

# LEGAL ETHICS IN COMPLIANCE

Deborah L. Rhode\*

## ABSTRACT

*This essay explores major failures in lawyers' compliance responsibilities, and the most promising correctives. It begins by surveying how cognitive bias skews ethical decision making in compliance contexts. Discussion then turns to how lawyers' own personal interests and circumstances contribute to compliance failures. Further analysis focuses on a third contributing factor: the diffusion and displacement of oversight obligations. A concluding section surveys strategies for encouraging cultures of compliance, and the role that individual lawyers can play in that effort.*

## TABLE OF CONTENTS

INTRODUCTION.....	212
I. COGNITIVE BIAS AND ETHICAL INDIFFERENCE .....	213
II. BOUNDED RATIONALITY AND CONFLICTS OF INTEREST.....	214
III. DIFFUSION AND DISPLACEMENT OF RESPONSIBILITY .....	220
IV. CULTURES OF COMPLIANCE .....	222

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\* Ernest W. McFarland Professor of Law and Director of the Center on the Legal Profession, Stanford University. Professor Rhode passed away on January 8, 2021, shortly before this issue went to press. *Gonzaga Law Review* is honored to publish one of Professor Rhode's final pieces.

## INTRODUCTION

Organizational misconduct occurs with dispiriting regularity. Between one-third and one-half of employees observe unethical conduct on the job.<sup>1</sup> The typical organization loses an estimated five percent of its revenues each year because of fraud, amounting to global total of some \$3.7 trillion annually.<sup>2</sup> When employees cheat on safety tests, the price is paid in human lives, as shown by recent scandals involving car manufacturers.<sup>3</sup> Organizational tax avoidance and evasion costs billions and is a major contributor to financial inequality.<sup>4</sup> When compliance professionals suppress complaints of sexual abuse, both victims and organizations incur enormous costs.<sup>5</sup> All of these problems are compounded when lawyers look the other way or fail to look at all.

To what extent attorneys are responsible for compliance failures is impossible to know. Rules of confidentiality generally prevent lawyers from disclosing their role unless a major public scandal implicates them in wrongdoing.<sup>6</sup> Most of our information comes from cases gone wrong; we rarely hear about what goes right and what moral meltdowns are averted because lawyers timely intervene. Still, these examples of failed oversight offer lessons on why attorneys are sometimes part of the problem rather than the solution and show what can be done to prevent it.

This essay proceeds in four parts. Part I explores the way that cognitive bias skews ethical decision making and compromises lawyers' compliance responsibilities. Part II analyzes how lawyers' personal interests and circumstances contribute to compliance failures. Part III examines the diffusion and displacement of oversight obligations. Part IV surveys strategies for encouraging cultures of compliance, and the role that individual lawyers can play in that effort.

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1. DAVID SHULMAN, FROM HIRE TO LIAR: THE ROLE OF DECEPTION IN THE WORKPLACE 163 (2007).

2. ASS'N OF CERTIFIED FRAUD EXAM'RS, REPORT TO THE NATION ON OCCUPATIONAL FRAUD AND ABUSE: 2014 GLOBAL FRAUD STUDY 4 (2014), <https://www.acfe.com/rttt/docs/2014-report-to-nations.pdf>.

3. See, e.g., DEBORAH L. RHODE, LEADERSHIP FOR LAWYERS 277–79 (3d ed. 2020).

4. EMANUEL SAEZ & GABRIEL ZUCHMAN, THE TRIUMPH OF INJUSTICE: HOW THE RICH DODGE TAXES AND HOW TO MAKE THEM PAY 67–87 (2019).

5. See, e.g., Marsha Ershaghi Hames, *Compliance Expert: Anti-Sexual Harassment Training Needs to Start with This...*, HR MORNING (Mar. 20, 2018), <https://www.hrmorning.com/articles/compliance-pro-anti-sexual-harassment-training-needs-to-start-with-this/>.

6. See, e.g., MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2020).

## I. COGNITIVE BIAS AND ETHICAL INDIFFERENCE

Ethical decision making is affected by social norms and social consequences.<sup>7</sup> People respond to cues from others, and observing moral or immoral behavior promotes similar conduct.<sup>8</sup> Through habituation and desensitization, individuals become accustomed to seemingly minor forms of misconduct by clients or colleagues. Ethical implications recede from consciousness through processes that psychologists call “ethical fading” and “ethical numbing.”<sup>9</sup> Moral awareness and “moral attentiveness” both decline, and individuals become less likely to consider moral issues.<sup>10</sup> Euphemisms often contribute to the problem. For example, lawyers use terms like “hard ball,” “testing the limits,” or “close to the line” to describe conduct that may cross it.<sup>11</sup> Over time, normalizing minor misconduct can pave the way for greater abuses.<sup>12</sup>

Ethical fading helps explain not only how lawyers overlook or paper over illegal actions by clients, but also how they overlook such actions taken by their peers. The same moral myopia occurs when lawyers assess their own or their colleagues’ compliance with legal and ethical mandates. For example, over ninety percent of surveyed lawyers believe that other lawyers, at least sometimes, pad their bills, and this perception becomes a rationalization for their own

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7. See LINDA KLEBE TREVIÑO & GARY R. WEAVER, *MANAGING ETHICS IN BUSINESS ORGANIZATIONS: SOCIAL SCIENTIFIC PERSPECTIVES* 171 (2003); Kenneth D. Butterfield et al., *Moral Awareness in Business Organizations: Influences of Issue-Related and Social Context Factors*, 53 *HUM. REL.* 981–82 (2000); Thomas M. Jones, *Ethical Decision Making by Individuals in Organizations: An Issue-Contingent Model*, 16 *ACAD. MGMT. REV.* 366, 368, 379 (1991).

