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Misbehaving Lawyers: Cross-Country Comparisons

Leslie C Levin*

I. INTRODUCTION

We do not know how many lawyers seriously misbehave. We only know about misconduct that is detected and reported.[1] Sometimes lawyer misbehaviour is so audacious or far-reaching that it becomes a big news story. More often, it is addressed without fanfare through court orders, discipline sanctions, or malpractice actions. These incidents of lawyer misbehaviour are not compiled systematically.[2] Thus, regulators may not know which lawyers repeatedly misbehave—nor do clients. Yet when lawyers misbehave, they can do substantial damage. Their wrongdoing not only hurts clients and third parties; it damages the reputation of the legal profession and undermines public confidence in the administration of justice.

The case studies in this volume look at six disciplined lawyers who seriously misbehaved[3] in Australia (Issac Brott), Canada (Anthony Merchant), the Netherlands ('Mr Straw'),[4] New Zealand (Christopher Harder and Christopher Comeskey), and the United Kingdom (Andrew Nulty).[5] These lawyers share some striking similarities to one another and to the lawyers that Richard Abel described in his case studies of disciplined lawyers

* Professor of Law, University of Connecticut School of Law, USA. I am grateful to Richard Abel for providing me with the opportunity to participate in this project. I would also like to thank him and Andrew Boon, Donna Buckingham, Nienke Doornbos, Linda Haller, Leny de Groot-van Leeuwen and Alice Woolley for their comments on a draft of this article. All websites accessed 21 October 2012.

1 See eg ABA Center for Professional Responsibility, 2010 Survey on Lawyer Discipline Systems, Chart I (2012). In some countries, even the number of complaints is not publicly available.

2 eg Linda Haller, 'Australian Discipline: The Story of Issac Brott', this volume, 197; Alice Woolley, 'Regulation in Practice', this volume, 243. Likewise, US courts do not systematically maintain records of the court sanctions imposed on individual lawyers or report this information to disciplinary authorities. Nor is the number of malpractice judgments (or settlements) involving individual lawyers known.

3 I am using the term 'seriously misbehaved' primarily to denote misconduct that is generally considered egregious (eg lying to a court, engaging in fraud). Occasionally, I also use the term to include repeated misconduct by a lawyer, the continuation of which is likely to undermine confidence in lawyers or the administration of justice.

4 'Mr Straw' is a pseudonymous name for the lawyer who is described in that case study.

5 For ease of reference, a brief description of these lawyers appears in the Appendix.

in the United States.[6] Like most of Abel's lawyers, the lawyers described in this volume represented individuals in personal plight matters.[7] They engaged in some similar misbehaviour.[8] They are—like most disciplined lawyers—male.[9] Most of them worked on their own early in their careers or with lawyers who were themselves ethically challenged. Many of the lawyers worked in a solo or small law firm (five or fewer lawyers) at the time they engaged in misconduct. Their work involved litigation, making their conduct visible not only to disciplinary authorities, but also to courts. Money often motivated their misconduct, at least in part.[10] They are repeat—and sometimes unapologetic—offenders of the professional rules governing lawyers. When caught, many engaged in self-justifying behaviour, blaming others or the disciplinary process rather than taking responsibility for their own conduct. Some had great difficulty expressing remorse, even when it was in their interests to do so.

Of course, case studies have their limits: cases are often chosen because they are interesting or unusual, rather than because they are typical.[11] Indeed, all but one of the lawyers discussed in this volume were colourful personalities who were well known in their legal communities.[12] Yet case studies also have advantages, as they provide fine-grained accounts that permit us to look for commonalities that might not otherwise be apparent from aggregated statistics or reading discipline decisions. As it turns out, these case studies suggest some common conditions that may lead some lawyers to seriously misbehave. Comparisons of these case studies also suggest some of the psychological processes and personality

6 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).

7 These lawyers practised primarily in the areas of criminal law, family law, immigration, personal injury work, and plaintiffs' class actions.

8 Rick Abel's case studies of disciplined lawyers in the US revealed problems with solicitation, fees, conflicts of interest, fraud, excessive zeal, and neglect of client matters. Abel, *Lawyers on Trial* (n 6) 444–60. The lawyers in this volume engaged in the same types of misconduct. Nulty and Merchant engaged in improper conduct when soliciting clients. Fee overreaching led to disciplinary problems for all six of the lawyers. Merchant had conflicts of interest. Straw and Comeskey engaged in fraud with respect to legal aid, while Nulty (and possibly Merchant) defrauded clients. Brott, Harder and Merchant ran into problems due to excessive zeal in court. Brott and Straw neglected client matters.

9 Patricia W Hatamyar and Kenneth M Simmons, 'Are Women More Ethical Lawyers? An Empirical Study' (2004) 31 *Florida State University Law Review* 785, 787; Linda Haller and Heather J Green, 'Solicitors' Swan Song? A Statistical Update on Lawyer Discipline in Queensland' (2008) 19(1) *Bond Law Review* 140, 146.

10 Likewise, Abel concluded that the lawyers he studied were motivated by 'need or greed'. Abel, *Lawyers in the Dock* (n 6) 492.

11 The typical disciplined lawyer appears to receive a single reprimand. The lawyers in the case studies in this volume were almost all disciplined repeatedly, and at some point they all received incapacitating sanctions (suspensions or disbarments).

12 For example, Merchant is 'one of the best known lawyers in Canada, successful, wealthy, [and] controversial'. Geoff Kirbyson, 'The Big Picture' *Canadian Lawyer*, August 2007, www.canadianlawyermag.com/Cover-Story-The-Big-Picture.html. Comeskey was 'New Zealand's most recognizable defence lawyer'. Tim Hume and Jonathan Marshall, 'The Great Defender' *Sunday Star Times* (Auckland), 7 November 2010, www.stuff.co.nz/sunday-star-times/features/3903855/The-great-defender. In this respect, they differed from the lawyers Abel studied, who were not well known in their large legal communities.

traits that may help to account for problematic behaviour in seriously misbehaving lawyers, even across cultures.

It is important to be cautious, however, with psychological labels. These discipline case studies allow us to look at lawyers' behaviour and their public explanations of their conduct—but they are not psychological case studies from which diagnoses can be made. At best, we can look at the disciplined lawyers' conduct and consider what psychological theories and research might tell us about the reasoning and actions of these lawyers. It may be useful to do this, however, in order to attempt to understand why some lawyers who confront certain situations repeatedly misbehave—while others do not. If we can identify personality differences or psychological processes that contribute to certain deviant behaviour, it may help us find approaches to address it.

Finally, the case studies enable us to consider how regulators might better deal with chronically problematic lawyers. As it turns out, the discipline systems described in this volume share common problems: they tend to be slow, reactive and forgiving of misconduct by recidivists. Although most of the discipline systems have been reorganised in recent years (most notably in Australia, New Zealand and the UK), problems remain—especially when dealing with lawyers who reoffend. Thus, the cases offer an opportunity to consider how to better deal with the seriously misbehaving lawyer.

II. EARLY TRAINING AND SOCIALISATION

What causes some lawyers to behave in conformance with professional rules while others do not? Scholars of the legal profession are still working to develop a complete account of the factors that influence how lawyers behave in practice. General upbringing probably plays a role in the resolution of questions of professional responsibility,[13] but the extent of its influence is unclear. Significant socialisation occurs in law school, where law students first learn what it means to be a 'professional'.[14] But much of the learning about the norms and values of the legal profession appears to occur in the workplace, where new lawyers learn from other lawyers who work around them and from observing conduct outside their offices.[15]

Many of the lawyers described in the case studies appear to have started out in practice with insufficient training or in offices with poor role models from whom to learn positive

13 eg Frances Kahn Zemans and Victor G Rosenblum, *The Making of a Public Profession* (American Bar Foundation, 1981) 171–2.

