

**PROFESSIONAL ADVISERS AND WHITE COLLAR  
ILLEGALITY: TOWARDS EXPLAINING AND EXCUSING  
PROFESSIONAL FAILURE**

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**I. INTRODUCTION**

Professional advisers play a pivotal role in the prevention and control of white collar illegality. They are in a position to exert a significant influence upon the moral climate within which their clients operate.<sup>1</sup> In some circumstances, the imprimatur of or certification by a professional is a prerequisite of the client's entitlement to do business. Professional guidance is often essential to ensure a client's compliance with regulatory requirements. Given the complexity of regulatory systems, those actors who are subjects of such regulation generally require professional assistance to achieve the most advantageous ordering of their affairs within the limits of the law.

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1 R. Tomasic and B. Pentony, "Taxation Law Compliance and the Role of Professional Tax Advisers" Paper prepared for presentation at the Sixth Annual Conference of the Australian and New Zealand Society of Criminology, Sydney, 24-26 September 1990,2.

On the other hand, through lack of diligence or by design, a professional adviser can facilitate a client's breach of the law. This may entail failure to dissuade a client from pursuing an illegal course of action, failure to detect such a violation, or, having detected a violation, failure to disclose the illegality to appropriate authorities. In more extreme cases the adviser can become an accessory, a co-conspirator, or an accomplice in the client's illegal activity. In the most extreme case, the adviser is a criminal entrepreneur, the architect of an illegal course of action taken by the client.

The professional advisers in question are a subset of what Kraakman refers to as "gatekeepers" - private parties who are in a position to disrupt misconduct by withholding their cooperation from a wrongdoer.<sup>2</sup> Misconduct on the part of either the professional or the client need not be intentional; in either case it may flow from varying degrees of negligence or indeed, from incompetence.

The diagram in Figure 1 depicts the relative contributions of professional and client to professional failure. The northeast quadrant reflects a situation wherein failure results from the intentional conduct of both client and adviser. Both intend deception; they are accomplices in fraud. Alternatively, when the professional knowingly imparts wrongful advice in the belief that the client will act upon that advice, the professional is aiding and abetting the client's criminal activity.

Where professional failure arises from deception on the part of a client, questions arise as to the degree of diligence with which the professional reviewed the client's affairs. In the southeast quadrant, the client has deliberately misled the adviser. At point "A" professional ignorance is least blameworthy, arising not from professional negligence but rather from the client's skill in concealing the deception, or from other factors essentially beyond the adviser's control.

Evidence of a client's intent to deceive, or other illicit purpose, may not be immediately apparent to a professional adviser. It then becomes appropriate to ask just how rigorously an adviser might be expected to scrutinise a client's affairs to discern the presence or absence of such intent. Moving upwards from point "A", the adviser's ignorance may flow either from his or her own negligence, or at point "B", from reckless indifference.

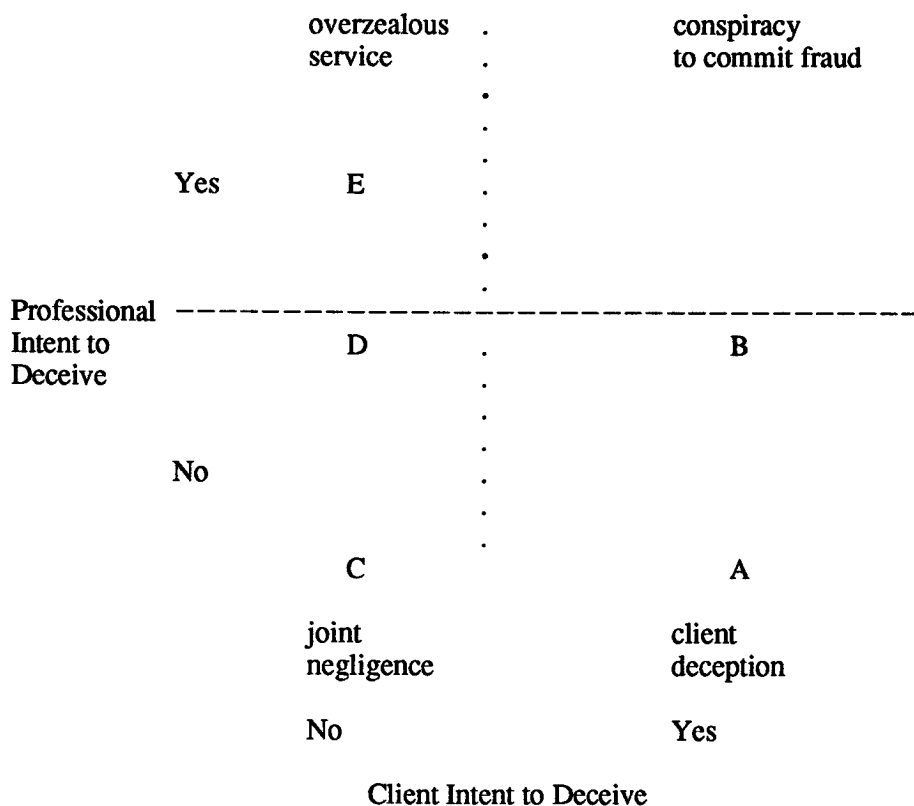
In some instances, a professional adviser may wrongly advise a client or make erroneous representations about the legality of a course of action. Such advice, when given in good faith, is represented by point "C"; when recklessly provided, by point "D".

The presumably rare situation where a professional knowingly lies on behalf of an unwitting client is represented by point "E". The following pages will be concerned primarily with professional conduct in the southern hemisphere of Figure 1, and to a lesser extent with activity occurring just north of the equator.

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2 R. Kraakman, "Gatekeepers: The Anatomy of a Third Party Enforcement Strategy" [1986] *Journal of Law, Economics and Organisation* 53.

FIGURE 1



Recent examples of failure on the part of professional advisers abound; the consequences of such conduct can be very costly in human and in financial terms. Of the hundreds of savings and loan institutions which failed in the United States over the past decade, many received clean audit opinions only shortly before being identified by regulatory authorities as insolvent.<sup>3</sup>

Registration statements and other documents filed with corporate affairs authorities by lawyers on behalf of their clients have on occasion contained

3 Testimony of Charles A. Bowsher, Comptroller General of the United States, before the Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, United States House of Representatives, 2 August 1990; see also M. Raab, "Detecting and Preventing Financial Statement Fraud: The Roles of the Reporting Company and the Independent Auditor" (1987) 5 *Yale Law and Policy Rev* 514.

false or misleading information.<sup>4</sup> This can lead to the erosion of trust which provides the very foundation for modern commerce. Investor reliance on such information can lead to catastrophic financial loss.

The inadequate oversight of construction projects by structural engineers has been followed by collapse of the structures, resulting in death or injury to workers or to members of the general public.<sup>5</sup> The engineer's failure to identify shortcomings in the design of a product may contribute to malfunction and to subsequent death or injury to consumers.

Braithwaite has documented numerous examples of grossly inadequate record keeping and outright falsification of data in the safety testing of drugs by researchers and testing laboratories under contract to pharmaceutical industry firms.<sup>6</sup> In some instances, these led to the marketing of drugs with dangerous side effects.