8. LYNN SHARP PAINE, *VALUE SHIFT: WHY COMPANIES MUST MERGE SOCIAL AND FINANCIAL IMPERATIVES TO ACHIEVE SUPERIOR PERFORMANCE* 45–46 (2003); Kim S. Cameron et al., *Organizational Virtuousness and Performance*, 47 *AM. BEHAV. SCIENTIST* 766, 773, 786–90 (2004); Brian Mullin et al., *Jaywalking as a Function of Model Behavior*, 16 *PERSONALITY & SOC. PSYCHOL. BULL.* 320, 321, 324–25 (1990).

9. Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 *SOC. JUST. RES.* 223, 224, 227–28 (2004); see also Ann E. Tenbrunsel et al., *The Ethical Mirage: A Temporal Explanation as to Why We Aren’t as Ethical as We Think We Are* 21–28 (Harvard Bus. Rev., Working Paper 08-012, 2009), <https://www.hbs.edu/faculty/Publication%20Files/08-012.pdf>.

10. Scott J. Reynolds, *Moral Attentiveness: Who Pays Attention to the Moral Aspects of Life?*, 93 *J. APPLIED PSYCHOL.* 1027, 1027–28 (2008).

11. See Celia Moore & Francesca Gino, *Ethically Adrift: How Others Pull Our Moral Compass from True North, and How We Can Fix It*, 33 *RES. ORG. BEHAV.* 53, 62–64 (2013).

12. See *id.* at 64; David T. Welsh et al., *The Slippery Slope: How Small Ethical Transgressions Pave the Way for Larger Future Transgressions*, 100 *J. APPLIED PSYCHOL.* 114, 124–45 (2015).

fudging.<sup>13</sup> Web Hubbell, onetime chief justice of the Arkansas Supreme Court, acknowledged some 400 instances of fraudulently inflating bills and charging personal expenses as business expenses while in private practice, but he dismissed the matter as a “private financial dispute” within the firm.<sup>14</sup> In a tape-recorded conversation with his wife, he conceded the overbilling.<sup>15</sup> When she responded, “You didn’t actually do that, did you, mark up time for the client, did you?” he acknowledged, “Yes I did . . . So does every lawyer in the country.”<sup>16</sup>

Firm leaders who are aware of billing abuses generally fail to report such misconduct to bar disciplinary authorities and many refuse to acknowledge inadequacies in organizational oversight.<sup>17</sup> According to the managing partner of Hubbell’s firm, “We thought and still believe we had good systems in place at the firm . . . [but] there is no system tight enough to prevent abuse by someone in a position of trust.”<sup>18</sup> Experts, however, view that attitude as part of the problem and fault bar leaders for “institutional ineptitude” and willful blindness.<sup>19</sup> As the discussion below suggests, self-interest is often a contributing factor in organizational misconduct. Abuses by powerful partners can go unchecked because “[n]obody wants to kill a rainmaker.”<sup>20</sup>

## II. BOUNDED RATIONALITY AND CONFLICTS OF INTEREST

Even when lawyers attempt to focus on ethical issues, their unconscious cognitive biases undermine that moral analysis.<sup>21</sup> In effect, people are subject to

13. See William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 *RUTGERS L. REV.* 1, 18–22, 88–90, 92 (1991).

14. Deborah L. Rhode, *Leadership in Law*, 69 *STAN. L. REV.* 1603, 1615 (2017); see DONALD L. BARLETT & JAMES B. STEELE, *THE GREAT AMERICAN TAX DODGE* 219 (2000); Benjamin Wittes, *It Could Happen to You: Hubbell’s Plea Spotlights Firm Billing Problems*, *LEGAL TIMES*, Dec. 12, 1994, at 16.

15. BARLETT & STEELE, *supra* note 14, at 219.

16. *Id.*

17. Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 *GEO. J. LEGAL ETHICS* 205, 276–77 (1999); Wittes, *supra* note 14, at 16–17.

18. Wittes, *supra* note 14, at 17.

19. Lerman, *supra* note 17, at 275, 281; see also Wittes, *supra* note 14, at 16–17 (quoting the president of a consulting company that specializes in auditing legal fees).

