

J e n n e s s e e ' s
BUSINESS

Business and Economic Research Center
Jennings A. Jones College of Business
Box 102
Middle Tennessee State University
Murfreesboro, TN 37132

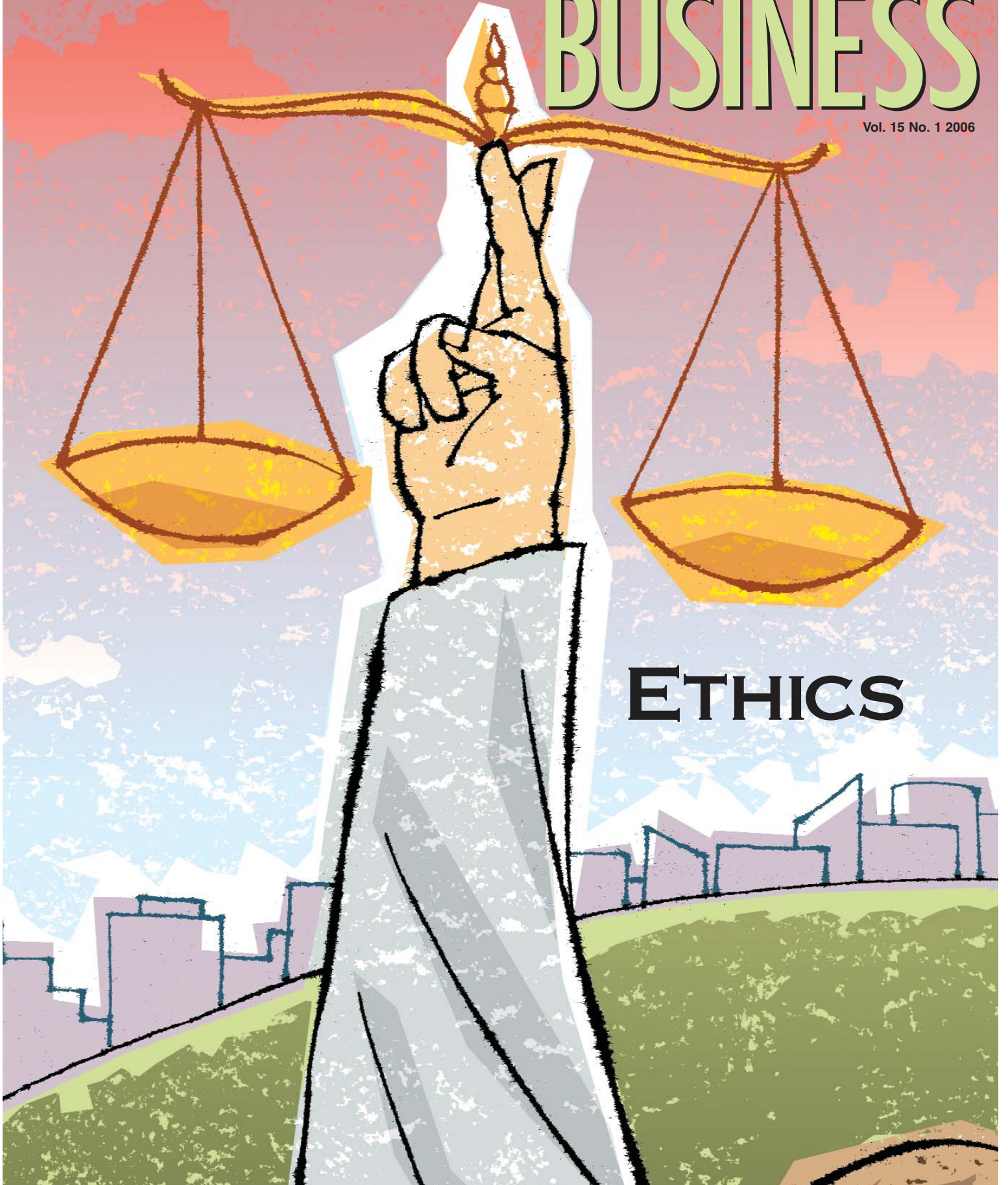
Non-Profit
Organization
U.S. POSTAGE
PAID
Permit No. 169
Murfreesboro, TN



Tennessee's

BUSINESS

Vol. 15 No. 1 2006



ETHICS

Tennessee's BUSINESS

Vol. 15 No. 1 2006

Published by the Business and
Economic Research Center (BERC)
Jennings A. Jones College of Business
Middle Tennessee State University
Box 102
Murfreesboro, TN 37132
(615) 898-2610
kkulp@mtsu.edu

Sidney A. McPhee
President
Middle Tennessee State University

E. James Burton
Dean
Jennings A. Jones College of Business

David A. Penn
BERC Director

Horace E. Johns
Executive Editor

Sally Ham Govan
Creative Director

WEB SITE

View our latest issue online:
www.mtsu.edu/~berc

Tennessee's Business provides an exchange of ideas in the fields of economics and business among businesspersons, academicians, and government officials. The opinions expressed in the articles are not necessarily those of the Business and Economic Research Center, the Jennings A. Jones College of Business, or Middle Tennessee State University, but are the responsibility of the individual authors. The material may be reproduced with acknowledgement of the source. Middle Tennessee State University, a Tennessee Board of Regents university, is an equal opportunity, nonracially identifiable, educational institution that does not discriminate against individuals with disabilities. Send address changes to *Tennessee's Business*, Business and Economic Research Center, P.O. Box 102, Middle Tennessee State University, Murfreesboro, TN 37132, (615) 898-2610, or kkulp@mtsu.edu. AA138-1205

Recipient of the 1991, 1996, 2000, and 2004
AUBER Award of Excellence in Publications

MIDDLE
TENNESSEE
STATE UNIVERSITY

EDITOR'S NOTE

There is lots of talk about ethics nowadays: ethics in business, government, personal dealings, and even the family setting. Unfortunately, much of the discussion centers on a lack of ethical behavior across the board. Have individuals and society in general lost their sense of honest, aboveboard, straightforward behavior? Certainly not entirely, but enough to raise red warning flags everywhere.

Ours has been referred to as the "cheating culture." Cheating is pervasive in many places. It is not unusual for businesses and individuals to cheat on their taxes. It is commonplace for employees to bring home office supplies for personal use. Many students knowingly download Internet music illegally, justifying it as only a minor wrong. Surveys suggest cheating and plagiarism are rampant on college campuses.

The business world has been rocked by ethical failures, most notably Enron and WorldCom. In both cases, investors lost millions of dollars when stock prices fell because of fraudulent financial reporting. Consequently, there has been a growing loss of confidence in America's big businesses.

Ethical failures resemble the addictive process: they start out small and then slowly but surely progress to bigger infractions—with more frequency and more devastating consequences. Ethical breaches also resemble the addictive model in that they are chronic and progressive and end in disaster.

To counter the ethical abuses of corporations, university business schools now routinely teach business ethics courses. These courses are needed to arm students with an ethical framework for making moral as well as legal decisions when they formally enter the business world. However, business ethics courses alone cannot clean up the "cheating culture." Many things have to change; first the higher-ups at a company—the officers and board of directors—need to set the example of ethical responsibility.

Capping off the ethical dilemma is the current nasty image of Tennessee politics. Shocking and disgusting were the arrests last spring of one former and four current legislators on charges of accepting bribes in exchange for their votes on legislation. Most of those cases—as well as the scandals surrounding the Tennessee Highway Patrol—are still pending.

In response to ethical problems in state government, both the governor and the legislature initiated panels to make recommendations. Governor Breiden has called a special legislative session, beginning January 10, to address the matter of ethics. It is difficult to predict what the legislature's final package will be, but surely it will produce some improvement.

It is feared that too much emphasis will be placed on the usual whipping boys: lobbyists who try to influence legislation on behalf of themselves, their employers, or their clients. Lobbyists have a genuine right to advocate their positions to legislators but should do so in an ethical manner. It should not be forgotten that lobbyists do not force legislators or other government officials to do wrong; they are ultimately responsible for their own actions.

The major focus of ethics reform must be on lawmakers. The criteria for reform are simple: set clear rules for lobbyists and legislators, require precise reporting of anything with monetary value, conduct all legislative business in the open, assign a panel independent of the legislature to oversee it, and especially, as often as possible, elect honest politicians to public office.