In the course of providing services to their clients, professionals may be confronted with moral choices, or with decisions between competing values. At times, these choices may be explicit, and the processes by which they are reached cut-and-dried. Most independent auditors who discover obvious frauds are unlikely to provide their clients with an unqualified bill of financial health. Under some circumstances however, these moral choices may be less stark, and the means of resolving them less explicit. The following pages propose a framework for the analysis of these issues.

Analysts of white collar illegality would do well to seek a more complete understanding of such occurrences. How does a professional adviser navigate the limits of legality on behalf of a client, particularly when, because of the discretionary and indeterminate nature of many regulatory rules, these limits may be unclear? What circumstances are conducive to a professional's exceeding these limits, whether intentionally or through negligence?

What circumstances might lead the professional adviser to subordinate his or her professional judgment to other imperatives? How does the professional seek to justify or to rationalise such behaviour? How does he or she frame the issue when a conflict arises between a duty to the client and a duty to the public?

This article will delineate the contours of what promises to be a fruitful area of research in white collar illegality. As the role of professional advisers in the prevention and detection of white collar illegality has received only limited attention to date, research should provide important new insight on this subject. The deregulatory trends which characterise many contemporary industrial societies have, ironically, enhanced the importance of the professional adviser's role. Self regulation or delegated regulatory tasks have emerged as

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4 Great Britain, Department of Trade and Industry, *House of Fraser Holdings, plc; Investigation under Section 432(2) of the Companies Act 1985* (1988).

5 Victoria, *Report of Royal Commission into the Failure of Westgate Bridge* (1971).

6 J. Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (1984).

complementary, if not alternatives, to governmental regulatory oversight. The devolution of regulatory control responsibilities to independent professionals appears increasingly common.<sup>7</sup>

The article takes as its model the phenomenon of audit failure, where a client experiences significant financial problems not long after having received a clean bill of financial health from an independent auditor. The article invites comparison of the accountant's contribution to audit failure with analogous shortcomings in the work of lawyers, consulting engineers, and other professionals independent of and external to their client's organizations.

The article charts a course for research on the contribution of professional advisers to white collar illegality by identifying (1) some of the social and organizational circumstances which may explain audit failure and its analogues; and (2) the basic moral reasoning or lesser excuse advanced by the professional after the fact to justify or to rationalize his or her questionable conduct.

## II. EXPLAINING PROFESSIONAL FAILURE

A number of factors may contribute to the professional's failure satisfactorily to perform an appropriate control function. Some of the more significant of these are noted here. For illustrative purposes they may be grouped into three categories, each representing a distinct level of analysis. Inter-organizational explanations embrace those factors of the environment within which the professional operates, including other organizations and institutions which interact with the provider of professional services. Intra-organizational considerations refer to those of the collectivity within which the adviser performs his or her professional work. Individual factors refer to the processes of perception and cognition on the part of the individual professional. Rarely may a given professional failure be explained by a single circumstance operating in isolation. Failures are most likely to arise from the interacting and compounding influence of factors discussed below.<sup>8</sup>

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7 T. Halliday and B. Carruthers, "The State, Professions, and Legal Change: Reform of the English Insolvency Act, 1977-1986", Paper Presented at the XIIth World Congress of Sociology, Madrid, Spain, (1990). This has the potential to transform the relationship of auditor-auditee from a professional-client relationship into one of an adversary nature, and to transform the profession into an apparatus of the state. See also I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (forthcoming).

8 H. Petroski, *To Engineer is Human* (1985), 220. For a discussion of the contribution of interacting factors to engineering failure, see S. Florman, *The Existential Pleasures of Engineering* (1976), 220.

## A. INTER-ORGANIZATIONAL EXPLANATIONS

### 1. *Competitive Pressures*

Most professional advisers work within large organizations which operate on a commercial basis. The highly competitive nature of the market for many professional services may impose time and resource constraints on the professional adviser which invite or even necessitate the "cutting of corners" during the course of an audit or an inspection. In engineering, the elimination of error is a direct function of cost.<sup>9</sup> The accounting firm which aggressively underbids its competition for an audit engagement and negotiates an inadequate fee can devote only so much staff time and can afford only so much partner involvement before it begins losing money. Underpricing one's professional services and then tailoring one's work to the anticipated remuneration can lead to neglect. Time constraints may invite the acceptance of inadequate audit evidence or may lead one to omit essential auditing procedures.<sup>10</sup>

Commercial imperatives may generate pressures on a professional adviser to attract new clients. Not all businesses are financially healthy or efficiently and honestly managed, although principals would like to portray them as such. In some cases, there may be a need to take on almost any prospective client, no matter how unsavoury they may be. This can require a degree of deference to a client's wishes which may lead the professional organization, or the individual professional adviser, to engage in conduct of questionable propriety.

Prospective clients experiencing financial distress may seek to reduce audit costs. Ironically, the very state of financial distress may require more intensive auditing. A company in poor financial health may thus engage professional services inadequate to the task at hand.<sup>11</sup>

In highly competitive circumstances which constitute a buyer's market for professional advisory services, the prevailing view may be one that if a professional organization or an individual professional adviser is unwilling to conform to the ethically questionable requirements of a client, a willing replacement can easily be found.

There are, for example, those companies whose principals "shop around" for an auditor, basing their "purchasing" decision on the accounting firm's acceptance or rejection of a particular accounting standard or on their

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9 *Id.*, 33.

10 For further discussion of the tradeoff between profit and quality in accounting, see M. Stevens, *The Big Eight* (1981), 86; *Report of the National Commission on Fraudulent Financial Reporting* (1987) 56, 116-117; H. Bosch, *The Workings of a Watchdog* (1990), 133.

11 K. Schwartz and K. Menon, "Auditor Switches by Failing Firms" (1985) 60 *The Accounting Review* 248, 252.

willingness to interpret accounts favourably. Pressures to accommodate client preferences may be reinforced in a competitive market situation.<sup>12</sup>

The marketplace for legal services may also be conducive to a certain lack of scrutiny of clients' affairs. Lawyers with a reputation for intrusiveness tend not to be favoured by clients, and many will be less successful than their more discreet counterparts.<sup>13</sup> Nelson refers to the increasingly competitive market for corporate law clients, suggesting that lawyers are less likely to resist clients' illegitimate demands in order not to discourage future business.<sup>14</sup>

Competitive pressures may also influence engineering decisions. Concern surrounding the ultimate profitability of a product may lead a contractor to shave costs through design modifications. Design flaws may result. Price competition among consulting engineers may lead to the provision of inadequate services and ultimately to physical failure.<sup>15</sup>

Time pressures and deadlines can be particularly important to the engineering profession. The adage "time is money" applies to an equal if not greater extent to engineers than to their counterparts in other professions. Delay in completion of a construction project, or in bringing a new product to market, can entail enormous financial cost to a client. Client pressure for prompt and favourable certification may at times reach an intensity sufficient to impair the independent, objective judgment of some professional advisers.

Tight reporting deadlines may also contribute to accounting failure. Time pressures may discourage auditors from pursuing anomalies.<sup>16</sup>

## 2. Normative Ambiguity

Situations in which the boundaries of legality are obscure may invite a professional's transgression. The ambiguity of accounting standards can

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12 *Ibid*; M. Stevens, *The Accounting Wars* (1985), 228. The practice of consulting various accountants in order to find one willing to accept a questionable or inappropriate accounting treatment has been termed "opinion shopping". Report of the National Commission on Fraudulent Financial Reporting, note 10 *supra*, 112; Bosch, note 10 *supra*, 113. The practice of condoning questionable financial statements in return for high fees has been termed "bottom fishing". N. Nash, "Auditors of Lincoln on the Spot" *The New York Times*, 14 November 1989.

