



## UvA-DARE (Digital Academic Repository)

### Incorrigible advocates

Doornbos, N.; de Groot-van Leeuwen, L.E.

**DOI**

[10.5235/LE.15.2.335](https://doi.org/10.5235/LE.15.2.335)

**Publication date**

2012

**Document Version**

Final published version

**Published in**

Legal Ethics

[Link to publication](#)

**Citation for published version (APA):**

Doornbos, N., & de Groot-van Leeuwen, L. E. (2012). Incorrigible advocates. *Legal Ethics*, 15(2), 335-355. <https://doi.org/10.5235/LE.15.2.335>

**General rights**

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

**Disclaimer/Complaints regulations**

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

## Incorrigible Advocates

Nienke Doornbos\* and Leny E de Groot-van Leeuwen\*\*

I don't feel that a suspension is a terrible thing, I am not troubled about it ... I am just not interested in what other people think of me. I don't see I did anything wrong.

*A suspended immigration advocate*

### 1. INTRODUCTION

Disciplinary bodies sometimes have to deal with lawyers who seem totally incorrigible. Time after time they are warned and disciplined, but they simply refuse to change their behaviour. Why do these lawyers seem to be unaffected by disciplinary punishment? Do they not care about professional standards and ethical rules? Why do they not modify their *modus operandi* in response to regulatory interventions?

The purpose of this article is to offer explanations as to why some lawyers refuse to let themselves be regulated by disciplinary proceedings, at least until the final 'verdict' is delivered: disbarment. Like the other contributions to this volume, we concentrate on a single case of 'a lawyer in the dock', inspired by the work of Richard Abel.<sup>1</sup> The rich context of a single case provides us with the opportunity to take an in-depth look at the functioning of a disciplinary proceeding. As the quotation above illustrates, we chose an advocate who exemplifies a defiant approach to disciplinary proceedings. We named him 'Mr Straw' because, for many clients, he was the last straw to clutch at during their asylum or immigration procedure. It was not hard to get in contact with Mr Straw because his name had repeatedly popped up in the newspapers by the time he was suspended. His name also appeared in a letter another advocate wrote to a newspaper, expressing his concern about 'blunderers, swindlers and opportunists' in asylum and migration law.<sup>2</sup> This letter evoked

\* Assistant Professor in Sociology of Law, University of Amsterdam, The Netherlands, N.Doornbos@uva.nl.

\*\* Professor, Law Faculty of the Radboud University Nijmegen, The Netherlands, L.deGroot@jur.ru.nl.

<sup>1</sup> Richard L Abel, *Lawyers in the Dock: Learning from Attorney Disciplinary Proceedings* (Oxford University Press, 2008); Richard L Abel, *Lawyers on Trial: Understanding Ethical Misconduct* (Oxford University Press, 2010). See also the reviews and the author's response in (2008) 11 *Legal Ethics* 103.

<sup>2</sup> Julien Luscuere, 'Volop prutsers bij recht voor vreemdelingen', *NRC Handelsblad*, 1 February 2010.

many reactions on the internet<sup>3</sup> and even led to parliamentary questions.<sup>4</sup> By the time we contacted our respondent, his firm was more or less moribund and dismantled. During our two-hour interview in an upstairs room at his office, the files on his clients were seized from the rooms on the ground floor to be divided and handled by other advocates. The official bankruptcy followed three weeks later.<sup>5</sup>

Through the case of Mr Straw—by studying his career path and disciplinary records—our aim is to unravel the factors that can explain advocates' indifference to the disciplinary process. We will do so using an approach of informed induction, ie, studying the data from a perspective informed by the growing body of literature regarding unethical behaviour of lawyers and disciplinary reactions. We will analyse the case from three different angles: (1) characteristics of the disciplinary system; (2) the social network of the advocate in question, including his professional network; and (3) the advocate's personality. Although the first and last of these have been the object of some academic study, the social network has largely been neglected by researchers.

Before presenting those three perspectives (sections 5, 6 and 7), we begin with some remarks on methodology (section 2). We also provide a short summary of facts and figures relating to the Dutch disciplinary procedure (section 3) and a quick overview of the case of Mr Straw (section 4). In the concluding section we describe the implications of our findings for theory.

## 2. METHOD

Like the other contributions to this joint research project, this is a N=1 study. In the year 2010 in the Netherlands, the civil law country where Mr Straw lives and practised, only 0.04 per cent of advocates were disbarred (six cases). A larger number (46 advocates, 0.28 per cent) were suspended for a period varying from a week to a year.<sup>6</sup> Most advocates who have to appear before a disciplinary tribunal receive a warning or reprimand or no sanction at all (see Table 1 below).

A detailed analysis of a single case can be useful in unravelling the underlying processes of disciplining of advocates and theorising their dynamics.<sup>7</sup> Our respondent, though not representative of all 'lawyers in the dock', exemplifies advocates who persist in their deviant behaviour regardless of disciplinary sanctions. Studying his case will help us formulate a tentative theory of 'indifferent advocates': the incorrigibles who flout disciplinary reprimands. Our explanations have to be tested and further grounded in empirical data through

<sup>3</sup> See eg the weblog of Folkert Jensma, 'Advocatenpraktijk blijkt al jaren ontspoord', NRC.nl, 28 January 2010, or Dutch Bar Organisation, news item 5 February 2010.

<sup>4</sup> Parliamentary notes, *Kamerstukken II* (Aanhangsel Handelingen), 2009–10, 1742.

<sup>5</sup> District Court of Rotterdam, 31 March 2010, date of publication: 8 April 2010, no rot 10.241.F.1300.1.10.

<sup>6</sup> Annual Report Hof van Discipline & Raden van Discipline 2010, 17.

<sup>7</sup> cf KM Eisenhardt and ME Graebner, 'Theory Building from Cases: Opportunities and Challenges' (2007) 50(1) *Academy of Management Journal* 25.

future research. We have started doing so by interviewing three other advocates disciplined repeatedly (about whom we hope to report on another occasion).<sup>8</sup>

We chose this advocate not only because he perfectly represents our target group but also because he was willing to participate in an interview, allowed us to attend the Disciplinary Appeals Tribunal hearing (which was scheduled to take place behind closed doors), and give us access to his entire file of complaints, correspondence and other material. This enabled us to triangulate our data and look at the case from different perspectives. In addition, we sporadically use the interview material of the three other interviewed advocates.

In our interview with Mr Straw and during the waiting period before and after the Disciplinary Tribunal hearing, we asked him about his career, the history of complaints and disciplinary proceedings, and his interpretation and evaluation of this whole process. We were aware, of course, that our data might be distorted by *impression management* and *retrospective sense making* by our respondent.<sup>9</sup> During the interview, indeed, we noticed that our respondent, although generally very open, sometimes trivialised or ‘forgot’ what had happened. To tackle these problems, we decided to base the factual account of the cases as much as possible on information from the file and decisions by the disciplinary tribunals, using the interview material to analyse the advocate’s response to the disciplinary proceedings and his evaluation of the whole process.