20. Lerman, *supra* note 17, at 281 (quoting Professor Roy Simon on the hesitancy of law partners to intervene when they notice a pattern of improper acts among partners); see also Lisa G. Lerman, *A Double Standard for Lawyer Dishonesty: Billing Fraud Versus Misappropriation*, 34 *HOFSTRA L. REV.*, 847, 864–65, 872 (2006) (highlighting the ethical concerns of bill padding and otherwise unethical billing practices within law firms).

21. See MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT’S RIGHT AND WHAT TO DO ABOUT IT* 36 (2011); DAVID DESTENO & PIERCARLO VALDESULO, *OUT OF CHARACTER: SURPRISING TRUTHS ABOUT THE LIAR, CHEAT, SINNER (AND*

“bounded rationality” and “bounded ethicality.”<sup>22</sup> They find it particularly hard to acquire and process information necessary for sound ethical decisions in the face of complexity, uncertainty, and time constraints; physical and mental fatigue can also impair ethical focus, and deplete resources for self-control.<sup>23</sup>

Self-interest further skews the reasoning process: “the more tempted we are to behave unethically, the more common—and thus acceptable—we perceive unethical action to be.”<sup>24</sup> Confirmation bias compounds this problem. We are most likely to seek out, recall, and value information that supports our preexisting beliefs and preferences.<sup>25</sup> Personal loyalties and financial interests also distort ethical judgment.<sup>26</sup> Despite efforts to be objective, people often succumb to “motivated reasoning.”<sup>27</sup> Such reasoning involves the “rationalization of preferred opinions,” namely “our tendency to arrive, by seemingly purely rational reasoning, to the opinions that we prefer for other motives.”<sup>28</sup>

Such self-interests often figure in lawyers’ compliance failures. One recent widely discussed example involves the prominent litigator and law firm chair David Boies. He has come under considerable criticism for his role in representing and sitting on the board of Theranos, the Silicon Valley start-up that

SAINT) LURKING IN ALL OF US 33–35 (2011); Chen-Bo Zhong, *The Ethical Dangers of Deliberative Decision Making*, 56 ADMIN. SCI. Q. 1, 1, 16–17 (2011).

22. Dolly Chugh et al., *Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest*, in CONFLICTS OF INTEREST 74–75 (Don A. Moore et al. eds., 2005).

23. See Francesca Gino et al., *Unable to Resist Temptation: How Self-Control Depletion Promotes Unethical Behavior*, 115 ORGAN. BEHAV. & HUM. DECISION PROCESSES 191, 199 (2011); Martin S. Hagger et al., *Ego Depletion and the Strength Model of Self-Control: A Meta-Analysis*, 136 PSYCHOL. BULL. 495, 495–99 (2010); William D. Killgore et al., *The Effects of 53 Hours of Sleep Deprivation on Moral Judgement*, 30 SLEEP 345, 351 (2007); Nicole L. Mead et al., *Too Tired to Tell the Truth: Self-Control Resource Depletion and Dishonesty*, 45 J. EXP. SOC. PSYCHOL. 594, 597 (2009); Mark Muraven & Roy F. Baumeister, *Self-Regulation and Depletion of Limited Resources: Does Self-Control Resemble a Muscle?*, 126 PSYCHOL. BULL. 247, 254–55 (2000).

24. BAZERMAN & TENBRUNSEL, *supra* note 21, at 59; see also Ann E. Tenbrunsel, *Misrepresentation and Expectations of Misrepresentation in an Ethical Dilemma: The Role of Incentives and Temptation*, 41 ACAD. MGMT. J. 330, 335–38 (1998).

25. See CHIP HEATH & DAN HEATH, *DECISIVE: HOW TO MAKE BETTER CHOICES IN LIFE AND WORK* 11–12 (2013); John Beshears & Francesca Gino, *Leaders as Decision Architects*, HARV. BUS. REV. (May 2015), <https://hbr.org/2015/05/leaders-as-decision-architects>.

26. See MAX H. BAZERMAN & ANN E. TENBRUNSEL, *supra* note 21, at 56–57, 67.

27. Slavisa Tasic, *Are Regulators Rational?* 17 J. DES ECONOMISTES ET DES ETUDES HUMAINES 1, 8–9 (2011).

28. *Id.*; see also Matt Ridely, *Studying the Biases of Bureaucrats*, WALL ST. J. (Oct. 23, 2010, 12:01 AM), <https://www.wsj.com/articles/SB10001424052702304410504575560323807741154>.

peddled a fraudulent blood-testing device designed to screen for multiple diseases.<sup>29</sup> Theranos founder Elizabeth Holmes “orchestrated a marketing scheme that blocked peer reviews and evidence of failures”; she then sold flawed tests that “led to erroneous diagnoses for patients.”<sup>30</sup> Part of what enabled Holmes’s fraud was her willingness to fire and silence any potential whistleblower and to find lawyers to assist that effort. She put David Boies on the Board of Directors, hired his firm Boies Schiller, and arranged to pay half of his and the firms’ fees in Theranos stock.<sup>31</sup> Many questioned whether this fee arrangement and dual role for Boies raised concerns about conflicts of interest, his ability to exercise unbiased judgment as a director representing the interest of investors, and as a lawyer representing the interests of management.<sup>32</sup>