13 K. Mann, *Defending White Collar Crime: A Portrait of Attorneys at Work* (1985), 120.

14 R. Nelson, "Ideology, Practice and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm" (1985) 37 *Stanford L Rev* 503, 544. Kraakman also discusses the practice of shopping for complaint gatekeepers. Kraakman, note 2 *supra*. See also Bosch, note 10 *supra*, 77.

15 C. Stanley, *The Consulting Engineer* (1982), 278.

16 *Re Thomas Gerard and Son Ltd* [1968] Ch 455; National Commission on Fraudulent Financial Reporting, note 10 *supra*, 56.

encourage a client to seek to influence an auditor's interpretation.<sup>17</sup> Lawyers too may perceive vagueness as an invitation to test the limits of the law.

### 3. *Models of the Professional-client Relationship*

Another explanation for professional failure may reside in circumstances of the professional-client relationship. The model of a neutral, disinterested, independent professional operating at arm's length from the client is more of a caricature than a representation of reality. Ellin<sup>18</sup> distinguishes between various models of the professional-client relationship. Under the "agency" model, the professional carries out the wishes of the client, as if the client were acting for him or herself. The professional is, in other words, a mere instrument of the client's will. Under the "cooperative" model, professional services are produced in an atmosphere of equality, partnership, and mutual trust. Under the "adversary" model, professional and client engage in arm's length bargaining in an atmosphere of mutual wariness.

One might envisage circumstances wherein relations between professional and client become so close that the professional internalizes the client's values to the extent that the professional is no longer able to make an independent judgment. This process of internalization may flow from social or cultural similarity of professional and client, from the duration of their professional relationship, or from mutuality of economic interest, as noted below.

Nelson suggests that the strength of corporate lawyers' identification with their clients' interests is such that it is unrealistic to regard them as neutral professionals.<sup>19</sup> Heinz and Laumann, in their study of the Chicago Bar, found that corporate lawyers were significantly constrained by and dependent upon their clients.<sup>20</sup>

Other lawyers may interpret the professional-client relationship as one of agency, and regard themselves as essentially having been "bought" by the client or as mere "letter carriers" with no responsibility for the letter's contents.<sup>21</sup>

Mann, in his study of defence attorneys specializing in white collar cases, notes the widespread view within the white collar defence bar that it is *not* the attorney's responsibility to enforce his or her client's compliance with the law.<sup>22</sup> The professional, on the other hand, is obliged to refrain from knowingly participating in violations of the law or from actively facilitating such violations.

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17 *Id.*, 116.

18 J. Ellin, "Special Professional Morality and the Duty of Veracity" (1982) 1 *Business and Professional Ethics Journal* 75.

19 Nelson, note 14 *supra*, 526.

20 J. Heinz and E. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (1982).

21 C. Fried, "The Lawyer as Friend: The Moral Foundation of the Lawyer-Client Relation" (1976) 85 *Yale LJ* 1060, 1085-87.

22 Mann, note 13 *supra*, 110.



A professional may be financially dependent on a client's account. Contract laboratories with responsibilities for independent testing of pharmaceuticals or pesticides may be dependent on manufacturer clients for continued growth if not economic survival.<sup>23</sup> A more direct interest in the client's financial affairs, although discouraged by some professional codes of ethics, may blunt a professional's critical faculties.

The diversification of some professions can lead to a greater involvement of professional advisers in a client's affairs. Many large accounting firms today are highly diversified, providing a wide range of management consulting services, in addition to traditional audit services. While some would argue that the wider knowledge of a client's affairs which can be obtained in the course of providing non-audit services may improve the effectiveness of an audit,<sup>24</sup> critics would contend this may constitute a conflict of interest and thereby threaten the objectivity of the audit function.<sup>25</sup>

Most professionals place at least a modicum of trust in their clients; they will vary in the length to which they will go in order to discern whether this trust may have been breached. Precisely how energetically a professional should search initially for errors or irregularities in his or her client's affairs is a matter for judgment. Professionals who forego independent verification and who depend uncritically on management representation of significant information face some risk of failure.<sup>26</sup> What degree of unsavoury aroma should suffice in order to invite further scrutiny is also problematic. Indeed, olfactory sensitivities may themselves vary widely. Accountants often elect to define their responsibilities quite narrowly, taking great pains to explain that they are not fraud investigators.

Professionals also differ widely in the premium which they place on client satisfaction. The accountant who deems a company's accounts to be unauditible and declines an engagement, or who refuses to subscribe to a client's preferred interpretation of inventory valuation, may be contrasted with

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23 Braithwaite, note 6 *supra*, 103. Kraakman observes that a large client organization may exercise considerable influence over a relatively small professional firm, note 2 *supra*, 71-2.

24 Lack of a thorough understanding of a client's business on the part of an auditor may facilitate management fraud. See J. Sorensen, H. Grove and T. Sorensen, "Detecting Management Fraud: The Role of the Independent Auditor" in G. Geis and E. Stotland (eds), *White Collar Crime: Theory and Research* (1980), 221.

25 A. Briloff, *The Truth About Corporate Accounting* (1981), 161. See also Report of the National Commission on Fraudulent Financial Reporting (1987), 44; 102; J. Cooke, "Can Accountants Regulate Themselves?" in Institute of Criminology, Sydney University Law School, *Crime and the Professions - the Accountancy Profession* (1985), 13, 14.

26 *Ibid.*; Briloff, note 24 *supra*, 34. For example of professional advisers who were criticised for undue reliance on clients' representations see Great Britain, note 4 *supra*, Chapters 22 and 23.

his or her colleague who, bending over backward to please the client, favourably twists an interpretation of his or her client's financial position.

Some clients may use threats, harassment and intimidation in order to influence professional judgment. Doctors who, in the course of testing pharmaceutical products reported adverse side effects, have elicited hostile communications from pharmaceutical manufacturers.<sup>27</sup> Engineers and other professionals who may be disinclined to interpret fact or law to their client's satisfaction may become the subject of physical threats, or more commonly, economic pressure.

The adviser's professional ideology and perception of role can be of great importance in explaining his or her behaviour as an agent of social control. Consider the lawyer who internalizes the aggressively adversarial posture of the criminal defense attorney and applies it in settings, such as the provision of advice relating to tax or securities, where it is arguably inappropriate.<sup>28</sup> This model of the professional as champion for the client may be contrasted with his or her counterpart who offers neutral, objective advice from a standpoint of disinterested independence.

#### 4. *Institutions of Control*

Other institutions may serve to enhance or to detract from the rigor with which an adviser performs his or her function. Reputational capital can be a significant asset, and market incentives to maintain these resources can be strong. Those professionals who command such assets are less likely to engage in conduct which might place their reputations in jeopardy. Association with a disreputable client or identification with an unsavoury venture may stain a professional image. Conversely, those professionals without significant reputational assets have less to lose by adopting risky practices or by engaging risky clients.<sup>29</sup>

Paradoxically, highly reputable professionals have an additional incentive for maintaining vigilance, in that they are particularly attractive to perpetrators of fraud. Prestigious accounting and law firms may thus be sought after as "bait" to attract gullible investors to a fraudulent enterprise.<sup>30</sup>

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27 Braithwaite, note 6 *supra*, 65-69.