### 3. DISCIPLINARY LAW: PROCEEDINGS AND FIGURES

Although the term for ‘lawyer’ in Dutch is *jurist*, this refers to all degree-holders, not to a profession or occupation. Notaries, judges, public prosecutors, court clerks and jurists in public administration, for instance, all belong to different occupations and are not members of the bar.<sup>10</sup> In everyday language, the Dutch speak about notaries or attorneys specifically, not about lawyers in general. This article is confined to the members of the Dutch bar, called *advocaten* (translated as advocates), distinguished from other jurists by their monopoly on representing people in court.

In the Netherlands, advocates are obliged to join the Dutch Bar Association, the national public-law professional body. When advocates are registered and have taken their oath, they are automatically members of the Bar Association. This association controls the discipli-

<sup>8</sup> 1. A personal injury advocate who repeatedly violated the prohibition of no cure–no pay agreements. After his disbarment he continued in practice as a legal adviser. 2. An advocate who specialised in victims of real estate fraud. He was disbarred as a result of complaints about denouncing the opposing party, financial disorder and leaking confidential information. 3. An advocate with a mixed practice who was suspended a couple of times because of complaints about, *inter alia*, financial fraud, false information and excessive expenses claims. He is still active as an advocate.

<sup>9</sup> Eisenhardt and Graebner (n 7) 28.

<sup>10</sup> K Schuyt, ‘The Rise of Lawyers in the Dutch Welfare State’ in RL Abel and PSC Lewis (eds), *Lawyers in Society: The Civil Law World* (University of California Press, 1988) 200. The same holds in Belgium: see L Huysse, ‘Legal Experts in Belgium’ in Abel and Lewis, *ibid*, 168.

nary system. Disciplinary law is contained in Articles 46–60 of the Act on Advocates. Article 46 states: ‘Advocates shall face disciplinary sanctions with regard to any act or omission which is in breach of their duty of care.’

Disciplinary proceedings entail the following. Every interested party can file a complaint against an advocate. Most complaints are filed by (ex-) clients, but some are brought by other interested parties, such as the opposing party’s advocate, a judge or a public prosecutor. Furthermore, the president of the local bar (*deken*) may lodge a complaint and request a thorough investigation of the advocate’s practice. The ‘self-cleaning’ capacity of the profession occurs through prevention by colleagues within the law firm or intervention by the president of the local bar. However, because the disciplinary tribunal usually acts in response to external complaints, it imposes sanctions on a limited number of cases of misconduct.

Every complaint must be written and filed with the president of the local bar to which the advocate belongs. The president will handle the complaint and function as an initial sieve, trying to reach a settlement or appease parties in other informal ways in order to solve the case and avoid forwarding it to the chairman of one of the five Disciplinary Tribunals (*Raden van Discipline*). Appeal is possible to the Disciplinary Appeals Tribunal (*Hof van Discipline*). The Disciplinary Tribunals consist of one judge (the chairman) and four advocates; the Appeals Tribunal consists of three judges (including the chairman) and two advocates.

In 2010 the Disciplinary Tribunals received 1,240 new cases and the Disciplinary Appeals Tribunal 293 new cases. Since there were 16,143 advocates, this represented approximately 7.7 new complaints for every hundred advocates (some may receive multiple complaints).<sup>11</sup>

The disciplinary sanctions are: simple warning, reprimand, suspension of up to one year, and disbarment.<sup>12</sup> A selection of Disciplinary Appeals Tribunal rulings is published anonymously in the *Advocatenblad* and on websites of the government and the Dutch Bar Association.<sup>13</sup> In contrast with some other countries (such as the US), the records are not open to the public and do not include files containing the advocates’ communications with their clients or verbatim transcripts of disciplinary proceedings.

As Table 1 shows, the total number of decisions in first instance was lower in 2010 than in 2009. However, the number of claims sustained was nearly constant (332 in 2010 compared to 301 in 2009). Statistics of earlier years display a natural variation, depending on the number of complaints filed and the capacity of the disciplinary bodies.

Besides professional disciplinary procedures there are some other formal mechanisms for regulating advocates. Since 1999 the Dispute Committee for the legal profession has been competent to adjudicate complaints regarding the quality of advocates’ services. A selection of its decisions is published through the same channels as the disciplinary decisions. Furthermore, advocates exhibiting reprehensible behaviour may be subject to criminal prosecution and civil proceedings.

<sup>11</sup> *Annual Report of the Disciplinary Appeals Tribunal and the Disciplinary Tribunals 2010*.

<sup>12</sup> Article 48.2 of the Act on Advocates.

<sup>13</sup> [www.tuchtrecht.nl](http://www.tuchtrecht.nl) and [www.advocatenorde.nl](http://www.advocatenorde.nl).

**Table 1: Imposed Sanctions of the Disciplinary Tribunals and Disciplinary Appeals Tribunal in 2010 and (2009)**

| Sanctions                   | Disciplinary Tribunals | Disciplinary Appeals Tribunal |
|-----------------------------|------------------------|-------------------------------|
| Not sustained, inadmissible | 220 (407)              | 100 (119)                     |
| Sustained, no sanction      | 46 (51)                | 9 (15)                        |
| Warning                     | 132 (113)              | 37 (43)                       |
| Reprimand                   | 78 (67)                | 18 (19)                       |
| Suspended suspension        | 24 (22)                | 8 (7)                         |
| Suspension <sup>§</sup>     | 46 (35)                | 19 (11)                       |
| Disbarment                  | 6 (13)                 | 2 (3)                         |
| <b>Total</b>                | <b>552 (708)</b>       | <b>193 (217)</b>              |

§ Including accelerated imposed suspensions under Art 60b and 60ab of the Act on Advocates; see para 4.

Source: Annual Report, *Disciplinary Appeals Tribunal and Disciplinary Tribunals 2010*, 17–19.

#### 4. A SHORT INTRODUCTION TO THE CASE AGAINST MR STRAW

Mr Straw (born 1943) had a high volume immigration practice with hundreds of hopeless cases of immigrants who had nowhere else to go, because other advocates had told them they could do nothing for them.<sup>14</sup> Straw, a former senior clerk of the Council of State,<sup>15</sup> explained to us how he got engaged in this particular area of law:

I started as an advocate completely open-minded and I did not have any thoughts about the cases I would take. However, accidentally I met the owner of a bar, who was a Kurd from Northern Iraq. He asked me what I had done before I became an advocate. I told him that I was chief clerk of the Asylum department of the Council of State. 'Oh, but then you had a look behind the scenes', he said. 'Yes, one could say so.' 'In that case, I know a lot of people who are interested in you as an advocate.' So just like that I had a couple of hundred Kurds as clients. This went round by word of mouth, and as a consequence, I haven't got down to any ideas of my own about the advocacy. I just did it. And as these people sometimes divorced or committed crimes, I incidentally did something else. And it was my choice to represent psychiatric patients. That has been my choice; the rest just happened to me.

