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ARTICLE

SELF-DECEPTION AND THE PURSUIT OF ETHICAL PRACTICE: CHALLENGES FACED BY LARGE LAW FIRM GENERAL COUNSEL

KIMBERLY KIRKLAND*

INTRODUCTION

In 2007 and 2008, I interviewed general counsel at some of the largest law firms in the United States.¹ I was investigating how general counsel conceive of and approach their roles and examining the assumptions and beliefs that frame their decision-making. In the course of my interviews, many general counsel expressed what appeared to me on rereading the transcripts to be internally inconsistent or dissonant views about the ethics of lawyers in their firms. On the one hand, general counsel told me lawyers in their firms “want to do the right thing” and conduct themselves within an ethical range the general counsel were comfortable with.² On the other hand, the vast majority of general counsel I interviewed reported that they kept a mental list of lawyers in the firm who, among other things, spin, shade, and omit relevant facts in conversations with general counsel about potential conflicts of interest.³ There was no question that the lawyers on the list knew that accurate facts about the scope of a past, or current representation on the one hand, and of the proposed representation on the other

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1. Some of the findings of that study are reported in Kimberly Kirkland, *Ethical Infrastructures and De Facto Ethical Norms at Work in Large U.S. Law Firms: The Role of Ethics Counsel*, 11 *LEGAL ETHICS* 181 (2009).

2. Interview with General Counsel No. 4, at 37–38 (2007–2008) (on file with author); Interview with General Counsel No. 6, at 20 (2007–2008) (on file with author). When citing my data I employ a coding system to protect the identities of the lawyers I interviewed and their firms. I assigned each general counsel I interviewed a number (e.g., Interview with General Counsel No. 1, Interview with General Counsel No. 2, etc.). Where I quoted general counsel, I refer to him or her by number and cite the page of the number of the interview transcript where the quotation is found.

3. Interview with General Counsel No. 4, *supra* note 2, at 45–47.

hand, are essential to determining whether a conflict exists. Thus, the conduct the general counsel described sounded ethically problematic to me, yet most general counsel did not seem to view the lawyers on the list as unethical. Further, although many general counsel appeared to view character flaws as a primary cause of lawyer misconduct, they did not view the list-lawyers' conduct as an indication of nascent character flaws.

General counsels' views of the lawyers on the list were particularly striking given the roles general counsel have assumed in large law firms. The general counsel I interviewed are among the large firm lawyers most consciously committed to ethical practice. They have spent years becoming experts in the ethical rules (an activity which typically does not generate immediate or direct financial rewards and therefore bespeaks a significant level of interest and commitment to ethics). They talk regularly both within and outside their firms about the ethical rules governing lawyers, something many lawyers rarely think or talk about. Moreover, the general counsel I interviewed spend time pondering about how and why lawyers get involved in unethical conduct and about how firms might prevent this. The general counsel I met care deeply about acting ethically, and many serve as exemplars of ethical lawyering within their firms. And yet, they did not characterize their partners' spinning, shading, and omitting relevant facts as lying or intentionally deceiving, notwithstanding that these partners know that those facts are relevant to determining whether the firm is complying with the ethics rules. Why not?

Were the general counsel I interviewed avoiding acknowledging an unpleasant truth about some of their colleagues or was my perception—the perception that the conduct of the lawyers on the list was ethically questionable—inaccurate? Was I judging the list-lawyers' conduct according to ordinary morality when a different set of norms should apply, or were general counsel rationalizing conduct that was unethical even under the generally accepted norms of the profession? These questions raise what Professor Elizabeth Chambliss has dubbed “the benchmark problem” in the empirical study of legal ethics.⁴

Chambliss argues that the two prevailing theories framing legal ethics research and analysis are “ethical fading theory”⁵ and “ethical learning theory.”⁶ Ethical fading theory is grounded in cognitive psychology. The term “ethical fading” describes the process by which good people engage in a

4. Elizabeth Chambliss, *Whose Ethics? The Benchmark Problem in Legal Ethics Research*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 47 (Leslie Levin & Lynn Mather eds., forthcoming 2012); see also Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 *SOC. JUST. RES.* 223, 228 (2004); John M. Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 70 *BROOK. L. REV.* 1177, 1186 (2005).

5. Chambliss, *supra* note 4, at 49–52; Tenbrunsel & Messick, *supra* note 4, at 224.

6. Chambliss, *supra* note 4, at 52–55.

variety of forms of self-deception,⁷ which allows the ethical and moral dimensions of their decisions and actions to fade. Conduct that at one time might have seemed unethical or immoral loses its ethical and moral salience over time as lawyers become enmeshed in specialized work groups. In those groups the norms-in-use typically vary from generally accepted ethical and moral norms and sometimes from the norms of other specialties within the profession. Ethical learning theory posits that acting ethically as a lawyer requires a process of professional socialization and training in a set of professional norms that are, in some cases, appropriately contrary to ordinary morality. These professional norms—some grounded in regulations, some developed informally through communities of practice and workplace practice groups—are quite specialized and often require expertise to understand. As a result, ethical learning theory suggests lawyers' ethics must be evaluated in the context of lawyering in an adversarial system generally as well as in light of the lawyers' practice-specific context. Thus, what appears to an outsider to be an example of ethical fading might in fact represent ethical learning. Because the outsider lacks knowledge and expertise of the practice of law and practice within a particular specialty and organizational setting, he evaluates the conduct at issue from a different normative benchmark—one not appropriate to the context. Accordingly, Chambliss argues that empirical legal research “requires a rigorous separation between empirical and normative claims . . . , [which], in turn, requires the systematic specification of normative benchmarks in research.”⁸

My findings provide an opportunity to separate empirical and normative claims and to compare the varying narratives generated when we examine the data first through the lens of ethical learning theory and then through the lens of ethical fading theory. This comparative methodology allows the reader and me to identify, test, and evaluate whether the norms each theory posits are the appropriate starting points for evaluating lawyers' ethics. I begin in Part II by describing my methodology. In Part III, I present my empirical findings about the list-lawyers' conduct and general counsel's views of their conduct. As I report these findings, I note several demographic and structural variables that may affect general counsel's perceptions of list-lawyers' ethics and the causes of lawyer misconduct. For instance, I identify differences in the views of general counsel who have worked in their firms for the majority of their careers (“homegrown general

7. Herbert Fingarette describes a person engaged in self-deception as: a person of whom it is a patent characteristic that even when normally appropriate he *persistently* avoids spelling-out some feature of his engagement in the world. Sometimes we see this as an “inability” to spell-out: The self-deceiver is “unable” to admit the truth to himself (even though he knows in his heart it's so). There is a kind of genuineness to his “ignoring”; it is not simple hypocrisy, or lying, or dumping of others. Yet we feel that in some sense he *could* admit the truth only if he *would*.

HERBERT FINGARETTE, SELF-DECEPTION 46 (2000); see also Tenbrunsel & Messick, *supra* note 4, at 224.

8. Chambliss, *supra* note 4, at 55.

counsel”) and the views of several general counsel who came to their positions from outside their firms (“outsider general counsel”). I also note commonalities and differences in the reports of general counsel who work in firms with “lock-step” or “modified lock-step” compensation systems⁹ and those general counsel who work in firms that employ more competitive compensation systems. A number of variations in responses appear to correlate (although the sample are far too small to draw any firm conclusions) with these structural differences in what otherwise is a largely homogeneous group of subjects.