14 Robert L Nelson and David M Trubek, 'Arenas of Professionalism: The Professional Ideologies of Lawyers in Context' in R Nelson, D Trubek and R Solomon (eds), *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (Cornell University Press, 1992) 186–7.

15 See eg Jerome E Carlin, *Lawyers' Ethics: A Survey of the New York City Bar* (Russell Sage Foundation, 1966); Zemans and Rosenblum (n 13) 173; Bryant G Garth and Joanne Martin, 'Law Schools and the Construction of Competence' (1993) 43 *Journal of Legal Education* 469, 483–5; Leslie C Levin, 'Guardians at the Gate: The Background, Career Paths, and Professional Development of Private US Immigration Lawyers' (2009) 34(2) *Law & Social Inquiry* 399, 425–7.

professional values. For example, Tony Merchant and Issac Brott appear to have worked on their own shortly after starting out in practice.[16] Mr Straw had his own firm from the start, and worked with an external supervisor (an unusual arrangement) during his traineeship. It seems unlikely that his supervisor was a positive role model; a few years after the training concluded, the supervisor agreed to nominally take on legal aid clients for Straw's firm to service—enabling the firm to exceed its legal quota—in return for 20 per cent of the fees (a scheme for which the supervisor was later disciplined).[17] Similarly, after Christopher Harder received his practising certificate, he practised solo as a barrister, rather than working in a firm as a 'barrister and solicitor', as did most newly admitted lawyers.[18] He worked part time for Peter Williams, a colourful criminal barrister who was investigated for years by the Law Society and whose career 'earned him persistent rumours that he is crooked'.[19] When Christopher Comeskey started out in practice, he was assisted by Charl Hirschfield,[20] New Zealand's highest earning legal aid lawyer, who ceased working for legal aid in 2011 around the time the New Zealand Law Society launched an investigation into his legal aid work.[21]

These experiences working alone or with lawyers who engaged in problematic behaviour may have profoundly affected the lawyers' later decision making.[22] Lessons learned early in practice can continue to affect decision making for many years. This is because lawyers use scripts and 'schemas' to simplify their thought processes in order to manage daily affairs.[23] Once people develop 'stock explanations' for what is happening, they resist rethinking their assumptions.[24] People want to think of themselves as consistent decision makers and so they are not inclined to rethink their decisions.[25] In addition, the cognitive bias of overconfidence causes people to think they are making good choices, and that they

16 Brott worked in a three-person partnership for about a year before he went out on his own. Merchant presumably articled for a year after graduation, but it does not appear that he worked in a partnership after he concluded his training.

17 Nienke Doornbos and Leny E de Groot-van Leeuwen, 'Incorrigible Advocates', this volume, 335.

18 Christopher Harder, *Through the Legal Looking Glass* (Howling at the Moon, 2002) 40.

19 *Ibid*, 43; Michele Hewitson, 'Peter Williams on Life, Law and Being a Bit Mad' *New Zealand Herald* (Auckland), 23 June 2007, www.nzherald.co.nz/ponsonby/news/article.cfm?l_id=358&objectid=10447357.

20 *Auckland Standards Committee v Comeskey* [2010] NZLCDT 19, [16].

21 'Lawyer Quits Legal Aid Work as Bills Probed' *TVNZ* (Auckland), 26 January 2011, http://tvnz.co.nz/national-news/lawyer-quits-legal-aid-work-bills-probed-4007988.

22 Alternatively, it is possible that there was something about these lawyers that made them want to work in unsupervised settings or made them impervious to ethical training. This is a point to which I return in the Conclusion.

23 Donald C Langevoort, 'The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases and Organization Behaviour' (1997) 63 *Brooklyn Law Review* 629, 639–40. Psychologists also refer to the use of 'heuristics' or general rules of thumb to arrive at their judgments. Scott Plous, *The Psychology of Judgment and Decision Making* (McGraw-Hill, 1993) 219.

24 Langevoort (n 23) 640.

25 See Roderick M Kramer and David M Messick, 'Ethical Cognition and the Framing of Organizational Dilemmas: Decision Makers as Intuitive Lawyers' in DM Messick and AE Tenbrunsel (eds), *Codes of Conduct: Behavioural Research into Business Ethics* (Russell Sage Foundation, 1996) 69–70.

do not need to rethink how to approach a decision they have previously made.[26] Thus, early experiences can be especially powerful once lawyers choose a particular response to an ethical issue.

The lack of good early training may also help to explain some of the lawyers' later misconduct. For instance, Straw's problems quickly surfaced in his first case after completing his traineeship with an external supervisor, when he received a disciplinary warning because he had missed a statute of limitations.[27] Comeskey's 'chaotic' administrative and business practices[28] may also have been due to a lack of proper training earlier in his career. Since he had never personally done any legal aid billing,[29] he could not properly train his junior barristers to perform this task.

The lack of good training may be especially problematic for the lawyers in these case studies because they were working as litigators. Litigation is an exercise in constructing the truth of a case and in pushing boundaries.[30] It is easy to see how problems can arise if lawyers work on their own to define the meaning of 'zealous advocacy' and to determine how far they can go when they construct the 'truth' in a case. Unsupervised (or ill-supervised), new advocates can easily cross the line into unacceptable conduct, especially when it is in their self-interest to do so. Thus, Straw's belief that it was acceptable to pursue meritless claims (for which he was paid by legal aid) for his immigrant clients may have developed because he practised alone without a good supervisor who might have trained him differently.[31] Once habituated to this view of the advocate's role, Straw apparently never reconsidered it—or was resistant to rethinking his approach—because he did not want to consider that he was wrong.

Once these individuals were running their own law offices, other lawyers in their firms did not—or could not—rein in their colleagues' unprofessional conduct. This may be because lawyers are not much influenced by other firm lawyers with less status or power. Or it could be because they have brought into the firms like-minded lawyers. Comeskey worked only with junior lawyers, at least one of whom reportedly believed that Comeskey's fraudulent billing practices were 'common in Auckland'.[32] Nulty 'operated with minimal peer constraints'.[33] He started his firm, Avalon, with 200 cases from his old firm and with Ike Ibeto, a Nigerian trained lawyer who only became qualified in the UK the same year Avalon was formed; Malcolm Trotter, a junior partner; and Nulty's brother, who had a law degree but was not qualified to practise.[34] Merchant's firm employed up to 40 lawyers, but

26 Jeffrey J Rachlinski, 'The Uncertain Psychological Case for Paternalism' (2003) 97 *Northwestern University Law Review* 1165, 1220.

27 Doornbos and de Groot-van Leeuwen, this volume, 340.

28 *Comeskey* [2010] NZLCDT 19, [52].

29 *Ibid*, [17].

30 Kimberly Kirkland, 'The Ethics of Constructing Truth: The Corporate Litigator's Approach' in LC Levin and L Mather (eds), *Lawyers in Practice: Ethical Decision Making in Context* (University of Chicago Press, 2012).