Straw had left the Asylum Department of the Council of State due to a reorganisation. He told us his wife had always been fascinated by advocates and held them in high regard. Leaving the Council of State on a full salary gave him the opportunity to become an advo-

<sup>14</sup> In many respects his case resembles that of Joseph F Muto in Abel, *Lawyers in the Dock* (n 1) ch 3.

<sup>15</sup> Straw probably coordinated clerks in the Asylum Department, who prepared files and minutes of hearings of the Council of State (the highest Administrative Court in the Netherlands). See M Ruppert, 'De medewerkers van de Raad van State' in *Raad van State 450 jaar* (Staatsuitgeverij, 1981) 335. Today law clerks at the Council of State also write draft opinions and take part in the decision-making process.

cate without any financial risk (or so he thought). In January 1998, at the age of 54, he was admitted to the Bar in The Hague and started his three-year traineeship under the tutelage of an external supervisor (patron). In the Netherlands, most trainees are employees of law firms. Straw, however, had his own firm from the start. As the business went well, Straw hired his son and some other employees (including the son's friend). The advocates in his firm (four by 2010) were all employees.

In 2001, in his first case after completing his traineeship, Straw was issued with a disciplinary sanction (a warning) from the Disciplinary Tribunal because he had missed a statute of limitations. A second complaint concerned initiating a wrong procedure (for a regular residence permit instead of asylum) without properly informing his client, a Turkish Kurd.<sup>16</sup> The Disciplinary Tribunal reprimanded him for lack of information. Looking back at this complaint, he recalled:

I said: 'That is nonsense, because I explained to that Turkish client very clearly what I did and what choice he had: asylum procedure or regular procedure.' However, I did say: 'If you choose asylum, then you choose a method that costs the government a lot of money, because it is obliged to give you accommodation. And because that option costs the government a lot of money, the government is very reluctant to grant it. They are very quick to reject an application. Furthermore, you are marked for life, because they take your fingerprints. So if you ever wanted to apply for a permit in another European country, that would not be possible anymore. If you, on the other hand, apply for a regular residence permit, then the costs for the government are low, they don't need to offer you accommodation.' By that time, it was government policy to process those cases very slowly. In practice, you could be protected for years. Of course you had to take care of yourself, but if you had a family or a job in the black market, you could do very well. So I promoted that method. I said: 'You have to choose by yourself, but personally I see more advantages in the regular procedure than in the asylum procedure.'

The Disciplinary Tribunal concluded that Straw's advice to his clients was not necessarily wrong, but because he had not confirmed his advice in writing, he had deliberately taken the risk that his client would not understand the limited chances to obtain a permit to stay and would object afterwards. By the time the complaint was eventually brought before the Disciplinary Tribunal, the client had applied for asylum.

In the following years, initiating pointless procedures without adequately informing and consulting clients became a recurring theme in Straw's disciplinary record. Most of the grievances were brought by disgruntled clients, who had learned from their subsequent advocate about the possibility of filing a complaint at the Disciplinary Tribunal. In the next sections we will describe some of the problems in detail.

By 2005 it had become apparent that every year Straw reached the maximum assignment of 250 legal aid cases per advocate; cases which are publicly funded by the government (in Dutch: *toevoegingen*). Straw abused the regulation by requesting more assignments, using the quotas of his employees (even when they were on maternity leave) and his former

<sup>16</sup> In the regular procedure the client had to show a temporary resident permit, issued by a Dutch official in the country of origin, which he did not have. The asylum procedure did not require such a document.

patron. Their clients were asked to sign a document which stated that they entrusted their case to those advocates, although they were actually represented by Straw (more on this in section 6).

Furthermore, serious questions arose concerning Straw's financial position when it emerged that he had accepted cash without accounting for it in his bookkeeping. The president of the local bar initiated an investigation into the quality of the representation Straw was providing and his financial position. Only after this investigation began did Straw provide the bookkeeping for cash during those years. The results of the investigation induced the Disciplinary Tribunal to suspend him immediately for an indefinite period on the ground that he apparently was not able to run his business properly (Article 60b Act on Advocates), a decision that was later confirmed on appeal. Strictly speaking, the suspension was not a disciplinary sanction but a measure of public order (see section 5). However, the effect was the same, and Straw's firm went bankrupt. Although by then Straw had reached the age of 66, he had not been thinking about retirement at all.

Table 2 overleaf gives an overview of the major disciplinary cases and other legal and administrative procedures concerning Straw after his admission to the bar in 1998. The overview reveals that from 2005, Straw functioned under the suspicious eye of the disciplinary bodies. He was suspended for a great deal of that period. However, Straw told us that the suspensions did not stop him from running his business.

I was already suspended for a year, but that didn't do the trick, because there were other advocates at our firm who handled cases just as usual ... As far as I was concerned, everything was peachy keen. I don't feel a suspension is a terrible thing. It really doesn't touch me very much. However, when the local bar president realised that I was not impressed by the suspensions, she had to think of something else. Then she told my employees: 'If you don't leave that office, we will get you all, individually. You will all be suspended.' Then of course my employees ran away. My son lost his patron. Another employee, a former employee from the Immigration and Naturalisation Service, also needed a patron. By then, my business had collapsed.

Despite the structural nature of the problems, very few complaints from clients surfaced. This is hardly surprising given the vulnerability of his clients (see section 6). Instead, the president of the local bar took the prosecuting role, which is not uncommon in the Netherlands in cases of serious breach of ethical regulations.

On two occasions the Disciplinary Appeals Tribunal overruled the primary decision of the Disciplinary Tribunal. The first time, the Disciplinary Appeals Tribunal found in the fact that Straw had admitted that his conduct was reprehensible a mitigating circumstance. The second time, the Disciplinary Appeals Tribunal transformed the disbarment into a suspension of 12 months, because the decision of the Disciplinary Tribunal had incorrectly stated that the rules on record keeping were violated 'again' and that Straw had problems with his finances, while the complaints which were sustained concerned different matters.

In the next section, we will look at Straw's case, focusing on the first perspective: the characteristics of the disciplinary system.