28 S. Lorne, "The Corporate and Securities Adviser, the Public Interest, and Professional Ethics" (1978) 76 *Michigan L Rev* 425, 426. Compare, however, this argument with that of Freedman, who contends that criminal defence is not isolable from other professional functions of the lawyer, and that the aggressively adversarial posture is entirely appropriate. M. Freedman "A Civil Libertarian Looks at Securities Regulation" (1974) 35 *Ohio State LJ* 280.

29 Raab, note 3 *supra*, 525.

30 Kraakman, note 2 *supra*, 68. For a discussion of the relative attractiveness of major accounting firms, see Schwartz and Menon, note 11 *supra*.

Liability to the client or to third parties for losses occasioned by professional negligence can serve to heighten professional vigilance.<sup>31</sup> Alternatively, immunity from legal action may invite nonchalance. In some instances, however, the exercise of vigilance may enhance liability. Engineers have been advised that to point out construction deficiencies on one occasion may obligate them to do likewise on subsequent occasions lest they be held liable for damages arising from unreported deficiencies.<sup>32</sup>

The risk of liability can cut both ways. Excessive deference to a client's wishes may render the professional liable to third parties in the event of subsequent failure. Alternatively, strict adherence to norms of professionalism may arouse a client's resentment. Accountants whose audit reports cast an unfavourable light on a client's financial affairs can find themselves the targets of libel action. Whatever the case, the availability of professional indemnity insurance may influence the adviser's inclination to nonchalance on a client's behalf, or to candid assessment of a client's circumstances.

The organization of one's profession may also provide incentives or disincentives to rigorous professional comportment. Professional associations vary with regard to their goals and with regard to the functions which they perform. Most are concerned to a considerable degree with the financial health of the profession and its members. Most seek to reduce or eliminate external threats to whatever autonomy the profession and its members may enjoy.

Beyond this, professional associations may play a role in defining and in reinforcing standards of professional practice. Many publish canons or codes of professional ethics to guide their members with regard to the relative emphasis they should place on duties to the client and responsibilities to the public interest. In some cases, these may be clear cut; most codes of engineering ethics contain the declaration that engineers in the performance of their professional duties "hold paramount the safety, health and welfare of the public".<sup>33</sup> In other professions, however, codes of ethics may be ambiguous or contradictory.<sup>34</sup>

Actions in the form of professional sanctions in the event that professional standards are transgressed, may be firm or non-existent. Mechanisms of

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31 For a discussion of negligence claims against accountants, see R. Baxt, "The Liability of Auditors - The Pendulum Swings Back" (1990) 8 *Company and Securities LJ* 249; D. Godsell, *Auditors Legal Duties and Liabilities in Australia* (1990). See also R. Rennie, "Cambridge Credit - the Straw that could Break the Camel's Back" in the Institute of Criminology, note 25 *supra*, 49.

32 M. Martin and R. Schinzinger, *Ethics in Engineering* (2nd ed., 1989), 325.

33 B. Lichter, "Safety and the Culture of Engineering" in A. Flores (ed.), *Ethics and Risk Management in Engineering* (1989), 211, 213.

34 R. Chalk, M. Frankel and S. Chafer, *AAAS Professional Ethics Project: Professional Ethics Activities in the Scientific and Engineering Societies* (1980), 102.

professional discipline can be toothless, or may constitute a real deterrent to malpractice.

Professional associations also vary significantly in the support which they are willing or able to provide their more principled members. Such support could include official statements of commendations for ethical conduct, or assistance with legal defence and awards to professionals who uphold ethical principles.<sup>35</sup>

The regulatory environment within which the client's affairs take place may be expected to influence the provision of professional services. For reasons ranging from relative size of their resource base to variation in philosophy of compliance, regulatory agencies differ substantially in their enforcement strategies.<sup>36</sup> An apparently permissive regulatory regime may invite risk-taking on the part of both the client and the professional adviser. Alternatively, a regulatory environment with a reputation for rigorous oversight and strict enforcement is more likely to encourage professional diligence.

Relations between different advisers may at times provide occasions for professional failure. When one professional relies on the assurance of another that a client's circumstances are in order, and neglects to verify the situation personally, errors can be compounded. A chain of unverified assurance can thus trip up otherwise careful professionals who would normally exercise greater care when dealing directly with the client.<sup>37</sup> Similarly, communications blockages between successive professional advisers can enhance the risk of failure.<sup>38</sup>

Other authorities may provide professionals with guidance relating to the resolution of value dilemmas. Consider, for example, how the United States Supreme Court regards the accounting profession:

By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.<sup>39</sup>

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35 S. Unger, "Would Helping Ethical Professionals get Professional Societies into Trouble?" (1987) *IEEE Technical and Society Magazine*, September, 17; S. Unger, "Role of Engineering Societies in Controlling Hazardous Technology" in A. Flores (ed.) *Ethics and Risk Management in Engineering* (1989), 223.

36 P. Grabosky and J. Braithwaite, *Of Manners Gentle; Enforcement Strategies of Australian Business Regulatory Agencies* (1986).

37 For examples, see J. Traub, *Too Good to be True: the Outlandish Story of Wedtech* (1990), 112-114; Great Britain, note 4 *supra*, 473.

38 Kraakman, note 2 *supra*, 71.

39 *US v. Arthur Young and Co* (1984) 465 US 805, 817.

## B. INTRA-ORGANIZATIONAL EXPLANATIONS

Although professional services may be provided by sole practitioners, they are often provided by members of an organized collectivity. In the factory-like environment of some professional organizations, the professional is less of an independent moral agent than an employee who must contend with the various constraints and pressures of organizational life, which tend not to encourage moral reflection.<sup>40</sup> These factors, and the process of adaptation to the perceived expectations of one's organization, can impede the individual's ability to make informed ethical judgments.<sup>41</sup>

When such services are rendered by a team, the structure of the team itself can be crucial to the performance of the professional function. Insufficient attention to the overall organization and staffing of a project, whether the planning and supervision of a financial audit or the development of testing protocols for a complex engineering design, can contribute to professional errors and omissions.<sup>42</sup>

Rapid expansion of an organization, such as that pursuant to a merger or takeover, may lead to malfunction. Mismanagement of rapid organizational growth may entail the deployment of inexperienced or otherwise unqualified personnel.

Other aspects of organizational life which bear upon the question of professional failure include the division of labour and fragmentation of decision making which the servicing of some large corporate clients may entail. The assignment of discrete tasks to team members and the supervision of members in the performance of these tasks may be accomplished in such a way as to minimize the risk of professional failure. Alternatively, the apportionment of limited tasks to individual members of a professional team can be done in a manner which impedes recognition of patterns of data which may be indicative of some anomaly. Deciding the scope of a financial audit - selecting those categories and subcategories of transactions to be scrutinized - and assigning responsibilities to individual members of an audit team, can be crucial to the success of an audit. In engineering, lack of attention to system design may result in individual components of a system being over-engineered, at the same time that the system as a whole is under-engineered. The Japanese, by contrast, are celebrated for their concern over achieving a consensus in the planning and execution of projects.<sup>43</sup>

Fragmentation of professional tasks and remoteness from the consequence of a professional project may also be conducive to the diffusion of responsibility

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40 D. Rhode, "Ethical Perspectives on Legal Practice" (1985) 37 *Stanford L Rev* 589, 590, 636.