Concerns also surfaced about the firm’s willingness to push the bounds of advocacy in preempting dissent.<sup>33</sup> Litigators exposed one young employee to hundreds of thousands of dollars in legal fees and threatened another with bankrupting him and his entire family.<sup>34</sup> The firm also threatened to sue the *Wall Street Journal* for defamation if it published an article challenging the effectiveness of the blood-testing technology.<sup>35</sup> In the face of mounting evidence of fraud, Boies remained a zealous advocate until a disagreement over how to handle federal criminal investigations prompted his resignation.<sup>36</sup>

In commenting on his role, Boies told a *New York Times* reporter that “greater due diligence would have led him to decline representation.”<sup>37</sup> And in an oblique reference to possible financial self-interest, he acknowledged that “I

29. JOHN CARREYROU, *BAD BLOOD: SECRETS AND LIES IN A SILICON VALLEY STARTUP* 241–49 (2019); Steven Davidoff Solomon, *David Boies’s Dual Roles at Theranos Set Up Conflict*, N.Y. TIMES (Feb. 2, 2016), <https://www.nytimes.com/2016/02/03/business/dealbook/david-boies-dual-roles-at-theranos-set-up-conflict.html>; see also Olga V. Mack, *Bad Blood: Even More Red Flags That Were Simply Ignored*, ABOVE LAW (Feb. 4, 2019), <https://abovethelaw.com/2019/02/bad-blood-even-more-red-flags-that-were-simply-ignored/>.

30. RHODE, *supra* note 3, at 394–95.

31. James B. Stewart, *David Boies Pleads Not Guilty*, N.Y. TIMES (Sept. 21, 2018), <https://www.nytimes.com/2018/09/21/business/david-boies-pleads-not-guilty.html>.

32. See, e.g., Solomon, *supra* note 29; see also Mack, *supra* note 29.

33. See Scott Alan Burroughs, *David Boies’s Fall from Grace*, ABOVE L. (Sept. 26, 2018), <https://abovethelaw.com/2018/09/david-boies-fall-from-grace> (quoting Carryou); Stewart, *supra* note 31.

34. CARREYROU, *supra* note 29, at 247; Stewart, *supra* note 31.

35. CARREYROU, *supra* note 29, at 257, 271, 279.

36. John Carreyrou, *Theranos and David Boies Cut Legal Ties*, WALL ST. J. (Nov. 20, 2016), <https://www.wsj.com/articles/theranos-and-david-boies-cut-legal-ties-1479514351>.

37. Stewart, *supra* note 31 (quoting Boies).

spend a lot of money.”<sup>38</sup> But he also defended his hard-ball tactics. “You don’t know all the facts when you take on a client . . . but once you do, you have a duty of loyalty. You can’t represent them halfway.”<sup>39</sup>

Boies similarly defended his assistance to Harvey Weinstein in fighting sexual abuse allegations.<sup>40</sup> Again, self-interest may have played a role, given Boies’s business dealings with Weinstein. As complaints began to surface publicly, Boies helped Weinstein hire a private investigation firm to dig up dirt that would discredit victims and reporters who were covering their claims. Although Boies acknowledged that perhaps he should have been on notice of Weinstein’s alleged abuse and “done something about it,”<sup>41</sup> he was unapologetic about his zealous advocacy. Even after the scale of Weinstein’s abuse became clear, Boies stated, “When I look back I don’t have any regret that I represented him the way I did.”<sup>42</sup> He told a *New York Times* reporter that once he agreed to help Weinstein, he was obligated to stick by him, just as he was obligated to assist Elizabeth Holmes. Boies stated:

A lawyer can choose what clients to represent. A lawyer does not have the choice of how to represent a client. A lawyer is duty-and honor-bound to represent a client effectively and aggressively, within the bounds of the system itself. And once a lawyer takes on a client, you do not have the right to abandon that client under fire, except in extraordinary circumstances.<sup>43</sup>

This view is flatly inconsistent with bar ethical rules, which prohibit lawyers from assisting a client’s illegal conduct and permit them to withdraw from representation that becomes morally repugnant.<sup>44</sup> The rules also ban representation that involves conflicts of interest, including circumstances where lawyers’ independent judgment may be materially affected by their own personal

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38. *Id.* (quoting Boies).

39. *Id.* (quoting Boies).

40. See JODI KANTOR & MEGAN TWOHEY, *SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT* 91 (2019); Miram Rozen, *Boies Responds to Criticism Over Role in Weinstein’s ‘Army of Spies’*, AM. LAW. (Nov. 7, 2017), <https://www.law.com/americanlawyer/2017/11/07/criticism-rises-over-david-boies-role-in-weinsteins-army-of-spies/>.

41. Ronan Farrow, *Harvey Weinstein’s Army of Spies*, NEW YORKER (Nov. 6, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-army-of-spies>.