In Part III, I offer alternative theoretical interpretations of the data for the purpose of providing readers with a basis for drawing their own conclusions and making judgments about general counsel’s perceptions and normative claims. Accordingly, I analyze my data first through the lens of ethical fading theory and then through the lens of ethical learning theory. Through that process I develop two distinct narratives about large firm general counsel’s views about the list-lawyers’ conduct. In so doing, I strive to capture the nuances and complexities of one aspect of large firm general counsel’s ethical world-views. First, I examine general counsel’s descriptions of the lawyers on their lists. I ask whether the language general counsel use in their descriptions: (1) reflects and enables a process of ethical fading; or (2) is an indication of ethical learning that requires the adoption of a context-specific set of ethical benchmarks appropriate to the competitive internal world of large law firm practice. I then investigate the role of personal relationships and compensation systems in the adoption of one narrative over the other. Specifically, I examine my data to determine whether there are differences in homegrown general counsel and outsider general counsel’s views of the list lawyers and for differences in the views of general counsel in firms with lock-step or modified lock-step compensation systems from those working in firms with competitive compensation systems. From this foundation, readers can assess for themselves whether general counsel’s perceptions represent ethical fading or ethical learning or some combination of the two.

I describe the methodology I employed in my 2007 through 2008 study of general counsel below.¹⁰

I. METHODOLOGY

My study of general counsel in large U.S. law firms consisted of semi-structured interviews with eighteen lawyers working in seventeen large law

9. See Paul C. Saunders, *When Compensation Creates Culture*, 19 GEO. J. LEGAL ETHICS 295, 295 (2006) (reviewing MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004) (characterizing the lock-step model as a system where partners of equal seniority are compensated equally regardless of their performance in the firm)).

10. Kirkland, *supra* note 1, at 186–88; Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631, 659–62 (2005).

firms. At the time of my interviews, sixteen of those lawyers currently or previously served as general counsel for their firms. Two of the lawyers I interviewed were conflicts directors¹¹ in their firms and worked for their firms' general counsel. Firms structure the general counsel role in a wide variety of ways. Six of the sixteen general counsel I interviewed held the title general counsel. Two of those lawyers shared the general counsel position and title with another lawyer in their firms. The titles given to the lawyer or lawyers charged with the responsibility of resolving ethics questions in the remaining firms varied widely. All made some reference to ethics, professional responsibility, or professionalism in the title.

For fourteen of the sixteen general counsel I interviewed, the general counsel job is part-time, meaning the lawyer serving in that role carried on a law practice as well. Two of the general counsel interviewed worked full-time in that role. A number of the firms employing a part-time model utilize a committee to fulfill the general counsel's duties, so the ethics responsibilities are shared among a small group of lawyers.

I conducted all of my semi-structured interviews in person, spending from one to two and a half hours with each lawyer. The interviews took place in four cities on the east and west coasts of the United States. I conducted an additional phone interview with one of the eighteen lawyers. Of the lawyers I interviewed, five were women and thirteen were men. All were Caucasian-Americans.

The eighteen lawyers I interviewed were not chosen at random. Instead, I used personal connections to gain access to the general counsel I interviewed. I was introduced to most of them by colleagues. I met several at conferences and asked if they might let me interview them. All of the lawyers I interviewed spoke with me on the condition that they and their firms not be identified.

The seventeen law firms range in size from approximately 350 to over a thousand lawyers, and all have multiple offices. Sixteen of the seventeen firms are "ranked" in the American Lawyer 100 rankings.¹² According to the American Lawyer's 2007 rankings, nine of the firms were among the

11. Both conflicts directors I interviewed reported to an ethics counsel. They both were responsible for overseeing the conflicts system and handled many conflicts issues themselves. When confronted with particularly difficult conflicts issues or a partner was upset about their advice, they referred the issue to ethics counsel. Both conflicts directors supervised the non-professional personnel on the conflicts staff. In addition, both conducted legal research for ethics counsel.

A conflicts director is a person in a law firm who is charged with the responsibility of ensuring that the firm is not engaged in representing individuals or organizations that may be mutually corrupting, which may place the firm and its lawyers in jeopardy of violating ethics rules or committing malpractice.

12. *The American Lawyer* is a monthly magazine for lawyers. It covers the business of the largest and most successful law firms in the United States. Each year *The American Lawyer* publishes firm rankings, which include ranking by gross revenues per lawyer, profits per partner, associate satisfaction, and hours committed to pro bono work.

fifty highest revenue-generating firms in the country, and ten had among the fifty highest reported profits per partner in the country.¹³

All but two of the general counsel I interviewed were partners in their firms. The two general counsel who were not partners both held the title “General Counsel.” One was a former partner in the firm who had resigned her partnership, and the other was hired from the outside. Neither of the conflicts directors I interviewed were partners. A number of the general counsel interviewed were rainmakers¹⁴ in their firms. All but one were or had been litigators when they practiced law.

Of the sixteen general counsel I interviewed, all but four were “home-grown,” meaning they had “grown up” in their firms. They began work in their firms as associates and were promoted to partner. Of the four general counsel who were not entirely homegrown, two were partially homegrown. One had practiced at his firm for a short while, left for many years to work elsewhere, and then returned to the firm as general counsel. The other had practiced elsewhere for a number of years and lateralled¹⁵ into his firm as an associate. This general counsel was made partner and assumed the role of general counsel thereafter. The other two non-homegrown general counsel were outsiders. One had practiced in other firms and had served as general counsel in another firm before he was hired as general counsel at his firm. The other had worked in the corporate world before he joined his firm.

One of the conflicts directors had worked as an associate at the firm before taking on the role of conflicts director. The other was hired from outside the firm.

II. LARGE FIRM GENERAL COUNSEL’S PERCEPTIONS OF THE ETHICS OF THE LAWYERS IN THEIR FIRMS—“THE LIST”

I asked all of the general counsel I interviewed about their perceptions of the ethics of the lawyers in their firms. At some point, in this line of questioning the homegrown general counsel expressed a general confidence in the ethics of their colleagues. They described their colleagues as people who generally try to “do the right thing.” One general counsel said:

I think all of my partners want to do the right thing and don’t want to get into trouble. It’s unpleasant being the subject of sanctions motions, disciplinary proceedings, and DQ motions. You watch someone else go through it and you know it’s not pleasant. I went through it once on a ridiculous claim, but the judge held a

13. See *The Am Law 100 2007*, AM. LAW., May 2007, at 125, 153–58. These data are self-reported.

14. The term “rainmaker” is used in large U.S. law firms to refer to a lawyer who generates substantial business for the firm (i.e., the lawyer brings in enough client work to keep himself and numerous other lawyers in the firm busy).

15. This is a term used in the legal profession to refer to experienced lawyers who move from a position in a firm or government office to a similar position in another firm.

hearing on sanctions—it drives you crazy that you may have put your firm and your client in harm’s way. . . . Everyone here wants to do the right thing—they don’t want to be “the one.”¹⁶

Another described the ethics of the lawyers in his firm as falling within a range he was comfortable with:

There is a spectrum of approaches among people. I think here they’re all within a range I’m pretty comfortable with. Am I sure there aren’t people taking on matters I wouldn’t take? No, but I haven’t seen things that make my hair curl.¹⁷

At the same time, the general counsel from firms with competitive compensation systems indicated that some lawyers in their firms raise greater ethics concerns than others.¹⁸ The first general counsel who mentioned keeping a mental list of lawyers who posed greater ethical concerns was an outsider general counsel who had served as general counsel at another firm before moving to his current firm. He explained, “You need to keep a mental book on who you’re dealing with.”¹⁹

One of the homegrown general counsel described the lawyers in his firm about whom he had concerns as “the lawyers people joke about.”