41 Nelson, note 14 *supra*, 504. For illustrations in the business context, see R. Jackall, *Moral Mazes: The World of Corporate Managers* (1988), 109-110.

42 Audits may be designed expressly to address the risk of fraud. See National Commission on Fraudulent Financial Reporting, note 10 *supra*, 153-164.

43 R. Pascale and A. Athos, *The Art of Japanese Management* (1982), 111, 127.

amongst members of the collectivity, and can thus militate against disclosure.<sup>44</sup> Darley and Latane refer to "pluralistic ignorance" wherein observers, led by the apparent lack of concern by others in the face of an anomalous situation, interpret the situation as less serious than they would if acting alone.<sup>45</sup> Safeguards may be built in by a professional organization. Kraakman discusses how legal opinions may be subject to review by a disinterested partner or by a law firm's review committee;<sup>46</sup> similar provisions for peer or partner review may apply to audit engagements.<sup>47</sup>

Specialization has become a characteristic of much professional activity. The tendency of a professional to focus specifically and precisely on a technical matter, rather than take a holistic perspective on a client's affairs, may at times be an efficient approach to the provision of professional services. It does, however, have its liabilities. Underlying, predisposing factors and problems of a systemic nature may go undetected.<sup>48</sup> Self-identification as a technician rather than as a moral actor will facilitate ignorance of wider normative considerations.<sup>49</sup> This becomes even more significant when, as Katz observes, white collar illegality is rarely "situationally specific", tending instead to entail acts dispersed over time and place.<sup>50</sup>

The risks posed by such fragmentation of assignment can be compounded by the absence of opportunities for communication between team members or by implicit pressures not to "rock the boat". The very structure of an organization can condition passive compliance in subordinate members.<sup>51</sup>

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- 44 S. Shapiro, "Collaring the Crime, Not the Criminals: Liberating the Concept of White Collar Crime" (1990) 55 *American Sociological Review* 346, 349; N. Passas, "Anomie, Crime and Corporate Deviance" (1990) 14 *Contemporary Crises* 157, 167.
- 45 J. Darley and B. Latane, *The Unresponsive Bystander: Why Doesn't He Help?* (1970).
- 46 Kraakman, note 2 *supra*, 72.
- 47 National Commission on Fraudulent Financial Reporting, note 10 *supra*, 54-55.
- 48 M. Konner, *Becoming a Doctor* (1987); for a most extreme example, see R. Lifton *The Nazi Doctors* (1986); see Nelson, note 14 *supra*, 531, 544. Shapiro, note 44 *supra*, 354; R. Wasserstrom, "Lawyers as Professionals: Some Moral Issues" (1975) 5 *Human Rights* 1. For an example of a situation wherein auditors were criticised for inadequately examining the work of audit staff in reviewing a large number of transactions, apparently discrete but in reality linked, see Australia, National Companies and Securities Commission, Special Investigations into affairs of The Trustees Executors and Agency Company Limited and Related Corporations and Affairs of Petane Holdings Pty Limited and Lenlord Nominees Pty Limited, *Fourth Interim Report: T.E.A. Property Development Projects (Control, Accounting and Profitability) Part II* (1985), para. 761.
- 49 G. Postema, "Moral Responsibility in Professional Ethics" (1980) 55 *NYU L Rev* 63, 80.
- 50 J. Katz, "Legality and Equality: Plea Bargaining in the Prosecution of White Collar and Common Crimes" (1979) 13 *Law and Society Review* 431, 435-436.
- 51 J. Katz, "Concerted Ignorance: The Social Construction of Cover-up" (1979) 8 *Urban Life* 295, 296; Shapiro, note 44 *supra*, 357. Individual members of an audit team may be

Impediments to the flow of information into and through an organization may be substantial. Withholding and filtering of information may occur informally or may be explicitly mandated procedure. Information may be withheld from supervisors in order to limit their potential responsibility, and to accord them "plausible deniability".

The reluctance to communicate bad news is a well documented principle of organizational communication.<sup>52</sup> Organizational constraints on individual disclosure need not be subtle. Subordinates in hierarchical organizations who might be inclined to question the propriety or prudence of their superiors may be inhibited by the formal or informal sanctions which could follow such a course of action. Individuals within organizations who may be inclined to "blow the whistle" on impending professional failure may face harassment or loss of employment.<sup>53</sup>

Where the adviser's function entails an element of risk assessment, and where the relevant decision is reached collectively, there may be a greater inclination on the part of individual participants to be less risk averse.<sup>54</sup>

### C. INDIVIDUAL-LEVEL EXPLANATIONS

Selectivity of perception and the inclination to disregard dissonant information are familiar human characteristics. There are those individuals who will go to great lengths to interpret sensory data in a manner consistent with their preferences.<sup>55</sup> Conversely, there are those professional advisers who may be exposed to information about which they would rather not know. Alternatively, they may encounter ambiguous data indicative of a problem which they subconsciously do not wish to understand. In the professions, as in life, both knowledge and ignorance can be selective.

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reluctant to communicate personal doubts, or may fail to do so with sufficient forcefulness. See Briloff, note 25 *supra*, 48.

- 52 C. Stohl and W. Redding "Messages and Message Exchange Processes" in F. Jablin, L. Putnam, K. Roberts and C. Porter (eds), *Handbook of Organizational Communication* (1987), 451, 482. See also A. Tesser and S. Rosen "The Reluctance to Transmit Bad News" in L. Berkowitz (ed.), *Advances in Experimental Social Psychology*, Vol 8 (1975), 193. C. O'Reilly and K. Roberts, "Information Filtration in Organizations, Three Experiments" 11 *Organizational Behaviour and Human Performance* 253. For an example of information blockage within a professional adviser's organization which inhibited the disclosure of questionable behaviour on the part of a client see Briloff, note 25 *supra*, 178.
- 53 C. Holden, "Scientist with Unpopular Data Loses Job" (1980) 210 *Science* 749. See also M. Glazer, and P. Glazer, *The Whistleblowers: Exposing Corruption in Government and Industry* (1989).
- 54 D. Bem, M. Wallach and N. Kogan, "Group Decision Making under Risk Aversive Consequences" (1965) *Journal of Personality and Social Psychology*, 453.
- 55 L. Festinger, *A Theory of Cognitive Dissonance* (1957).

As noted above, white collar illegality is rarely detected in the manner of a "smoking gun". Rather, there occurs a gradual accretion of suspicion, a slow emergence of doubt, in the eye of the beholder. One tends to pay greater attention to those stimuli which confirm rather than contradict one's presuppositions. A professional adviser who enters an engagement with trust in his or her client, who subsequently encounters something slightly irregular, may be disinclined to probe further.