—Horace Johns, editor

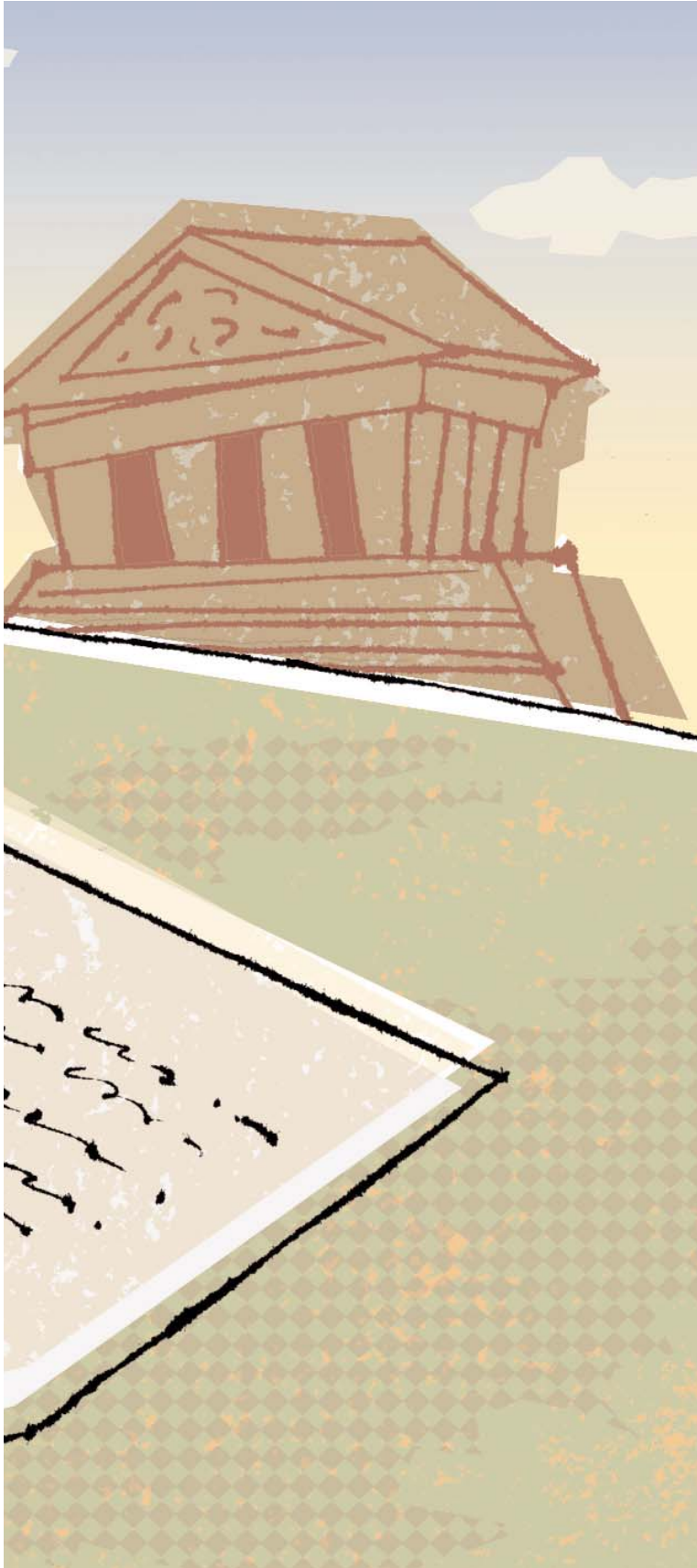
CONTENTS

The Costs of Poor Business Ethics: Sarbanes-Oxley Three Years Later <i>Kevin L. James</i>	2
Teaching the Importance of Being Ethical <i>M. Jill Austin</i>	6
Resisting Temptation: Sentencing Guidelines <i>Gary M. Brown</i>	10
Just Another Day at the Office: The Ordinarity of Professional Ethics <i>Don Welch</i>	14
The Road More Traveled: Illegal Digital Downloading <i>Timothy N. Tappan</i>	20
Tennessee Government Ethics <i>Joseph Sweat</i>	24
The Dean's View: Thoughts on Ethics in the Education of Business Leaders <i>E. James Burton</i>	28

THE COSTS OF POOR BUSINESS ETHICS: SARBANES-OXLEY THREE YEARS LATER



Artville



Congress passed sweeping legislation to regain investors' confidence in American business and promote economic recovery—but at what cost?

by Kevin L. James

The Sarbanes-Oxley Act has been called the most significant legislation to impact corporate business since the Securities Acts of 1933 and 1934. It is interesting to note that the business climate during the 1920s was not unlike that of the 1990s. At that time, American business experienced a significant surge in growth. Easy credit gave consumers the opportunity to buy beyond their means and gave investors the opportunity to buy stocks on margin, allowing them to invest beyond their means as well. There was much speculation in the stock market, causing stock prices to soar to unprecedented heights. However, economic growth came to a dramatic halt with the onset of the Great Depression. While failures in business ethics did not necessarily cause economic collapse during the 1920s, they certainly exacerbated the effects. Large investors frequently took advantage of small investors due to an absence of laws preventing such acts and the lack of enforcement of laws that did exist. Seeing that one critical part of economic recovery was regaining the investors' confidence in American business, Congress passed sweeping legislation to protect investors.

History has, in a sense, repeated itself. In the 1990s, our nation once again experienced significant economic growth, easy credit access, and unprecedented stock prices. When economic growth ended, failures in business ethics once again caused investors to lose faith in American business. This time, ethical failures came mostly in the form of corporate managers taking advantage of investors in the company. Some managers manipulated company earnings reports in efforts to boost stock prices. These artificially elevated stock prices not only provided job security but often significant compensation from incentive bonuses or exercised stock options. Other managers used huge amounts of company funds for personal spending. Many examples can be cited: Adelphia Communications, HealthSouth, Tyco, Sunbeam, and others.

The most significant recent frauds were Enron and WorldCom. As in the 1920s, Enron gave rise to overwhelming public sentiment that American "big business" would take advantage of the small investor. Many Enron investors lost their retirement savings while wealthy company managers withdrew their investments before stock prices plummeted. Just months later, internal auditors at WorldCom uncovered the largest corporate fraud in the history of American business, ultimately uncovering \$11 billion dollars in financial reporting misstatements. Once again, investors lost millions of dollars as

continued on page 4

continued from page 3

stock prices fell. The resulting dearth of investor confidence led Congress to pass sweeping legislation intended to protect the investing public. The result was the Sarbanes-Oxley Act of 2002 (SOX or “the act”).

The scope of SOX is great enough that space here does not allow for a full discussion of its provisions. One key impact was the formation of the Public Company Accounting Oversight Board, a five-member board that has assumed authority for setting standards for firms that audit public companies and performs independent inspections of the quality of their audits. The act also includes provisions to enhance the independence of public company auditors and directors who provide oversight of financial reporting. Regulations on the public companies themselves include requirements of senior management to certify the accuracy of published financial reports and to assess and document the effectiveness of internal controls.

Three years have passed since the act was approved, and it remains quite controversial today. While no one refutes the fact that the act has benefits, many have questioned whether the benefits outweigh the significant costs. Some believe the act was passed too hastily in response to highly publicized corporate frauds and that Congress did not fully consider the costs. Indeed, actual costs have been billions of dollars greater than the initial SEC estimate of less than \$1.5 billion. Whether you deem the costs or the benefits to be greater, SOX provides a case study of just how great the cost of poor business ethics can be to all relevant constituents.

Costs and Benefits for Investors

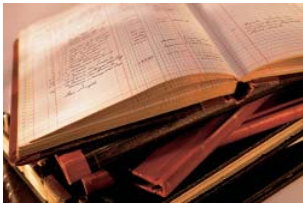
SOX was passed primarily to protect investors by providing reliable financial reporting. Many factors suggest that it has succeeded in doing that. From an investor’s standpoint, we have seen many benefits of SOX. Corporate governance has improved as audit committees and boards of directors meet more frequently and for longer periods of time. Internal auditors have experienced increased funding and staffing. They have also been given greater access to audit committees, allowing them more opportunity to announce financial reporting concerns. Company controls and financial records have been subjected to much greater scrutiny by external auditors, providing additional investor protection.

As for corporate managers, they are much more focused on accurate financial reporting than before the act. Charles River Associates studied a sample of Fortune 1000 firms and found that the average sample company remedi-

ated 271 control deficiencies prior to issuing financial statements as a result of the SOX-required internal control assessment.¹ While most of these deficiencies were minor, their collective remediation undoubtedly caused a significant boost in overall control effectiveness. In a separate study by Oversight Systems, 79 percent of financial executives surveyed said their internal controls have improved as a result of compliance with SOX. About one-third of managers also said SOX reduces the risk of financial fraud, reduces errors in financial operations, and improves the accuracy of financial reports.² Such results provide direct benefits to company shareholders.

How much investors are sacrificing to receive these benefits is unclear. While the Oversight Systems survey suggested many benefits, 33 percent of respondents stated that SOX compliance created a cost burden that suppresses stock prices, and 14 percent believed compliance costs decreased their ability to pay out dividends. Also, there is some evidence that the act may decrease investment options. Many smaller public companies are considering going private or selling their businesses to larger public companies to escape the high costs of the added regulations.³ Finally, a study by Financial Executives International (FEI) suggests that 44 percent of companies disclosing control weaknesses change audit firms, often from a Big Four firm to a smaller one. This trend causes some concern for investors because of the large number of resulting first-year audits. Research suggests that lower familiarity with client operations in the first year of an audit may actually lower the likelihood of detecting errors and fraud. Also, in the case of larger clients, one might question whether smaller firms have adequate resources to perform the audit as effectively as a Big Four firm.

Furthermore, some benefits come with negative impacts. For example, it is beneficial that management is more focused on internal controls, but there is some risk that managers may become so focused on controls that they experience some distraction from business operations. Some also posit that the act has made management overly conservative. Indeed, some evidence is beginning to suggest that capital expenditures and research and development spending are both down since inception of the act.⁴ Such undesirable effects are likely to hinder long-term business growth. Moreover, boards of directors exercising greater power may also increase conservatism because directors now bear greater risk if corporate risk taking fails but receive little reward if it succeeds. In the end, unwillingness of companies to take risk may result in lower overall returns for investors.



SOX was passed primarily to protect investors by providing reliable financial reporting. Many factors suggest that it has succeeded in doing that.