There are those lawyers people joke about—who people say “he’s never seen a conflict in his life.” These are the lawyers with a very narrow view of what a conflict is. Yes there are some—there are definitely some who are more of a concern. . . . These lawyers, the lawyers people joke about, they will push and want to take on the matter and need to be talked back from taking something on.²⁰

Similarly, another homegrown general counsel reported that he kept a “watch list” of problem lawyers:

Question: Are there lawyers within the firm who you worry about with respect to ethics?

Yes, you have a “watch list.”²¹

I asked this same general counsel what put a lawyer on the “watch list.”

Question: How does someone end up on the “watch list”? How do you identify the people you need to watch?

You look at what is the nature of the questions they ask. What is the nature of the push back they give you? What’s their attitude toward ethics issues? Is it an inconvenience or are they trying to

16. Interview with General Counsel No. 4, *supra* note 2, at 37–38.

17. Interview with General Counsel No. 6, *supra* note 2, at 20.

18. Two general counsel were not forthcoming about their firms’ compensation systems. Of these two, one did not comment about whether he had a list; the other acknowledged that he kept a list.

19. Interview with General Counsel No. 7, at 2 (2007–2008) (on file with author).

20. Interview with General Counsel No. 6, *supra* note 2, at 19.

21. Interview with General Counsel No. 3, at 25 (2007–2008) (on file with author).

comply? Is their response—“that’s a stupid rule” or “I don’t want to”? If that kind of attitude comes repeatedly, I know I have someone who views the rules as impediments to their practice. That’s how someone gets on the “watch list.” And I’m generally right. When I trace back the malpractice suits or ethics issues there are not a lot of surprises. They are often people on my “watch list.”²²

Another homegrown general counsel described the characteristics or conduct that put a lawyer on his list this way:

Question: Do you have a mental list of lawyers within the firm you watch out for?

Yes, and anyone who tells you he/she doesn’t is lying.

Question: Who goes on the list—what qualities or conduct lands someone on the list?

[It’s a] mental list—it takes time to develop. *But you know who is going to tell you all the facts over time.* You know who is more possessive and territorial over time and you work with them.²³

This became a common theme in my interviews. Both homegrown and outsider general counsel in firms that employed competitive compensation systems repeatedly identified the nature of a lawyer’s representation of facts in a discussion about a potential conflict of interest as an indication that a lawyer belonged on the list of lawyers who needed to be handled differently. Determining whether a proposed representation creates a conflict of interest is a central function of large firm general counsel’s job and is vitally important to the firm. Facts are essential in determining whether a proposed representation of a new client presents a conflict of interest with the firm’s representation of a current or former client. General counsel routinely gather facts about the scope of the firms’ past or current representation of a client and the proposed representation of a new client or a new matter for an existing client. Consistently, the conduct general counsel cited as raising concerns about lawyers ethics related to lawyers’ truthfulness in this fact-gathering process. One general counsel’s comments are representative:

The people I put in that category are people who haven’t been truthful to me. I put them in a category I’m going to watch more carefully. I don’t tend to get that kind of information [information that would put a lawyer in the “watch more carefully” category] from other people. It’s usually based on my experience.

Question: Can you describe the kind of situations where a lawyer has not been truthful with you and you’ve put them in the “watch more carefully” category?

22. *Id.*

23. Interview with General Counsel No. 4, *supra* note 2, at 44 (emphasis added).

[I'm] not told the basic correct information about what the new representation will be, or what the old one [representation] was. I don't usually run across it [untruthfulness] with PR issues [as opposed to new business issues, i.e., conflicts issues.]²⁴

The outsider general counsel who first mentioned that he maintained a mental list of lawyers he needed to watch more closely reported similar experiences:

I have to be able to have a mental book on each person I deal with. If I'm talking to a person I know is in a ["can't trust"] box—he'll tell me this, but I have to ask him questions. [If you push on someone—[and if the] facts aren't what someone told me. . . . If you find yourself wrestling with guys, you know you need to be careful about this person.

Question: What kind of facts are you talking about?

The description of the work we might want to do for a new client—[he might] rephrase the nature of what's being brought in. Or [he might rephrase the lawyers'] statement of work that's come in, that the firm has [already] done.²⁵

General counsel reported that they had developed strategies for uncovering the truth about the facts in sorting out potential conflicts of interest. Several reported putting multiple lawyers with knowledge of the representation in the same room to create a check on the problem-lawyers' account of the facts: "Getting everyone involved with the client in question in the same room diminishes the chances that there is a spin or shading of the presentation."²⁶

Another general counsel reported using similar tactics to try to get all of the facts relevant to the determination of whether a conflict exists:

There are times when I feel it's important to get both partners on the phone because if I talk to them individually both present a set of facts to try to convince me that they are right, so often I arrange that. These lawyers are generally advocates and they are pretty good at it—they are interested either in minimizing or heightening the conflicts.²⁷

The outsider general counsel expressed the view that it is helpful that many general counsel have litigation skills when dealing with these situations. He explained that litigators are skeptics and are good at pressing people on the facts. He described a situation in which he used his litigation skills to uncover the truth when a conflict issue arose with a prospective lateral hire whose firm represented a client who was adverse to a current client of the general counsel's firm:

24. Interview with General Counsel No. 2, at 29 (2007–2008) (on file with author).

25. Interview with General Counsel No. 7, *supra* note 19, at 6–7.

26. Interview with General Counsel No. 4, *supra* note 2, at 45.

27. Interview with General Counsel No. 6, *supra* note 2, at 11.

I said, “let me talk to him.” I’ve taken depositions—[I’m] good at asking questions. A twenty-minute conversation reveals [the] lateral is totally under-selling his role with clients. At the end [of the conversation], the [prospective lateral] says, “I guess this kills the lateral move.” I tell him, “Yes, unless we get big waivers.”²⁸

Another general counsel reported doing independent research to investigate the facts:

Question: Do you do anything differently with a person you’re concerned about?

I do a lot by email anyway because I have a package on new matters and I want a record if I’m hit by a bus—I don’t want them saying “Why did he clear this?” I make sure people tell me what they’re telling me in writing. Remember it’s a weapon. If it doesn’t sound right to me, I’ll do my own looking around. We have the ability to search through the document management system. You’d be amazed what you’ll find that way.²⁹

Several general counsel also reported putting a number of lawyers in the same room to provide a check on a problem-partner’s reluctance to implement the firm’s *resolution* of a conflict issue. One general counsel explained:

[I]f you need a waiver, how you ask the client can often determine whether the waiver will be forthcoming—I know if the firm has determined it’s appropriate to seek a waiver—we need to make a genuine effort to get one. I don’t think they are being dishonorable but if [the partners on the list] present the proposal, the enthusiasm won’t be there. So I say, “I’d like so-and-so on the phone with you.” The partner in question will be more enthusiastic if so-and-so is on the phone or so-and-so will be more enthusiastic.³⁰

In contrast, when they are dealing with lawyers whose ethics they trust, a number of general counsel reported that they are far less aggressive in pursuing the facts.