**Table 2: Reconstruction of Disciplinary and Other Proceedings concerning Mr Straw**

| <b>Specification of complaints</b>                                                                                                                                                                       | <b>Complainant</b>                           | <b>Legal institution</b>                                   | <b>Sanction</b>                                                                                         |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------|------------------------------------------------------------|---------------------------------------------------------------------------------------------------------|
| Missing a statute of limitations                                                                                                                                                                         | A former client, represented by an advocate  | Disciplinary Tribunal of The Hague, 8 October 2001         | Warning                                                                                                 |
| Filing a wrong procedure; missing a statute of limitations; lack of information; billing the client while the client was entitled to funding for legal assistance                                        | A former client, represented by an advocate  | Disciplinary Tribunal of The Hague, 16 December 2002       | Reprimand                                                                                               |
| Abusing a regulation concerning the maximum number of government paid cases; making improper financial arrangements with vulnerable clients                                                              | President of the local bar                   | General Board of the Dutch Bar Organisation, 4 August 2005 | Reject request to act as a patron                                                                       |
|                                                                                                                                                                                                          | President of the local bar                   | Disciplinary Tribunal of The Hague, 19 December 2005       | 12 month suspension (6 months suspended)                                                                |
|                                                                                                                                                                                                          |                                              | Disciplinary Appeals Tribunal, 2 June 2006                 | 6 month suspension (3 months suspended)                                                                 |
| Failing to inform clients about developments and his approach in their cases; negligent handing over of the case; lodging an appeal without consent; making improper financial arrangements with clients | 3 former clients, represented by an advocate | Disciplinary Tribunal of The Hague, 18 February 2008       | Disbarment ( an employee receives a warning)                                                            |
|                                                                                                                                                                                                          |                                              | Disciplinary Appeals Tribunal, 29 August 2008              | Reversal of the disbarment; 12 month suspension instead (+ confirmation of the warning for an employee) |

|                                                                                                                                                                                                                                                                            |                                                    |                                                            |                                                                              |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------|------------------------------------------------------------|------------------------------------------------------------------------------|
| <p>Failing to inform the client about the merits and costs of the procedures involved in a case; not willing to talk to the client and inform him about his (il)legal status; assignment of the case in the name of a firm colleague</p>                                   | <p>A former client, represented by an advocate</p> | <p>Disciplinary Tribunal of The Hague, 13 October 2008</p> | <p>Complaints are partly founded, no sanction due to the long suspension</p> |
| <p>Failing to consult the complainant; problems concerning the handover of a file</p>                                                                                                                                                                                      | <p>An advocate</p>                                 | <p>Disciplinary Tribunal of The Hague, 2 February 2009</p> | <p>One month suspension (following the previous suspension)</p>              |
| <p>Not able to properly practise the profession (Article 60b Act on Advocates); acting in breach of his duty of care (Article 60ab Act on Advocates) with regard to the quality of legal service; malpractice concerning government payments and financial malpractice</p> | <p>President of the local bar</p>                  | <p>Disciplinary Tribunal of The Hague, 18 January 2010</p> | <p>Suspension for an indefinite period</p>                                   |
|                                                                                                                                                                                                                                                                            |                                                    | <p>Disciplinary Appeals Tribunal, 4 April 2010</p>         | <p>Straw is given the opportunity to submit expert opinion</p>               |
|                                                                                                                                                                                                                                                                            |                                                    | <p>Disciplinary Appeals Tribunal, 5 May 2010</p>           | <p>Confirmation of the suspension for an indefinite period</p>               |
| <p>Financial insolvency</p>                                                                                                                                                                                                                                                |                                                    | <p>District Court Rotterdam, 31 March 2010</p>             | <p>Law firm declared bankrupt</p>                                            |

## 5. CHARACTERISTICS OF THE DISCIPLINARY SYSTEM

**Slow and Fast Track Procedures**

It is a common problem in many countries that disciplinary proceedings are reactive and operate very slowly.<sup>17</sup> They are reactive because disciplinary action can be undertaken only if complaints have been filed. Since clients in most countries cannot claim compensation for loss and damages at disciplinary tribunals, they are not easily motivated to lodge a complaint. From the literature we know that in general only the tip of the iceberg of complaints comes to the surface and leads to disciplinary action.<sup>18</sup>

This is even truer for migrants and asylum seekers, such as Mr Straw's clients, who may not be familiar with the disciplinary procedure and the Dutch legal system more generally and therefore may not even have known that there were grounds for a complaint at all. It is plausible to assume that migrants and asylum seekers will be reluctant to file a complaint because their advocate is, in most cases, their only companion in a very bureaucratic and demanding procedure.

With respect to the length of disciplinary proceedings, it is estimated that a first instance disciplinary proceeding in the Netherlands normally takes six to seven months. If an advocate files an appeal, sanctions will not be imposed on him until the Disciplinary Appeals Tribunal reaches a final decision, which will take another few months. Therefore, it can take a year or more before an advocate who seriously neglects his clients or who has links with criminal organisations can be suspended or disbarred.<sup>19</sup> In the past ten years various measures have been taken to tackle these problems, and at the time of the writing some are under consideration to ensure faster and more effective regulation of advocates.

In 2002, a fast-track procedure was introduced<sup>20</sup> (Article 60b Act on Advocates) which gives the Disciplinary Tribunal authority to immediately suspend an advocate for an indefinite period if the advocate is temporarily or permanently unable to run his or her business appropriately, for instance because of health problems, malpractice, fraud or serious problems in his or her private life.<sup>21</sup> The Disciplinary Tribunal is also empowered to make special provisions for the advocate or his firm if it is reasonably expected that the advocate's practice will return to an acceptable level within the foreseeable future (Article 60c Act on Advocates). For instance, the Disciplinary Tribunal can decide that a mentor

<sup>17</sup> Abel, *Lawyers in the Dock* (n 1) 499–501.

<sup>18</sup> M Garbus and J Seligman, 'Sanctions and Disbarment: They Sit in Judgment' in R Nader and M Green (eds), *Verdicts on Lawyers* (Thomas Y Cronwell, 1976); Richard L Abel, *American Lawyers* (Oxford University Press, 1989); LE de Groot-van Leeuwen, 'Polishing the Bar: The Legal Ethics Code and Disciplinary System of the Netherlands, and a Comparison with the United States' (1997) 4 *International Journal of the Legal Profession* 93; Leslie C Levin, 'The Emperor's Clothes and Other Tales about the Standards for Imposing Lawyer Discipline Sanctions' (1998) 48(1) *American University Law Review* 8–9; Abel, *Lawyers in the Dock* (n 1) 500.

<sup>19</sup> Parliamentary notes of the Senate (Eerste Kamer), 2008–9, 31 385, C, p 2.

<sup>20</sup> Amendment to the Act on Advocates of 28 March 2002, *Staatsblad* 2002, no 184.

<sup>21</sup> Parliamentary Notes, *Kamerstukken II* 1999/00, 26 940, pp 8–12 (MvT).

should be appointed to supervise the office or order the advocate to undertake training on a specific subject. The fast-track procedure has to be initiated by the president of the local bar association (the *deken*) and is not dependent on the presence of complaints. Immediate suspension under Article 60b is not regarded as a disciplinary sanction, but rather as a preventive measure for public order.