Costs and Benefits for U.S. Companies

Most feedback on SOX from U.S. companies has focused on the costs of the act. Indeed the costs have been great, amounting to billions of dollars more than initially anticipated. Many of these costs represent outlays to document internal controls, test their effectiveness, and strengthen control weaknesses. For many companies these outlays have included significant payments to software providers and consultants in addition to diverting thousands of hours of employee time from normal duties to work on SOX compliance. Additional controls testing by auditors also increased audit fees by an average of 61 percent.⁵ Average first-year costs for the internal control provision of SOX have been calculated at \$3.1 to \$8.1 million depending on the size of the company.⁶ Furthermore, corporate board members now demand higher compensation as a result of additional time spent and additional risk taken: average annual director fees have increased 43 percent from the pre-SOX era for S&P 500 companies. Insurance and training costs have also increased for both directors and company officers. Overall, Foley and Lardner estimate SOX has increased the cost of being a public company by \$4.4 million (45 percent) from 2003 to 2004 alone.⁷

Despite these costs, more than half of financial executives say that SOX compliance was a good shareholder investment and that they would keep the costly internal control provisions if they were members of Congress.⁸ This may be in part due to expectations that costs will decrease because many internal control deficiencies found in the first year of testing have now been corrected. Many companies also believe they can decrease the costs of testing controls through the use of automation and/or by applying an approach that will focus on areas of higher risk. Nonetheless, Foley and Lardner report that an overwhelming majority of executives (82 percent in their study) believe corporate governance and public disclosure reforms are too strict.

Cascade Effects on Private and Nonprofit Organizations

When SOX was passed, Congress clearly stated that the intent was to impact only public companies. However, three years later, the act has significantly impacted private companies and nonprofit organizations. In one survey, 87 percent of private companies and 97 percent of nonprofit organizations said they had been impacted by the act.⁹ Many organizations indicated that implementation of selected SOX provisions was self-imposed in efforts to maintain high credibility in an environment where public confidence is low. For nonprofits implementing

SOX provisions, ensuring continued community and government support was a priority. Some organizations stated that implementation was not self-imposed but that they were forced to adopt certain reforms by auditors, lenders, and state governments. Regardless of the cause, these organizations have mostly adopted the less expensive provisions of the act like CEO/CFO certifications as opposed to expensive internal control assessments. Nonetheless, these organizations reported a 34 percent increase in corporate governance costs as a result of SOX-related measures. About 28 percent of responding organizations believed that the costs of these measures outweighed the benefits.

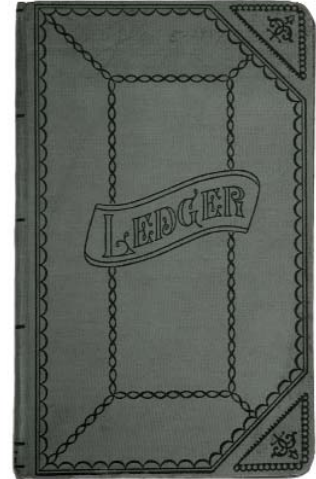
Conclusion

Is the Sarbanes-Oxley Act worth the costs? This question is likely to be debated for some time. Many believe that while the costs are huge the benefits are much greater. In contrast, a large majority of financial executives believe the act needs to be revisited.¹⁰ Former U.S. Senators Bob Dole and Tom Daschle also have publicly called for revisions to reduce the costs of the act. They believe this can be done without sacrificing the benefits.¹¹ Regardless of the final assessment of the act, the costs that have resulted from failures in business ethics have been and continue to be tremendous, and they negatively impact all constituents involved. To the extent that American business can find ways to prevent future ethics failures and not repeat history, billions of company and investor dollars will be saved. ■

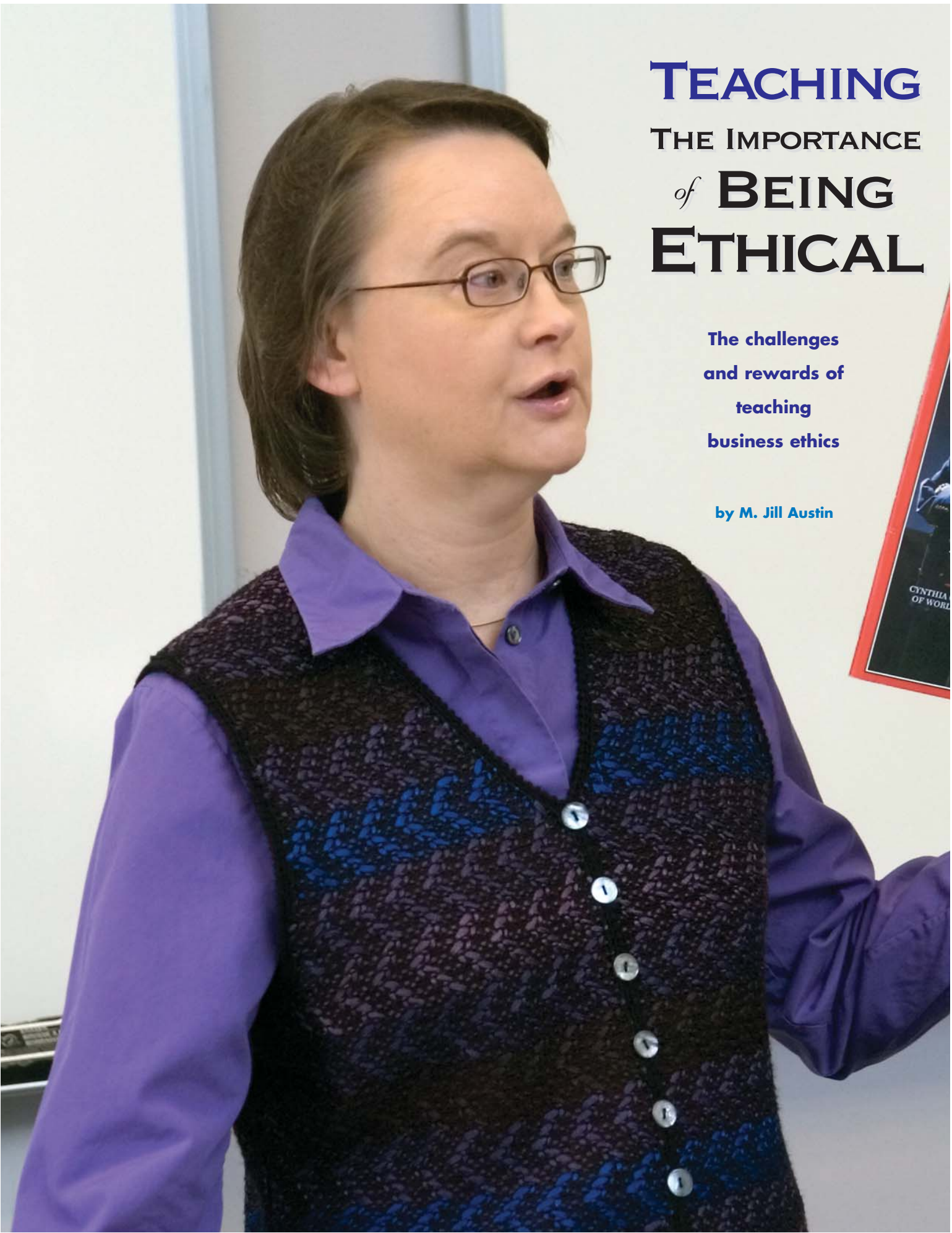
Kevin L. James, assistant professor of accounting at MTSU, coordinated the campus speaking engagement of Cynthia Cooper, WorldCom whistleblower, in academic year 2004–2005.

Notes

1. Charles River Associates. *Sarbanes-Oxley Section 404 Costs Remediation and Deficiencies: Estimates from a Sample of Fortune 1000 Companies*, April 2005.
2. Oversight Systems, Inc. *The 2004 Oversight Systems Financial Executive Report on Sarbanes-Oxley*, 2004.
3. Foley and Lardner, LLP. *The Cost of Being Public in the Era of Sarbanes-Oxley*, June 2005.
4. Hermanson, Dana. "Is the Sarbanes-Oxley Act Worth the Cost?," *Internal Auditing*, July/August 2005.
5. Foley and Lardner, June 2005.
6. Financial Executives International. *Special Survey on Sarbanes-Oxley Section 404 Implementation* (www.fe.org).
7. Foley and Lardner, June 2005.
8. Oversight Systems, 2004.
9. Foley and Lardner, LLP. *The Impact of Sarbanes-Oxley on Private and Nonprofit Companies*, March 2005.
10. Oversight Systems, 2004.
11. Dole, Bob, and Tom Daschle. "Let's Reform the Reforms." *Wall Street Journal*, October 3, 2005.



Despite these costs, more than half of financial executives say that SOX compliance was a good shareholder investment and that they would keep the costly internal control provisions if they were members of Congress.



TEACHING
THE IMPORTANCE
of **BEING**
ETHICAL

The challenges
and rewards of
teaching
business ethics

by M. Jill Austin

CYNTHIA
OF WORD



Dr. M. Jill Austin teaches a business ethics course at Middle Tennessee State University.

Business ethics courses became popular at universities in the late 1980s and early 1990s due to ethical abuses of major corporations such as the Union Carbide of India disaster; the Exxon oil spill; and insider trading scandals by Ivan Boesky and Michael Milkin. In recent years, leaders of companies such as Enron, World-Com, Tyco International, and Health-South have found themselves in ethical trouble. Critics may suggest that the recurrence of widespread business ethics abuses means that ethics cannot be taught. Another explanation is that since business ethics courses were not part of the curriculum for most current business leaders, these leaders' unethical deeds do not prove (or disprove) whether business ethics can be taught.