The failure to perceive indicia of client wrongdoing may result simply from sensory overload in the face of time pressures. Alternatively, it may occur as a result of the professional's predisposition. The tendency to perceive stimuli which are congruent with one's expectations or preferences and the tendency not to perceive dissonant information is a common one. There may well be a temptation to resolve factual or normative ambiguity in the client's favour.<sup>56</sup> This can be explicitly reinforced by codes of professional ethics.<sup>57</sup>

Experienced professionals are able to place themselves in a state of mind which may be characterised as one of ambivalence or uncertainty, perhaps conditioned by reliance on the assurances and representations of others, which permit an interpretation of professional conduct as within the bounds of permissibility.<sup>58</sup>

Individuals also differ widely in their estimation of risk. Those professionals who underestimate risk of failure are by definition less likely to engage in precautionary measures.<sup>59</sup> While no profession has a monopoly on arrogant overconfidence, it is tempting to speculate whether the role demands of the legal professional as advocate, and the relative optimism of the design engineer, are accompanied by different approaches to uncertainty than those manifested by accountants.

As noted above, the role differentiation and technical specialization characteristic of many professions contributes to the development of professional tunnel vision. Similarly, the degree to which a professional internalizes the values embraced by his or her client may also introduce bias in perception and cognition.

There are those who are inclined to introspection, and those who are not. When a lack of self-awareness is combined with a certainty that one is right (or

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56 Rhode, note 40 *supra*, 629. Fraud may be perceived as merely sloppy bookkeeping. Traub, note 37 *supra*, 112. Mann refers to the lawyer's perceived professional mandate to resolve doubt in favour of one's client as encouraging a search for doubt; note 13 *supra*, 120. He describes techniques employed by attorneys to avoid discovering undesirable information.

57 Mann, note 13 *supra*, 247.

58 Traub, note 37 *supra*, 114. He quotes one professional as stating "Clients do things that you don't ask questions about". *Id.*, 120.

59 C. Heimer, "Social Structure, Psychology and the Estimation of Risk" (1988) 14 *Annual Review of Sociology*, 491-519.



righteous) one may fail to perceive that one's own conduct may be questionable.<sup>60</sup>

In some cases, concerted ignorance may be explicit. Mann describes how some white collar defense attorneys carefully probe their clients for information helpful to a defense, but discourage disclosure of information which might be counterproductive, or which, if known, could place the lawyer in an ethically questionable position.<sup>61</sup>

### III. PROFESSIONAL FAILURE

In confronting their failure to prevent or to detect illegality by a client, some professionals may acknowledge moral agency, and will undertake an attempt at genuine justification. This entails an admission of responsibility, accompanied by the argument that one's course of action was appropriate under the circumstances.<sup>62</sup> These moral claims will, of course, vary in persuasiveness, and may be subject to evaluation. One model for the evaluation of moral judgment has been suggested by Bok in her discussion of the ethics of lying.<sup>63</sup> In order to claim exoneration, the professional must first have acknowledged the existence of a moral dilemma, evaluated the relative merits of available courses of action, and ensured that no morally preferable alternatives were available to the path eventually taken.

In real life, or course, the professional may not engage in conscious moral choice in the first place. The activity later coming into question may have been experienced as "business as usual" rather than perceived as entailing a moral judgment. He or she may concede a degree of thoughtlessness - an absence of moral reflection altogether. While one might argue that professionals should know better, the ambiguous nature of many regulatory regimes is such that some clients, and their advisers, may be unaware of the ethical or legal implications of their conduct.

Alternatively, professionals may seek to portray themselves as amoral calculators, having engaged in what they regard as a rational choice based on careful assessment of the likely (material) costs and benefits of available

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60 M. Martin, (ed.) *Self Deception and Self Understanding: New Essays in Philosophy and Psychology* (1985). Elsewhere, Martin suggests five ways in which self deception may occur. The self deceiver may disregard evidence; may discount relevant facts; may evade attention through systematic distraction; may evade understanding by blurring his own grasp of what he knows; and may evade belief by rationalization or wilful ignorance; M. Martin, *Self Deception and Morality* (1986), 15; S. Bok, *Secrets: On the Ethics of Concealment and Deception* (1982), Ch 5.

61 Mann, note 13 *supra*, 103-105; see also Traub, note 37 *supra*, 120, 257.

62 J. Austin, "A Plea for Excuses" *Proceedings of the Aristotelian Society* (1956), 1.

63 S. Bok, *Lying: Moral Choices in Public and Private Life* (1978).

courses of action.<sup>64</sup> The most cynical of these will perceive illegality as an indispensable part of the ordinary way of doing business.<sup>65</sup>

Otherwise, a professional's response may be based on a simple explanation of his or her questionable behaviour. Bok distinguishes between a true explanation - a mere statement of empirical fact, and an excuse - a proposal advanced to remove blame by denying responsibility altogether or by claiming that one's responsibility was dilute or limited.<sup>66</sup>

The extent to which the "vocabulary of evasions"<sup>67</sup> differs across professions, in scope and emphasis, and in its ability to stand up to analysis, is an inviting subject. Given the emerging responsibilities for social control which members of many professions may be expected, if not required, to undertake, the results of such an enterprise may be useful to those who would adjust professional codes of ethics to reflect these new roles.

#### A. ATTEMPTS AT GENUINE MORAL JUSTIFICATION

Those attempting a genuine moral justification for professional failure may present a variety of arguments. Where the professional failure is undeniable, and entailed some element of intent, one may portray one's transgressions as essential to prevent the occurrence of a greater harm, such as the collapse of a financial institution with attending losses for small investors, or the failure of a business enterprise, with resulting unemployment. Thus, one may seek to justify one's actions in concealing or in understating adverse financial information in order to prevent a self-fulfilling prophecy.<sup>68</sup>

Alternatively, the professional may try to justify a course of action by appealing to what he or she perceives as a "high good" or wider public interest. The professional may contend that his or her questionable actions were instrumental in achieving a greater benefit. An engineer may seek to justify a relaxation of vigilance in testing by contending that the likely benefit of a product would outweigh the product's possible risks.

Otherwise, the professional may seek to construct a moral justification attuned to the defense of necessity in criminal law. There are those

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64 R. Kagan and J. Scholz, "The 'Criminology of the Corporation' and Regulatory Enforcement Strategies" in K. Hawkins and J. Thomas (eds), *Enforcing Regulation* (1984), 67.

65 Passas, note 44 *supra*, 167. Jackall, note 41 *supra*, in his discussion of business decision making, relates how executives excuse unlawful or otherwise questionable conduct as "reasonable" or "pragmatic".

66 S. Bok, note 63 *supra*, 74; Austin, note 62 *supra*, 2-3.

67 S. Macaulay, "Control, Influence and Attitudes: A Comment on Nelson" (1985) 37 *Stanford L Rev* 553, 562.

68 M. Wells, "Comment" in Sydney University Institute of Criminology (1985) 71. On the matter of deception in order to avoid a self-fulfilling prophecy, see J. Paul, "The New York City Fiscal Crisis", in A. Gutmann and D. Thompson (eds), *Ethics and Politics: Cases and Comments* (1984), 44.

professionals who disclaim responsibility with the excuse that if they personally had not engaged in the questionable conduct, someone else would have. Thompson refers to this as "excuse from alternative cause".<sup>69</sup> An extension of this argument entails the contention that were one to withdraw from a professional engagement, a successor would effect an even greater degree of questionable conduct.<sup>70</sup> In a sense, then by remaining in an engagement, the professional claims to be acting to minimize harm. Such attempts at justification are not very compelling, as they have the tendency to reduce the behaviour of all to that of the worst.