Another, comparable accelerated procedure (Article 60ab Act on Advocates) came into force in July 2009,<sup>22</sup> enabling the president of the local bar association to immediately suspend an advocate for an indefinite period in anticipation of a disciplinary procedure. A prerequisite for this procedure is that there is strong evidence that the advocate has acted unethically and the situation is becoming critical. During his suspension, a member of another local bar association usually conducts research into the quality and solvency of the advocate's practice. Within six weeks (a term that can be extended for another six weeks) the head of the local bar association has to present the full case to the Disciplinary Tribunal.<sup>23</sup> This procedure is intended only for cases where quick action is required.<sup>24</sup>

### **'Sanction' or 'Measure': The Same Effect**

Mr Straw was one of the few advocates ever to have been subjected to the Article 60b procedure.<sup>25</sup> He explained to us how he experienced it:

My advocate says that this [an Article 60b-measure: a so-called preventive measure for public order, ND/LdG] is de facto also a sanction, and not 'just' a sanction, but a very serious sanction, viz. a prohibition to practise my profession. You can be suspended just like that, without any proven facts which could justify such a prohibition ... But they [the disciplinary bodies] say: taking your job, no no no, that is not a sanction, we call that a 'measure' ... I think law should not be positive law just because it says it is, but should also have a foundation. It is impossible to say: this is law and this is a sanction, because we call it a sanction and this is not a sanction, simply because we say it isn't. It should have a sound basis. The underlying idea must be clear and should not be changed from one day to the next. There must be continuity in that idea ... otherwise it is arbitrary.

As we have seen, the rationale for accelerated disciplinary proceedings is to protect the public from on-going malpractice or, to put it more bluntly, to remove the 'bad apples' from the profession as soon as possible in order to minimise damage. However, we think Straw has a point that the distinction between a disciplinary sanction and a measure of public

<sup>22</sup> Amendment to the Act on Advocates of 25 May 2009, *Staatsblad* 2009, no 222.

<sup>23</sup> para 4a of the Act on Advocates.

<sup>24</sup> Some other measures are still under consideration by Parliament, for instance the publication of a so-called black list of lawyers who have been suspended or disbarred, and direct access for complainants to the Disciplinary Tribunals (instead of first having to approach the head of the local bar). Although we will not discuss these measures in detail, we hope it is clear that the disciplinary system in the Netherlands is developing towards a faster and—at least for serious cases—more inquisitorial procedure, resulting in 'naming and shaming'.

<sup>25</sup> The president of the local bar also requested a suspension based on an Art 60ab procedure, but that request was denied because our respondent was already suspended under Art 60b.

order is artificial. The two procedures often operate concurrently, as was acknowledged when the new legislation was introduced.<sup>26</sup> Given the fact that the power under Article 60b is exercised by disciplinary bodies, it is not surprising that ‘lawyers in the dock’ *feel* they are being punished.

Whether or not the accelerated procedures fall under the scope of Article 6 of the European Convention on Human Rights and meet the criteria for a fair trial remains to be seen, since no case has yet been submitted to the European Court of Human Rights.<sup>27</sup> Straw’s advocate (a nationally well-known criminal practitioner) argued in his counsel’s speech that the procedure in our respondent’s case violated the European Convention. Straw afterwards sighed ironically: ‘That would be nice for our descendants’; his firm was already bankrupt by then.

### Perceived Impartiality of the Disciplinary Body

Besides the reactivity and slow pace of the old procedure and the arbitrariness of the new ones, a third characteristic often associated with disciplinary proceedings is the perceived lack of impartiality. This objection is often advanced by complainants who feel that the bar is a closed shop of advocates protecting each other.<sup>28</sup> Paradoxically, advocates who are being disciplined make the same objection. They often feel that advocates from large law firms dominate the disciplinary committees and solo practitioners are singled out. Whether the disciplined advocates engage in more unethical practices than other advocates or are selectively prosecuted we do not know. However, the statistics show that male, white, middle-aged advocates working alone or in small firms are overrepresented in disciplinary proceedings.<sup>29</sup>

The claim of selective ‘prosecution’ was made by our respondent, as well as by the three other advocates we interviewed. They all felt that the disciplinary procedure was not professional, transparent or objective and that the disciplinary bodies were not impartial or

<sup>26</sup> Parliamentary Notes, *Kamerstukken II 2007/08*, 31 385, no 3, p 3.

<sup>27</sup> In two Belgian medical disciplinary cases (Le Comte, Van Leuven and De Meyere of 23 June 1981, NJ 1982, 602 and Albert and Le Comte of 10 February 1983, A 58) the European Court of Human Rights decided that Article 6 was applicable, because the right to practise a profession should be considered a civil right under the Convention.

<sup>28</sup> In a survey of 164 complainants, half of the respondents were of the opinion that the local bar president showed partiality. They were even more critical about the Disciplinary Tribunals, which 52% of the complainants regarded as biased, and the Disciplinary Appeals Tribunal, which 62% regarded as biased. N Doornbos and LE de Groot-van Leeuwen, *Klachten op orde* (Kluwer, 1997) 133–7.

<sup>29</sup> This pattern emerged in The Netherlands; see Doornbos and De Groot-van Leeuwen, *ibid*, 71–84, as well as in The United States; see Abel, *Lawyers in the Dock* (n 1) 55–56 and 506, and was found in previous studies by J Carlin, *Lawyers’ Ethics: A Survey of the New York City Bar* (Russell Sage Foundation, 1966); JF Handler, ‘The Discretionary Decision: Adversarial Advocacy Reform or Reconstruction’, Working Paper No 12, Disputes Processing Research Program 1983, Madison Law School (University of Wisconsin, 1983) 21; BL Arnold and J Hagan, ‘Careers of Misconduct: The Structure of Prosecuted Professional Deviance among Lawyers’ (1992) 57 *American Sociological Review* 771; Leslie C Levin, ‘The Ethical World of Solo and Small Law Firm Practitioners’ (2004) 41 *Houston Law Review* 381.

independent. They saw themselves as victims of selective prosecution and experienced the disciplinary process as an unfair trial. On this matter, Straw told us:

My conflict is with [the president of the local bar], that's my opinion ... She wasn't impartial at all. By that time, my office had a conflict with one of its employees [discussed in the next section]. We were invited to the office of the president to discuss this issue—my son and I were invited (I don't know why the two of us, she probably thought we both were in charge or something). The conversation was not about this conflict, however. Instead, we were lectured that what we did was disgraceful. According to her, we abused the law by initiating meritless procedures. And if they weren't meritless, they were at least meaningless. She told us that that problem should be dealt with. Our problem with the employee wasn't mentioned at all. It was all about: you are parasites of our society.

His feeling that he was the victim of a personal crusade by the president of the local bar reinforced Straw's sense of alienation from professional ethics. He put forward two issues that he believed strengthened his defence: the fact that there had been few complaints by clients (in his view these cases were instigated by resentful advocates) and the fact that the Disciplinary Appeals Tribunal had reduced the sanctions.