What Teaching Ethics Means

Teaching business ethics does not mean an instructor tells students what is ethical and unethical. Rather, instructors provide information and ask questions so students can think through all sides of business ethics questions. This process allows students to evaluate business ethics concepts and determine how they fit into their values and how these values can be part of their business lives. Research shows that individuals' values continue to develop while they are students in a formal education process (King and Mayhew, 2002), so business ethics courses should have some impact on future business leaders' ethics decisions. At a minimum, thinking about ethics issues serves to broaden students' understanding of the complex issues that are part of business decision making.

Most college students have developed a strong sense of values before they enroll in a college business ethics class. Values such as honesty, integrity, fairness, and care for others have been instilled in students by parents, friends, religious institutions, school systems, and a variety of other sources. Some students are more highly developed ethically, and a business ethics class will likely reinforce the good values that have been instilled in these students during their formative years. Other students may not have strong ethical values or may hold negative values.

Hopefully, a business ethics class will cause these students with fewer positive values to question some of their values—and to establish some new ones. Every student in a business ethics class will likely learn something different from the class experience. If the semester of ethics instruction is successful, students will understand the value of incorporating ethics into business decisions and will be thinking about their own values and how appropriate or inappropriate they are for ensuring successful business careers. It is naïve to believe that every student in every business ethics class will make perfectly ethical decisions in every situation. However, an ethics class will certainly provide an opportunity for students who want to contribute positively to a business to learn how they can do so.

Two Hurdles for the Instructor

Business ethics instructors face two challenges when they teach business ethics courses. The first is that students separate business ethics from their personal values. Many students have the idea that business ethics is somehow different from everyday ethics. They believe they must do whatever is needed by the business to be successful, whether or not the action is against their personal values. It seems impossible to be a person with two sets of values—one for work and one for home. Helping students understand that their personal values can be in sync with their work values provides students with a framework for thinking about business ethics. Students generally have definite ideas about what it means to be an honest person, to have integrity, to treat others with respect, to be fair, etc. These strongly held personal values can be translated into business ethics discussions when students understand that it is important to factor ethics into their business decisions.

A second challenge for faculty members teaching business ethics is convincing students that there are other objectives of business besides maximizing profit. Since students take many business classes that focus on profit maximization, they get the idea that this is the only consideration of business. Making the case that profit maximiza-

continued on page 8

A second challenge for faculty members teaching business ethics is convincing students that there are other objectives of business besides maximizing profit.



Dr. M. Jill Austin (standing, center) talks to students (seated clockwise) Patrick McLennan, Susan Miller, Joyce Bryant, Ryan Florida, Teresa Morris, and Nick Elledge.

continued from page 7

tion is not the only objective of business and that business has many stakeholders other than stockholders is sometimes difficult. Businesses stakeholders include not only stockholders but also customers, employees, suppliers, and the community. Business leaders who only consider profit may not earn as much profit as they might if they made decisions that are ethically right for ALL stakeholders. Some ethics experts suggest that if companies will concentrate on satisfying the stakeholders, profits will take care of themselves. Once students understand the concept of competing needs of stakeholders, it is easier for them to see that profits are not the only consideration of business.

Goals of a Business Ethics Class

Faculty who teach business ethics may cover different examples of ethical and unethical behavior, but there are some common goals for a business ethics class. One of the primary goals is to make students aware of ethics challenges and considerations faced by business employees. Through class discussions and assigned readings, students will hear about many unethical and ethical business actions they did not know about before the class. Exposure to information and company examples should help students learn how to identify potential ethical dilemmas before they become involved in unethical behavior. Additionally, students will learn patterns of behaviors that

lead to ethical business activities through company examples and may be able to organize their workplace around some of these ethical business activities. One of the most important goals of a business ethics class is to teach students how to think through an ethical dilemma and learn how to make judgments about what is ethical. Philosophical theories can be used to explain how students can think through issues of individual rights, justice, and what is best for society related to ethics issues.

Final Thoughts

Whether students take a separate business ethics class or ethics topics are discussed in several business classes, it is important that business students be exposed to this topic during their college coursework. Since it appears to be a demand of society and most businesses to increase the number of ethical business people and reduce the number of unethical activities by business leaders, there must be some formalized training in ethics. Ethics training can and should occur on the job, but if the goal is to instill in business employees a desire and the skills to factor ethics into business decision making, college is the optimal time to offer initial ethics training.

References

King, P.M., and M.J. Mayhew. 2002. "Moral Judgment Development in Higher Education: Insights from the Defining Issues Test." *Journal of Moral Education* 31(3): 247–270.

MTSU Photographic Services

MY PHILOSOPHY AND APPROACH

When I first developed an undergraduate business ethics course in 1989, I struggled with how to teach the course and how to determine what types of business examples and topics should be discussed. After studying the discipline for more than 16 years and making adjustments during that time, I now organize the class around three general topics:

- definition of business ethics,
- process for making ethical decisions, and
- ways companies institutionalize ethics.

It usually takes about a month (eight to 10 classes) of discussions to convince students that business ethics is a topic worthy of study and to define the subject in a meaningful way. These conversations typically include discussions of individual values, stakeholders, why employees feel pressure to make ethics errors, and whether businesses have an obligation to give back to the community. We discuss utilitarian theory, deontological theory, virtue theory, relativist perspective, and justice to learn the process for ethical decision making. After students understand the importance of, and have a framework for, making ethical decisions, we discuss ways companies institutionalize ethics, such as codes of ethics, social audits, ethics training programs, and ethical advocates.

Course materials assigned during the class include current readings of magazine articles, a business ethics textbook, and several business ethics cases. While I frequently discuss company actions during classes to illustrate course topics, I focus on 10 to 12 cases each semester. Some of these cases are “classics” such as the Exxon oil spill, Ford Pinto case, and Union Carbide of India disaster while other cases are more recent (WorldCom, Enron, Tyco International, HCA, etc.). I make a conscious effort to discuss companies that have a good reputation for ethical behavior such as Hershey Foods and Levi Strauss. While company managers do not make perfectly ethical decisions all of the time

because human beings are not perfect, I believe it is important to help students understand that the majority of companies have managers who want to do the right thing and do not plan for their businesses to be involved in unethical activities. In addition to these discussions, students learn effectively from short videos on topics such as telling the truth, social responsibility, and sexual harassment. Web sites that include ethics cases and provide examples of ethics issues are useful, as are reviews of company Web sites that provide evidence of a firm’s corporate philanthropy, code of ethics, or social audit.

In discussing these topics, we try to look at all sides of the issues. For example, if the class is discussing the alternative that it is not acceptable for an employee to take the \$20 lunch reimbursement if he did not have lunch, I will challenge their view by making the opposite case that taking the reimbursement is acceptable and expected since the company offers the reimbursement without requiring receipts. Students understand that I will not tell them how to think about an issue and that our discussion of all sides provides information that helps them determine what is ethical. While I really hold the same view as the students in the example above related to the reimbursement of expenses, I think they can learn more effectively when they have to convince me what is ethical. Of course, I guide students’ thinking and discussions in situations where they are leaving out relevant points. Finally, students practice—by defining ethics issues, deliberating on all of the issues that should be considered in specific ethical dilemmas, and articulating their case for what is ethical. It is rewarding to teach this class, and I strongly believe that students learn to be effective business ethics decision makers by taking such a course. ■

M. Jill Austin, department chair and professor of management, teaches business ethics at Middle Tennessee State University.

Some of these cases are “classics” such as the Exxon oil spill, Ford Pinto case, and Union Carbide of India disaster while other cases are more recent (WorldCom, Enron, Tyco International, HCA, etc.).

Hershey Foods has a good reputation for ethical behavior.



RESISTING TEMPTATION:

Regulations written to implement one little-noticed section of Sarbanes-Oxley require com

by Gary M. Brown

On November 1, 2004, a delayed consequence of the Sarbanes-Oxley Act took effect—the U.S. Sentencing Commission’s Sentencing Guidelines revising the elements of and heightening the need for corporations to implement compliance and *ethics* programs. Yes, you read correctly—ethics.

This action, while not widely noticed, offered more potential for reform than past regulatory efforts. As history shows, laws alone are not enough. Companies need to practice genuine ethics as well.

Ironically, these changes took effect as reports surfaced about something that would have been unthinkable just two years before—challenges by business to the rule making of and intensified scrutiny by the Securities and Exchange Commission. This push-back took place as the number of high-profile corporate scandals was beginning to diminish and memories of prior scandals were beginning to fade.

Some suggest that Sarbanes-Oxley and the plethora of resulting regulations are putting an unreasonable regulatory burden on American corporations. Indeed, Hank Greenberg, former chief executive officer of AIG, was one of the more vocal critics of today’s increased regulatory scrutiny (until recently), referring to some of the new regulations as “foolishness.” (AIG has since faced scrutiny by the SEC, the Justice Department, and the New York attorney general.)

No one (perhaps not even Greenberg) would argue, however, that some exceedingly bad actors caused many of the spectacular corporate failures in recent years.

