

Why Do Lawyers Acquiesce in their Clients' Misconduct? — Part IV

Vox

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his is Part IV of my series, exploring the reasons why lawyers acquiesce in their clients' frauds and other misconduct. For background, please access [Part I](#), [Part II](#) and [Part III](#) of this series. In this segment, I will focus on the relationship between lawyers' "role ideology"—normative visions about their professional role—and the inclination to “go along to get along” when their high status clients (or, more accurately, high-paying client representatives) want to engage in financial shenanigans that impact our capital markets.

Don't think this is an issue? It is now 2010 and we are still recovering from the most serious financial crisis since the Great Depression. No doubt, some lawyers looked the other way when their client representatives wanted to engage in deception. The difficulty for researchers like me who want to learn more about this type of problem is that information about the lawyer-client relationship is ordinarily privileged (to be sure, there are a number of exceptions, e.g., the crime-fraud exception). Luckily, we have the following story of the former associate general counsel of Lehman Brothers, based on some excellent reporting by James Sterngold of (Bloomberg) *BusinessWeek*, which you can directly access here: [Lehman Bros. story](#).

But here's a brief synopsis of the news story from *BusinessWeek*:

Oliver Budde faced a momentous life decision. In February 2006, he had resigned from his position as associate general counsel from Lehman Brothers, a venerable (and publicly traded) investment bank in which he worked for nine years. He had been disappointed with the lack of transparency in how his firm had disclosed certain long-term restricted stock units (RSUs) that were granted to senior executives, including former chief executive officer (CEO) Richard S. Fuld Jr. After raising the issue with his superiors in the general counsel's office, he was told that Lehman's outside attorneys at a prestigious law firm had blessed the policy to exclude unvested RSUs from the annual compensation tables in the SEC filings. Budde disagreed with this aggressive interpretation of the rules and voiced his objections. Eventually, he quit the firm.

Later on that year, the Securities & Exchange Commission (SEC) announced that it would require the clear reporting of unvested RSUs and other stock-based awards in public filings. Eager to see if the firm would now fully disclose the controverted RSUs, Budde pored over the proxy statement released in March 2008. “I looked several times, and my jaw just dropped,” he said. “What happened to the RSUs?”

After performing some calculations, Budde determined that CEO Fuld's compensation was \$409.5 million, rather than the mere \$146 million disclosed in the proxy statement. Apparently, Lehman had counted only two of fifteen RSU grants. After considering his options, Budde decided to blow the whistle and report Lehman's noncompliance to the SEC and Lehman's board of directors. On April 14, 2008, he sent a detailed two-page e-mail to the SEC's Division of

Enforcement. After describing Fuld's failure to disclose more than \$250 million in RSU grants, Budde wrote:

The last thing the country needs right now is another investment bank in crisis. I have wrestled with this over the past five weeks, since I first read the proxy. This is not a shot at retribution, and I am in no way a disgruntled former employee (disappointed, even disgusted, yes). I walked away freely from Lehman, and my ethical concerns in a number of areas were no secret to my superiors there. (Sterngold)

For his efforts, Budde received only a form "thank you" letter from the SEC. His letters to the Lehman board were also ignored. But Budde's calculations were supported by a *Yale Journal of Regulation* article entitled, "The Wages of Failure: Executive Compensation at Bear Stearns and Lehman, 2000-2008" (Bebchuk et al.). Of course, as it turned out, potential securities fraud was just one of the myriad problems afflicting Lehman at that time. In September 2008, Lehman Brothers collapsed in the largest bankruptcy in U.S. history. (Sterngold)

The Oliver Budde story raises a number of questions, the answers to which we still do not know. One wonders: to what extent did the in-house and outside lawyers of Lehman Brothers (other than Budde) actively engage their client representatives (CEO Fuld among others) on whether it was *ethically proper* to exclude unvested RSUs from the annual compensation tables in the SEC public filings? Setting aside whether it was explicitly required by the SEC regulations at the time, didn't the concealment of material amounts of compensation cause the lawyers to at least pause and consider the ethical implications, especially in light of public furor over runaway executive compensation?