31 Doornbos and de Groot-van Leeuwen, this volume, 340, 347.

32 Hume and Marshall (n 12).

33 Andrew Boon and Avis Whyte, 'Icarus Falls: The Coal Health Scandal', this volume, 277.

34 *Ibid,* 296.

he heads the firm, and he seemingly looks to no one else for how to conduct his practice—except possibly his three sons.[35]

Straw's case demonstrates why law firms cannot easily rein in errant lawyers if those at the top are corrupt. Straw had his own firm, and subsequently hired his son, his son's friend, and two other advocates as employees. These junior lawyers were financially dependent and 'did not provide any significant check on his behaviour'.[36] Every year when Straw reached the maximum assignment of 250 legal aid cases per advocate, he requested more assignments, using the quotas of his employees and his former supervisor. It is not hard to see why the other lawyers in the firm were complicit; Straw's employees were paid twice the wages they would have received in firms of comparable size. As one of his employees noted, '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'.[37] Only one lawyer, who had been on maternity leave, objected to Straw's work on legal aid assignments in her name during her year-long absence. It was only when the other employees were threatened by the local bar president with disciplinary suspensions if they stayed with the firm that they finally left and Straw's firm collapsed.[38]

The lawyers in the case studies apparently did not look to—or were not influenced by—communities of practice outside of their firms that might have encouraged ethical behaviour. Communities of practice are 'groups of lawyers with whom practitioners interact and to whom they compare themselves and look for common expectations and standards'.[39] Straw had few contacts with lawyers outside his firm. As he explained, 'I have very little contact with my colleagues. I don't know what they do'.[40] Merchant did not look to the class action bar to guide his behaviour; he had a contentious relationship with that bar, 'in most circumstances refusing to opt for a team approach'.[41] Brott was apparently unconcerned with the views of other barristers, making himself a pariah by publicising his claim that a deceased barrister (QC) had been a drug addict.[42]

Doornbos and de Groot-van Leeuwen suggest that where 'professional socialisation is absent or attenuated and the advocate does not have a strong professional network', a lawyer 'will rely solely on personal ethics'.[43] It does appear that in these situations, lawyers will

35 Kirbyson (n 12) ('In lots of areas they dominate me and push me around. I get more criticism from them than from anybody else'). Merchant's sons were unlikely to be positive role models for their father, as they probably learned how to practise law at his firm. His son Matthew was ordered disbarred in 2009, although a new hearing was ordered in 2011. Law Society of Alberta, Notices of Disbarment, www.lawsociety.ab.ca/lawyer_regulation/hearings_outcomes/notices_disbarment/disbarments/detail.aspx?rid=371.

36 Doornbos and de Groot-van Leeuwen, this volume, 351.

37 *Ibid*.

38 *Ibid*.

39 Lynn Mather, Craig A McEwan and Richard J Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford University Press, 2001) 6, 14.

40 Doornbos and de Groot-van Leeuwen, this volume, 351.

41 Timothy Taylor, 'The Merchant of Menace' *Globe and Mail* (Toronto), 20 December 2007, www.theglobeandmail.com/report-on-business/the-merchant-of-menace/article1091902.

42 Haller, this volume, 204.

43 Doornbos and de Groot-van Leeuwen, this volume, 354.

work out how to respond on their own. Where lawyers are not constrained or influenced by those around them, the lawyer's decisions are more likely to be affected by self-serving reasoning. As a result of the *self-serving bias*, when there is a conflict between an individual's interests and those of others, the individual will favour himself.[44] This bias allows people to believe that it is fair for them to have more of a given resource than an independent observer would judge.[45] This would help to explain why Nulty deducted 'success fees' from the coal miners' relatively modest recoveries when his right to do so was, at best, unclear, or why the other lawyers overreached for fees to which they were not entitled. When the self-serving bias is combined with a strong desire for money, this may help to account for some misbehaviour by these lawyers.

III. MONEY, LIES, AND MACHIAVELLIANISM

Much of the misconduct that the lawyers in this volume engaged in was seemingly motivated by money. This misconduct was often accompanied by lying, either in connection with their wrongful acts or in an attempt to cover them up. This section explores these issues in an effort to consider whether the lawyers' behaviour might be explained, in part, by their attitudes towards money and a psychological construct known as Machiavellianism.

A. The Role of Money

The temptation that money poses for lawyers is a cross-cultural phenomenon. Fee overreaching led to disciplinary problems for all six lawyers. Some of these lawyers systematically exploited government payment schemes. Others engaged in improper business-getting tactics to earn more fees. Sometimes they simply acted in ways that were disadvantageous to their clients to increase their own earnings. Some of the conduct clearly violated professional rules governing lawyers while in other cases, the propriety of their actions was less clear. But this is not surprising—when people confront an ambiguous situation, they tend to interpret it in a self-interested fashion.[46]

Much of the misconduct in the case studies involved taking advantage of government-financed or government-administered programs in ways that financially benefited the lawyers. These may be tempting targets because government programs often have difficulty

44 See eg Max H Bazerman and Don A Moore, *Judgment in Managerial Decision Making* (Wiley, 7th edn 2008) 94–96; Daniel T Gilbert and Joel Cooper, 'Social Psychological Strategies of Self-Deception' in Michael W Martin (ed), *Self-Deception and Self-Understanding: New Essays in Philosophy and Psychology* (University Press of Kansas, 1985) 75.

45 See Bazerman and Moore (n 44) 94; Don A Moore, Philip E Tetlock, Lloyd Tanlu and Max H Bazerman, 'Conflicts of Interest and the Case of Auditor Independence: Moral Seduction and Strategic Issue Cycling' (2006) 31 *Academic Management Review* 1, 7–8.

46 See eg Donald C Langevoort, 'Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)' (1997) 146 *University of Pennsylvania Law Review* 101, 144–6.

monitoring abusive billing practices. For example, Straw took on hundreds of hopeless immigration cases—and far more than he was legally entitled to receive—that were paid for by legal aid. He initiated 'pointless procedures' and pursued meritless appeals, enabling him to collect legal aid fees on multiple occasions from a single unwinnable case.[47] Comeskey took advantage of government legal aid by rendering a legal aid bill claiming that he had done certain work (charging his senior rate) for work performed by junior lawyers in his firm, and by billing legal aid for a memo that was never actually written.[48] Brott apparently also engaged in a scheme that defrauded legal aid.[49] Nulty's firm, Avalon, processed 32,000 coal miners' claims against a government-administered fund, from which Avalon allegedly received £40 million.[50] These earnings were due, in part, to Nulty's deduction of an improper 'success fee' from any recovery the miners received, in addition to the scale fee Avalon was receiving from the government.[51]

These lawyers also overreached for money in other ways. Merchant was briefly suspended from practice for improperly withdrawing trust funds to pay his fees; he was ordered by a court in a different case to return over $231,000 in fees that he was found to have wrongfully taken;[52] and he was disciplined in a third case for failing to deposit settlement funds into court and acting 'to protect his own financial and other interests to the detriment of many'.[53] Both Merchant and Nulty used deceptive practices to sign up clients and to get them to enter into fee agreements that favoured the lawyers.[54] Comeskey was judicially criticised for 'profligate' and 'grossly excessive' time spent on matters, resulting in an unacceptably high legal bill.[55] Brott overcharged one client,[56] commenced cases on behalf of other individuals without their knowledge in order to obtain the fees,[57] and had unex-

47 Doornbos and de Groot-van Leeuwen, this volume, 340, 348.

48 *Comeskey* [2010] NZLCDT 19, [7]–[10]. It is likely that his firm overbilled legal aid on other occasions. Comeskey contended that it was common practice for barristers to bill legal aid at senior rates for the work of junior lawyers. Moreover, at the time of Comeskey's suspension, the Legal Services Agency had launched an investigation of 25 other legal aid files in his office. David Fisher, 'Comesky's $57,000 Legal Aid Probe' *New Zealand Herald* (Auckland), 11 July 2010, www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10658015.

49 Brott's arrangement with Xavier David Holden, a convicted drug dealer, which enabled Holden to hold himself out as a lawyer affiliated with Brott's law office and collect legal aid funds, probably provided Brott with some financial benefit. *Law Institute of Victoria v Brott* [2008] VCAT 1998, [15], [22].

50 Boon and Whyte, this volume, 300.

51 David Robinson, 'A Disgrace to the Profession' *Chambers Magazine*, 2009, www.chambersmagazine.co.uk/Article/%27A-disgrace-to-the-profession%27. While the rules concerning whether clients could be charged additional sums were not initially clear, once the proper approach was clarified in 2004, Avalon continued to charge success fees for a while.

52 Woolley, this volume, 252–4.

53 Law Society of Saskatchewan, Discipline Decision Case Summary, *In the Matter of Merchant* (12 December 2011), www.lawsociety.sk.ca/media/41336/merchantsentencing.pdf.

54 Woolley, this volume, 265–6; Boon and Whyte, this volume, 301–2.

55 *The Queen v Cavanaugh*, HC Civ 2002-404-3798, 7 December 2006, [78].