Regulatory Dèjà Vu

Controversies over corporate ethics are nothing new, and neither are efforts to solve the problem through legislation. Consider the following findings of a Senate committee investigating a stock market crisis:

- “Self-dealing and outright fraud (not the least of which involved a gigantic, rapidly growing energy operation)

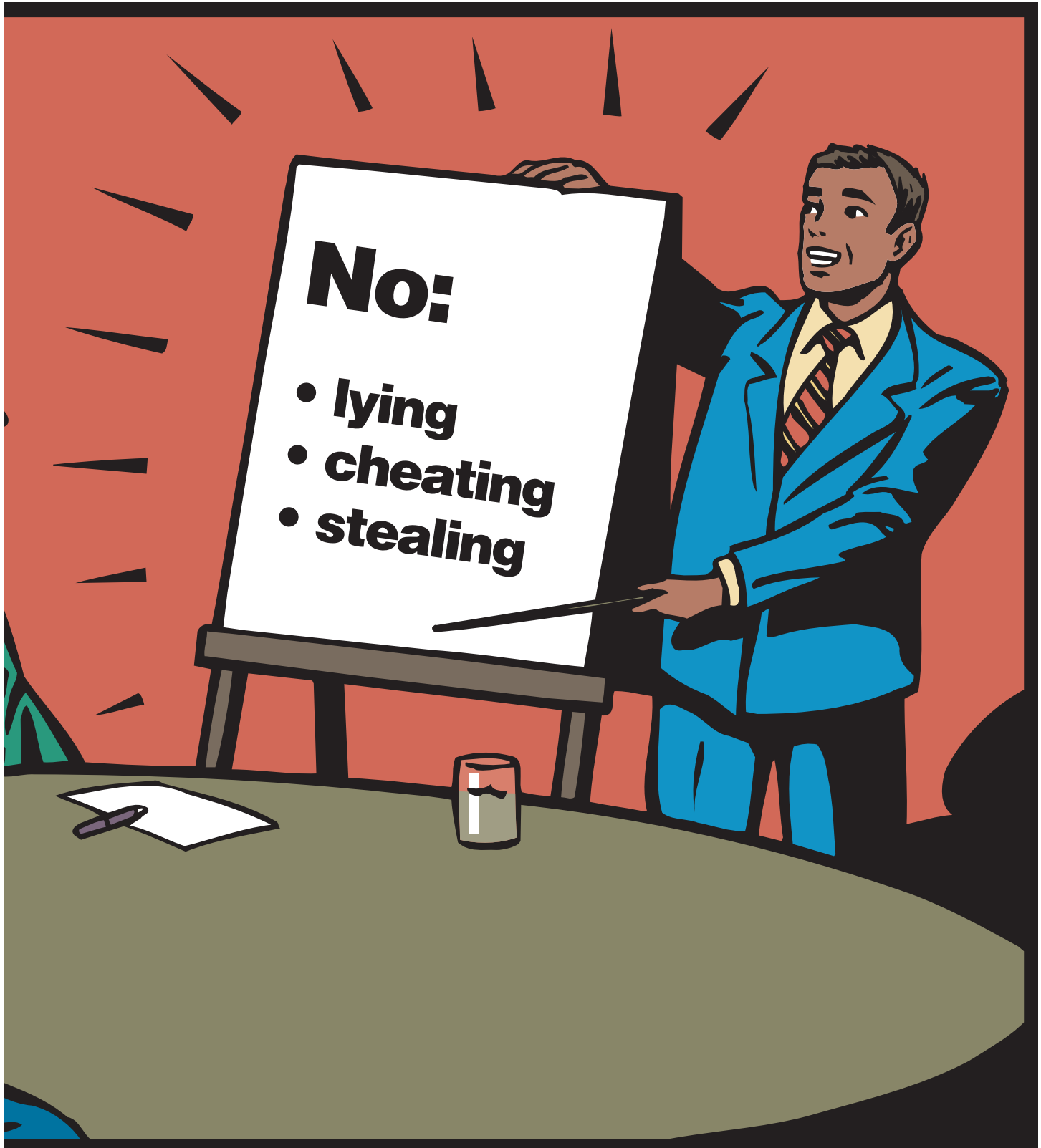
continued on page 12



Arville

SENTENCING GUIDELINES

panies to establish compliance *and ethics* programs, offering greater potential for reform.



have become associated with erosion of the stock market.”

- “Leading Wall Street investment banks are under fire for their lending and investing practices, including transactions designed to allow companies to misstate their financial results.”

These findings are not from the 2002 investigations of Enron; they are from a 1932 Senate committee that investigated the causes of the 1929 stock market collapse. (The energy company then was run by Samuel Insull.) This 1932 investigation resulted in passage of various laws that 70 years later form the backbone of the federal securities law scheme.

Consider another quote about the anxieties of corporate officers and directors over “the act”:

- “This consternation can be attributed, in significant part, to the spectre which some commentators have raised of exposure to enforcement action, and perhaps criminal liability, as a result of technical and insignificant errors in corporate records or weaknesses in corporate internal controls.”

This statement is not referring to Sarbanes-Oxley. It is from the 1979 SEC policy statement on the Foreign Corrupt Practices Act, a major piece of post-Watergate legislation. The act resulted from the “most devastating disclosure” ... “the fact that, and the extent to which corporations falsified entries in their own books and records.”

That falsification resulted in the accounting provisions of the Foreign Corrupt Practices Act, which require that all public corporations maintain a system of internal controls to ensure that transactions are recorded in accordance with management’s authorization and that the corporation’s assets are safeguarded.

And what did the SEC indicate was the “most effective antidote” to these problems? An “increase in the numbers and responsibility of independent directors” and “effective audit committees composed of independent directors.”

So 25 years after passage of the Foreign Corrupt Practices Act, what happened? Alan Greenspan, chairman of the Federal Reserve, offered his opinion: “The historical guardians of financial information were overwhelmed.”

One of these groups of guardians was the supposedly independent directors whose job it was to police management. They didn’t, and management, left unsupervised, succumbed to human nature. Greed and self-interest overcame ethics and judgment, resulting in several top

corporations—Enron, WorldCom, HealthSouth, Tyco, and ImClone—becoming bywords for business corruption.

Sarbanes-Oxley addressed many of the perceived failings of directors. In areas in which directors failed to perform critical tasks or exhibited an inability to appropriately exercise discretion, Congress did the jobs for them (CEO/CFO certifications of financial statements) or removed their discretion (prohibition on personal loans to directors and officers).

Perhaps the most mentioned and criticized section of Sarbanes-Oxley, however, is Section 404, with its requirement that auditors attest to companies’ internal controls. Significantly, Sarbanes-Oxley did not mandate a single additional internal control. It simply required an audit of the controls that had been mandated by the Foreign Corrupt Practices Act some 25 years earlier.

So why is there director anxiety about Sarbanes-Oxley? Although these fears exist, some say convincingly that neither the act nor any resulting regulation has increased directors’ liabilities. This view has been stated publicly by high-level SEC officials and reaffirmed recently in the *Disney* decision by the Delaware Chancery Court.

Yet the directors know from history that businessmen stumble, scandal occurs, and prosecutors come calling.

Requiring Corporate Ethics

Congress knows this, too. And that’s why the regulations written to implement one little-noticed section of Sarbanes-Oxley offer something new not only to cause concern in the boardroom but to further empower directors in their oversight role.

Section 805 mandated a review of the Sentencing Guidelines to ensure that “the guidelines that apply to organizations . . . are sufficient to deter and punish organizational criminal conduct.” Revisions to the organizational guidelines took effect November 1, 2004. Although the Supreme Court struck down as unconstitutional the guidelines’ mandatory sentence enhancing provisions, the provisions relating to compliance and ethics programs remain and are likely to persist through any revisions.

The guidelines now focus on the establishment of “effective compliance *and* ethics” programs. Compliance alone now is not enough: companies must consider an additional factor—ethics—in the establishment of such programs. Furthermore, as indicated in §8B2.1 of the Sentencing Guidelines, a *precondition* to an effective compliance and ethics program is promotion of “an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”

**Significantly,
Sarbanes-Oxley did
not mandate a
single additional
internal control. It
simply required an
audit of the controls
that had been
mandated by the
Foreign Corrupt
Practices Act some
25 years earlier.**



Of great importance to boards is the guidelines' requirement that a compliance and ethics program be overseen and implemented by a company's "governing authority" (i.e., its board of directors). The board is required to be knowledgeable about the content and operation of the compliance and ethics program. It must exercise reasonable oversight regarding the implementation and effectiveness of the program.

Additionally, the board must appoint "high level personnel" (policymaking individuals) to oversee compliance. It must use reasonable efforts not to include within the "substantial authority" group (those having substantial discretionary authority) individuals who are known (or should be known) to have engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.

Other elements of an effective plan include periodic communication about standards and "effective training programs" for all employees (including the board of directors). The organization must take reasonable steps to ensure compliance, including monitoring and auditing to detect criminal conduct. It must periodically evaluate the effectiveness of the ethics program, and it must publicize a system whereby employees may report potential criminal conduct without fear of retaliation.

Finally, any program needs to be *consistently* enforced and promoted through "appropriate incentives" to comply with the program and "appropriate disciplinary measures" for noncompliance or for failing to take reasonable steps to prevent or detect criminal conduct.

These new guidelines address the root cause of many of the corporate failures of recent years—ethical laxity among corporate executives. They are meant to address the real deficit that confronts corporate America—the trust deficit, the substantial loss of trust in corporations and their executives by the public and investors.

Unfortunately, Kenneth Lay and Jeffrey Skilling may not be mere anomalies of the corporate world. They may be products of a poisoned corporate society over which corporate directors must now exercise more oversight.

The Corporate DNA

Commentators, puzzled by Skilling's actions at Enron, ask, "How could a Harvard MBA act so unethically?"