A further strategy of justification may entail something resembling a defence of duress based upon fear of client retaliation. Liability of professional advisers for disclosures reflecting adversely upon their clients were noted above.<sup>71</sup> Professional advisers may seek to excuse failure by arguing that their action or inaction was conditioned by a potential legal threat.<sup>72</sup>

Of course, the quality of moral justification is a function of its wider acceptance. The wayward professional, vulnerable to self-deception, may attach grossly inappropriate weight to a certain outcome, an attribution unlikely to be shared by professional colleagues or laypeople. Publicity and a degree of consensus is thus essential to the justification of moral choice.<sup>73</sup>

## B. THE CONSTRUCTION OF LESSER EXCUSES

Those professionals who may not be up to sophisticated moral reasoning but who still seek the mitigation of blame can be expected to advance lesser *post hoc* rationalizations of professional failure. In the absence of reasoned moral justification, the adviser's response to professional failure is likely to take one of two forms.<sup>74</sup> The professional's first resort will tend to involve denial of any wrongdoing altogether. In such instances, the professional will either deny that a failure occurred in the first place, or will contend that he or she took all reasonable precautions and adhered strictly to all professional standards in providing service to the client. A securities lawyer who fails to disclose the existence of client negotiations with a "white knight" in response to a hostile takeover offer might, for example, argue that the discussions in question were only preliminary; their lack of sufficient substance and the remoteness of any

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69 D. Thompson, *Political Ethics and Public Office* (1987), 50.

70 Rhode, note 40 *supra*, 626.

71 See text accompanying note 32 *supra*.

72 For an example of such an excuse by an accounting firm which failed to notify authorities of alleged fraud, see D. Vise "SEC's Ruder Backs Disclosure Law for Accountants" *The Washington Post*, May 3 1988, C1. See also M. Lulan, "Reporting by Auditors" in Sydney University Institute of Criminology, note 25 *supra*, 67.

73 S. Bok, note 63 *supra*, 92.

74 *Ibid*, 74.

agreement were such as not to warrant disclosure.<sup>75</sup> For example, legitimate differences of opinion may exist regarding what constitutes information which may be material to the financial well-being of a company. The professional may simply embrace his or her own interpretation of the facts, and contend that the authoritative judgment which underpins the allegation of ethical impropriety was simply incorrect.

Where professional failure and its consequences are undeniable, it may still be possible to deny wrongdoing. This can, for example, entail the argument that one's best professional efforts were in fact applied to the problem at hand, that no anomalies were apparent at the time, and that the adverse consequences were simply not foreseeable. Such an argument could, for example, be advanced by an accountant whose client's skill at concealing a fraud was such that no "red flags" became apparent in the course of a reasonably thorough audit.

The professional adviser's vocabulary of extenuation can also be conditioned by the organizational and environmental considerations discussed above. Perhaps the most obvious of these occurs when the professional anticipates becoming the target of legal action. In these circumstances, his or her excuse may be framed in anticipation of a particular legal defense.

Alternatively, the adviser may argue that he was making an attempt in good faith to probe the limits of legality on behalf of his client. Where these limits are uncertain or ambiguous, a certain testing of the law may be appropriate to see what enforcement authorities are willing to tolerate.<sup>76</sup> Such circumstances of ambiguity invite both misadventures and their subsequent rationalization.<sup>77</sup>

In their classic discussion of how delinquents mobilize justifications for deviance, Skyes and Matza use the term "neutralization" to refer to efforts to extenuate moral agency.<sup>78</sup> They identify five basic techniques of neutralization, including denial of responsibility; denial of harm or injury; denial or derogation of victim; condemnation of condemners; and appeal to higher loyalties. Although the intentional acts of delinquents differ substantially from the reckless or negligent conduct of professional advisers, techniques of neutralization are occasionally shared.

Auditors often disavow responsibility for fraud detection, contending that their obligations were limited to adherence to conventional auditing standards. Some might contend, for example, that they are not in a position to pass

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75 In the matter of George C. Kern, Jr. (Allied Stores Corporation) U.S. Securities and Exchange Commission, Initial Decision, Administrative Proceeding, 14 November, 1988; Memorandum of Law of the Division of Enforcement, 6 March, 1989; Reply Memorandum of Law of the Division of Enforcement, 21 April, 1989, File No. 3-6869.

76 Lorne, note 28 *supra*, 467.

77 Passas, note 44 *supra*, 166.

78 G. Sykes and D. Matza, "Techniques of Neutralization" (1957) 22 *American Sociological Review* 644.

judgment on the health of an organization or on the morality of its executive, and are required simply to determine if financial statements conform to generally accepted accounting principles. Others will go further and contend that the detection of fraud is a "mission impossible", that events are beyond the auditor's control.<sup>79</sup> In the terminology of Sykes and Matza, this would entail denial of responsibility.

There are those situations in which a professional might argue that his or her own alleged wrongs were themselves causally unrelated to, or at least causally remote from, the eventual impact. Thompson discusses how, in the public sector, specialization facilitates the division of moral agency. The adviser will thus contend that other factors, or other actors, intervened to dilute his or her own responsibility.<sup>80</sup> Such an argument is commonly coupled with an attempt to shift blame to another party. Attempts to "pass the buck" often arise from failures occurring in the context of complex processes involving a number of different participants. Failures occurring in large scale engineering projects are especially conducive to such forms of excuse. Structural engineers, in the aftermath of a mid-construction accident, are inclined to blame the contractor. Failures occurring after completion of a project may be attributed to improper maintenance.<sup>81</sup> Indeed, it has been argued that the legal system provides plaintiffs with incentives to maximise the number of defendants in such cases.<sup>82</sup> Here again one sees what Sykes and Matza would refer to as denial of responsibility.

Where the professional acknowledges some transgression, he or she may seek to minimize their culpability by arguing that the misconduct was itself trivial, "a minor technicality".<sup>83</sup> Regardless of the severity of the professional lapse, an adviser may argue that the consequences were victimless, or that the ultimate impact of the transgression was negligible.<sup>84</sup> Consulting engineers who fabricate "satisfactory" test results and who are fortunate enough to be able to point to the absence of subsequent malfunction or system failure will argue that their actions were "harmless". Sykes and Matza would describe this as denial of injury.

Professionals may be inclined to blame the victim, holding him or her largely responsible for his or her own misfortune. Consider, for example, the person who is injured in the course of using a rotary lawnmower to trim a hedge. The designer of the lawnmower in question would disclaim responsibility, arguing

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79 F. Clarke, "Presentation of Discussion Paper" in Sydney University Institute of Criminology note 25 *supra*, 66.

80 Thompson refers to this as "excuse from null cause", note 69 *supra*, 62.

81 Florman, note 8 *supra*, 94.

82 W. Landes and R. Posner "Joint and Multiple Tortfeasors: An Economic Analysis" (1980) *J Legal Stud* 517.

83 Briloff, note 25 *supra*, 16.

84 Thompson, note 69 *supra*, 82.

that it was not a shortcoming of design, but rather the egregiously improper use of the device, which led to the injury. Sykes and Matza would refer to this as denial of the victim.

In some circumstances, the professional will suspend personal moral judgment, instead invoking that of an authority figure. Such "moral modeling" may be regarded as volitional, as distinct from that which is imposed coercively by members of an organization's hierarchy. "Respectable" people may appear to condone practices which might otherwise be regarded as questionable. Impressionable subordinates thus internalize the values of those senior to them.