My guess is that if those lawyers paused, they didn't pause for long. It is likely that by the time this issue arose at Lehman Brothers, experienced lawyers had (more or less) fallen into the habit of analyzing ethical problems in a way that bleaches out the moral content. Social psychologists call this gradual transformation "ethical fading."

More provocatively and more generally, I wonder whether societal views about lawyers' role can in fact *contribute* to lawyers' acting unethically, which, of course, belies the notion that lawyers should be *professionally independent* from their clients. I'd like to explore the issue of whether the normative visions of the lawyers' role are the "dog wagging the tail" or the "tail wagging the dog."

Role Ideology

Lawyers can be professionally molded to accommodate various conceptions of lawyering, with some conceptions creating greater pressures to align with clients than others. The effect of all these alignment pressures (including the alignment pressures stemming from economic self-interest) is that lawyers' ethical judgments will sway in the client's favor. (To be clear, I am focusing exclusively on lawyers who represent high-paying corporate clients. I am fully aware that the opposite problem—lawyers exploiting or taking advantage of clients—occurs with many individual or less affluent clients.)

One key variable in determining the strength of an agent's accountability to her principal is her understanding of the nature of her role as attorney and the ideological or normative commitments that such role entails – role ideology. Ideologies about the law come with their own particular normative vision of lawyering and the lawyer's role. Conversely, roles come “ready-made,” packaged by society, with their own sets of ideologies or “normative guidelines and values that give meaning and shape behavior.” Even an ideology that purports to view the lawyer's role in “morally neutral” or “agnostic” terms still makes a normative choice that we *should* view her role in such terms.

Role ideologies serve two functions. First, they constitute nontrivial *ex ante* situational influences that define the universe of socially acceptable norms for that role, to whom or what the lawyer is accountable, and what degree of alignment to (or independence from) the *de facto* principal (i.e., the client representative) is socially appropriate. When acting in accordance with a role, one simply acts as others expect one to act. As put by philosopher Gerald Postema, “Although there is a personal or idiosyncratic element in any person's conception, nevertheless, because the role of lawyer is largely socially defined, significant public or shared elements are also involved.” Thus, socially defined role ideologies can lend ideological legitimation to a given style of lawyering (e.g., lawyering based on “client supremacy”), making it a more palatable option. Over time, a lawyer may come to identify with a particular role ideology and come to believe that her unethical choices are in fact entirely consistent, and even possibly endorsed, by such role ideology.

Second, and perhaps more importantly, role ideologies can serve to legitimate any *post hoc* rationalizations of unethical behavior by framing the ethical problem in a manner that makes it more attractive to act unethically. As Postema explains, “By taking shelter in the role, the individual places the responsibility for all of his acts at the door of the institutional author of the role.” For the person who fully identifies with her role, the response “because I am a lawyer,” or more generally “because that's my job,” suffices as a complete answer to the question “why do that?” And cognitive dissonance theory predicts that when our internal attitudes do not correspond with our actions, then our internal attitudes are likely to shift to harmonize with our past actions.

In modern legal culture, various role ideologies are available. At one extreme is the “officer of the court” view, the grand vision of a public-regarding role for lawyers that contemplates a broader professional obligation than to act only in the client's (or the lawyer's) self-interest. Under this model, inside counsel, simply by virtue of being a lawyer, would be accountable not only to her client representative but also to the public. In this world, the alignment generated by accountability to the *de facto* principal might be partial (at best), since lawyers would not only have to consider management's (perhaps fraudulent) goals but also the public welfare. Of course, outside of the legal academy, most lawyers do not live in this world.