But it's not the MBA—it's the DNA. This is what former SEC Chairman William Donaldson addressed in early 2003 when he stated: "In my mind, the most important thing that a board of directors should do is determine the elements that must be embedded in the company's moral

DNA.... It should be the foundation on which the board builds a corporate culture based on a philosophy of high ethical standards and accountability. This culture should penetrate every level of the organization and influence all of the board's decisions including the selection of a CEO and the senior management team who will ultimately ensure that the company's operations reflect its philosophy."

The Securities Act of 1933 and the Securities Exchange Act of 1934 did not prevent fraud. Neither did the Foreign Corrupt Practices Act. Nor will the Sarbanes-Oxley Act of 2002 or the rules and regulations it mandated. At most, increased criminal penalties perhaps will cause executives to think twice before engaging in questionable activities.

Ethics is a hard thing to monitor. When seemingly *de minimis* ethical and compliance violations are overlooked, the ethical alarm bells don't sound. That is why adherence to the ethics and compliance requirements of the organizational guidelines will require more than a "check the box" approach.

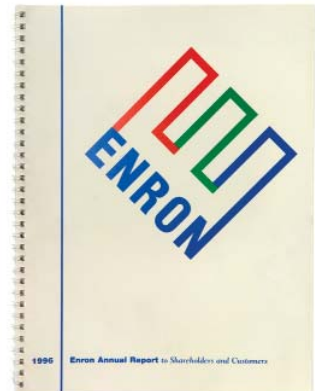
Enron, for example, had an "award winning" 60-page-plus code of ethics, key provisions of which were waived to allow Andrew Fastow's off-the-books partnerships. Whenever the provisions of a code of ethics are set aside, management must stop and challenge the basis for such decisions.

Corporate directors must now be sure to set the "tone at the top." They must require that high ethical standards be a part of each company's culture. Effective codes of ethics must be "living" documents rather than mere framed pieces of paper hanging on corporate walls. They must be encouraged and valued at the highest levels of management. They must be embodied in the decisions made every day by people throughout the corporation. Even *de minimis* ethical violations cannot be sanctioned.

Had directors of some of the failed companies been more vigilant, would things have been different? Some prefer to think so. ■

Gary M. Brown is a shareholder in the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, where he chairs the firm's corporate department. Former special counsel to the Senate Committee on Governmental Affairs in the investigation into the causes of the collapse of Enron, Brown is the general counsel to the Ethics Officer Association and counsels boards on regulatory compliance and corporate governance. Brown can be reached at gbrown@bakerdonelson.com.

© 2004 ALM Properties Inc. This article is reprinted with permission from Legal Times.



Corporate directors must now be sure to set the "tone at the top." They must require that high ethical standards be a part of each company's culture.

JUST ANOTHER DAY AT THE OFFICE

Should "professionals" have a different standard of ethics than the rest of us?

by Don Welch



Much of the recent work in professional ethics has focused on the distinctiveness of the ethics of the professions. Alan Goldman has described the view that professional duties must override what would otherwise be moral obligations because special norms and principles should guide a professional's conduct.¹ We've been told that professionalism embodies a standard of good conduct other than the norms of morality that ordinarily govern relations among people.² Often the claim is not that professionals must meet the same moral standards as the rest of us and go beyond those but that their distinctive moral standards may conflict with the requirements of "ordinary morality."³

A prevailing assumption among many professionals is that they are called on to conform to ethical standards "higher" than those that apply to ordinary people.⁴ Professional morality places its values "at a higher position in the ethical hierarchy. It gives them greater ethical importance than does ordinary morality."⁵ On reflection, however, it is not at all clear what "higher" means. Consider one statement of the ethical meaning of professionalism:

In ethical terms, to be a professional is to be dedicated to a distinctive set of ideals and standards of conduct. It is to lead a certain kind of life defined by special virtues and norms of character.

And it is to enter into a subcommunity with a characteristic moral ethos and outlook.⁶

Because of these presumably distinctive ideals and standards, it is argued, professional ethics may sometimes justify, even require, a practitioner to do something different

than what would otherwise be morally obligatory. This approach "implies that the rules which decide what is ethical for ordinary people do not apply equally, if at all, to those with social responsibility."⁷ These standards clearly establish a certain immunity for professionals from the moral requirements placed on "laypeople"; we shall return to the question of whether they are "higher."

The standards that are to govern the work of professionals are often written into canons or codes of professional ethics, which Michael Davis describes as conventions among professionals that are produced when an occupation becomes a profession. "What conscience would tell us to do *absent* a certain convention is not necessarily what conscience would tell us to do *given* that convention."⁸ The existence of such professional codes as well as conventions that take other forms means that professionals are not permitted to engage in the weighing of interests and factors that is allowed by ordinary morality.⁹ Therefore, they are, to an extent, exempt from judgment based on moral standards

outside the particular subcommunity that has its own distinctive moral ethos.

Given this heightened status accorded to professional ethics, it is understandable that entry into the club of professionalism is quite desirable. To the long-accepted entries of such occupations as law and medicine have been added such areas as engineering, accounting, nursing, social work, journalism, management, education, policy analysis, and scientific research.¹⁰ The insistence of many occupational groups that they, too, be recognized as "professionals" has led one commentator to fear that the label "professional" is being threatened with evacuation of its meaning.¹¹

Those who have been writing about the unique qualities and characteristics of professional ethics are themselves professionals. It is not surprising that, writing from their particular standpoints, they view their own moral dilemmas as different from and more noteworthy than those faced by the masses. The sense one gets from reading much of the professional ethics literature is that, compared to the world of ordinary ethics, the demands placed on professionals are more compelling, the reasoning required of them is more sophisticated, and the compromises they make are morally superior. I am convinced, for the reasons stated below, that the distinctions are overdrawn.

Stephen F. Barker has attempted to establish the distinctiveness of professional ethics while avoiding the idea that professional obligations are more demanding and harder to comply with than those of nonprofessional occupations.¹² He identifies three features that distinguish professional ethical ideology from nonprofessional ideology: (1) the ethical ideology of a profession does not stem merely from a business contract between employer and employee; (2) this professional ethical ideology involves requirements that those in the occupation have largely agreed to impose on themselves; and (3) this ideology includes an ethical ideal of service to society.¹³

A focus on the employer-employee contract, however, narrows the inquiry much too quickly. Certainly not all self-employed people are inherently more professional than all salaried people. It is true that professional obligations do not stem "merely" from an employer-employee business contract. But, as Barker recognizes, many professionals are employees and so some of their obligations *do* stem from such contracts. Further, it is also the case that all of the obligations of nonprofessionals cannot be traced to such an employer-employee contract.

Barker gives the following example in his comparison of nonprofessional firefighters and professional physicians to illustrate the distinctiveness of the noncontractual professional obligation: "[I]t will be unethical for the physician publicly to endorse medicines or treatments which have no proven medical value, though nonphysicians may do this blamelessly."¹⁴ If one agrees with this conclusion, it is only because of the distinctive content of the practice of medicine, not because of some generalized sense of the distinctive nature of professional obligation. I would argue that a parallel obligation *does* apply to the firefighter: that it would be unethical for a firefighter who is making a presentation in an elementary school classroom during fire prevention week to endorse fire safety practices that are not safe.

We need to avoid taking the position that professionals impose upon themselves obligations to serve society in ways that nonprofessionals do not because the only ethical obligations non-



THE ORDINARINESS OF PROFESSIONAL ETHICS

professionals have is to adhere to their employee contract. Confining the moral obligations of nonprofessionals to those embodied in such a contract is overly restrictive. Certainly there are firefighters, cafeteria workers, construction workers, secretaries, and a host of other nonprofessionals who, as members of those groups, have felt they should respond to moral expectations that were not part of a business contract.

Professionals do not have a monopoly on responding to the ideal of service to society. As Barker points out, many nonprofessionals are indeed called into service to society. Nor are professionals immune from employment arrangements that override a duty they have to service a larger community good. For example, physicians reject “bedside rationing” of scarce services for the good of society because of their obligation to the single patient before them; attorneys reject being drawn into seeking justice for the good of society because of their obligation to the single client before them. Of course, service to an individual is one way a professional can be of service to society. But the same is true for nonprofessionals. One could reply that sometimes nonprofessionals act professionally and sometimes professionals act in an unprofessional manner. The question still remains whether it is appropriate to maintain such a generalized ideal of professionalism that calls for a different form of ethical analysis.

My point is that any claim for a stronger ethical content and substantially different ethical structure for professional ethics is dubious. All of us, professionals and nonprofessionals, experience and respond to ethical problems in fundamentally the same way. The efforts to identify special concepts of morality for professionals create distracting distinctions that separate out pieces of the moral life that can be better understood as integral parts of a whole. I am *not* arguing that professionals do not have to respond to particular expectations that make a difference in the moral choices they make. Particular contexts require particular kinds of ethical attention. My argument, rather, is that everyone is continuously engaged in exactly the same kind of process of moral deliberation.

Experts on professional ethics usually don’t include truck drivers as members of the club. Let’s consider a truck driver who is headed for El Paso, Texas, in June to deliver a load of furniture. Her intention is to drop off the furniture and then drive an empty truck 40 miles to Las Cruces, New Mexico, to pick up a load of onions to take back to Atlanta—or as close to Atlanta as she can get. A day out of El Paso, our

trucker needs to call ahead to Las Cruces to begin setting up the onion load.