42. KANTOR & TWOHEY, *supra* note 40 at 91.

43. Stewart, *supra* note 31 (quoting Boies).

44. MODEL RULES OF PRO. CONDUCT r. 1.2(d), 1.16(b)(4) (AM. BAR. ASS’N 2020).

interests.<sup>45</sup> Boies compromised his own reputation, as well as his firm's, by remaining willfully ignorant of client misconduct when he had a personal financial stake in the matter.

Such conflicts of interest are all too common in compliance contexts. The desire to hold on to lucrative business or avoid antagonizing powerful colleagues figures into many compliance scandals. For example, Enron was the largest client of its outside firm Vinson & Elkins, before the company imploded over fraudulent accounting practices.<sup>46</sup> Lawyers were acutely aware that, in the words of one Enron employee, work went to another firm that was "flexible," rather than "difficult."<sup>47</sup> So too, at Wells Fargo, the general counsel's office seemed at best "willfully ignorant" of a widespread pattern of accounts opened and fees charged without consumers' consent.<sup>48</sup> As one former Wells Fargo employee noted, "[e]verybody knew there was fraud going on, and the people trying to flag it were the ones who got in trouble."<sup>49</sup> The widespread perception was that Wells Fargo's CEO was not "someone who wanted to hear bad news," or to rethink reward structures that were driving misconduct.<sup>50</sup> A *New York Times* article, tongue-in-cheek, ran under the title "Pervasive Sham Deals at Wells Fargo, and No One Noticed?"<sup>51</sup> The reason for such oversights seemed to be along the lines famously coined by novelist Upton Sinclair: "It is difficult to get a man to understand something [is unethical] when his salary depends upon his not understanding it."<sup>52</sup>

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45. *Id.* at r. 1.7(a)(2).

46. Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 641 (Nancy B. Rapoport & Bala G. Dharan eds., 2004).

47. Ellen Joan Pollock, *Enron's Lawyers Faulted Deals but Failed to Blow the Whistle*, WALL ST. J. (May 22, 2002), <https://www.wsj.com/articles/SB1022015509705465440>.

48. ANTHONY C. THOMPSON, DANGEROUS LEADERS: HOW & WHY LAWYERS MUST BE TAUGHT TO LEAD 131 (2018).

49. Stacy Cowley, *At Wells Fargo, Complaints About Fraudulent Acts Since 2005*, N.Y. TIMES (Oct. 11, 2016), <https://www.nytimes.com/2016/10/12/business/dealbook/at-wells-fargo-complaints-about-fraudulent-accounts-since-2005.html> (quoting Ricky Hansen, Jr., a former Wells Fargo branch manager, who was fired after reporting fraudulent accounts).

50. INDEP. DIR. OF THE BD. OF WELLS FARGO & CO., SALES PRACTICE INVESTIGATION REPORT 53–55 (April 10, 2017), <https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/presentations/2017/board-report.pdf>.

51. Andrew Ross Sorkin, *Pervasive Sham Deals at Wells Fargo, and No One Noticed?*, N.Y. TIMES (Sept. 12, 2016), <https://www.nytimes.com/2016/09/13/business/dealbook/pervasive-sham-deals-at-wells-fargo-and-no-one-noticed.html>.

52. DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 227 (2010) (quoting Upton Sinclair).

That same mindset helps explain why lawyers for employers of serial predators signed off on multiple secret settlements with women alleging sexual abuse. For a quarter-century, leaders of Fox News ignored reports that its chair, Roger Ailes, abused and propositioned subordinates, and retaliated against those who refused his advances.<sup>53</sup> When one anchor, Gretchen Carlson, finally went public with a lawsuit, the network's legal and public relations department portrayed her as someone "with an ax to grind."<sup>54</sup> Only after two dozen women came forward, including the prominent anchor Megyn Kelly, did Fox force Ailes to step down.<sup>55</sup> In-house counsel apparently took a similar "forgive and forget" attitude toward Bill O'Reilly, who negotiated six secret agreements with complainants, totaling \$45 million, before he was forced out.<sup>56</sup>

Harvey Weinstein's abuse went unchecked for decades because he was everyone's meal ticket, and many, including lawyers, profited from favors that he could bestow. A notable example was Lisa Bloom, who had made her firm's reputation by representing victims of sexual abuse.<sup>57</sup> She had business dealings with Weinstein that encouraged her offers of assistance when complaints began to surface publicly.<sup>58</sup> In a memo obtained by *New York Times* reporters, she volunteered to publish dirt on one of his accusers, Rose McGowan.<sup>59</sup> Bloom was willing to "call her out as a pathological liar" and to place an article about McGowan "becoming increasingly unglued, so that when someone Googles her

53. See Deborah L. Rhode, *How Unusual Is the Roger Ailes Sexual Harassment Case?*, HARV. BUS. REV. (Aug. 10, 2016), <https://hbr.org/2016/08/how-unusual-is-the-roger-ailes-sexual-harassment-case> [hereinafter Rhode, *How Unusual*].