The conflict between Straw and the local president reflected a fundamental disagreement over a classic theme in lawyers' ethics:<sup>30</sup> should a lawyer consider only his client's interests, or should he also consider the general interests of society? Whereas Straw argued that he followed his clients' instructions, the local bar president insisted that Straw had failed to inform his clients adequately and therefore had not acted in their interests; furthermore, he had disrupted the publicly-funded legal aid system. She described his *modus operandi* before the Disciplinary Tribunal as follows:

Mr Straw initiates a procedure that is obviously without merit and completely pointless, for instance a request for a permission to stay on humanitarian grounds. For that procedure the alien first needs to return to his country of origin, but he does not do that. He must file the request in person at the immigration office (IND), but he does not do that. He has to pay the legal fees in person, but he does not do that. He has to have a valid passport, but he does not have it. Very distressing circumstances are an important prerequisite for a successful procedure, but the alien does not fulfil this requirement ... Of course, the IND immediately rejects this pointless and meritless request as ineligible. Mr Straw then files an administrative appeal, an appeal at the courthouse and a request for temporary provisions. With that, he collects three assignments of legal aid support (at €800 each) ... All procedures will be denied. Straw then begins a new round with the same client. This time he argues that his client should have a permit to stay not on humanitarian grounds but rather, for instance, on the ground that he is unable to leave the country for reasons for which he is not to blame. Again Mr Straw files an administrative appeal and an appeal at the courthouse, and requests temporary provisions. Again Mr Straw can bill €800 to the state three times.

<sup>30</sup> Compare for instance the 'dying ideal of the lawyer-statesman', observed by AT Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (The Belknap Press of Harvard University Press, 1993).

As a result, Straw billed the Legal Aid Board approximately €900,000 in one year and had almost a thousand cases pending before the District Court. The president of the local bar acknowledged that advocates have a great deal of discretion in terms of how they operate but stressed that they must keep clients informed of what is happening and give them a realistic estimate of their chances of obtaining asylum or a residence permit. In her view, Straw had failed to do that.

Straw, naturally, had a totally different view of the matter. He told us:

They say I abuse the law. But a rule is a rule, a law is a law. One cannot prohibit an advocate from using the law ... If you think the rules are not right: change the rules ... Our clients know they have no chance of winning their cases, but they gain time instead. In the meantime they can earn some money, send some money to their families back home, and perhaps meet a partner, preferably a European partner who can be helpful in obtaining a residence permit. Time is important for those people. As you know, we had a huge regularisation of illegal immigrants in 2007.<sup>31</sup> Many of my clients received a residence permit at the time ... While they gain time, I earn money.

In his view, the migrants who came to his office knew they had almost no chance of obtaining a residence permit. All they wanted, according to Straw, was to stay as long as possible and earn money in the meantime. They might even hope for a new round of legalisation of illegal immigrants, as had occurred in 2007. Since it was his task to help them stay, Mr Straw just went on and on filing applications and appeals and claiming expenses from the Legal Aid Board. Over the years he even won small victories at the highest national administrative court. For instance, he found a loophole in the regulations requiring an applicant to be present in person when applying for a residence permit.<sup>32</sup>

Straw's advocate at the Disciplinary Appeals Tribunal argued that an advocate is not 'an officer of the court' or an '*Organ der Rechtspflege*'. A good advocate should be very eager to find loopholes that are in his clients' interest and should not refrain from any action just because it is inconvenient for the authorities. Therefore, the concept of aimless or meritless cases, in his view (and we agree), is problematic, especially in immigration matters.

The Disciplinary Appeals Tribunal decided that Straw should be given the opportunity to offer an external expert opinion on whether the procedures he had initiated were indeed meritless or aimless, as the local bar president had argued. The court appointed a retired immigration law professor to conduct research into the matter. However, because Straw could not guarantee that he would be able to pay for this, the research never took place, and Straw was suspended for an indefinite period as requested by the local bar president.

<sup>31</sup> Amendment Aliens Act implementation guidelines 2000 [*Wijziging Vreemdelingencirculaire 2000*], (2007/11), *Staatscourant* 13 juni 2007, no 111, p 12. See Albert Kraler, 'Regularisation: A Misguided Option or Part and Parcel of a Comprehensive Policy Response to Irregular Migration?', IMISCOE Working Paper No 24, 2009.

<sup>32</sup> Administrative Jurisdiction Division of the Council of State [*Afdeling Bestuursrechtspraak Raad van State*], 10 June 2008, publication no LJN BD3801.

### Some Concluding Remarks concerning the Disciplinary System

Abel argues that the alienation of lawyers from professional ethics is reinforced by the disciplinary process.<sup>33</sup> The case of our respondent confirms this. Mr Straw and the other advocates we interviewed felt that they had been singled out and selectively 'prosecuted'. The fact that the president of the local bar association has the authority to act as prosecutor, speaking for complainants who choose not to come forward (ex-clients, the Legal Aid Board, the District Court), reinforces this feeling. As Levin has pointed out, a perceived lack of procedural justice can lead to a perceived lack of substantive justice.<sup>34</sup> This seems to be an important factor in explaining lawyers' negative attitudes towards disciplinary action.

The new accelerated procedures confer great discretion on the president of the local bar. Even though his or her view will certainly be critically assessed by the Disciplinary Tribunal, the proceeding is treated more seriously if a local bar president *ex officio* assumes the prosecuting role. A new dilemma arises: to tackle the slow pace and reactivity of the disciplinary procedure, an inquisitorial approach has been chosen. This approach works in the sense that it is successful in stopping the advocate in the dock from working. The public are protected. The inquisitorial approach is vulnerable, however, in the sense that the requirements for a fair procedure may not be met. Granting a single person the power to act very quickly with far-reaching consequences does seem risky. Also, presidents are human, and humans can act out of anger, losing their impartiality. Single-person procedures should be slow, and fast procedures should be administered by several people and safeguarded against groupthink.

As it stands, the inquisitorial character of investigations and the far-reaching consequences take some advocates completely by surprise. Sometimes, the accelerated procedure occurs very quickly, as happened with one of the other advocates we interviewed. We got the impression that the way in which misbehaving advocates were dealt with had gone from one extreme (the slow procedure of the past) to the other (a sometimes too hasty procedure).

In the next section we will explore the second perspective in explaining the incorrigibility of advocates: the social network.

## 6. THE ADVOCATE'S SOCIAL NETWORK

Concrete personal relations and networks of relations are important in establishing expectations and in creating and enforcing norms. An advocate's social network may influence their professional conduct in two opposing ways: it may stimulate both ethical and unethical behaviour. Colleagues, for example, offer good or bad role models. Professional pitfalls for

<sup>33</sup> Abel, *Lawyers in the Dock* (n 1) 507.

<sup>34</sup> cf LC Levin, 'Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock' (2009) 22 *Georgetown Journal of Legal Ethics* 1549.



sole practitioners and lawyers in small law firms, like that of Mr Straw, are their isolation from established colleagues and a lack of independent powerful clients.

We define a social network as all the people communicating with an advocate in a way that might influence his professional behaviour during the period from his admission to the bar to his suspension. In Straw's case, this network consisted of clients, employees (including a family member), his former patron, and other colleagues.

