with money).
162. MODEL RULES OF PROF’L CONDUCT r. 1.13(b) (AM. BAR ASS’N 2017).
163. *See* Eldred, *supra* note 55, at 378 (“One of the most important factors that can accentuate the power of automatic [decision-making] processes is ambiguity in controlling rules, which makes it easier for people to unconsciously believe that they are acting in a responsible manner.”).
164. MODEL RULES OF PROF’L CONDUCT r. 1.13(b) (AM. BAR ASS’N 2017).

rule may prime attorneys to advocate that questionable conduct is not likely to injure and may even be in the best interests of the company.<sup>165</sup>

Second, all three audiences should consider how corporate attorneys could be primed to provide better advice in the face of planned misconduct. But what language should be the prime? A prime that suggests lawyers should “protect the corporate client from liability” may be a workable option. The language emphasizes the positive (attorneys should help their client), the word “protect” likely triggers associations of safeguarding the client’s interests, and the language provides simple direction that the client should be protected from liability.

Finally, attorneys, corporations, and rule makers should decide how to deliver the prime. Attorneys should consider ways to display the protect-the-client-from-liability prime in their offices.<sup>166</sup> For corporations, it may be as important to prime other company decision makers as it is to prime attorneys. In that way, everyone working for the company may associate avoiding liability as in the corporation’s interest. A corporate code of conduct could be an avenue for conveying this message.<sup>167</sup> For a prime to work, it must be something attorneys (and other decision makers) are exposed to at times when it will influence advice (and receptiveness to advice).<sup>168</sup> This could be achieved with a code of conduct card—perhaps the size of a business card—that company decision makers are encouraged to carry with them or keep within eyesight in their offices.

Rule makers should consider amending professional conduct rules to provide a better prime to corporate attorneys faced with an agent’s planned misconduct. As noted above, the current Model Rule 1.13(b) is most pertinent—it is the rule that addresses what an organization’s attorney should do when faced with potentially liability-creating misconduct.<sup>169</sup> That rule could be revised as follows to provide corporate attorneys with a prime to protect the client from liability:

If a lawyer for an organization ~~knows~~ learns that an ~~officer,~~  
~~employee or other person associated with~~ agent of the

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165. This interpretation was not the intent behind these rules but is how they have often been interpreted. *See* Schaefer, *supra* note 37, at 279–80.

166. Eldred, *supra* note 21, at 799–800 (explaining that he provides each Professional Responsibility student a quote about ethical decision-making that he hopes they will keep in their workspace when they are lawyers).

167. *See, e.g.*, DELOITTE, CODE OF ETHICS AND PROFESSIONAL CONDUCT (2016); ALLETE, CODE OF BUSINESS CONDUCT (2015); *see also* Fed. Deposit Ins. Corp., Institution Letter on Corporate Codes of Conduct: Guidance on Implementing an Effective Ethics Program (Oct. 21, 2005).

168. KAHNEMAN, *supra* note 62, at 50–51 (explaining how priming works in a “second or two”).

169. MODEL RULES OF PROF’L CONDUCT r. 1.13(b) (AM. BAR ASS’N 2017).

~~organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, or planning conduct that may result in liability for the organization (or liability of the agent to the organization), then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to take action to protect the organization from liability, including advising the agent and higher authorities within the highest authority that can act on behalf of the organization against the conduct as determined by applicable law.~~

The revised rule takes the prime front and center: protect the organization from liability. While the proposed amendment substantially simplifies the language of the rule, it does not change the rule's substance.<sup>170</sup> At a time when an attorney is most susceptible to influence—as he is viewing this rule to create a plan for addressing an executive's possibly ill-advised plan—the prime evokes associations of protecting the company, which should influence better advice.<sup>171</sup>

### *C. Educating Lawyers About Debiasing Techniques*

Some have legitimately questioned whether education can significantly impact behavior that occurs outside of a person's conscious awareness.<sup>172</sup> But providing people with the right kind of education and tools can help them recognize and address their biases.<sup>173</sup> How the education is delivered can make the difference between causing people

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170. *Id.*

171. Eldred, *supra* note 55, at 383–84 (explaining that how a decision is framed can reduce, or increase, “the power of conscious, ethical deliberation”).