54. Jim Rutenberg, *Gretchen Carlson Suit Against Fox News Head Forces Network to Face Changing Mores*, N.Y. TIMES (July 7, 2016), <https://www.nytimes.com/2016/07/08/business/media/gretchen-carlson-suit-against-fox-news-head-forces-network-to-face-changing-mores.html>.

55. Rhode, *How Unusual*, *supra* note 53; Manuel Roig-Franzia et al., *The Fall of Roger Ailes: He Made Fox News His 'Locker Room'—and Now Women Are Telling Their Stories*, WASH. POST (July 22, 2016), [https://www.washingtonpost.com/lifestyle/style/the-fall-of-roger-ailes-he-made-fox-his-locker-room—and-now-women-are-telling-their-stories/2016/07/22/5eff9024-5014-11e6-aa14-e0c1087f7583\\_story.html](https://www.washingtonpost.com/lifestyle/style/the-fall-of-roger-ailes-he-made-fox-his-locker-room—and-now-women-are-telling-their-stories/2016/07/22/5eff9024-5014-11e6-aa14-e0c1087f7583_story.html); see also MEGYN KELLY, SETTLE FOR MORE 309 (2016) (discussing how Kelly's story encouraged other women to come forward).

56. See Emily Steel, *How Bill O'Reilly Silenced His Accusers*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/business/media/how-bill-oreilly-silenced-his-accusers.html>.

57. KANTOR & TWOHEY, *supra* note 40, at 95–96.

58. See Megan Twohey & Johanna Barr, *Lisa Bloom, Lawyer Advising Harvey Weinstein, Resigns Amid Criticism from Board Members*, N.Y. TIMES (Oct. 7, 2017), <https://www.nytimes.com/2017/10/07/business/lisa-bloom-weinstein-attorney.html>.

59. KANTOR & TWOHEY, *supra* note 40, at 101–03.

this is what pops up and she is discredited.”<sup>60</sup> Bloom also offered to stage a “pre-emptive interview” that would present Weinstein as a good and decent person and a generous philanthropist so that he would be the “hero of the story not the villain. This is very doable.”<sup>61</sup> Only after the damage to her own reputation and law firm became evident did Bloom publicly acknowledge her “colossal mistake.”<sup>62</sup>

Although Bloom may be an extreme case, many other lawyers in leadership positions have been reluctant to enforce compliance with sexual harassment mandates in their own firms or organizations. Morris Dees, the celebrated cofounder and chief litigator of the Southern Poverty Law Center, was not removed from office until 2019, despite a long history of staff complaints to Center leadership about his harassment and retaliation against female complainants.<sup>63</sup> Such institutional indifference to complaints and retaliation have made many targets of abuse reluctant to report it. As one female lawyer noted, those who complained “were no longer employed there and these men were. Is there anything more to be said?”<sup>64</sup> Another attorney predicted, “if one of us had to go[,] it would have been me.”<sup>65</sup>

### III. DIFFUSION AND DISPLACEMENT OF RESPONSIBILITY

A related problem involves diffusion and displacement of responsibility. Either responsibility is so widely shared that no one feels accountable, or individuals shift their obligations to others in the organization. These dynamics help explain why General Motors failed to take prompt remedial action in response to reports of a faulty ignition switch. An expert’s report on what went wrong described

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60. *Id.* at 101.

61. *Id.* at 102.

62. See Claudia Rosenbaum, *Lisa Bloom Knows She Made “A Colossal Mistake” in Harvey Weinstein*, BUZZFEED (October 14, 2017), <https://www.buzzfeednews.com/article/claudiarosenbaum/lisa-bloom-knows-she-made-a-colossal-mistake-in-harvey>.

63. Bob Moser, *The Reckoning of Morris Dees and the Southern Poverty Law Center*, NEW YORKER (Mar. 21, 2019), <https://www.newyorker.com/news/news-desk/the-reckoning-of-morris-dees-and-the-southern-poverty-law-center>.

64. LAUREN STILLER RIKLEEN, WOMEN’S BAR ASS’N OF MASS., SURVEY OF WORKPLACE CONDUCT AND BEHAVIORS IN LAW FIRMS 10 (2018), <https://wbawbf.org/sites/WBAR-PR1/files/WBA%20Survey%20of%20Workplace%20Conduct%20and%20Behaviors%20in%20Law%20Firms%20FINAL.pdf> (quoting a survey respondent).

65. *Id.* at 12.