56 Brott charged a client over $240,000 for one month's work; when his bill was challenged in court, he reduced it by more than half. Haller, this volume, 217.

57 The disciplinary tribunal noted that 'had the insurers for the at fault drivers paid without query, the activities would never have been discovered [and the alleged clients] would have been used without their knowledge for the financial benefit of the respondent'. *Legal Services Commissioner v Brott* [2011] VCAT 110, [14].

plained deficiencies in his client trust account.[58] Harder refused to return unearned fees.[59]

Like the US lawyers Abel studied, these lawyers apparently were motivated by need or greed.[60] Nulty's handling of the coal health cases made him the UK's highest earning solicitor in 2005.[61] Straw billed the Legal Aid Board €900,000 in one year.[62] Comeskey was reportedly experiencing financial pressure due to his lifestyle, his overhead costs, and child support payments owed to his former wife.[63] The Merchant firm was cash-strapped because it had not been paid for several years for its work on the residential school settlement.[64]

The fact that these lawyers needed or wanted more money makes them no different from many other people—or from other lawyers. Unlike most people, however, lawyers are often in positions of trust, making it easy to overreach. The temptation to overreach may be especially great when the risk of detection appears low. In order to overreach without detection, deception is typically required. Not surprisingly, this is precisely the misconduct in which the lawyers in the case studies engaged.

B. Lying Lawyers

Lying is a daily life event.[65] Most often, people lie because it is in their self-interest to do so.[66] They lie to make a positive impression or to spare themselves embarrassment. They also lie to gain an advantage or avoid punishment.[67] Even though there are rules prohibiting lawyers from lying in their professional capacity, we know that many lawyers lie to their clients.[68] Likewise, the lawyers in the case studies lied, not only to their clients, but to the government, the courts and other third parties.[69]

Some of the lies told by these lawyers were directly connected to efforts to earn more money. Straw lied when he used the names of other lawyers to apply for legal aid cases so that his firm could exceed the case quota and obtain additional payments. Comeskey's firm falsely billed for legal aid funds at Comeskey's billing rate for services that he did not actually perform. Brott lied to opposing counsel about having received instructions to pursue

58 *Law Institute of Victoria v Brott* [2008] VCAT 1998, [9].

59 *Re Harder*, NZLPDT, 13 December 1995, 10–11.

60 Abel, *Lawyers on Trial* (n 6).

61 Joanne Harris and Matt Byrne, 'UK's Richest Lawyer Faces Law Society Ban' *The Lawyer* (London), 21 August 2006, www.thelawyer.com/uks-richest-lawyer-faces-law-society-ban/121530.article.

62 Doornbos and de Groot-van Leeuwen, this volume, 348.

63 Hume and Marshall (n 12).

64 Taylor (n 41).

65 Aldert Vrij, *Detecting Lies and Deceit: The Psychology of Lying and the Implications for Professional Practice* (John Wiley, 2000) 7. Vrij uses the terms 'lying' and 'deception' interchangeably. He defines deception as 'a successful or unsuccessful deliberate attempt, without forewarning, to create in another a belief which the communicator considers to be untrue'. *Ibid*, 6.

66 Steven L Grover, 'Lying, Deceit and Subterfuge: A Model of Dishonesty in the Workplace' (1993) 4(3) *Organization Science* 478, 479–80.

67 Vrij (n 65) 8–9.

68 eg Lisa Lerman, 'Lying to Clients' (1990) *University of Pennsylvania Law Review* 659, 705–25.

69 They also engaged in self-deception. Since the definition of 'lying' used here involves another person, the discussion of self-deception will not be addressed until Part IV.

claims (that he was not authorised to bring) so that he could earn a fee.[70] Merchant falsely stated in letters when soliciting clients that there would be no costs or risks associated with the residential schools litigation.[71] Nulty sent letters to clients that were a 'systematic and deliberate method of misleading clients' to induce them to sign new letters so that he could deduct success fees from their recoveries.[72]

These lawyers also lied for their clients. People sometimes lie for another person's benefit,[73] and in some cases, the lawyers in the case studies lied primarily to help their clients.[74] For example, during a criminal appeal, Comeskey made misleading submissions concerning the prosecution's conduct, apparently to advantage his client.[75]

Some of the lawyers also lied to save themselves once they realised they were in trouble. Merchant gave false testimony in a case in which his firm had wrongfully retained fees in excess of $231,000.[76] Nulty falsely stated in a letter to the Department of Trade and Industry that his firm had not deducted fees from his clients' coal health recovery, when it had previously deducted more than £220,000 in success fees and continued to deduct success fees even after he wrote the letter.[77] Brott falsely claimed that he was acting upon instructions from his 'clients' (with whom he had never spoken) until his discipline hearing commenced.[78] Psychological research may help to explain the lawyers' behaviour.

C. The Love of Money and Machiavellianism

Many people equate money with success, power and self-worth.[79] And some people desire money more than others. Researchers use a Love of Money scale to measure attitudes about

70 *Legal Services Commissioner v Brott* [2011] VCAT 110, [15]–[16].

71 Woolley, this volume, 265–6.

72 *In the matter of Nulty and Trotter* (SDT No 9871-2008), 15 January 2010, [78]–[79], www.sra.org.uk/SDT. In addition, Nulty deceived potential clients when he advertised the services of the Miners and General Workers Compensation Recovery Unit, without making clear that the claims referral company was not connected to a trade union (as the advertisement suggested) and in fact, was directly connected to his law firm. Boon and Whyte, this volume, 296.

73 Vrij (n 65) 8.

74 Woolley, this volume, 274 suggests—probably correctly—that there may be some loss of perspective that causes litigators to overstep the bounds of proper advocacy. Whether they do so entirely for their clients or also for their own benefit (eg to enhance their 'win' record or for other psychic rewards) deserves further study.

75 Donna Buckingham, 'Putting the Legal House in Order', this volume, 315. Likewise, Brott wrote a letter to the Family Court giving the false impression that he would no longer act for a client who was unable to pay for a trial (when his fees had actually been secured by a costs agreement), in an apparent effort to buy the client additional time. Haller, this volume, 212. Brott also lied when he signed as an attesting witness to a guarantee that had not been signed in his presence, presumably to accommodate his client. *Ibid*, 201.

76 Woolley, this volume, 251–3.

77 *In the matter of Nulty and Trotter* (SDT No 9871-2008), 15 January 2010, [88]–[89], www.sra.org.uk/SDT.

78 *Legal Services Commissioner v Brott* [2011] VCAT 110, [14].

79 Adrian Furnham and Ryo Okamura, 'Your Money or Your Life: Behavioral and Emotional Predictors of Money Pathology' (1999) 52 *Human Relations* 1157, 1161; Thomas Li-Ping Tang and Randy K Chiu, 'Income, Money Ethic, Pay Satisfaction, Commitment and Unethical Behavior: Is the Love of Money the Root of Evil for Hong Kong Employees?' (2003) 46 *Journal of Business Ethics* 13, 25.

money and the relationship of those attitudes to unethical intentions and behaviour.[80] They have found that love of money is positively related to employees' unethical intentions across six continents.[81] This is significant because many theorists believe that behaviour is determined by intentions.[82] Researchers have also found that women seem to have lower concerns about making money than men, are less inclined to take moral risks for money than men, and have more ethical attitudes with respect to money in certain contexts.[83]

The love of money is also positively related to a manipulative behavioural disposition (Machiavellianism).[84] Machiavellianism is traceable to the writings of Niccolò Machiavelli, a sixteenth-century political strategist. Machiavellianism was identified in the 1950s as a psychological construct and is used by personality and social psychologists to explain antisocial behaviour by high functioning individuals in the non-institutionalised population.[85] It has been variously described as a personality trait measured along a continuum[86] or a strategy of social conduct.[87] Machiavellianism is based on manipulation, expediency, exploitation and deviousness. People with high Machiavellianism ('high Machs') often employ aggressive and devious methods to achieve goals without regard for the rights or needs of others.