### **Clients**

As we noted, Straw had an enormous number of clients. Most were migrants, unable to speak Dutch and caught up in a complex legal process that would have been virtually impossible to comprehend even had they mastered the language. On top of this, Straw effectively blocked the channels through which any influence on his professional behaviour could have occurred. At the start of each case he made his clients agree that he would conduct their cases (filing appeals, etc) without consulting them. Moreover, he sold fraudulent documents to clients to show to public authorities, which bore a stamp declaring that the bearer's case was still under consideration. Given their vulnerable position and hopeless cases, it is not surprising that very few migrant clients filed complaints against our respondent. Those who did had the help of other advocates. Straw never received any complaints from his other clients, most of whom were psychiatric patients. We may surmise that this type of client was just as powerless as the migrants to monitor Straw's actions.

### **Employees**

Straw was the only partner in his firm. Employees can be part of a network exercising moral checks and balances, provided that these employees are competent advocates and enjoy some degree of independence. In Mr Straw's small law firm, with only four employees, this probably was not the case. One employee was his son. His other employees were paid around double what they would have taken home in other firms of comparable size and were generally treated as part of the 'appeals machine'. Financial dependency is well illustrated in a letter written by one of Straw's employees: 'For me, Mr Straw's firm constituted virtually the only opportunity to get into advocacy for a salary that is on par with my age and work experience.'

In our interview, Straw explained that the one-year suspension did not have any effect, because his employees kept the firm running.

When the Disciplinary Tribunal decided to remove me from the bar, ... I wasn't greatly concerned, because it is my experience that the Appeal Tribunal always reduces the sanction to half of what it was. Meanwhile, the firm was running as usual. I don't think that I am very sensitive to those measures.

During that time, Straw's son did make some improvements to the firm's communications with clients. He remained in Straw's employment, however, and (in Straw's view) did not voice any serious criticism. Straw decided that, in order to keep the machine running at maximum production, another employee who was absent for more than a year should nevertheless retain the maximum number of legal aid assignments in her name. When she objected to this and expressed her concerns to the local bar president, Straw considered her disloyal. Her testimony regarding the malfunctioning of the firm stimulated the president of the local bar to conduct further investigations. Her 'disloyalty' was an important step in Straw's downfall.

The final blow came when the local bar president made it clear to Straw's other employees that they too would face disciplinary suspensions if they stayed at the firm. They left hastily, and Straw's firm collapsed. All in all, we see that the employee portion of Straw's social network did not provide any significant check on his behaviour. Straw brushed aside the one complaint by the female employee as an act of treason.

### **Former Patron**

An important step in the socialisation of advocates is the three-year traineeship at a law firm following law school. Normally, young graduates are initiated in the dos and don'ts of advocacy during this in-house apprenticeship. When Straw entered the bar, however, he had already completed a considerable number of years as an employee of the Council of State, where he had specialised in asylum law. He decided not to do his apprenticeship as an intern; instead, almost immediately he started his own firm under the supervision of an external patron. We think that the lack of a proper socialisation period was another factor in the malfunctioning of our respondent. Not only did he not internalise the ethical rules, he was not corrected by his patron when he violated the regulations.

What is more, his former patron, instead of setting an example, joined Straw in his unethical behaviour. When it became apparent to Straw in 2004 that he had reached the maximum assignment of 250 legal aid cases, he asked his former patron, Mr B, to help. They reached an agreement that Mr B would nominally take over a number of clients and claim expenses from the Legal Aid Board. In fact, Straw handled the cases himself and paid his former patron 20 per cent of the fees. Mr B was disciplined for conspiring with Straw to defraud the Legal Aid Board.

### **Colleagues**

An advocate's professional network can extend beyond an apprenticeship or one's own firm. When answering a question about contact with other colleagues, Straw said:

I don't know most of my colleagues, because I am always very busy with my own firm. Occasionally I see a colleague when I attend a course and I sometimes read about them in the newspaper, but otherwise I have very little contact with my colleagues. I don't know what they do.

When we asked Straw whether he belonged to one of the associations of immigration law specialists he responded ‘yes, yes’ and mumbled something irrelevant. When we pressed him to specify which association, he evaded the question.

Despite his small and weak professional network, Straw found a well-known criminal advocate, Mr S, to defend him at the Disciplinary Appeals Tribunal. As we noted earlier, in arguing before the Tribunal, Mr S contended that an advocate is not ‘an officer of the court’ and therefore has no obligations to society. This position is controversial within the Bar Association. In 2008, the Association paid a lot of attention to the draft of a new Counsel Act. The Bar Association embraced five core values: partiality, independence confidentiality, expertise and honesty. But it advised the Dutch State Secretary for Justice that it did not endorse a sixth core value: ‘the advocate shall take into account the general interest of the proper administration of justice’. According to the Association, this value already formed an integral part of the professional rules: as a member of the legal profession, ‘an advocate always contributes to the general interest of a proper administration of justice’.<sup>35</sup> Straw was enthusiastic about the way Mr S handled his case, defending him by advancing an extreme ‘no obligations’ argument.

### **Some Concluding Remarks concerning the Social Network**

With powerless clients, financially dependent employees, and advocates in his immediate vicinity who facilitated Straw’s actions, he found strong support for his own moral attitude and professional views. Within his meaningful social network there was nobody to keep him on the right professional ethics track. He minimised contact with other advocates, for instance via specialists associations, the Dutch Bar Association or during courses. In other words, his network was small and almost entirely composed of people who were dependent on him.

## 7. THE PERSON OF THE ADVOCATE

Levin argues that much of the behaviour of ‘lawyers in the dock’ can be explained by sociological and psychological theory about moral decision-making, through concepts such as socialisation, imitation, and the use of moral schemas or scripts.<sup>36</sup> In her view, the misconduct of lawyers is often the result of common psychological biases, like over-optimism, overconfidence, self-deception and egocentrism. People want to view (and present) themselves as good and consistent decision-makers and attribute responsibility to others when things are going wrong. We are not psychologists and cannot draw any conclusions about the personality structure of our respondent. However, our client himself was fully aware that one of his problems was strong optimism, combined with overconfidence. In an interview for a website on advocates he stated:

<sup>35</sup> Dutch Bar Association, Annual Report 2008.

<sup>36</sup> Levin (n 34).

By nature I am optimistic. That is part of my character. And that is the reason I had so many clients.

He was so optimistic that even when the Disciplinary Tribunal decided to disbar him, he was fully convinced that the Disciplinary Appeals Tribunal would reverse that decision (as it did). Not once during the disciplinary proceedings did he actually think he might have to give up his practice.