172. *See, e.g.*, Robertson, *supra* note 67, at 34–35 (explaining that when cognitive biases are “deep seated and unconscious, education is least likely to be effective”); Eldred, *supra* note 55, at 388 (asserting that “biases [cannot] be purged simply by educating . . . lawyers about them” and citing research for the proposition that “merely calling attention to the existence of unconscious biases and asking people to counteract them voluntarily rarely changes behavior”).

173. Joan C. Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates over Implicit Bias and Intersectionality*, 37 HARV. J.L. & GENDER 185, 228 (2014) (explaining that unconscious bias does not mean bias that cannot be controlled and explaining the value in some contexts of describing bias as “unexamined” rather than “unconscious”).

to become more entrenched in their biases or open to change. Education about the existence of biases will likely be ineffective and maybe even counterproductive, particularly when a person's biases are "deep-seated and unconscious."<sup>174</sup> But teaching people productive ways to overcome their biases may make a difference.<sup>175</sup>

Research suggests that counter-factual thinking is a method that can be effective in de-biasing decision-making.<sup>176</sup> With this technique, the decision maker intentionally takes a position inconsistent with the position that the bias would influence him to reach.<sup>177</sup> One strategy for doing this is considering the "outsider's perspective" when reaching a decision on the issue.<sup>178</sup>

For the corporate advisor, the hazard of partisan bias is an inability to see why the company's desired course of conduct may result in substantial liability.<sup>179</sup> A corporation could address this issue by providing training for its attorneys about how counter-factual thinking can be used to see the facts from the perspective of a prosecutor or plaintiff. What arguments would they make if they were to prosecute or file suit based on this decision? In other words, corporate advisors need to think about the potential for liability when they encounter a potentially profitable new scheme, rather than focusing on evidence that confirms the bias that the conduct is acceptable.

*D. Serious Consequences for Attorneys Who Fail to Protect Corporate Clients from Crime and Fraud Liability*

Behavioral science suggests that if attorneys were to face serious consequences for failing to advise against fraudulent and criminal conduct, those consequences would have a positive impact on future corporate attorney advice. The "serious consequences" could include civil and criminal liability. Civil liability would take the form of malpractice liability for the attorney's failure to act competently and loyally to advise against and protect her client from serious forms of

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174. Robertson, *supra* note 67, at 35.

175. *Id.* at 34 (citing Linda Babcock et al., *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 916 (1997)) (noting the mixed evidence on the effectiveness of debiasing, but noting that some studies have found it effective to educate people about biases and ask them to "question their own judgment by explicitly considering counterarguments to their own thinking").

176. *Eldred*, *supra* note 55, at 389.

177. *Id.*

178. *Id.* (citing Katherine L. Milkman et al., *How Can Decision Making Be Improved?*, 4 PERSP. ON PSYCHOL. SCI. 379, 381 (2009)).

179. *See supra* notes 133–135 and accompanying text.

liability.<sup>180</sup> Criminal liability would flow from the lawyer's participation in the corporate client's fraudulent scheme.<sup>181</sup>

While the Timothy Muir case is one in which a corporate attorney faced serious consequences for his role in a client's criminal conduct, such cases remain rare—and not for a lack of attorney misconduct. The *in pari delicto* doctrine has generally been interpreted to prevent a corporate client from pursuing a malpractice claim against an attorney who failed to advise against criminal or fraudulent misconduct.<sup>182</sup> Courts should revisit the liberal application of *in pari delicto* in these cases, which effectively insulates corporate attorneys *because* they failed to do their job.<sup>183</sup> While there are more criminal prosecutions of corporate lawyers today than in recent history, these prosecutions are still rare.<sup>184</sup> Prosecutors should scrutinize an attorney's role in a

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180. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 48 (AM. LAW INST. 2000) (describing a client's cause of action against an attorney for professional negligence).

181. *Id.* at § 8 (describing attorney's liability for criminal acts).

182. See generally Paula Schaefer, *In Pari Delicto Deconstructed: Dismantling the Doctrine that Protects the Business Entity's Lawyer from Malpractice Liability*, 90 ST. JOHN'S L. REV. 1003 (2016) (arguing that the *in pari delicto* doctrine should not be a complete defense when a corporation claims that its lawyer committed malpractice by failing to advise against fraudulent or criminal conduct that harmed the company).