The Mach scale has been used in more than 500 psychological studies, and has been found to predict behaviour in both experimental and naturalistic settings.[88] The highest Mach scores are found among individuals in management and law.[89] High Machs are concerned about financial success and status.[90] They 'manipulate more, win more, persuade more'.[91] Machiavellianism is positively related to a propensity to engage in unethical behav-

80 Thomas Li-Ping Tang and Yuh-Jia Chen, 'Intelligence vs Wisdom: The Love of Money, Machiavellianism, and Unethical Behavior Across College Major and Gender' (2008) 82(1) *Journal of Business Ethics* 1, 5–6. The Love of Money scale measures, *inter alia*, attitudes toward money, the meaning attributed to money, and the desire for, value of, and expectations about money. *Ibid*, 5.

81 *Ibid*, 6.

82 Yuh-Jia Chen and Thomas Li-Ping Tang, 'Attitude Toward and Propensity to Engage in Unethical Behavior: Measurement Invariance Across Major among University Students' (2006) 69 *Journal of Business Ethics* 77, 78.

83 Furnham and Okamura (n 79), 1173; Chen and Tang (n 82) 82, 86, 89.

84 Tang and Chen (n 80) 3, 7.

85 John W McHoskey, William Worzel and Christopher Szyarto, 'Machiavellianism and Psychopathy' (1998) 74(1) *Journal of Personality and Social Psychology* 192, 193, 207.

86 Anna Gunnthorsdottir, Kevin McCabe and Vernon Smith, 'Using the Machiavellianism Instrument to Predict Trustworthiness in a Bargaining Game' (2002) 23 *Journal of Economic Psychology* 49, 53; Abdul Aziz, Kim May and John C Crotts, 'Relations of Machiavellian Behavior with Sales Performance of Stockbrokers' (2002) 90 *Psychological Reports* 451, 452.

87 David S Wilson, David Near and Ralph R Winter, 'Machiavellianism: A Synthesis of the Evolutionary and Psychological Literatures' (1996) 119(2) *Psychological Bulletin* 285; Thomas Li-Ping Tang, Yuh-Jia Chen and Toto Satarso, 'Bad Apples in Bad (Business) Barrels: The Love of Money, Machiavellianism, Risk Tolerance, and Unethical Behavior' (2008) 46(2) *Management Decision* 243, 248.

88 Gunnthorsdottir *et al* (n 86) 54; McHoskey *et al* (n 85) 202.

89 Jason J Dahling, Brian G Whitaker and Paul E Levy, 'The Development and Validation of a New Machiavellianism Scale' (2009) 35(2) *Journal of Management* 219, 222.

90 *Ibid*, 228; Tang and Chen (n 80) 6.

91 *Ibid,* 6.

iour.[92] High Machs lie more and are more likely to take advantage of extended trust.[93] Yet they can be charming.[94] Machiavellianism is positively associated with measures of narcissistic grandiosity and with feelings of entitlement, superiority and arrogance.[95] High Machs are not prone to feelings of guilt and they externalise blame rather than accept responsibility for their actions.[96]

It is not known how the lawyers in these case studies would fare on the Love of Money scale or on scales measuring Machiavellianism. Their behaviour is, however, consistent with high ratings for Machiavellianism. They all lied or engaged in manipulative and devious conduct. Merchant, Nulty and Straw, in particular, were very concerned about financial success. Comeskey, Merchant and Nulty appeared to be charming in social interactions (at least when dealing with the media). Several of them exhibited narcissistic grandiosity. For instance, Merchant described himself as 'larger than life in Saskatchewan'.[97] He portrayed himself as a 'crusader' and a 'hero'.[98] Harder travelled (uninvited) to Fiji during a political coup and to Waco, Texas during the Koresh siege to offer his mediation services (which were declined).[99] Comeskey told one associate that he was the best lawyer in the country.[100] None of them appeared to experience feelings of guilt for their misconduct. Instead, they blamed others.

The possibility that several of these lawyers share the behavioural trait of Machiavellianism is, at this point, merely a hypothesis. Moreover, even if the lawyers in the case studies share this trait, high Machiavellianism may not be present in most disciplined lawyers, or even in most lawyers who seriously misbehave. The theory deserves further exploration, however, because it may help to explain repeated misconduct that is motivated by money. It may also help to explain why lawyers respond differently to certain temptations. If behavioural predispositions or personality traits account for certain misconduct, this may have implications for how to deal with lawyers who misbehave.

92 McHoskey *et al* (n 85); Gunnthorsdottir *et al* (n 86) 55; Tang and Chen (n 80) 6.

93 Aziz *et al* (n 86); Gunnthorsdottir *et al* (n 86) 55, 62.

94 Wilson *et al* (n 87) 292; McHoskey *et al* (n 85) 195.

95 McHoskey *et al* (n 85) 196.

96 *Ibid*, 196–7; Doris McIlwain, J Evans, E Caldis, F Cicchini, A Aronstan, A Wright and A Taylor, 'Strange Moralities: Vicarious Emotion and Moral Emotions in Machiavellian and Psychopathic Personality Styles' in R Landon and Catriona Mackenzie (eds), *Emotions, Imagination and Moral Reasoning* (Psychology Press, 2012) 128–9.

97 Jonathon Gatehouse, 'White Man's Windfall' *Macleans* (Toronto), 4 September 2006, www.macleans.ca/article.jsp?content=20060911_133025_133025.

98 *Ibid.*

99 Buckingham, this volume, 324.

100 Hume and Marshall (n 12).

IV. ADDITIONAL LESSONS FROM PSYCHOLOGY

Some of the lawyers in the case studies exhibited—or may have exhibited—true psychological disorders. Harder had a significant alcohol problem even before becoming a lawyer.[101] His verbal abusiveness towards clients, judges and court staff and his physical aggressiveness—which included punching another lawyer[102]—were due, at least in part, to alcohol and substance abuse.[103] Nulty was arrested twice for assault, including once for an altercation with a police officer.[104] Straw exhibited a possibly sociopathological lack of concern about how his misconduct was viewed by others. As he noted, 'I am just not interested in what other people think of me'.[105]

Several of the lawyers in the case studies deliberately cultivated attention and had an unusually strong need for public recognition. This narcissism is not only consistent with high Mach personalities, but may also implicate other psychological issues. Merchant is a relentless self-promoter, telling reporters that he is good at delivering sound bites and leaving long rambling messages on voicemail to ensure that he is portrayed by the media in the best possible light.[106] He assiduously cultivates the image of a dedicated workaholic, claiming to work an inhuman number of hours (in one year, 5,300).[107] Nulty's need for public recognition trumped common sense. Even though lawyers involved in the coal health cases were under scrutiny for improperly deducting additional fees from miners' recoveries by 2004, Nulty's firm contacted *The Lawyer* in mid-2006 to inform it about how much money the firm (which made 99 per cent of its money from the coal health cases) was making.[108] Harder garnered attention by repeatedly travelling to political hotspots and offering his legal services.[109] Comeskey (misleadingly) portrayed himself as a selfless hero when he negotiated the return of missing war medals from the National War Museum;[110]

101 Harder (n 18) 39. He also had difficulty with rule following. While in the Royal Canadian Air Force, Harder went AWOL on three occasions and stole a blank ID card so that he could drink off base. *Ibid*, 19. In addition, he was convicted in Canada of practising law without a licence before he emigrated to New Zealand. *Ibid*, 37–38.

102 Buckingham, this volume, 325; Wayne Thompson, 'Harder Vows to Reinvent Himself' *New Zealand Herald* (Auckland), 11 February 2006, www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10367817.

103 See 'I've Changed, Says Disbarred Lawyer' *New Zealand Herald* (Auckland), 20 October 2007, www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10471036.