[a] troubling disavowal of responsibility made possible by a proliferation of committees. It is an example of what witnesses called the ‘GM salute,’ a crossing of arms and pointing outward towards others, indicating that the responsibility belongs to someone else. Here, because a committee was ‘responsible,’ no single person bore responsibility or was individually accountable.<sup>66</sup>

There was also evidence of a “GM nod” in which employees agreed to a course of action but failed to follow through.<sup>67</sup> One example involved a junior attorney who asked whether there should be a recall.<sup>68</sup> According to the expert’s report, the lawyer “was told that the issue had already been raised with engineering, that the engineers were working on it, and that they had not come up with a solution. This lawyer got the ‘vibe’ that the lawyers had ‘done everything we can do.’”<sup>69</sup> As General Motor’s CEO Mary Barra summed it up, in these and other discussions, “nobody took responsibility.”<sup>70</sup> The cost for the corporation was over a billion dollars in legal liability.<sup>71</sup>

A similar displacement of responsibility led to a famous compliance scandal at Salomon Brothers, a subsidiary of a leading Wall Street investment firm Salomon Inc.<sup>72</sup> The problems arose because the firm failed to discipline and disclose securities law violations by Paul Mozer, the head of the Government Trading Desk.<sup>73</sup> Mozer placed a false bid to avoid limitations placed by federal Treasury Department rules. When the fraud came to light, Mozer claimed it was an isolated incident. His supervisor, Salomon vice president John Meriwether,

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66. ANTON R. VALUKAS, JENNER & BLOCK, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS 68–69 (May 29, 2014), <https://www.aieg.com/wp-content/uploads/2014/08/Valukas-report-on-gm-redacted2.pdf>.

67. *Id.* at 256.

68. *Id.* at 108.

69. *Id.*

70. Ben W. Heineman Jr., *GC and CEO Responsibility for GM’s Dysfunctional Culture*, CORP. COUNSEL (June 6, 2014), <https://www.law.com/corpcounsel/almID/1202658366128/> (quoting Barra); see also Michael W. Peregrine, *The Broader Governance Lessons of the “Valukas Report,”* COLUM. L. SCH.: CLS BLUE SKY BLOG (Sept. 12, 2014), <https://clsbluesky.law.columbia.edu/2014/09/12/the-broader-governance-lessons-of-the-valukas-report/>.

71. In 2015, the Department of Justice and GM agreed to a Deferred Prosecution Agreement that imposed a \$900 million fine and required GM to create a \$600 million fund for victim compensation. Robert Eli Rosen, *The Sociological Imagination and Legal Ethics*, 19 LEGAL ETHICS 97, 100–01 (2016).

72. The case is profiled in MICHAEL USEEM, THE LEADERSHIP MOMENT 178–207 (1998) and discussed in RHODE, *supra* note 3, at 270–276.

73. USEEM, *supra* note 72, at 178–207.

who was aware of other highly aggressive conduct by Mozer, notified Salomon Brothers' president.<sup>74</sup> They then discussed the matter with Donald Feuerstein, the firm's general counsel, and Salomon Inc's CEO John Gutfreund. Because Feuerstein "believed the conduct was 'probably criminal' . . . the group agreed it should be reported to the New York Federal Reserve Bank."<sup>75</sup> A subsequent SEC report described the decision-making as follows:

Each of the four executives who attended the meetings . . . placed the responsibility for investigating Mozer's conduct and placing limits on his activities on someone else . . . [The president stated that he believed that Gutfreund and Feuerstein] . . . would take whatever steps were necessary or required as a result of Mozer's disclosure. Feuerstein stated that he believed that, once a report to the government was made, the government would instruct Salomon about how to investigate the matter. [The CEO] stated that he believed that the other executives would take whatever steps were necessary to properly handle the matter. According to the executives, there was no discussion among them about any action that would be taken to investigate Mozer's conduct or to place limitations on his activities.<sup>76</sup>

Mozer was admonished, but he continued to submit illegal bids, and no one lived happily ever after.<sup>77</sup> To settle the case, the firm ended up paying one of the largest-ever SEC penalties for a financial institution. It also lost major clients and market share after its stock price plummeted.<sup>78</sup> According to Deryck C. Maughan, who became the CEO after the scandal, the events constituted a "billion-dollar error of judgment."<sup>79</sup>

#### IV. CULTURES OF COMPLIANCE

What, then, can lawyers do to ensure greater compliance with ethical rules? This author, along with many others, has written extensively elsewhere about appropriate strategies, and this is not the occasion for a comprehensive review.<sup>80</sup> But it may be useful to close with a brief summary of key proposals.

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74. See RHODE, *supra* note 3, at 271.

75. *Id.*

76. Gutfreund, Exchange Act Release No. 34-31554, 51 SEC Docket 93 (Dec. 3, 1992).

77. RHODE, *supra* note 3, at 272, 274.

78. *Id.* at 270.

79. *Id.* at 270-271 (quoting Maughan).

80. See *id.* at 264-266; DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE 66-67 (2000); Deborah L. Rhode, *Moral Counseling*, 75 *FORDHAM L. REV.* 1317, 1319-20 (2006).