Our truck driver has had a long and mutually satisfactory relationship with a truck broker who works out of Las Cruces in the summer. Over the years these two individuals have come to rely on the services each can provide the other, the trucker sometimes helping out the broker by taking a load that really didn’t fit her own needs best, the broker sometimes giving the trucker special consideration in arranging loads with shippers. The trucker also knows that the dispatcher for the largest produce shipper in Las Cruces is willing to deal directly with truckers. A call to the dispatcher might produce a better load more quickly and save the trucker the brokerage fee. There is also a new truck broker who has just set up shop in Las Cruces who might have access to loads that are not available to the more established broker.

So the driver has to decide which people to call and what to say when she calls. She does not expect to arrive in Las Cruces until late Saturday afternoon. She knows that the shippers don’t want to wait that late to load a truck on Saturday and usually don’t work on Sunday. She also knows that, if she tells them she will be there Saturday morning and gets a commitment for a load on that basis, she will get loaded when she arrives late, even if it takes until midnight. Does she communicate her plans honestly, guaranteeing a two-day layover, or does she attempt to strike a deal based on a commitment she knows she can’t keep?

She also knows the probability of getting exactly what she wants—an 800-bag load with one drop in Atlanta for \$1.85 per bag—is fairly low. One-drop loads to Atlanta are easy for brokers and shippers to cover. She can expect initial offers of loads to places like Dothan, Tallahassee, and Chattanooga, with deliveries to be made at possibly three or four different places. While she knows she would accept one of these as a last resort, she doesn’t want to give up too easily on more attractive possibilities. How honest should she be in her negotiations in terms of what she would be willing to accept?

Our driver knows that 790 fifty-pound bags of freshly loaded onions are all that she can carry within the legal weight limits of some states she’ll be crossing. An 800-bag load is standard, but onions dry out in transit, and she can probably be within legal limits with an 800-bag load by the time she hits the first open scales. Even accepting a hard-and-fast 800-bag limit, however, may produce undesirable consequences since larger loads are not uncommon and the refusal to accept a larger load increases the difficulty of getting a load in a timely fashion. If the route offered makes the probability of



**Certainly there are
... a host of ...
nonprofessionals
who ...
have felt they
should respond to
moral expectations
that were not part
of a business
contract.**

detection low enough to be worth the risk to her, should she be willing to accept a load that exceeds legal limits? Similarly, if an offered load has a delivery date requiring a driving schedule that exceeds regulations on the number of hours per day a trucker can drive, should that load be accepted?

In the course of these transactions, the driver will be under considerable pressure to (1) violate obligations incurred in a long-standing relationship, (2) make promises she can't keep, (3) be dishonest in negotiations with others, and (4) disobey the law. These seem like the kinds of moral dilemmas that pose the greatest problems for professionals. Further, while truck drivers may not have a written code of ethics approved by a formal association, they do operate in a world of deeply entrenched mores and practices. To use Davis's term, *conventions* exist in the world of truckers, brokers, and dispatchers that are recognized by all the participants. The driver makes decisions in response to the expectations embodied in these customs and norms, not as an isolated individual simply pursuing her own self-interest.

The participants in this situation—the broker, dispatchers, packing shed operators, other truckers—would not be surprised to find our truck driver making promises she could not keep or disobeying the law. The standard of practice in this occupation may well be to act in ways that would be deemed unethical in the abstract or under ordinary circumstances. She may even be expected to act in such ways. My interest is not in exploring whether it is wrong to follow vocational expectations that one be less than fully honest but in asking whether that matter should be considered differently for professionals than for the rest of us.

The focus of the inquiry is to try to understand why “professional” conventions should receive greater moral weight than the conventions of truckers—or of hundreds of other occupations or nonoccupational roles we play. Quite apart from an analysis of the particular content of a code or an investigation of a specific situation, professional standards seem to have been accorded a special significance simply because they are professional. Commentators have suggested many features that divide the professions from other pursuits.¹⁵ The question is whether any of these justifies assigning greater moral weight to the norms that exist in professional subcultures. A consideration of four often-identified characteristics of a profession illustrates why I am doubtful an adequate grounding exists for the morally differentiated professional ethical analysis, as it is often described.

Most lists of features of the professions include something like the criteria mentioned

earlier. One such feature is providing services that are important to society. In recent years we have seen many examples in other countries of people starving to death because of a lack of a food distribution system. Truck drivers provide this important service to society. Airplane mechanics, firefighters, and farmers, to mention only a few, also feel that they provide important services but find themselves on few lists of professionals. Even if service to society does provide a basis for separating the professions from other occupational pursuits, it seems that that feature would argue for less moral insularity, not more. The more crucial a service is to a community, the greater the community's stake is in seeing that the service is rendered in ways that are morally appropriate in light of prevailing societal standards.

Not unrelated to this first feature of the professions is a second characteristic: professionals are committed to some good larger than their own self-interest, e.g., the welfare of society. Accordingly, we expect morally superior behavior from those engaged in a profession. But it may well be that this self-proclaimed adoption of a higher calling was rooted in economic self-interest and a desire for social status, and a gap often exists between this vision and actual professional practice.¹⁶ Indeed, the adoption of some ethical codes can be seen as ways of protecting professionals' self-interests by exempting them from the moral claims placed on the rest of us rather than obligating them to higher moral aspirations in the service of the common good. And, since we're seeking distinctive features of the professions, it should be noted that we expect many others to be committed to some good larger than their own self-interest: mothers and fathers, United Way volunteers, scoutmasters, and lay religious leaders, to name a few.

A third feature often associated with the professions is that they are often granted a degree of autonomy by society, sometimes including a societally granted monopoly for the services they render. This autonomy usually entails a judgment by peers, a certain insulation from lay judgment and control. Rather than providing grounds for the claimed moral distinctiveness, this feature seems to be a result of having found such distinctiveness. A measure of autonomy is granted because of a recognition that something distinctive about a profession warrants this special treatment. The issue in this inquiry is not whether this degree of moral autonomy and insulation exists or whether additional responsibilities are generated by such a grant of autonomy; rather, the issue is why it is appropriate to separate out certain professions in this way.



**Airplane mechanics,
firefighters, and
farmers, to mention
only a few, also
feel that they
provide important
services but find
themselves on few
lists of
professionals.**

continued on page 18

A fourth feature of the professions also provides a basis for arguing for this autonomy and thus for moral distinctiveness: the nature of professional services requires skills and knowledge not possessed by the population at large. Professions entail extensive training with a significant intellectual component. The problems and moral dilemmas encountered by professionals simply cannot be accurately assessed by lay people.

While this fourth feature seems on point, it is important that we not give it too much weight. This characteristic of professions may say much about *who* engages in moral assessments of professional behavior; it may say very little about *how* those people should make such assessments. Esoteric knowledge and specialized training may limit the number of people who can ably analyze a professional problem. These features, however, do *not* require that those able people analyze that problem using ethical modes of reasoning different from those of “ordinary morality.”¹⁷

If I want to emphasize the continuities rather than the discontinuities, it is obviously important to identify what the truck driver has in common with the doctors and lawyers. In fact, at this point, I want to enlarge the conversation to address the continuities between the ethics of the professionals and those of every other person who plays a distinctive role in our community—which is all of us. So the discussion includes not only those driving trucks and engaged in other occupations but also mothers and fathers, participants in political parties and neighborhood organizations, citizens, and members of churches and synagogues. Davis is right that the conventions that exist among us affect our moral choices. We face such conventions, however, in every role we play.

In this regard, we should look at one feature sometimes mentioned as characteristic of the professions. Individuals incur certain obligations when they enter into a profession. They pledge to abide by a code of ethics; they covenant with others to uphold the standards of that profession; they agree to act in accordance with professional expectations. This kind of contracting among members of a profession creates limits on the extent to which one can act as an individual agent. Of course, our truck driver may have certain kinds of contractual obligations—to a company from which she leases the trailer or the bank that holds a note on the cab or the shipper who relies on a delivery. But it is important to look beyond these kinds of obligations that flow from formal arrangements. Agreements like bank loans and official codes of ethics are not the only sources for moral deci-

sion making. Many of the professional conventions are matters of less formal expectations than those codified in rules and officially adopted standards. We are also subject to the conventions and expectations of family, friends, and members of nonvocational groups, i.e., the expectations of ordinary morality.

The common thread, the source of the “ordinariness of professional ethics,” is that all of us, in all aspects of our lives, are subject to moral claims inherent in the roles we play. The term “positional obligation” refers to the concept that holding a particular position or filling a particular role carries obligations that that person would not otherwise have.¹⁸ This feature of role morality is not, of course, a new thought.¹⁹ But the well-established insights of role morality render unremarkable the weaker claims of professional ethics—that professional roles entail obligations. Further, the insights of role morality cast doubt upon the stronger claims—that professional ethics require moral norms and forms of moral reasoning different from those required by “ordinary” roles. Professional ethics conventions—in codes and in other forms—create *prima facie* duties. We can only think about the ethical issues a professional confronts in the context of the conventions of that particular profession. But this insight applies to the conventions associated with all aspects of our lives. All of the other relationships we establish create *prima facie* duties as well.²⁰ The difficult questions arise when we find ourselves subject to contradictory *prima facie* duties.