One general counsel described his conversations about conflicts with a lawyer whom he trusted:

Yes, you keep a mental list—[But] [t]here are some people who are really good on these issues—[David Jones] on the Executive Committee for instance. He’ll say “here’s what I want to do,” I may kick the tires a little bit, but I’ll say go ahead because I know he’s conservative on these things; he will disclose when he should, he will get a waiver when he should . . .³¹

28. Interview with General Counsel No. 7, *supra* note 19, at 9.

29. Interview with General Counsel No. 2, *supra* note 24, at 29–30.

30. Interview with General Counsel No. 4, *supra* note 2, at 45.

31. Interview with General Counsel No. 11, at 18 (2007–2008) (on file with author).

This general counsel indicated that he asked more questions of partners on the list.³²

Despite their acknowledgement that lawyers spin, shade, and even omit relevant facts and despite the fact that they have to use litigation-like strategies to uncover the facts when dealing with list lawyers, none of the homegrown general counsel I interviewed described or seemed to view their colleagues' representation of facts as intentional misrepresentations or lying. One general counsel's comments are indicative of the homegrown general counsel's seemingly dissonant views about the lawyers on their lists:

I've never known any of my partners to lie to me. Have they omitted relevant information later adduced by my questions? Yes. (pause) Anyone who tells you there is no "list" is lying.³³

Later this same general counsel said:

I really don't think any partner would lie to me about a matter involving the firm's interest because it's their firm too. I don't think they'd lie to anybody about the facts and circumstances. People exaggerate the extent of the impact. There are some partners who are better citizens than others. . . . I say if a sentence starts "clearly" it's not going to be clear. It's the same thing—If a partner says, "you know I'm a good citizen," I'll bet you dollars to donuts he's not in the top ten.³⁴

In contrast, one of the two outsider general counsel I interviewed did appear to view some of the lawyers in his former firm as unethical:

I'd sit in meetings and think, the most important thing is to have a strong sense of right and wrong. These [partners'] powers of persuasion are highly refined: you find yourself listening to them and going along and then you have to stop and say "but A, B, C, and D." There's no substitute for common sense and a strong sense of right and wrong. The smartest people think they can get away with things—I would never trade a strong sense of integrity and character for intelligence with no center.³⁵

Later, this same outsider general counsel said:

Especially at the big firms, the top echelon is full of super type-A personalities. They are very smart, very smart in clever ways. You'd think at a law firm you'd be in a place that would respect the rule of law but they're too smart for that.

I would do investigations [investigating the facts to try to determine the scope of representation for purposes of determining whether a conflict existed]. They know the relevant questions;

32. *Id.* at 19.

33. Interview with General Counsel No. 4, *supra* note 2, at 16.

34. *Id.* at 45–47.

35. Interview with General Counsel No. 10, at 2 (2007–2008) (on file with author).

they know where you're headed so they give partial answers. It's hard to pin them down on the facts. They are skilled at presenting the facts in the light most favorable to what they want.³⁶

In other words, this outsider general counsel viewed partners' omitting facts or persuasive representation of the facts as an indication that these lawyers did not respect the rule of law. Moreover, his comments suggest that he viewed some of the large law firm partners he worked with as lacking integrity and/or character.

The other outsider general counsel categorized the types of people you find in a large law firm:

[There are a variety of types of lawyers at every firm]:
 [Some] might be nice honest people—[the kind of] person you trust to care for your children—but they just don't get ethics.
 [You] also see cunning, shrewd, crafty, canny people who know exactly where blank rule is and stay one step inside. They go to the edge of the cliff and don't step off. These are people you'd never leave your kids with, but they don't get into ethics trouble.
 [Then] there are other people who say, "I can get away with that once." They're often right. It's true. Sometimes you can get away with it two times, but you can't make a career of it. [It's] amazing how many suits against firms don't arise organically [i.e., as a direct consequence of a lawyer's violation of rules]. Usually it's other lawyers or clients who have the incentive to poke around and look for a problem. They go looking for the vulnerability. You have to assume you could get caught.³⁷

Thus, this outsider general counsel believes some lawyers within large law firms intentionally violate rules.

In stark contrast, notwithstanding their common experience with lawyers shading, spinning, and omitting relevant facts and, thus, the need to keep "the list," homegrown general counsel generally expressed confidence in the ethics of the lawyers in their firms. Moreover, they did not characterize the list-lawyers' conduct as lying or as intentionally misleading and did not appear to view these lawyers as lacking integrity.

III. ETHICAL FADING OR DIFFERENT NORMATIVE BENCHMARKS?

So what do we make of large law firm general counsel's perceptions of the ethics of the lawyers in their firms? General counsel working in firms with competitive compensation systems report that there are lawyers in their firms who spin, shade, and omit relevant information when describing current or prospective representations to the general counsel in discussions about conflicts. The homegrown general counsel within this cohort do not appear to view this conduct as lying or as an indication that these lawyers'

36. *Id.* at 2.

37. Interview with General Counsel No. 7, *supra* note 19, at 2.

ethics are outside an acceptable range. Although most partners in large law firms are not well versed in the details of the conflicts rules, there is no question that they are aware that in order to determine whether a conflict exists, the general counsel needs an accurate and complete understanding of the scope of the prior or existing representation and of the proposed representation. In other words, large law firm partners know why the general counsel asks the questions he asks. Most lay people would view someone who knows (1) why he is being asked to provide certain facts, (2) why accurate information is important, and (3) responds by providing less than all of the relevant facts and/or who tries to color the presentation of the facts, as deliberately misleading if not lying. And at least one of the outsider general counsel seemed to view the list lawyers as lacking integrity.

Is the fact that homegrown general counsel do not view the list-lawyers' conduct as lying an indication that they are deceiving themselves and thus that they are, in fact, experiencing ethical fading? Alternatively, are they operating from a different set of normative benchmarks? In other words, do they work from a different set of ethical norms than do lay people—a set of norms that is entirely appropriate to the context of their work? Or might there be some truth in both of these options? I explore these questions below.

A. *Ethical Fading Theory—Language Euphemisms*

Cognitive psychologists Ann Tenbrunsel and David Messick argue that several enablers of self-deception, including language euphemisms, slippery slope decision-making, and errors in perceptual causation, allow an actor to avoid recognizing the full ethical implications of his decision.³⁸ Language euphemisms, slippery slope decision-making, and errors in perceptual causation can serve to encourage unethical behavior by allowing us to frame a decision as something other than an ethical decision. Tenbrunsel and Messick explain:

[S]elf-deception leads to coding, or framing, of decisions that either eliminate negative ethical characterizations or distort them into positive ones. Self-deception helps to disguise violations of our ethical principles. If we do not see that our actions are unethical, then we can behave in a self-interested but ultimately unethical manner. In other words, we don't code the decision as an unethical one; rather, we see it as ethically colorless. The decision is categorized in other terms, perhaps as a business, economic, personal, or legal decision. Such categorization in turn allows behavior that others would judge as unethical.³⁹

38. Tenbrunsel & Messick, *supra* note 4, at 225.

39. *Id.* at 231–32.

Tenbrunsel and Messick explain how language euphemisms can serve as one of the enablers of self-deception:

Language euphemisms are the “disguised” stories we tell ourselves about our unethical actions. These stories are an edited version of the “real” story, devoid of all ethical implications. Through renaming actions we take and relabeling decisions we make, we turn what may be unacceptable into socially approved behaviors. Euphemistic language can make harmful conduct respectable and [is therefore] an “injurious” weapon.⁴⁰

For example, accountants sometimes refer to illegal accounting practices as “aggressive” or “creative” accounting; the military speaks of “collateral damage” rather than civilian casualties; businesses describe layoffs as “right sizing.”⁴¹ Tenbrunsel and Messick note that language euphemisms serve to describe conduct in an ethically neutral way and, in some circumstances (such as the term “right sizing”), may also serve to justify the action.⁴² In this way, language euphemisms allow us to avoid acknowledging or reflecting on the ethical implications of our actions.