First, and most importantly, lawyers who have compliance responsibilities, whether in representing clients or managing legal workplaces, need to make ethics a priority, in practice as well as principle. This requires integrating ethical concerns into all activities, particularly performance evaluations and reward systems. Systems that place overwhelming weight on bottom-line concerns encourage employees to do the same and to “put their moral values on hold.”<sup>81</sup>

Second, lawyers need to monitor compliance structures and persuade their organizational clients to do the same. Strategies include ethical climate surveys, hotlines, and ethics officers or ombudspersons. Anonymous surveys can ask employees whether their workplace “has a culture of integrity” and “whether they can raise concerns without fear of retaliation.”<sup>82</sup> By preserving confidentiality, such initiatives can encourage reporting by individuals wary of retribution and identify areas for follow-up investigations.<sup>83</sup>

Most organizations also need more safe spaces for moral disagreement and more protection for whistleblowers. The problem in too many workplaces is that “[n]ot only does no one want to listen, but no one wants to talk about not listening.”<sup>84</sup> Support from leaders, supervisors, and peers is crucial in encouraging reports of misconduct. As the subtitle of one article on whistleblowing noted: “It takes a village.”<sup>85</sup> Best practices include: establishing and publicizing multiple channels for complaints, including confidential hotlines; assigning responsibility for prompt investigation and follow up; ensuring a thorough review process that addresses not only individual wrongdoing but also underlying causes; and providing appropriate discipline for misconduct and protection from retaliation.<sup>86</sup>

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81. WILLIAM DAMAN, *THE MORAL ADVANTAGE: HOW TO SUCCEED IN BUSINESS BY DOING THE RIGHT THING* 3 (2004); Vikas Anand et al., *Business as Usual: The Acceptance and Perpetuation of Corruption in Organizations*, 18 *ACAD. MGMT. EXECUTIVE* 39, 48 (2004) (noting that performance evaluations need to take into account more than numbers).

82. BEN W. HEINEMAN, JR., *THE INSIDE COUNSEL REVOLUTION* 119 (2016).

83. See Blake Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 *RES. ORG. BEH.* 1, 39 (2003); Vikas Anand et al., *supra* note 81, at 49.

84. C. FRED ALFORD, *THE WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER* 20–21 (2001).

85. David Mayer et al., *Encouraging Employees to Report Unethical Conduct Internally: It Takes A Village*, 121 *ORG. BEH. & HUM. DECISION PROCESSES* 89, 89, 102 (2013).

86. See MARCIA P. MICELI ET AL., *WHISTLEBLOWING IN ORGANIZATIONS* 193–197 (2008); Benisa Berry, *Organizational Culture: A Framework and Strategies for Facilitating Employee Whistleblowing*, 16 *EMP. RESP. & RTS. J.* 1, 9–10 (2004); Marcia P. Miceli & Janet P. Near, *What Makes Whistleblowers Effective?: Three Field Studies*, 55 *HUM. REL.* 455, 475 (2002).

Finally, individual lawyers need to engage in more self-reflection about where they draw the line in representing clients and influencing their own organizations on compliance matters. Much, of course, depends on contexts, but there are better and worse ways of framing the relevant question. Former U.S. Attorney for the Southern District of New York Preet Bharara has recalled occasions when students have asked him the wrong way. One interchange went as follows:

‘Mr. Bharara, You’ve talked about making sure you don’t cross the line and that it’s dangerous to wander too close to the line. So, exactly how far from the line do you recommend people stay?’ It is asked as if it were a geometry problem. I say, ‘Oh, about three and a half feet should do the trick.’

I am always a bit taken a bit aback at these attempts to quantify ethics. I answer such questions by explaining that I disagree with the premise of the question; its orientation is unfortunate and off base; that if you are single-mindedly focused on walking the line, you are bound to end up afoul of regulators and, God forbid, criminal prosecutors. Even more dangerous perhaps, you are sending a message to every other person at the firm that line walking is a good idea. That can work for a while, but not forever. A culture of minimalism is lethal.<sup>87</sup>

Although lawyers often have limited leverage in influencing clients or colleagues on compliance issues, each of us can use whatever influence we have on matters that truly matter. And we can enlist allies in strategies that do not put our own livelihoods at risk. Recent activism following #MeToo points the way. For example, when prominent law firms continued hiring serial abusers without adequate vetting, some lawyers found effective ways to respond.<sup>88</sup> In the winter of 2018, flowers arrived at one such firm, Mayer Brown, to mark the arrival of a prized new recruit.<sup>89</sup> He had left two previous firms after allegations of misconduct that were handled confidentially. The bouquet came from members of one of those previous employers with a note reading, “Thanks for

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87. PREET BHARARA, *DOING JUSTICE* 195 (2019).

88. See Sara Randazzo & Nicole Hong, *At Law Firms, Rainmakers Accused of Harassment Can Switch Jobs with Ease*, WALL ST. J. (July 30, 2018, 11:38 AM), <https://www.wsj.com/articles/at-law-firms-rainmakers-accused-of-harassment-can-switch-jobs-with-ease-1532965126>.

89. *Id.*

taking him . . . . It was signed: The women.”<sup>90</sup> Mayer Brown began an investigation, and the lawyer resigned the following week.<sup>91</sup>

Individual lawyers often have more influence than they suppose. Cultures of compliance are a common good, which all professionals have an opportunity and obligation to sustain. None of us can afford to treat ethical responsibility as someone else’s responsibility.

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90. *Id.*

91. *Id.*