183. *Id.* at 1062 (explaining that the application of the *in pari delicto* defense to corporate attorneys depends on a great irony in that the facts that should trigger liability—that the lawyer failed to act reasonably to stop an agent's misconduct that was aimed at enriching the corporate client—are the basis for the lawyer's defense; this is so because agent misconduct aimed at enriching the company is imputed to the company and the company is barred from suing the lawyer because "it" participated in the misconduct).

184. It is often noted that none of the lawyers who advised Enron faced prosecution after the company's massive accounting fraud became public in 2001. *Id.* at 1049 (first citing Ashby Jones, *Where were the Lawyers?*, WALL ST. J. (Jan. 2, 2007, 8:52 AM), <https://blogs.wsj.com/law/2007/01/02/where-were-the-lawyers/> [<https://perma.cc/35YP-Z2RN>]; then citing Dan Ackman, *Enron's Lawyers: Eyes Wide Shut?*, FORBES (Jan. 28, 2002, 12:16 PM), <https://www.forbes.com/2002/01/28/0128veenron.html> [<https://perma.cc/3KYQ-MVUW>]). In more recent years, though, there have been some high-profile criminal prosecutions of corporate lawyers. See, e.g., *United States v. Newkirk*, 684 F. App'x. 95, 96–98 (2d Cir. 2016) (affirming conviction of Bryan Cave lawyer Harvey Newkirk for his role in his client's fraud related to the purchase of Maxim magazine and holding that the evidence warranted a jury instruction that Newkirk's guilty knowledge could be inferred from facts that supported a finding of conscious avoidance); *United States v. Collins*, 581 F. App'x. 59, 60–61 (2d Cir. 2014) (affirming conviction of Mayer Brown lawyer Joseph Collins for his role in Refco, Inc.'s fraudulent scheme and determining conscious avoidance jury instruction was proper).

corporation's fraudulent schemes just as they would consider the conduct of any other company executive.

One reason an increase in liability for attorneys would likely result in better advice is that it would prevent ethical fading. Ethical fading occurs when a person stops thinking of a decision as one that implicates ethical (and in this case, legal) consequences.<sup>185</sup> When a decision instead is thought of as a business decision or a routine decision that does not require ethical (or legal) thinking, the decision may not be approached as thoughtfully.<sup>186</sup>

An example of how publicity about adverse attorney consequences can counter ethical fading and lead to better decision-making was evident following the *Himmel* case. In that case, the Illinois Supreme Court's suspended an attorney for failing to report the unethical conduct of another attorney.<sup>187</sup> In the year following Himmel's highly publicized suspension, attorney reports of misconduct by fellow attorneys—as required by Illinois Rules of Professional Conduct 8.3—increased from 154 to 922.<sup>188</sup> Put simply, Himmel's discipline prevented ethical fading: other attorneys could plainly see the ethical issue that was implicated by learning of another attorney's misconduct.

Similarly, publicity about serious consequences that an attorney has suffered for failing to advise against fraudulent and criminal misconduct should bring the ethical and legal issue to the forefront of attorneys' minds. Cases like the Muir case—with publicity regarding a corporate attorney being convicted and sentenced to years in prison<sup>189</sup>—make a difference to attorneys in a legal community who follow the coverage. When there are prominent examples of corporate attorneys doing prison time, it makes it difficult for lawyers to lose sight of the implications of their actions. In case there was any doubt, Muir closed a letter to one reporter with the following: "Last, I have one thing to say: Prison sucks."<sup>190</sup>

Further, holding lawyers responsible for their role in corporate misconduct addresses one of the situational factors that encourages

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185. Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 224–25 (2004).

186. *Id.* at 232–33.

187. *In re James H. Himmel*, 533 N.E.2d 790 (Ill. 1988).

188. Seth Ellis & Jeffrey R. Hanes, *The 20 Year Anniversary of Himmel: Brushing Up on Your Duty to Report Attorney Misconduct*, DCBA, Mar. 2009, at 16.

189. There has been a good deal of publicity related to Muir's prosecution and conviction for his role in his client's criminal scheme. *See, e.g.*, Dornbrook, *supra* note 1; Pete Brush, *Atty Tells Jury Tribe Grew Wary of Racer's Payday Loan Plan*, LAW360 (Sept. 18, 2017, 5:47 PM).