When general counsel describe the partners on their lists as spinning and shading the facts, ethical fading theory would argue they are using language euphemisms, which allow them to avoid the ethical implications of the list-lawyers’ intentionally misleading statements. Describing these lawyers as “good advocates” serves both to reduce the ethical salience of their conduct and to justify the conduct as an aspect of big firm lawyering, notwithstanding that when they discuss conflicts issues with their general counsel, the lawyers on the list are not acting as advocates for a client in an adversarial process. Rather, they are acting in their own self-interest, trying to increase or maintain the business they originate and presumably receive credit for that business under their firms’ compensation systems. Ethical fading theory might further suggest that general counsel’s use of language euphemisms that invoke the adversary process allows them to recast the conflict resolution process, moving it from an ethical frame (one focused on lying as right or wrong) to a lawyering frame where spinning and shading facts and highlighting or de-emphasizing other facts in the interests of presenting the best case for your client—in this case the list lawyer himself—is understood to be expected and appropriate conduct.

In addition, ethical fading theory would posit that the fact that partners on “the list” reportedly omit facts rather than making direct misstatements blurs conceptions of responsibility. Cognitive psychology research indicates that we tend to view acts of omission—even our own acts of omission—as

40. *Id.* at 226.

41. *Id.* at 226–27.

42. *Id.* at 228.

less morally problematic than acts of commission.⁴³ Acts of omission allow the actor (the ommitter) to shift moral blame from himself to the receiver of the information who failed to follow up or ask the right questions. Because general counsel have taken on the role of asking the right questions, they appear to treat it as a case of “no ethical harm, no ethical foul.”

The fact that general counsel take on the responsibility for asking the right questions to determine and resolve conflicts issues when list lawyers are involved furthers the framing of the conflicts resolution process and the conduct of the individuals involved as a lawyering issue, not an ethics issue. In the adversary process lawyers on both sides have an obligation to thoroughly investigate the pertinent facts and then present the best version of their cases, highlighting the good facts and de-emphasizing unfavorable facts to the fact-finder. The fact-finder works to discover the truth in the interplay between the two versions of the story. In the conflicts resolution process, the list lawyer spins, shades, and omits relevant facts, but the “advocate” on the other side, the lawyer whose work for an existing or potential new client potentially conflicts, may not be in a position to investigate the facts relating to the scope of the list-lawyer’s previous or proposed representation. So general counsel take on the role of adversary and test the list lawyer’s presentation of his case. The general counsel I interviewed seemed confident that through aggressive questioning they are able to find the truth. Ethical fading theory would argue that general counsel’s failure to view the list lawyer’s shading, spinning, and omitting relevant facts as unethical represents ethical fading. The use of language euphemisms and adoption of litigation-like strategies to address conflicts issues effectively allows general counsel to avoid judging their colleagues as unethical, something contrary to their self-interest as the lawyers ostensibly responsible for ethics in their firms. Instead, they frame their colleagues’ conduct as “lawyering.”

B. Ethical Learning—Advocacy in the Business of Large Law Firm Practice

In contrast, ethical learning theory would argue that large firm general counsel operate from a different and entirely appropriate set of ethical benchmarks; and when viewed from those benchmarks, the list-lawyer’s conduct is not unethical. General counsel’s perceptions of and judgments about the conduct of the lawyers on the list are informed by their knowledge of both the law governing lawyers and the nature of large law firm practice.

All of the large firm general counsel I spoke with are experts on and oversee the firm’s compliance with the relevant Rules of Professional Conduct. However, they do not generally view their roles as related to morality

43. See Ilana Ritov & Jonathan Baron, *Reluctance to Vaccinate: Omission Bias and Ambiguity*, 3 J. BEHAV. DECISION MAKING 263, 263–64 (1990).

or as promoting ethical behavior in a lay sense. They do not generally view the Rules of Professional Conduct as statements of ethical or moral principles. For example, a number of my general counsel interviewees describe themselves as legal positivists with respect to the ethics rules. As such, they view the applicable Rules of Professional Conduct as a political document arrived at through the jockeying of interest groups, not declarations of right and wrong. One general counsel's comments are indicative:

I delivered a lecture at [a] law school on the intersection of ethics and morality. I'm a legal positivist; I don't think there is any linkage. The morality is the morality of the system. It has to be fair and just You have to find your own morality elsewhere—because the rules are not a source. The Rules/The Model Rules is [sic] a political document. There are interests involved in its creation just like with any other legislation.

I bring morality to the job I do as a lawyer. I don't overtly bring it to my role as ethics partner. I view my role as ethics partner as objective counselor—I don't see myself as invoking morals. Every now and then I'll say "Why would you want to do that? Is that really the approach you want to take here?" But that's not my day-to-day role.

People walk in every day and want counseling in the purest sense. But that's spiritual counsel, not ethics partnering. I don't overtly bring that kind of value judgment or view of professionalism into my advice on nuts and bolts ethics issues—I'm rarely asked questions that implicate morality.⁴⁴

In particular, general counsel generally view the rules governing conflicts of interest as political resolutions, not as expressions of right and wrong. The vast majority of the general counsel I interviewed expressed the belief that the ethics rules governing conflicts of interest are ill-suited to address relationships between large firms and their sophisticated corporate clients. They do not believe that their clients, Fortune 500 companies, need the protection of the conflict rules.⁴⁵ General counsel argue that their firms' large corporate clients have armies of in-house lawyers who are capable of determining whether a law firm's current or prior representation of another client will compromise the firm in its representation of their employer. In addition, the large corporations that large law firms represent frequently are involved in transactions and litigation that require highly specialized and sophisticated legal services.⁴⁶ There are limited numbers of lawyers and firms qualified to do that work. In order to hire "the best" firm in a particular specialty, a company may be willing to engage a firm that has sued the company in the past although the rules may prohibit waiver in those circumstances. The general counsel think their clients' in-house lawyers are

44. Interview with General Counsel No. 3, *supra* note 21, at 34–35.

45. Kirkland, *supra* note 1, at 191.

46. *Id.* at 183.

sufficiently informed and knowledgeable to make that choice and should be permitted to do so. That said, across large law firms, general counsel spend the bulk of their time addressing conflicts of interest and the professional responsibility rules governing conflicts.

Thus, although they do not question that the conflicts rules may be necessary to protect the interests of individuals and small entities, general counsel dispute the contention that their large corporate clients need or want the same protections. As a result, general counsel argue, and learning theory might posit, that conflicts issues do not present ethical questions in the sense that the rules do not delineate “right”—protecting the client’s interests—or “wrong”—endangering the client’s interests—in the context of large firm practice.⁴⁷ Although accurate information is necessary to determine the risk of taking on a given representation to the firm, because general counsel do not see conflicts issues as involving or implicating important ethical principles, they may not see truth-telling as necessary to reach an *ethical* outcome in resolving the conflicts issue.

Further, homegrown general counsel characterize the list lawyers’ conduct as “lawyering.” They view the conflict resolution process as akin to the litigation process, and in litigation a lawyers’ responsibility to the truth is a far murkier concept. Lawyers are expected to present the best case for their clients, emphasizing some facts and de-emphasizing others. Lawyers who

47. When conflicts issues arise, general counsel distinguish those situations that present clear-cut conflicts from those where there is ambiguity about whether a representation would violate the conflict rules. When it is not clear whether a conflict exists or can be waived, general counsel and their firms frame the decision about whether to take on the new matter as a business decision (i.e., they view the risk of being sanctioned or disqualified as potential business risks). Consequently, general counsel and their firms treat these decisions as business decisions. Because they frame many conflict issues as business decisions and see the rules as inappropriate and even unfair in the context of their relationships with their corporate clients, they tend to treat decisions about the firm’s course of action in cases where there is a clear conflict under the ethics rules as compliance issues, not questions of right and wrong or morality.