Elsewhere, the professional may seek justification in professional ideology or in terms of the professional-client relationship. The internalization by some lawyers of the criminal defense model of zealous advocacy was noted above; in some instances, the professional will invoke the principle of loyalty to his or her client to outweigh other considerations. Luban terms this the "adversary systems excuse".<sup>85</sup> Thompson observes the paradox that a professional may seek to rely upon a code of ethics in order to excuse unethical conduct.<sup>86</sup> Sykes and Matza would refer to this technique as an appeal to higher loyalty.

The antithesis of the paternalistic model of professional-client relations is that which Rhode describes as governed by "restraints of role."<sup>87</sup> Here the professional embraces the principle that it is inappropriate to override or second-guess a client's policy decisions. Mann provides an illustration from an interview with one white collar defence counsel, who described it as his obligation to defend the client, not to sit in ethical judgment of him, nor to initiate law enforcement actions. Professional responsibility is seen as limited to informing the client of the significance and consequences of an illegal course of action.<sup>88</sup> Thus, professional advisers can provide implicit advice and assistance in illegal conduct, but ultimately concede that "what the client does is the client's business".

Others may engage in what Rhode refers to as an "appeal to agnosticism" contending that the concept of public interest is too nebulous to define, much

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85 D. Luban, "The Adversary System Excuse" in D. Luban (ed.), *The Good Lawyer: Lawyers' Rules and Lawyers' Ethics* (1983), 83; D. Luban, *Lawyers and Justice: An Ethical Study* (1988); see also J. Daley and R. Karmel "Attorneys' Responsibilities: Adversaries at the Bar of the SEC" [1975] *Emory LJ* 747; Rhode, note 40 *supra*, 594. An extreme extension of this argument may be found in Freedman, who contends that the adversary system assumes perjury and is designed in part to deal with it. See Freedman, "Client Confidences and Client Perjury: Some Unanswered Questions" [1988] *University of Pennsylvania L Rev* 1939. For an alternative viewpoint which places greater weight on the responsibilities as officer of the Court, see J. Noonan "The Purposes of Advocacy and the Limits of Confidentiality" (1966) 64 *Michigan L Rev* 1485.

86 Thompson, note 69 *supra*, 201.

87 Rhode, note 40 *supra*, 624.

88 Mann, note 13 *supra*, 121.

less to invoke, in order to override the interests of one's client.<sup>89</sup> Problems which may arise from this posture can be significant. As Rhode claims, "Clients can justify a social action on the ground that counsel have pronounced it not unlawful, while counsel can rationalise their participation by deferring to client autonomy".<sup>90</sup>

A similar justification derives from the professional's perception that the regulatory requirements or procedures in question were themselves inappropriate, unworkable, or at an extreme, illegitimate, to be regarded as more the product of self-serving bureaucracies than as serving any useful social function. Nelson, in his survey of lawyers practising in large firms, reported antipathy to regulatory agencies.<sup>91</sup> Sykes and Matza would describe this as condemning the condemners.

In circumstances of unquestionable failure, the professional may base his or her attempt at extenuation on prevailing informal norms. One may, for example, contend that the practices in question had long been implicitly condoned by regulatory authorities. The discretionary enforcement which characterises most regulatory regimes may produce a situation where sanctions are eventually imposed for a particular course of action which had been taken on one or more previous occasions with impunity. Under these circumstances, unless the impending change in enforcement strategy was made explicit, the professional may argue that the conduct in question was tolerated by regulatory authorities.

The invocation of informal norms may extend to those prevailing in one's own industry or in one's own professional organization. Scriven refers to this as the "defense of common practice".<sup>92</sup> For example, professionals retained by companies doing business in certain cultures traditionally regarded bribery as an accepted and essential business practice.

At an extreme, standards can be perceived as so constraining that it is simply impossible to adhere to them and still conduct one's business. Alternatively, they can be perceived as symbolic or aspirational rather than as strictly binding; departure from the standards may thus be interpreted as excusable.

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89 D. Rhode, note 40 *supra*, 620.

90 *Ibid.*, 625, see also W. Simon, "Ethical Discretion in Lawyering", (1988) 101 *Harvard L Rev* 1083; R. Gordon, "The Independence of Lawyers", (1988) 68 *Boston University L Rev* 1. For a discussion of how professional passivity implicitly encouraged continuing fraud, see Traub, note 37 *supra*, 114.

91 Nelson, note 14 *supra*, 524. See also Fried, note 21 *supra*, 1081.

92 M. Scriven, "Business Responsibilities in Product Design and Manufacture" in V. Weil (ed.), *Moral Issues in Engineering: Selected Readings* (1989), 222, 223. See also Bok, note 69 *supra*, 163. Rhode describes how subordinates in hierarchical organizations may lack the expertise, certitude or formal responsibility which can provide the basis for moral judgment, note 40 *supra*, 637.

#### IV. CONCLUSION

One may at this stage begin to speculate about the antecedent circumstances and *post factum* rationalizations of professional failures. It would appear that within the legal profession, the internalization of the criminal defence model of zealous advocacy may not only underlie failure to prevent, detect and disclose client illegality, it may also serve as the main theme of excuse advanced by the wayward professional. The lawyer sees him or herself as serving the public interest *through* the adversary system, rather than more directly, as is the case with members of other professions.

Audit failure, by contrast, would appear to arise most commonly from commercial pressure, where accountants underprice their services and then tailor their work to fit the fee. When failure occurs, the professional denies responsibility for diagnosing and investigating fraud.

Engineering failures on the other hand, also appear to arise from time and budget pressures. The vocabulary of neutralization advanced in the aftermath of engineering failure tends to attempt to fix moral responsibility on other actors.

A more detailed review and analysis of professional moral reasoning would be of some utility. It would appear that many, if not most, attempts at extenuation in the aftermath of professional failure tend not to entail systematic moral reasoning, but rather more feeble attempts at excuse. Given the new and expanding social control responsibilities which members of many professions may expect to face, a systematic exposition of various forms of moral reasoning (and lesser forms of excuse) across professions may be useful to those who would adjust professional codes of ethics to confront these new responsibilities.

The responsibilities of professionals are not fixed and immutable, but rather tend to evolve, either spontaneously or in response to external demands. Accountants, in their capacities as independent auditors, are under increasing pressure to be alert for possible client illegalities, and to disclose those which come to their attention. The accounting profession in the United States, having reversed a previous position, recently expressed support for proposed legislation requiring auditors to notify regulatory authorities of possible illegal acts by clients.<sup>93</sup> The U.S. legal profession, by contrast, rejected proposals to widen duties of disclosure of client illegality.<sup>94</sup>

Wolfe describes morality as a "negotiated process, through which individuals, by reflecting periodically on what they have done in the past, try to ascertain what they ought to do next".<sup>95</sup> It may be time for such reflection.

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93 R. Blumenthal, "Accounting Group Reverses its Position, Backs Bill on Auditors Blowing Whistle." *The Wall Street Journal*, 14 September 1990, A2.

94 T. Schneyer, "Professionalism as Bar Politics; The Making of the Model Rules of Professional Conduct" (1989) 14 *Law and Social Inquiry* 677; Rhode, note 40 *supra*, 612.

95 A. Wolfe, *Whose Keeper? Social Science and Moral Obligation* (1988), 216.