190. Dornbrook, *supra* note 1, at 4.

wrongful obedience. Individuals are more inclined to be obedient in a questionable situation when they feel comfortable that the authority figure is ultimately responsible.<sup>191</sup> While there are multiple ways that laws,<sup>192</sup> professional conduct rules,<sup>193</sup> and even companies<sup>194</sup> might encourage lawyers to feel responsible for protecting their corporate clients from criminal liability, attorneys' knowledge that other lawyers have faced serious consequences for these failures also provides a powerful incentive. Knowing that jail may be the consequence for failing to take ownership of the decision is likely to influence attorney advice.

Finally, serious adverse attorney consequences—in the form of civil or criminal liability—would be significant because that would impact how attorney self-interest influences an attorney's advice.<sup>195</sup> Today, it is easy for an attorney to see her self-interest as aligned with that of the company's decision makers (who want to engage in the arguably fraudulent or criminal conduct).<sup>196</sup> The attorney can make a good deal of money "helping" the company engage in misconduct. If it appears there is little or no chance of facing civil or criminal liability for this help, there is no incentive for the lawyer to tell corporate decision makers the difficult news that they do not want to hear. In contrast, if lawyers know that they can face prison time and/or substantial civil liability for failing to protect their corporate clients from fraudulent conduct, their self-interest is realigned with that of their corporate clients.

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191. See *supra* notes 80–84 and accompanying text.

192. Burger, *supra* note 72, at 499 (citing the Sarbanes-Oxley Act's requirement that senior executives personally certify the accuracy of corporate financials as an example of a law that requires a specific person to take responsibility so that they are less likely to defer to others or pass blame up or down the corporate hierarchy).

193. The ABA and SEC's 2003 adoption of attorney professional conduct rules concerning an attorney's obligation in the face of organizational client misconduct was an attempt on the part of both bodies to place clear responsibility on attorneys to intervene to prevent corporate crime and fraud. See CARL PIERCE ET AL., PROFESSIONAL RESPONSIBILITY IN THE LIFE OF THE LAWYER 596–97 (2d ed, 2015). For reasons discussed in this Article, those rules should be revised to clarify the attorney's responsibility to protect the organizational client from such liability.

194. Burger, *supra* note 72, at 499 (explaining that in order to lessen wrongful obedience, organizations should "implement policies that force individuals [to] take responsibility for their actions").

195. Eldred, *supra* note 55, at 388 (explaining that a direct strategy for addressing ethical blindness in attorneys is to change the way they calculate self-interest).

196. See *supra* Part II.D.

## CONCLUSION

The fact that attorney Timothy Muir is in prison today should be of concern to corporate attorneys. There is nothing in the facts of his case that suggests that Muir is a “bad person.” He is just an attorney who acted in some very predictable ways. It could have happened to anyone.

Muir acted as a zealous advocate of his corporate client’s plans, rather than an advisor helping his client avoid liability. He was likely influenced by his own self-interest in making money and continuing his working relationship with Scott Tucker’s companies. This would have made it difficult for Muir to tell Tucker what he did not want to hear. It is likely that Muir felt obedience and conformity pressure to help the company continue with business-as-usual, despite the fact that there were warning signs. Finally, his bias as a partisan for the company undoubtedly colored his view of the facts, making it difficult to see the civil and criminal liability that was likely.

Behavioral legal ethics reveals the causes of the flaws in Muir’s thinking. The field also suggests the tools attorneys, corporations, and rule makers could use to change corporate attorney behavior that is potentially harmful to clients. Obedience and conformity research reveals that competing opinions can result in better decision-making, while priming studies teach us that strategically placed words can have a positive impact on attorney behavior. Research on de-biasing demonstrates that attorneys can learn to overcome (or at least lessen) their biases so they will be more likely to reach an independent professional judgment. And while it is certainly not a popular solution, if more corporate attorneys faced serious consequences for facilitating fraudulent and criminal conduct, that would have a positive impact on the self-interest and obedience “calculations” of other attorneys navigating these issues.

The list of possible solutions provided in this Article is just a starting point. Relying upon behavioral legal ethics, that list can be expanded upon by creative stakeholders interested in the goal of attorneys providing better advice to their corporate clients.