That said, one general counsel who described himself as a positivist expressed the view that there is a morality involved in following the rules of professional conduct:

Well I use the test “What would your mother say?” Come up with a position where Mom would be pleased. Beyond this I’m a positivist—this is one set of rules—securities firms have different rules—rules differ in different jurisdictions. The Code and Rules are reasonable.

I think there is a morality involved in trying to comply with the rules, in not cheating. That said, I’m not sure the Model Rules make the world a better place. There is something important about trying to comply honestly with whatever rules you accept.

The first analysis is compliance—you need to stay on the right side of the regulations. Sometimes there is a discussion about what’s the right thing to do. But you only get to that after compliance and business thinking.

Interview with General Counsel No. 12, at 23 (2007–2008) (on file with author).

However, even in this general counsel’s firm—in situations where what it means to comply is ambiguous—the firm appears to frame compliance as a business decision: Do we do this “the conservative way [or] the aggressive way,” (General Counsel No. 12) not as an ethical decision (i.e., is it ethical to take on this business)? Thus, the decision is framed as a business decision, requiring analysis of the business risks involved, and the lawyers in the firm in charge of business decisions (which sometimes includes general counsel) decide whether to take the business risk.

omit facts take a risk that the other side may bring those facts to light and make the lawyer look like he was dishonest, but choosing to omit facts from a presentation of one's case in litigation is generally not seen as lying or unethical.⁴⁸ Because the majority of the general counsel I interviewed are litigators, thinking about the intra-firm conflict resolution process as an adversarial process is likely a natural mindset. In that context, the list-lawyers' conduct in shading, spinning, and even omitting facts does not have the ethical salience that it would outside of litigation.

Interestingly, that general counsel find it necessary to engage in adversarial battle with the list lawyers adds credibility to their argument that the conflict rules are not appropriate to large law firms. Partners in large law firms with competitive compensation systems are dealing with partners on the list who are advocating zealously for their clients against the interests of their partners and, in some cases, against the interests of the firm itself. This suggests that the incentive structures created in firms with competitive compensation systems make it extremely unlikely that those partners would compromise the interests of their clients in any way for the clients of other partners in the firm.

Ethical learning theory would suggest that in this context, even if we view the list-lawyer's statements about the facts as lying to or intentionally misleading general counsel about the scope of the firm's representation of their clients, their conduct has no ethical significance for the clients involved. Thus, ethical learning theory might suggest that spinning, shading, and omitting relevant facts is appropriate advocacy in the rough and tumble internal market of today's large law firms where partners are jockeying for institutional support for their books of business.

C. *Ethical Fading or Ethical Learning—Variations in the Views of Homegrown and Outsider General Counsel*

In contrast, based on his comments, it appears at least one of the outsider general counsel rejects this as the proper normative benchmark. This outsider general counsel described the list-lawyers' conduct as evidencing a disrespect for the rule of law and viewed them as lacking integrity and character. How do we account for the differences in the normative benchmarks this outsider general counsel seems to be using and those the majority of the homegrown general counsel I interviewed seem to adopt? First, unlike the other general counsel I interviewed, this outsider general counsel had never practiced as a litigator so he was probably less likely to adopt an adversarial frame. In addition, because he did not grow up in the

48. In contrast, prosecutors have a duty to disclose (though not necessarily to "present" to a jury) facts that may be detrimental to their cases. See MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2006); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that prosecutors have a duty to disclose all material evidence to defendants).

firm, he had not had the benefit of the ethical learning the homegrown general counsel have had. Most large law firms' general counsel have spent their careers practicing in large firms. Overwhelmingly, they have spent the majority of their careers in a single firm. My study included only two outsider general counsel, and their views may not even be representative of that small group. As a result, there are limitations to the conclusions we can draw from the variations in the homegrown and outsider general counsel's perceptions. However, my findings suggest some interesting hypotheses and questions for further research.

Recognizing the limitations of this study, we can posit a number of possible explanations for the differences in outsider and homegrown general counsel perceptions of the ethics of large firm lawyers. First, this outsider may be wrong. He left his firm, and his less than favorable view of the lawyers in his former firm may be unrelated to the list-lawyers' conduct. Second, it is possible that lawyers in the outsider general counsel's firm may have been less ethical or moral than the lawyers in the other firms I studied. Third, the outsider general counsel was not a litigator so perhaps he had no affinity for the adversarial framing the homegrown general counsel adopt. In addition, this outsider general counsel grew up in corporations, which were perhaps less internally competitive than today's large law firms. Perhaps in the corporations where he served as general counsel, the "rule of law" was set by management and challenging that law was unacceptable. In contrast, in at least some large law firms with competitive compensation systems, internal competition and advocacy for resources and support is expected and tolerated.

Alternatively, lawyers who shade, spin, and omit relevant facts may be intentionally misleading their general counsel in discussions about potential conflicts, and the homegrown general counsel may not be acknowledging that reality. Because the homegrown general counsel have known many of their partners for many years and likely have an affection for many of them, it may be more difficult for them to view those colleagues' actions in an unbiased way or to judge them harshly. In other words, they may have powerful social incentives to deceive themselves.

Even if we accept that the conflicts rules are not appropriate to large law firms and their clients and therefore do not define ethical norms for large firms, the list-lawyers' conduct is contrary to the interests of the firm. Although general counsel believe they effectively combat this tendency by treating the list lawyers as adversaries, the fact that general counsel need to do that with some partners and not others suggests that some partners approach the conflict discussion in a forthcoming manner and others do not. Those who are not forthcoming are advocating for their self-interests over the interests of one or more of their partners and possibly the interests of the firm if it turns out that omitted facts were not disclosed and the firm fails to comply with the ethics rules and is caught. Homegrown general counsel at

firms with competitive compensation systems do not see this conduct as evidence of a character flaw. Interestingly, however, many of the home-grown general counsel seemed to focus on character flaws (as opposed to institutional incentives) as the cause of lawyer wrongdoing. For example, in discussing the causes of lawyer wrongdoing, one general counsel brought up *Eat What You Kill*, the book by Milton Regan about John Gellene and Milbank Tweed, the large New York law firm where he worked.⁴⁹ In *Eat What You Kill*, Regan suggests that Milbank Tweed's compensation system played a role in Gellene's misconduct.⁵⁰ This general counsel took issue with Regan's suggestion and insisted Gellene's problems were the result of a flawed character.

A little background about Gellene may be helpful here. Gellene was convicted of perjury in connection with his work in a large commercial bankruptcy case where he represented the debtor. Nine years earlier, the firm discovered that although he had passed the New York and New Jersey bar exams before he began a clerkship, Gellene had failed to submit the paperwork necessary to be admitted to the N.Y. Bar and as a result had been practicing at the firm without a license.⁵¹ The firm fired him but re-hired him approximately a year later after he was admitted to the N.Y. Bar.⁵² Two years later, Gellene was asked to lead a team representing a company in a complex financial restructuring.⁵³ The company had come to the firm through one of the firm's leading rainmaking partners, Robert Lederman.⁵⁴ Gellene began work on the matter and after lengthy, often acrimonious negotiations with one of its creditors, the company filed for bankruptcy protection.⁵⁵ As part of the bankruptcy process, Gellene and Milbank asked to be appointed as counsel for the company, now the "debtor" in the bankruptcy proceeding.⁵⁶ To acquire approval to serve as debtor's counsel, Gellene and Milbank were required to disclose the firm's connections with any of the debtor's creditors and any other party in interest.⁵⁷ The firm, in fact, had a significant connection to a party in interest (another Lederman client), but Gellene failed to disclose that fact in the disclosure affidavit he signed under oath.⁵⁸

In *Eat What You Kill*, Regan suggests that Milbank's "eat what you kill" compensation system and the organizational pressures it created may

49. MILTON C. REGAN, JR., *EAT WHAT YOU KILL* (2006).

50. See *id.* at 6–7 (citing specifically the shift from job security to merit-based compensation).

51. *Id.* at 60.