At the other extreme, the lawyer's role is shaped by a “law is the enemy” or “libertarian-antinomian” philosophy (to use Robert Gordon's nomenclature), which sees regulation contemptuously as nothing more than a tax on business, a hindrance to the wheels of private commerce. This view is reflected in President Reagan's inaugural address statements: “[G]overnment is not the solution to our problem; government *is* the problem.” At Enron, such a view was endorsed by management: senior managers had conducted a skit in which one of the

themes was deceiving the SEC. Under this view, the lawyer's role is to assist the client in devising creative ways to circumvent the law regardless of any harm to third parties or the underlying purposes of the law. As the view that is most hostile to law, the alignment to the *de facto* principal (who favors unlawful actions) would be strong.

In the middle, two agency-centered conceptions characterize how many lawyers view their role. One traditional conception of lawyering that has found tremendous longstanding support by the organized bar and the rules of professional ethics is that the lawyer should be committed to the "aggressive and single-minded pursuit of the client's objectives" within, but all the way up to, the limits of the law. Her zealous advocacy should not be constrained by her own moral sentiments or commitments but only the "objective, identifiable bounds of the law." Thus, under this model of partisan loyalty, the lawyer is instructed to interpret legal boundaries from the perspective of maximizing client interest. In this client-centered world, the alignment to the *de facto* principal would also be strong.

Another middle-of-the-road ideology is the "agnostic" view that law is a "neutral constraint," and – accordingly — the lawyer's role is that of an amoral risk-assessor. This view is characterized by the lack of moral imperative to comply with the law and the lawyer's moral detachment from the law. The lawyer's role is diminished to that of a counselor who games the rules to work around the constraints and lower "tariffs" or "taxes" as much as possible. While this view is not openly hostile to the law, it is not respectful of and thus corrodes the legitimating force of the law. The lack of moral imperative to observe the law means that noncompliance is a feasible, even reasonable, business option.

Which role ideologies predominate in today's corporate legal practice? In my view, one can find empirical evidence of all these role ideologies with different lawyers and in different contexts. That said, I think the two middle-of-the-road ideologies dominate modern corporate representation. You will find the "zealous advocate" model being emulated in litigation practice. The image and rhetoric of the "zealous advocate" also get invoked every time the legal profession fends off external regulation (e.g., regulatory attempts by the SEC). (See [Lawyer Exceptionalism in the Gatekeeping Wars](#) for more on the external regulation of the American bar.) You will also find a variant of the "zealous advocate" model that substitutes "adversarialism" with "entrepreneurialism" among transactional lawyers who believe that they are "greasing the wheels of commerce." And, in my opinion, you will find many lawyers who view themselves as amoral risk-assessors. Any of these normative visions of lawyering can be stretched to accommodate unethical behavior.

My guess is that those lawyers who accommodated Lehman Brothers' desire to be less transparent in their public filings were (at least for the moment) adopting something close to the amoral risk-assessor model (which, frankly, is easy to do in highly technical fields like securities regulation or tax). In short, they were "just providing advice," telling clients what the pros and cons of a proposed course of action are and then leaving it to the clients to make the final call, even if that final decision is unethical and/or requires the lawyer's full-blown assistance to implement. Many lawyers feel they can engage in this ethical division of labor ("so long as I give accurate advice and not encourage you to break the law, you can do what you want").

But are these role ideologies the dog wagging the tail or the tail wagging the dog? This question invariably invokes a longstanding debate in social psychology about the extent to which “reasoned deliberation” influences behavior. Some think reason plays a large role in explaining human behavior. Others, like psychologist Jonathan Haidt at Virginia, think that reasons—or more accurately—culturally supplied explanations are more likely to be the rational tail wagging the emotional dog, in other words, a post-hoc construction intended to justify more automatic—and typically, self-interested—judgments. But Haidt qualifies this position. He says that since we are highly attuned to group norms (and subject to strong conformity pressures), we are much less likely to engage in conduct that clearly violates those norms. Accordingly, explicit moral reasoning plays an *ex ante* role in societies by defining what is or is not acceptable behavior.