Also, like Abel's lawyers, Straw was convinced that he had done nothing wrong. One of Abel's conclusions is that all the disciplined lawyers he studied were convinced that they were 'above the law'.<sup>37</sup> During the disciplinary hearings, they maintained their righteousness, even in the face of contrary evidence. According to Abel, this sense of self-righteousness even intensified during the disciplinary proceedings. The lawyers shifted blame onto others, onto the situation, or onto the disciplinary system, which in their view was selective, biased and partial. We have seen (in section 5) that Straw's attitude towards the disciplinary system resembles Abel's findings. The prosecuting actions of the local bar president felt like a 'personal crusade' against him. Not once did he feel he had done something wrong. Looking back on the disciplinary proceedings, Straw told us:

Respondent: I don't feel I did anything wrong.

Interviewer: You don't feel you misbehaved at any moment?

Respondent: No, absolutely not.

Interviewer: Not in any of those cases?

Respondent: No. Okay, I missed the deadline in the first case. However, I did not think the term had been expired, but the district court decided differently. It was all about the question of what counts as the first day of a term. I had a different idea about that. Nevertheless, if something is *qualified* as being wrong, that is different from knowing myself I did something wrong.

Interviewer: Would you mind, knowing that you did something wrong?

Respondent: Yes, but I don't do that. For instance, if I had a couple of drinks, I would take a cab home. It has happened in the past that I drove a car when I was drunk. By that time, the prosecutor told me: 'This is not the first time. I thought you were intelligent, but this is the second time.' Then I felt ashamed.

The extract makes clear that although Straw is not completely without any moral sense, he strongly resists regarding his behaviour in moral terms. He makes his own judgements, distinguishing between what he himself considers wrong and what others characterise as wrong. In other words: he makes a clear distinction between *personal ethics* and *professional ethics*. He uses only his personal morals as a compass for his actions and seems unreceptive to professional rules of conduct. What is more, he has not internalised professional rules of conduct (partly because of the lacuna in his socialisation as an advocate), and therefore they are not part of his frame of reference.

<sup>37</sup> *Ibid*, 495.

An interesting question then is what, if anything, could have stopped him earlier in the disciplinary process. We put this question to Straw, whose answer referred only to the financial impact of closing the firm. This suggests that for Straw it is not the *content* of the ethical rules that matters but rather the *consequences* of non-compliance. Moreover, he seems interested only in the financial consequences. The possibility of becoming an outcast in the profession, for instance, does not seem to affect him at all.

### **Some Concluding Remarks concerning the Psychological Dimension**

For moral reasoning to shape behaviour, ethical rules have to be internalised in childhood or during professional training. We did not ask Straw about his childhood, but it was clear to us that he lacked professional socialisation. As a consequence, he had not internalised, and even may not have known, the ethical rules of the profession. (Of course, other factors may also have contributed to this.) Combined with character traits like over-optimism and strong self-confidence, this made Straw quite unreceptive to the interventions of the local bar president and the disciplinary tribunals. Only financial consequences appear to have had a potential corrective effect.

## 8. TOWARDS A THEORY OF INCORRIGIBLE ADVOCATES

It is not our concern to condemn or justify Straw's behaviour; our aim is rather to look for factors that explain why advocates like Straw seem so impervious to discipline.

Straw's self-reported optimism, combined with the fact that he was convinced of his own righteousness and his inclination to shift blame (to others, the situation, and the system), are important explanatory factors. However, these psychological attributes cannot be seen in isolation from other influences, like the lack of socialisation and the fact that Straw operated on his own, without meaningful feedback or criticism from his social network.

An advocate's identity is constructed partly by socialisation and the advocate's social network during that period. Moral rules are internalised during law school, during the years as a trainee, and in daily contact with colleagues after admission. If professional socialisation is absent or attenuated and the advocate does not have a strong professional network, it is not surprising that the advocate will rely solely on personal ethics, as our respondent did.

An advocate's social network, even if small, is one of the key factors in understanding the advocate's misconduct and the limited possibilities for changing that behaviour. In fact, the kind of social network or its absence may itself be a factor contributing to that behaviour. The social pressure and reputational influences of a network influence whether the advocate behaves according to generally accepted professional standards or according to other norms and values. Because our respondent did not participate in any professional social networks (for instance a specialist association or the local bar), he seemed unaffected by the stigmatisation of discipline. Social stigmatisation did not seem to bother him; at least, it did not make him change his routines.

In the end, only the financial consequences of misconduct hit him hard. That brings us to the characteristics of the disciplinary system. From his personal disciplinary record, it is clear that from 2005, Straw was under close surveillance by the disciplinary bodies. Nevertheless, it took five years for his firm to collapse, during which time Straw continued his practices by using the services of subordinates. Unorthodox measures were needed, like threatening his employees with discipline. The introduction of a fast-track procedure gave the local bar president the means to intervene more quickly. Otherwise the disciplinary procedures might have taken longer.

However, the new fast-track procedure is vulnerable to abuse (although abuse may be too strong a word). What we mean is that initiating the accelerated procedure in cases like Straw's almost always leads to bankruptcy. The consequences of an immediate suspension are enormous. Advocates are isolated professionally, socially and financially. It is therefore even more important that disciplinary proceedings are professional and objective and meet all the requirements of a fair procedure as stated in Article 6 of the European Convention on Human Rights. We do not argue that these requirements were violated in Straw's case. However, his bankruptcy had already occurred before the disciplinary actions of the local bar president and the first instance disciplinary tribunal had been evaluated by the Disciplinary Appeals Tribunal, rendering the opinion of the highest disciplinary body effectively irrelevant. An accelerated procedure with appellate review must be quicker than the current process, or the suspension should be postponed when an appeal is filed. Furthermore, this accelerated procedure should be chosen only where the interests of clients are in acute danger. The procedure gives the local bar president a great deal of discretion to apply inquisitorial measures with powerful effect. However, this may reinforce the feelings of prosecuted advocates about the selectivity and arbitrariness of disciplinary action. As already pointed out, a perceived lack of procedural justice may lead to a perceived lack of substantive justice.<sup>38</sup> This also seems to be an important factor in explaining advocates' negative attitudes towards disciplinary action and their incorrigibility.

A second issue for further consideration is the fact that Straw evidently was affected only by the financial consequence of his firm's collapse. In this light, it is striking that financial measures (fines) are not part of the Dutch disciplinary system. Graduated sanctions, like the discipline imposed by the bar association, seek to deter and often do so effectively. In the current Dutch system, however, financial sanctions are insufficiently graduated. They are either absent or inflict total ruin. Our analysis of Straw's case offers a strong argument for creating a systematic set of graduated financial sanctions in the disciplinary system.<sup>39</sup>

To conclude, we hope we have made clear that the various factors that contribute to advocates' scepticism about the disciplinary process—features of the disciplinary system, advocates' social networks and personalities—should not be studied in isolation but together. The key to explaining non-compliance with ethical rules lies in the interaction between these three perspectives.

<sup>38</sup> Levin (n 34) 1578–80.

<sup>39</sup> See for other pro and contra arguments Linda Haller, 'Disciplinary Fines: Deterrence or Retribution?' (2002) 5 *Legal Ethics* 159; Levin (n 18) 77–80.