52. *Id.* at 61–62.

53. *Id.* at 15–16.

54. *Id.*

55. *Id.* at 97–135.

56. *Id.* at 2. For more detail on these negotiations, see *id.* at 97–135.

57. *Id.* at 2–3. For more detail, see *id.* at 148–72.

58. *Id.* at 3. For more detail, see *id.* at 148–72.

have played a role in Gellene's wrongdoing.⁵⁹ The general counsel who raised Gellene as an example had knowledge of the Gellene matter, including Gellene's early history at Milbank Tweed, and expressed disbelief about Regan's suggestion that Gellene's actions in the bankruptcy case were spurred by institutional pressures:

I thought Mitt Regan was wrong about why Gellene did what he did. Gellene's problem was a paperwork problem, if the paperwork was hard or unpleasant he would put it in a drawer. I don't think John Gellene was driven by business issues to do what he did.⁶⁰

In a later interview, another homegrown general counsel described what he referred to as the "lone wolf problem." General counsel use the terms "lone wolves" and lawyers with "silo practices" to refer to partners who work exclusively for one or a few clients who do not otherwise engage the firm's services. A lawyer with a silo practice therefore has an exclusive relationship with those clients; the only other firm lawyers who work with the client are those junior lawyers the silo partner decides to bring on and supervise. I asked whether he saw John Gellene as an example of a lone wolf. He characterized Gellene as a lone wolf but attributed Gellene's misconduct to a character flaw and a lack of monitoring rather than to institutional pressure to generate revenues.

Question: How do you account for what happened at Millbank with John Gellene? Is he an example of a lone wolf?

I was talking to a client about [John Gellene and Milbank Tweed] recently—he was fascinated by it. We talked about Mitt Regan's book *Eat What You Kill*. I think personally, he (Mitt) got it wrong

Gellene's problem was a lone wolf problem—but I don't think Gellene gave a damn about money. It wasn't about *Eat What You Kill*—it was that he was off on his own. He was a brilliant, driven guy but you knew this problem was coming from the first incident. Not that I don't believe in redemption, but I went to Catholic school and it's my sense that if you steal small, you'll steal big, if you lie small, you'll lie big. You either have the character or you don't. *If he were here* he'd have been gone after the first incident.

We had exactly the same thing happen to us (before my time) and he (the guy) was history. [It was a] precise parallel even to the point where the way people talked about it here was the same way that they talked about Gellene at Milbank. At Milbank people said, "He lied to Alexander Volcher!" (Volcher was the Chair of Milbank for many years)—it was like lying to God. [Volcher] looked like God: he was 6'3", he had white hair. It's the same

59. *Id.* at 50. For more detail, see *id.* at 291–95.

60. Interview with General Counsel No. 3, *supra* note 21, at 29.

thing I heard here. People were more shocked that he had lied to [our Chair], then the second thing—that he sent a false affidavit to the Bar.

The fellow who did it here pled to a tax violation ten or so years ago. Long after he left us. [Our Chair] used to criticize me for being too moralistic but I believe if you steal small, you'll steal big; if you cheat [the firm] on overtime, you'll cheat a client.⁶¹

This general counsel was describing what ethical learning theory calls “slippery slope decision-making.”⁶² The “slippery slope” refers to a first small step over an ethical line that creates a new ethical norm within an organization. From the new ethical line, small steps can take an organizational actor further and further from the organization’s original ethical norms. Past practices often define the norm within organizations. Because in the slippery slope scenario the steps beyond a past practice are small, they can be taken without raising an ethical “hew and cry,” notwithstanding that practices may now be very different from when someone took the first step over the ethical line.⁶³

When considering Gellene, this general counsel seems to acknowledge the dangers of the slippery slope. However, he does not appear to do the same with the partners on “the list.” He describes the list lawyers in his firm as “spinning” and “shading” facts and reports that they “omit relevant facts,” but he does not appear to view this conduct as “lying small”; nor does he treat it as an indication that these lawyers may at some point “lie big.”⁶⁴ He does not appear to see the lawyers’ conduct as the first step down the slippery slope. Perhaps for this general counsel, the ethical line has moved and spinning, shading, and omitting relevant facts is now the norm. In addition, this general counsel expressed the view that the firm’s failure, if any, was the failure to get rid of Gellene after the first incident. In this general counsel’s view, the failure was not the pressures of Milbank’s eat what you kill compensation system.

In contrast, one of the two outsider general counsel I interviewed had a very different perception. Regan’s interpretation resonated with this outsider general counsel’s experience:

61. Interview with General Counsel No. 4, *supra* note 2, at 32–34 (emphasis added).

62. See Darley, *supra* note 4, at 1184–85; Tenbrunsel & Messick, *supra* note 4, at 228–29.

63. Tenbrunsel and Messick cite one of a number of similar examples from the business world—the case of Kurzweil Applied Intelligence, Inc. and its Co-CEO Bernard Bradstreet. In order to improve the company’s financial profile as he tried to prepare it to go public, Bradstreet allowed sales to be posted a day or two in advance of the time the deal was actually signed in order to meet quarterly revenue targets. Over time, sales reps began to post sales weeks in advance of the actual sale; and by the end, some sales reps were forging signatures on sales contracts. A small step over the ethical line led to small steps beyond that new norm until, in the end, the company was engaging in outright fraud. Tenbrunsel & Messick, *supra* note 4, at 228–29.

64. Interview with General Counsel No. 4, *supra* note 2, at 32.

In *Eat What You Kill*, [Regan] captured it perfectly. The pressures struck a chord with me. It was exactly what I saw.⁶⁵

And later, the same general counsel said:

I thought [Regan] did it well in *Eat What You Kill*. He got the nuances. In *Eat What You Kill*, it was the junior partner who went to jail. The younger partners know what the powerful partner wants them to do—they don't have to tell them that—that's, that skill is what is rewarded in large firms and in law schools. It doesn't always have to do with ethics. But they don't have to tell them what they want them to do.⁶⁶

Both of the homegrown general counsel who talked about Gellene acknowledged the fact that many law firm compensation systems reward origination, and, as a result, a lawyer's compensation is often on the line when conflict issues arise. However, when they discussed the Gellene matter and Regan's thesis that the institutional structure and ensuing incentives and pressures of Milbank Tweed's compensation system played a role in his misconduct, both general counsel rejected the system as a cause. Instead, they attributed Gellene's unethical behavior to a character flaw.