104 Boon and Whyte, this volume, 297; 'Shotgun Thugs in Bank Ram-Raid Terror Rampage' *Manchester Evening News*, 27 September 2001, 2. The 2001 charge was ultimately dropped. Although perhaps not reflective of a psychological disorder, Brott reportedly had such disregard for rules that he amassed more than $25,000 in parking tickets in one year. Lawrence Money, 'Spy' *The Age* (Melbourne), 3 October 1993, 16.

105 Doornbos and de Groot-van Leeuwen, this volume, 335.

106 Kirbyson (n 12); Gatehouse (n 97); Taylor (n 41).

107 Gatehouse (n 97); Taylor (n 41).

108 Matt Byrne, 'Mine Yield' *The Lawyer* (London), 4 September 2006, www.thelawyer.com/mine-yield/121699.article. Nulty reportedly showed 'no signs of regretting telling *The Lawyer* how much money his firm makes', or that he had personally made £13 million the previous year.

109 Buckingham, this volume, 324; 'Sporting Contacts', www.sportingcontacts.co.nz/Person_Display_38.aspx?CategoryId=2&pageId=0&ProductId=51.

110 Although Comeskey portrayed himself as receiving nothing for his efforts to negotiate the return of the medals, in fact, he had an agreement to receive $15,000 for his role. Hume and Marshall (n 12).

asked his contacts to spread the word that he had been named in a magazine as one of its sexiest New Zealanders; and was recording a documentary series on his high-profile clients at the time he faced discipline.[111]

People need to see themselves as good and reasonable, and most people will subconsciously distort evidence to bolster or maintain a positive self-image.[112] Indeed, the maintenance and enhancement of self-esteem is described as 'a fundamental human impulse'.[113] Self-esteem is seriously threatened once a lawyer finds himself in discipline proceedings. It seems possible that especially for these lawyers—with their inflated sense of importance and their need for positive recognition—it was very difficult to even recognise that they had misbehaved. It may have been even harder to take responsibility for what they had done or to express remorse.

The subconscious distortion of reality in order to maintain self-esteem can be seen in Brott's case. Brott wrote a letter to a client that he knew would be given to the Family Court, falsely stating, 'unless monies are made available to place this office in funds for trial, we are unable to prepare for a trial nor act on your behalf with respect to the trial'. In fact, Brott knew that his fees had already been secured by a costs agreement, but he wrote the letter to help his client obtain an adjournment.[114] Brott claimed in the disciplinary proceedings that there was no intention to mislead, and when confronted with the falsity of the letter, said it was 'clumsy, but absolutely the contents were accurate'.[115] The tribunal noted that it did not question that Brott genuinely believed his own argument, but observed that Brott's evidence 'amounts to little more than "casuistical paltering with the exact truth of the case"'.[116]

People also use reframing strategies to shift blame and to maintain self-esteem. As Charles Snyder noted, 'excuses have typically been conceived as mechanics for deceiving other people', but they are 'also aimed at the internal audience of oneself'.[117] Excuse making is a common strategy for reconciling the conflict between a person's belief that he is a good person and the fact that he is responsible for a negative outcome.[118] When people commit bad deeds, they frame the facts to try to convince themselves that the deed was not so bad or attribute the responsibility to others.[119] They may use the argument that 'everyone is doing it', which lessens their sense of responsibility for the act.[120] They may also derogate

111 *Ibid.*

112 See Mark R Leary and Deborah L Downs, 'Interpersonal Functions of the Self-Esteem Motive: The Self-Esteem System as a Sociometer' in Michael H Kernis (ed), *Efficacy, Agency, and Self Esteem* (Plenum Press, 1995) 123–5; Donald C Langevoort, 'Taking Myths Seriously: An Essay for Lawyers' (2000) 74 *Chicago-Kent Law Review* 1569, 1575; Roland Benabou and Jean Tirole, 'Self-Confidence and Personal Motivation' (2002) 117 *Quarterly Journal of Economics* 871, 872.

113 Benabou and Tirole, *ibid*, 871; see also Charles R Snyder, 'Collaborative Companions: The Relationship of Self-Deception and Excuse Making' in Martin (n 44) 36.

114 *Legal Services Commissioner v Brott* [2008] VCAT 1801, [17]–[18], [59], [81], [86].

115 *Ibid*, [85].

116 *Ibid*, [90], [93].

117 Snyder (n 113) 35.

118 *Ibid,* 37.

119 Benabou and Tirole (n 112) 885.

120 Snyder (n 113) 42.

the source of the negative feedback (eg a client or judge who considers a behaviour problematic) to maintain self-esteem.[121]

Comeskey's behaviour illustrates this reframing and blaming strategy. Comeskey refused to admit that his billing practices were improper, instead claiming that falsely billing legal aid at a higher rate was common practice.[122] He blamed his junior staff who prepared the bills and verbally blasted the courts for how they handled the charges against him.[123] He also claimed that billing for time he had not worked was necessary given the low fees paid by legal aid. This is a classic self-exoneration strategy. As Albert Bandura explains, self-exoneration is

> achievable by viewing one's harmful conduct as forced by compelling circumstances rather than as a personal decision. By fixing blame on others or on circumstances, not only are one's own injurious actions excusable, but one can feel self-righteous in the process.[124]

It is therefore not surprising that the disciplinary tribunal noted the 'lack of evidence of any real insight that Mr Comeskey has about the seriousness' of the legal services invoice, and that Comeskey was unable to apologise for his misconduct without additional prodding.[125]

Other lawyers demonstrated similar behaviour. Merchant did not admit responsibility or express remorse for his actions.[126] Instead, he fought all the charges against him and sometimes battled for years.[127] It was far easier—and psychologically more comfortable—to move into the role of advocate and fiercely oppose the misconduct charges. He blamed others and he termed some of the proceedings against him 'unfair'.[128] Likewise, Straw reframed his role as an advocate so that he could believe he had done nothing wrong. If, as he argued, his job was to find loopholes for his clients, his behaviour was justified. As he noted, 'Our clients know they have no chance of winning their cases, but they gain time instead'.[129] He viewed the conduct of the one lawyer who objected to his legal aid scheme as 'disloyal'. He saw himself as a 'victim' of a personal crusade by the local bar association president. Since (according to Straw) the discipline system was unfair, it was not worthy of respect.

121 *Ibid*, 38–39.

122 Buckingham, this volume, 327.

123 *Ibid.*

124 Albert Bandura, *Social Foundations of Thought and Action: A Social Cognitive Theory* (Prentice-Hall, 1986) 203.

125 Buckingham, this volume, 328, 330. Comeskey was given the opportunity after a 30 minute adjournment to make another apology. In this respect, he resembled a slightly less extreme version of Philip Byers, one of the lawyers Abel studied. Byers' repeated failure to admit the wrongfulness of his actions led to a much more serious sanction than he otherwise would have received. Abel, *Lawyers in the Dock* (n 6).

126 eg Law Society of Saskatchewan, *In the Matter of Merchant, QC*, 1 June 2012, www.lawsociety.sk.ca/media/41336/merchantsentencing.pdf; Gatehouse (n 97).

127 Most recently, the time between the charges against him and the disciplinary hearing was 81 months, in large part because of Merchant's litigation of the issues. *In the Matter of Merchant* (n 126).

128 eg Jacquie McNish, 'The Trials of Tony Merchant' *Globe and Mail* (Toronto), 29 April 2009, https://secure.globeadvisor.com/servlet/ArticleNews/story/gam/20090429/LAWMAIN29ART1929.

129 Doornbos and de Groot-van Leeuwen, this volume, 348.

Some of the lawyers make a credible case that the discipline system is not always fair. Indeed, this is a frequent complaint in the US as well.[130] In some cases, this complaint may be valid.[131] But in other cases, the claim of 'unfairness' is also a means of preserving self-esteem. In other words, if the process is not 'fair', then the tribunal's findings of lawyer wrongdoing are not legitimate. The lawyers can then continue to see themselves them as 'good' lawyers—and good people—thereby preserving self-esteem.

