

The Volkswagen Scandal: When We Ask, “Where Were the Lawyers?” Do We Ask the Wrong Question?

By: Alice Woolley

Every institutional ethics scandal – [Watergate](#), the 2008 [Financial Crisis](#), [Enron](#), the [Savings and Loan Scandal](#), the Daily Mail [hacking scandal](#) – prompts the question: where were the lawyers?

In its asking, “the question” expresses both faith and disappointment – faith that lawyers help ensure lawful conduct; disappointment that in this case (whichever case it is) they appear not to have done so. “The question” is, in short, fundamentally optimistic. While it acknowledges that *here* the lawyers failed, it rests on the premise – or at least maintains the hope – that, somehow, lawyers can do better: lawyers can prevent unlawful things from happening.

The Volkswagen emissions testing deception (nicely summarized by the [NY Times](#) and the [BBC](#)) is the latest scandal to raise the [question](#). This post gives my analysis of it. While we don’t know where Volkswagen’s lawyers were – or if they were anywhere – we can plausibly speculate as to where they might have been, and what they could have done to prevent Volkswagen’s wrongdoing.

But in so doing I also want to ask whether the question is misplaced. Are we wrong to put the faith we do in lawyers? And are we foolish to be disappointed when they fail to justify the faith we place in them? And if we are, is there a better question we could ask to understand institutional wrongdoing?

Lawyers’ involvement in Volkswagen’s deception could plausibly have occurred at one of two points: when the scheme to install the “defeat devices” was put in place, and in 2014-15 when Volkswagen was being investigated by the California Air Resources Board and the Environmental Protection Agency.

At the time the company decided to install the defeat devices, the role of the lawyers would have been advisory, providing some kind of opinion to the company about the legality of its approach. Under one scenario, the lawyers would have advised the company that its scheme was unlawful, but when the company ignored their advice and proceeded with the installation of the defeat devices, the lawyers – respecting solicitor-client privilege – said nothing. Under another scenario, the lawyers advised the company that its scheme was lawful. While one would like to think that no one could plausibly advise that installing devices to fake-out emissions testing is lawful, enough examples of egregious legal advice exist to prevent ruling out that possibility.

At the time the company was dealing with the California and federal investigations, the role of the lawyers would have been as advocates. They would have helped the company develop and implement its “very aggressive” response (as reported by the NYT) to those investigations. They would have facilitated Volkswagen’s attempt to prevent its wrongdoing from being publicly exposed.

How could lawyers have prevented or reduced Volkswagen's deception? Their best chance would be at the advising stage. By providing unequivocal advice that installing the defeat device was unlawful, and taking that advice up the corporate structure, including to the company's board if necessary, they could have involved enough people to make it difficult for the company to proceed with such an unambiguously deceptive course of conduct. And certainly at the advising stage the lawyers could have declined to provide advice that would place a gloss of legality on the company's malfeasance.

At the advocacy stage the lawyers could conceivably have advised the company to cooperate with the investigation, but to do so would have had only a marginal impact; at that point the company had already sold millions of vehicles with the defeat devices installed. Further, it is not at all clear that lawyers ought to decline to provide advocacy for their clients, even when those clients have acted badly. Indeed, providing zealous advocacy for the badly behaved client seems like proper conduct for a lawyer, not improper. That the effect of such advocacy is to impair government investigations does not change the analysis.

The ability of lawyers to prevent Volkswagen's misconduct requires, though, that the company actually ask the lawyers for advice, which it is not obvious that they would have given the pretty clearly unlawful nature of what they did. It also requires that, when asked for their advice, the lawyers be willing to speak truth to power. To tell people at the company on which they economically depend – either as external counsel or in-house – and with whom they may have personal relations, that what they are doing is clearly wrong. And then – if their advice is ignored – to commit the social and professional solecism of calling out wrongdoing by their colleagues and, perhaps, their friends.

Lawyers should do that. In fact, anyone with knowledge of what Volkswagen was doing should have spoken out against it. Not much of a moral compass is required to realize that actively and purposefully deceiving a government regulator *attempting to prevent pollution* is really bad behaviour, and that something ought to be done to stop it.

But how surprised ought we to be that people didn't? We have any amount of evidence – experimental and historical – that most people fail to rise above their moral [circumstances](#). When circumstances and institutional structures encourage bad behaviour, people are more likely to act badly than to act well. We properly assert the lawyer's obligation to respect and facilitate the rule of law, particularly when [advising clients](#). Lawyers not only have a personal moral obligation to address Volkswagen's conduct but also – if they were asked for advice – a professional one. But we should also acknowledge that lawyers are only likely to fulfill those personal and professional duties when circumstances at least somewhat support them doing so. Lawyers have special duties. But they aren't special – they are ordinary people, likely to respond in the ways ordinary people do to the circumstances in which they find themselves. So when a lawyer fears a client's disapproval (or wants the client's approval), where the lawyer works in an environment in which certain kinds of misconduct become normalized or excused, where conformity is valued, or, conversely, creativity in “interpreting” rules is, it is not really that surprising that that lawyer does not act to prevent misconduct, even where satisfaction of his personal or professional obligations should lead him to do so.

This isn't an excuse. Everyone who participated in the Volkswagen deception acted wrongfully. But it is an explanation for the failure of lawyers to prevent wrongdoing, and one that suggests

that when you ask the question, “where were the lawyers?” the answer is almost always going to be: where everyone else was.

Which means that if our goal is to prevent corporate misconduct then asking where the lawyers were isn’t the right question or, at least, isn’t a sufficient one. It focuses on individuals and their professional obligations, rather than on the circumstances in which those individuals acted as they did. And that limited focus will never fully explain the failure of those individuals to meet their obligations.

We have to ask tougher and more intractable questions. About the power structure of the lawyer-client relationship, particularly where lawyers work in-house. About the nature of corporate decision-making, and its potential to encourage or discourage moral conduct. About the potentially corrosive effect that lawyer advocacy has on lawyer advising.

In short, we have to ask not only where were the lawyers, but also about where the lawyers were.

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