These general counsels' attribution of Gellene's problems to a character flaw was particularly interesting in light of general counsels' reports about statistics collected by malpractice insurers that show a correlation between firms' compensation systems and firm risk profiles. One general counsel explained, "The liability insurers will tell you the closer you are to a 'lock step' compensation system, the safer your profile. The closer you are to an 'eat what you kill' system the riskier the profile—the greater the number of claims."⁶⁷

Later, the same general counsel reiterated the point:

AON⁶⁸ will tell you there is a direct correlation between competitive compensation systems and the number of claims filed against firms. You don't have to be a rocket scientist to know if you eat what you kill, it encourages you to take risks that are greater.⁶⁹

Confirming this reality, a general counsel from a lock-step compensation firm reported that he uses the fact that his firm employs a lock-step compensation system to negotiate better rates with the firm's insurers.⁷⁰

However, the general counsel who mentioned the AON statistics was the same general counsel who expressed the view that the Milbank's failure, if any, was the failure to get rid of Gellene after the first incident. In

65. Interview with General Counsel No. 10, *supra* note 35, at 2.

66. *Id.*

67. Interview with General Counsel No. 4, *supra* note 2, at 38.

68. AON Corporation is the second largest insurance broker and the largest provider of professional liability insurance for attorneys in the world.

69. Interview with General Counsel No. 4, *supra* note 2, at 43.

70. Interview with General Counsel No. 8, at 3 (2007–2008) (on file with author).

this general counsel's view the failure was not the pressures of Milbank's eat what you kill compensation system. Although both of the general counsel who discussed Gellene at length were familiar with the story of what happened, neither accounted for the two other lawyers at Milbank who, according to Regan's research, participated in discussions about whether to disclose the firm's relationship with a creditor. On one occasion in a meeting with Gellene and Robert Lederman, the rainmaking partner who had the relationship with both the debtor and Salovaara (the 'other party in interest'), Toni Lichstein, a junior partner on the team, questioned whether the firm needed to disclose the relationship with Salovaara.⁷¹ Lichstein revisited the issue with Gellene and Lederman separately after the affidavit was first filed.⁷² According to Regan's research, Gellene told Lichstein disclosure was not required, and Gellene did not disclose.⁷³ Lederman apparently took steps to have another firm take over representation of Salovaara in an ongoing matter, but apparently did not take steps to have Gellene amend his affidavit to disclose the relationship.⁷⁴ Thus, according to Regan, Gellene's failure to disclose was not the act of a single individual with a flawed character.

Presumably all of the general counsel I interviewed are familiar with the statistics that demonstrate a correlation between claims against the firm and competitive compensation systems, but only the general counsel who reported that their firms used lock-step compensation systems focused primarily on the influence of the compensation system on lawyer ethics when asked about the causes of lawyer wrongdoing.

D. *Ethical Fading or Ethical Learning—General Counsel's Perceptions of the Role of Compensation Systems in Lawyer Conduct*

Ethical fading theory suggests that self-deception is enabled by our erroneous assessments or assumptions about the causes of ethical failures.⁷⁵ Tenbrunsel and Messick identify three types of perceptual errors that lead us to misplace moral responsibility for ethical failures.⁷⁶ First, when we ask why ethical failures happen, we tend to focus on people rather than systems.⁷⁷ We assume that systems are error proof, and, as a result, we assign blame to people rather than to system failures.⁷⁸ Tenbrunsel and Messick conducted a study that demonstrated how a system can cause ethical failures. In their study, they introduced a weak monitoring system to detect

71. REGAN, *supra* note 49, at 146.

72. *Id.* at 155–56.

73. *Id.*

74. *Id.*

75. Tenbrunsel & Messick, *supra* note 4, at 229–31.

76. *Id.*

77. *Id.* at 229.

78. *Id.*

undesirable behavior.⁷⁹ They found that undesirable behavior was more prevalent among the subjects who were made aware of the presence of a weak monitoring system than among subjects who were not told about the monitoring system.⁸⁰ But Tenbrunsel and Messick's research indicates that, notwithstanding the evidence that systems sometimes cause undesirable behavior, systems are rarely blamed.⁸¹

Second, Tenbrunsel and Messick argue that self-interest affects our perceptions about the cause of ethical failures.⁸² For instance, studies indicate we often assign causal significance to factors we see as mutable and underplay the causal significance of what we view as immutable factors. So, in the above example, if a system is believed to be immutable and human beings are viewed as mutable, we may attribute causal influence to the people instead of the system. Tenbrunsel and Messick suggest that self-interest can affect our assessment of which factors are mutable; we may be more likely to perceive a factor as mutable if doing so would deflect blame.⁸³

Both of the homegrown general counsel who thought Gellene's problems were the result of his flawed character suggested that Gellene would have been terminated after the first incident at their firms. In their view, Milbank's mistake was failing to get rid of a bad apple,⁸⁴ not Milbank's eat what you kill compensation system. Both of these general counsel worked in firms that used competitive compensation systems. Ethical fading theory would suggest the presence of bad apple behavior is a mutable factor in the minds of these general counsel because they think they can effectively detect and check bad apple behavior in the conflict resolution process. They likely view the system of incentives and rewards in their firms as, practically speaking, entirely immutable.⁸⁵ Moreover, consistent with this thinking as general counsel have developed their roles, one of their primary functions—their *raison d'être*—is to act as a check on the bad apples by approaching them like skeptical litigators when dealing with conflicts issues.

In contrast, ethical learning theory might argue that far from an error in perceptual causation, these general counsel are absolutely correct that large law firms will not get rid of competitive compensation systems in order to

79. Ann E. Tenbrunsel & David M. Messick, *Sanctioning Systems: Decision Frames, and Cooperation*, 44 ADMIN. SCI. Q. 684, 689–93 (1999).

80. *Id.* at 693.

81. Tenbrunsel & Messick, *supra* note 4, at 229.

82. *Id.* at 230.

83. *Id.*

84. Darley, *supra* note 4, at 1178 (referring to and critiquing the prevalence of “bad apple” theorizing among conventional explanations for recent cases of corruption among U.S. corporations).

85. See Tenbrunsel & Messick, *supra* note 4, at 230; see also *supra* text accompanying notes 81–82.

reduce list-lawyers' incentives to spin, shade, and omit relevant facts in the conflict resolution process or to void Gellene-like failures to disclose. Over the last thirty years, the vast majority of large law firms that employed lock-step compensation systems have abandoned those systems.⁸⁶ They made these changes to gain competitive advantage in the market place. Because most of the corporations large law firms represent are no longer loyal to one law firm, using it for all of their legal needs, firms need rainmaking partners who can attract and keep lucrative clients. For firms to retain these rainmaking partners, they need to pay them according to the value of the revenues they bring to the firm rather than by seniority. Thus, ethical learning theory would posit that general counsel are correct that their firms' compensation systems are immutable and that they need to expend their energies on detecting and checking the flawed characters who will put their self-interest ahead of the interest of the firm in that environment. All of which, leads us back to where we started—is the fact that homegrown general counsel do not appear to view the list lawyers as ethically flawed characters a sign of ethical fading or an indication of ethical learning?

I do not know that I am in any better a position to make that judgment than you, the reader. However, I am suggesting that if any of us are to make normative judgments about lawyers' ethics based on empirical data, we must employ a deliberative approach.⁸⁷ As empiricists we must present and examine our data through these competing narrative lenses (ethical fading versus ethical learning), allowing ourselves to "inhabit" each in order to examine the alternatives with both sympathy (i.e., a belief that it is accurate) and detachment (a healthy skepticism for the story being told). Only a clear-eyed and compassionate presentation of the data provides a basis for the nuanced deliberation required to make judgments about lawyers' ethics.

86. REGAN, *supra* note 49, at 36.

87. Anthony T. Kronman suggests such an approach for the making of judgments generally in *Living in the Law*, 54 U. CHI. L. REV. 835, 850–54 (1987).