V. REGULATORY RESPONSES TO RECIDIVISM

These case studies reveal some common problems with the ways in which lawyer discipline systems address serious misconduct. This is not surprising, as these systems were until relatively recently (and some still are) run by law societies or bar associations. In addition, the discipline process and the sanctions imposed are often private,[132] keeping the public unaware of lawyer misbehaviour and shielding the decision makers' sanctions from criticism. The time between the wrongdoing being reported to authorities and the point at which discipline is imposed is sometimes exceedingly long.[133] Some lawyers are permitted to continue to practise law, even though they engage in repeated misconduct.

Indeed, one of the most significant problems revealed by the case studies is that the discipline sanctions were often followed by more misconduct by the disciplined lawyer. Although most disciplined lawyers do not seem to reoffend,[134] all but one of the lawyers in these case studies (Nulty) was a recidivist.[135] Straw was seemingly unfazed by the discipline imposed on him, maintaining a 'business as usual' approach to his practice until it was essentially shut down. Harder was first censured and fined on four discipline matters in 1992 and was again censured and fined on three matters in 1994. This was followed in 1995 with more fines and censures for six charges. At that time the Disciplinary Tribunal warned:

130 Leslie C 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, 1578–9.

131 For example, a wrongly accused lawyer may experience the public nature of the process or delays in decision making as unfair. Unfairness may also be experienced by the lawyer who engaged in wrongdoing where the decision makers are biased, do not provide fair notice, or otherwise do not follow correct procedures.

132 eg Haller, this volume, 209. The discipline systems in the countries that are the subject of these case studies impose private or anonymous discipline for some misconduct, with no limit on the number of private sanctions that can be imposed on a lawyer.

133 For example, even though the Law Society's investigation into Avalon's books resulted in a completed Forensic Investigation Report by June 2005, the discipline case against Nulty was not heard until April 2009. Boon and Whyte, this volume, 298. As previously noted, a recent discipline matter against Merchant took 81 months before a sanction was imposed. See n 127.

134 See eg Leslie C Levin, Christine Zozula and Peter Siegelman, LSAC Report, *The Relationship Between Bar Admissions Data and Subsequent Lawyer Discipline* (2012) (on file with author).

135 It appears that Nulty was subject to discipline on only one occasion. He had, however, engaged in repeated misconduct before he was struck off the roll.

> Mr Harder, this Tribunal simply does not want to see you again. You have to grasp the opportunities that come along. This could well be you last opportunity. Make the most of it.[136]

But he only heeded the warning for a few years. In 2003, Harder was charged with criminal assault for punching another lawyer.[137] It was only after five additional complaints from 2003–2005 that he was struck off the roll.

In some cases, the full extent of a particular lawyer's misconduct may not be obvious due to a lack of communication between the courts and the disciplinary authorities.[138] For example, Brott was first reprimanded and fined by disciplinary authorities (for two complaints) in 1985 and was also criminally charged that same year with falsely attesting as a witness to a guarantee that had not been signed in his presence.[139] He was ultimately disciplined 17 times and also engaged in a variety of misconduct in court proceedings, but was not removed from the roll of practitioners until 2011.[140] Likewise, the full extent of Merchant's repeated misconduct is not evident unless one considers both the five discipline matters in which he was sanctioned and the court decisions in which judges found that Merchant aggressively overreached for fees, engaged in questionable litigation tactics, and attempted to mislead tribunals.[141]

What should be done with repeat offenders? Obviously, first it is important to identify them. One way to do this, as Linda Haller and Alice Woolley note, is for courts to refer problem lawyers to discipline systems, or for courts to report to discipline authorities all court sanctions and cost orders imposed. If malpractice judgments and settlements were also reported by the courts to discipline authorities, most findings of lawyer misconduct could be tracked in a single place.[142]

In addition, it is important to recognise that symbolic sanctions like censures—whether public or private—do not deter certain repeat offenders from misconduct. The same is true of fines. Brott, Harder and Merchant were repeatedly fined (in amounts ranging from $400 to $5,000) and assessed the costs of the proceedings, but continued to engage in misconduct. Even substantial fee reductions may not cause some lawyers to alter their behaviour. Merchant's fees were reduced by half in 1997 because of his conduct, he was forced to return fees of $232,000 in 2002, and yet in 2005, he again engaged in self-interested conduct

136 *In re Harder*, NZLPDT, 13 December 1995, 20.

137 The court discharged Harder based on its assessment that the conviction would be out of proportion to the offence, but he paid costs and made a charitable contribution. Buckingham, this volume, 325.

138 Haller, this volume, 219, 225.

139 *Ibid*, 201. While his criminal conviction was eventually reversed, it is undisputed that Brott falsely attested that the signatory was before him when he signed the guarantee. This conduct is often considered sufficient reason for the imposition of discipline.

140 Haller, this volume, 197, 221.

141 Woolley, this volume, 251–2, 257.

142 In addition, lawyers could be required to report information about malpractice lawsuits and court sanctions to a disciplinary regulator, as they are required to do in California. California Business and Professional Code § 6068 (o) (2012). Although a monitoring system that relies exclusively on self-reporting is unlikely to be adequate, if it is coupled with reporting from other sources, self-reporting could prove to be a useful cross-check on information maintained by the regulator.

that resulted in his fees being substantially reduced.[143] Similarly, anecdotal evidence from the US suggests that substantial fee reductions for misconduct do not deter some lawyers from repeating their misconduct.[144] Short suspensions also do not seem to work as specific deterrents for some lawyers because they do not significantly interfere with a lawyer's ability to continue to practise law. It takes time to disengage from a law practice; by the time disengagement occurs, the short suspension period is often over. For litigators, requests for extensions and adjournments can effectively obviate the effects of the suspension altogether. Short suspensions also have little practical impact when the lawyer works in a firm with other lawyers who can take over the work.[145] Thus, Straw's three- and six-month suspensions had little effect; as he noted, the firm 'was running as usual'.[146] Merchant may have viewed the two-week suspension imposed on him as little more than a much-needed vacation. It probably had little impact on the activities of his 40-lawyer firm.

The case studies also suggest that disciplinary authorities should systematically consider prior discipline when determining the appropriate sanction for lawyers who reoffend. Theoretically, most discipline systems already do this, but the case studies of Messrs Brott, Harder and Merchant suggest that the authorities are very slow to impose significant sanctions. These systems might benefit from an explicit 'three strikes' rule for lawyers who repeatedly reoffend. The three strikes would not necessarily mean—as they do in baseball—that the lawyer is 'out'. But the rule would require courts or disciplinary authorities to consider the cumulative misconduct of a lawyer, rather than focus on one incident at a time. The decision maker would consider whether a lawyer who is being reviewed under a three strikes rule should be subject to a period of suspension, probationary supervision, or other measures to protect the public.[147] Lawyers who repeatedly engage in misconduct involving money may be required to work in supervised settings where they do not handle billing or have direct access to client or third party funds.

Finally, no discipline system—no matter how well conceived—will fully protect the public from repeatedly misbehaving lawyers. It is therefore important to provide current and prospective clients with information they need to protect themselves. Although all of

143 Woolley, this volume, 268, 272; *Thompson v Merchant Law Group*, 2008 Sk C LEXIS 647.

144 For example, Marvin and Ira Kurzban incurred a rare reduction of requested attorneys' fees by more than $350,000 for their contentious behaviour in court, which included inappropriate behaviour toward the judge. *Lee v American Eagle Airlines*, 93 F Supp 2d 1322 (SD Fla 2000). Nevertheless, Ira Kurzban was later admonished in a separate discipline matter by a Florida Grievance Committee for his 'interactions with the presiding judge [which] evidenced a pattern of disrespect and belligerence … [and] crossed the line of a zealous advocate into behaviour that was unprofessional by arguing with the court beyond that which is acceptable'. *Florida Bar v Kurzban*, No 2008-70,746 (11A) (2009).

145 For these reasons, suspensions of less than six months are disfavoured in many US jurisdictions. See ABA Standards for Imposing Lawyer Sanctions 2.3 (1992).

146 Doornbos and de Groot-van Leeuwen, this volume, 350.

147 It must be acknowledged that even excluding lawyers from practising law does not necessarily protect the public. Although struck off, Straw is working as an immigration consultant, presumably doing work that is not that different from what he did as a lawyer. Harder was permitted to practise law in Tonga for two clients on a temporary licence and intends to seek reinstatement in New Zealand. 'I've Changed, Says Disbarred Lawyer' (n 103).

the disciplinary systems discussed in this volume now make some information publicly available, it is still too difficult for the public to learn the details of lawyer misconduct. While the merits of a discipline system that includes private sanctions can be debated, it seems hard to justify a system in which multiple private sanctions imposed on a lawyer are hidden from the public. Moreover, even a legally trained researcher cannot easily locate all of the public findings of misconduct involving a lawyer, because they are not readily available in a single place. If the primary purpose of lawyer discipline is to protect the public, then more attention must be given to helping the public find the information they need to make informed choices about seriously misbehaving lawyers.

VI. CONCLUSION

This comparative project suggests that even when lawyers are products of different legal systems, there are similarities among some recidivists and the disciplinary responses to recidivism. The explanation for the former may simply be that lawyers are human (notwithstanding lawyer jokes to the contrary), and that the same psychological processes affect lawyer behaviour, regardless of where they reside. The explanation for the latter may also be found in social psychology, which suggests that when lawyers judge their colleagues, the outcome is likely to favour the in-group and not the public. Thus, discipline decision makers will give the lawyer the benefit of the doubt—over and over again.

This suggests that the move to take discipline out of the hands of lawyers—as has been done in Australia and the UK—is a good one, although the actual effects of these changes are still unclear. Australia started moving lawyer discipline out of law societies and bar associations and into public agencies more than 20 years ago; nevertheless, lawyers typically run the discipline agencies and lawyers are still the predominant decision makers with respect to sanctions in the lower tribunals.[148] It is not yet known whether the Australian reforms have resulted in a discernible difference in the imposition of sanctions. In the UK, non-lawyers will have more involvement in the regulation of lawyers, but again, it is too soon to evaluate how well the new system will work.

More should also be done at the front end to reduce misconduct. Abel has argued for more supervision of lawyers during their early training to reduce later misbehaviour and to encourage lawyers to take responsibility for their mistakes.[149] These case studies provide some support for that view. New lawyers should work with other lawyers when they start out in practice, ideally in offices with positive ethical cultures. But if it is true that some people love money more than others or are predisposed to engage in deceit, it is not clear

148 The only non-lawyer Legal Services Commissioner is in Queensland. In that state, the Legal Practice Committee, which hears complaints of unsatisfactory professional misconduct, is composed of two lawyers and one layperson. See Legal Practice Committee, www.lpcommittee.qld.gov.au.

149 Abel, *Lawyers in the Dock* (n 6).

whether early training will discourage those individuals from wrongdoing. Ethics may be of little concern to these lawyers, regardless of the early training they receive.[150]

Requirements in Australia and the UK that law firms engage in self-assessment and implement risk-based management systems may make it more difficult for lawyers to engage in misconduct. For instance, internal complaints handling mechanisms will put a law firm on notice when a lawyer misbehaves. As the case studies illustrate, however, it may be difficult—even with management systems in place—to control the behaviour of lawyers who head the firms. If all else fails, when this subset of lawyers engages in wrongdoing, the only answer may be incapacitating sanctions (suspension or disbarment), practice restrictions relating to money, psychological treatment, or other external controls.

The problem with lawyer discipline systems is not necessarily the initial sanctioning decision, although in some cases lawyers' initial experiences may adversely affect how they process and react to discipline.[151] The relatively light symbolic sanctions that lawyers often receive for their first instance of misconduct may be warranted, given that most lawyers do not reoffend. Moreover, the fact that some lawyers reoffend after the first sanction is arguably inevitable: Even psychologists are not especially good at making predictions about future behaviour, and thus discipline decision makers are unlikely to accurately predict who will reoffend. When lawyers are repeat offenders, however, this comparative study suggests that a different—and more aggressive—approach may be needed in order to protect the public from seriously misbehaving lawyers.

APPENDIX

Issac Brott was admitted to practice in Victoria, Australia in 1978. His practice included family, immigration and personal injury law. He worked in Melbourne primarily on his own or with one or two employees. Starting in 1985, he was found to have engaged in misconduct, including false statements to courts, overreaching for fees, and commencing actions without client consent. He was disciplined 17 times and sanctioned in other matters by courts before he was suspended from practice for six years in 2008.

Christopher Comeskey was admitted in New Zealand in 1997, at age 40. He practised criminal law in Auckland with one or two junior lawyers and handled some high profile criminal cases. In 2006, Comeskey was judicially criticised for a 'profligate' and 'grossly excessive' fee request, which the court attributed to 'inaccurate time recording' or 'a high

150 Compare Dahling *et al* (n 89) 249 (noting 'a large body of research that indicates that Mach is rooted in stable personality') with John F Rauthmann and Theresa Will, 'Proposing a Multidimensional Machiavellianism Conceptualization' (2011) 39(3) *Social Behaviour and Personality* 391, 393 ('MACH has a substantial shared-environment component … which "suggests that individuals acquire Machiavellian traits over time and possess enough phenotypic plasticity to adjust to their environment"').

151 eg Leslie C Levin, 'The Emperor's Clothes and Other Tales about the Standards for Imposing Lawyer Discipline Sanctions' (1998) 48 *American University Law Review* 1, 75–6.

level of inefficiency'. In 2010, he received a nine-month suspension for making misleading statements to the court in a criminal case, failing to appear for a client, and rendering a fraudulent legal aid bill. At that time, the Legal Services Agency was investigating 25 other legal aid files in his office.

Christopher Harder was admitted to practice in New Zealand in 1983, at age 35. He faced difficulty gaining admission due to a pre-existing alcohol problem. Harder practised criminal law as a solo practitioner. He was first censured and fined for four discipline charges in 1992 and was censured and fined for eight additional charges over the next three years. In 2003, Harder was charged with criminal assault for punching another lawyer. It was only after five additional complaints from 2003–2005 that he was struck off the roll in 2006.

EF Anthony Merchant QC was called to the bar in Saskatchewan, Canada in 1968. He practises family and criminal law and is known for his class action work. He heads the Merchant Law Group, a 12-office law firm of up to 40 lawyers. Merchant helped to secure the $1.9 billion residential schools settlement through which members of Canada's First Nations will be compensated for removal from their families and abuse. He has been sanctioned by disciplinary authorities six times and in other matters by courts, including for fee-related misconduct and misleading statements. The most significant sanction imposed on him was a three-month suspension, which is being appealed.

Andrew Nulty was admitted to practice in England in 1996. Nulty formed his law firm, Avalon, in 2001, with two junior partners. Avalon processed 32,000 coal miners' claims against a fund established to compensate miners for their health problems. Avalon allegedly received £40 million from the fund, with an additional £25 million going to Sureclaims, a company controlled by Nulty, that improperly solicited clients for Avalon. These earning were due to Avalon's improper deduction from the miners' recovery of a 'referral fee' which went to Sureclaim and an improper deduction of a 'success fee' for Avalon. Nulty was struck off the rolls in 2009.

'Mr Straw' was admitted to the bar in The Hague in 1998, at age 54, and practised primarily immigration law. He worked with his son and a few other junior lawyers. He received his first disciplinary sanction in 2001 and a second one in 2002. Straw took on hundreds of hopeless immigration cases—and far more than he was legally entitled to receive—that were paid for by legal aid. He pursued meritless cases, enabling him to collect additional legal aid fees. He was first suspended for six months in late 2005 and was later suspended indefinitely.