The inevitability of facing contradictory *prima facie* duties lies in the reality that each of us embraces multiple roles. We may be truck drivers or physicians, but at the same time we may also be mothers, citizens, church members, and neighbors—to name only a few possibilities. Our continuing task is to respond to a variety of role expectations that inevitably conflict with one another from time to time. Insofar as professional obligations impose only *prima facie* duties and our response to these should be similar in character to our response to other *prima facie* duties, we can avoid the danger Steven Salbu has identified as lurking in professional ethical standards: “A prefabricated, externally imposed code of ethics, taken literally to be what it pretends to be, suggests that the ethical issues have been addressed by the experts. The person who accepts the code at face value replaces the honest and difficult confrontation of ethical questions with a mindless conformity to the rules.”²¹

Recognizing that professional ethics is like other ethics, we can broaden the horizons of professionals engaged in moral reflection and moral decision making. The insularity of pro-



Our continuing task is to respond to a variety of role expectations that inevitably conflict with one another from time to time.

professional ethics can give way to Bruce Jennings's model of "professional ethics as civic discourse," a call for a broader dialogue that is accessible to the public at large.²² At the heart of such a model is the belief that ordinary people have something worthwhile to contribute to a public discussion of professional morality.

The moral dilemmas faced by professionals are fundamentally the same as those we face in all arenas of life. The challenge raised by conflicting expectations in the professions is similar to the challenge raised in everyday life. How do we balance incompatible demands and weigh competing priorities? How do we determine the appropriate answer to the question, "What should I do?"²³ I do not believe the external demands of "ordinary morality" are always secondary to the expectations generated by professional conventions. I cannot accept a moral system that asserts that professional duty always overrides other duties such as the obligations accompanying one's role as a father or as a citizen.²⁴ Unless one is willing to make such a claim of unqualified preeminence for professional obligations, those obligations are recognized as one set of moral expectations alongside others, to be responded to in the same way that we respond to ordinary moral expectations.

It does not follow that there is no such thing as professional ethics. We can recognize a particular ethic to be professional because it is marked by the realities of the relationships that exist in what we consider a professional setting—not by some distinctive structures for ethical reasoning. There is such a thing as professional ethics. There are also such things as parental ethics, political ethics, business ethics, and religious ethics. In each case the distinctive character of the enterprise derives from the particular relationships and the content associated with particular contexts. These kinds of ethics do not call for different kinds of ethical reasoning than that called for by ordinary ethics. Rather, it is in ordinary ethics that we find the understandings of moral obligation common to all of these more particularized forms of ethics. ■

Don Welch teaches ethics at Vanderbilt University Law School, where he is associate dean and professor of law. This article is reprinted from Professional Ethics, vol. 2, pp. 3-13 (1993) with permission of the author.

Notes

1. Alan Goldman, *The Moral Foundations of Professional Ethics* (Totowa, N.J.: Rowman and Littlefield, 1980). Goldman finds these assertions unconvincing in most cases.
2. Albert Flores, *Professional Ideals* (Belmont, CA: Wadsworth, 1988), p. 1.
3. Rob Atkinson has described the distinction, "firmly ensconced in the literature," between legal professional morality and ordinary morality in "Beyond the New Role

Morality for Lawyers," *Maryland Law Review* 51 (1992): 855-860.

4. Gerald J. Postema, "Moral Responsibility in Professional Ethics," *New York University Law Review* 55 (1980): 63.

5. Benjamin Freedman, "A Meta-Ethics for Professional Morality," *Ethics* 89 (1978): 10.

6. Bruce Jennings, Daniel Callahan, and Susan Wolf, "The Professions: Public Interest and Common Good," in "The Public Duties of the Professions," Special Supp., *Hastings Center Report* 17, no. 1 (1987): 5.

7. Peter F. Drucker, "What is 'Business Ethics'?" *The Public Interest* no. 63 (Spring 1981): 24.

8. Michael Davis, "Thinking Like an Engineer: The Place of a Code of Ethics in the Practice of a Profession," *Philosophy and Public Affairs* 20, no. 2 (1991): 154-155.

9. *Ibid.*, p. 162.

10. Some of these fields have been promoted from the ranks of "demi-professions," the term used for teachers, nurses, and social workers in Amitai Etzioni (ed.), *The Semi-Professions and Their Organization* (New York: Free Press, 1969).

11. Paul F. Camenisch, *Grounding Professional Ethics in a Pluralistic Society* (New York: Haven Publications, 1983), p. 4. John Kultgen has suggested the concept of professionalism should be relevant to all types of work in a modern industrial society in *Ethics and Professionalism* (Philadelphia: U. of Pennsylvania Press, 1988).

12. Barker, "What Is a Profession?" *Professional Ethics* 1 (Spring/Summer 1992): 73-99.

13. *Ibid.*, pp. 88-89.

14. *Ibid.*, p. 89.

15. See, for example, Michael Bayles, *Professional Ethics* (Belmont, CA: Wadsworth, 1981), pp. 7-11; Paul F. Camenisch, "On Being a Professional, Morally Speaking," in *Moral Responsibility and the Professions*, edited by Bernard Baumrin and Benjamin Freedman (New York: Haven Publications, 1983), pp. 42-61.

16. Jennings, Callahan, and Wolf, *op. cit.*, p. 5.

17. In reaching this conclusion, I agree with Mike W. Martin in his exchange of essays with Benjamin Freedman: Freedman, "A Meta-Ethics for Professional Morality," *Ethics* 89 (1978): 1-19; Martin, "Rights and the Meta-Ethics of Professional Morality," *Ethics* 91 (1981): 619-625; Freedman, "What Really Makes Professional Morality Different," *Ethics* 91 (1981): 626-630; and Martin, "Professional and Ordinary Morality," *Ethics* 91 (1981): 631-633.

18. Frederick Shauer, "The Questions of Authority," *Georgetown Law J.* 81 (1992): 97, using the term coined by A.J. Simmons in *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979).

19. See, for example, Dorothy Emmett, *Rules, Roles and Relations* (New York: St. Martin's, 1966).

20. John H. Fielder, "Organizational Loyalty," *Business and Professional Ethics Journal* 11 (Spring 1992): 71-90.

21. Steven R. Salbu, "Law and Conformity, Ethics and Conflict," *Indiana Law Journal* 68 (1992): 106.

22. Bruce Jennings, "The Regulation of Virtue," *J. of Business Ethics* 10 (1991): 567. See also Jennings, "Bioethics and Democracy," *Centennial Review* 34 (Spring 1990): 207-225.

23. I have explored the approach suggested in this essay in greater depth in *Conflicting Agendas: Personal Morality in Institutional Settings* (Cleveland: Pilgrim Press, 1994).

24. The "weight" that should be accorded to the conventions of a particular profession, or any other role, can be determined only through an analysis of the important ethical issues confronting practitioners of that profession. The relative priority given to internal professional conventions and "external," broader ethical norms will vary from case to case. Such an in-depth study of particular professions is, of course, beyond the scope of this article.



**The moral dilemmas
faced by
professionals are
fundamentally the
same as those we
face in all arenas
of life.**

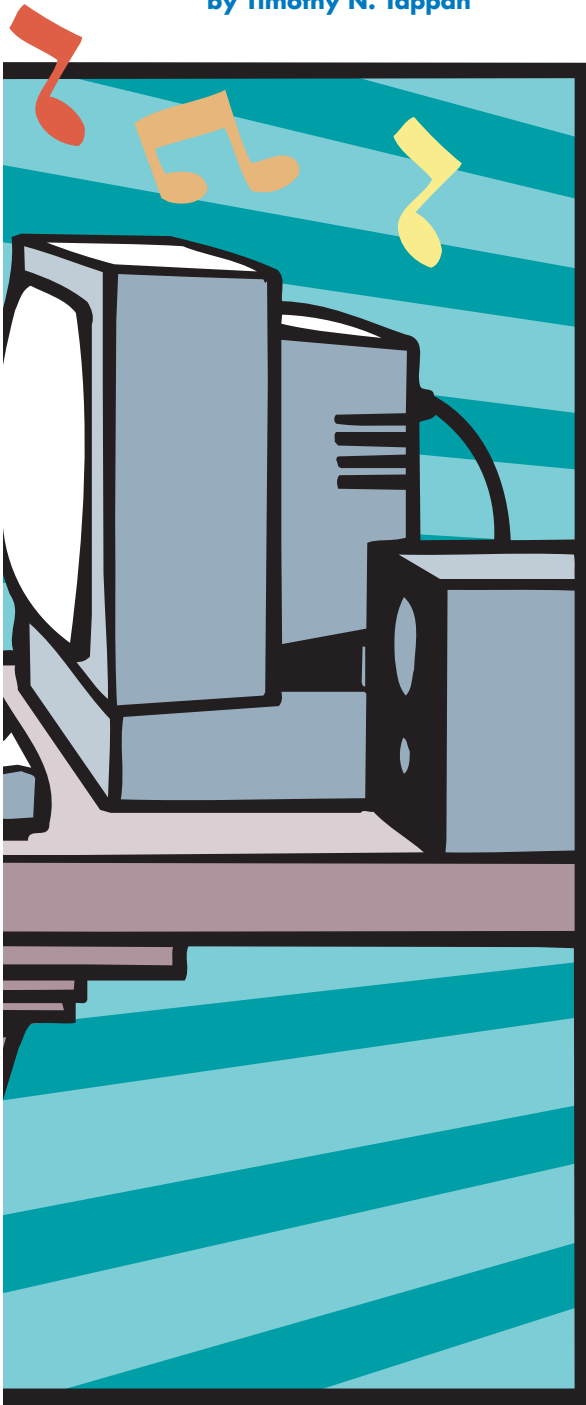
THE ROAD MORE TRAVELED: ILLEGAL DIGITAL DOWNLOADING



Arville

According to techno-ethics, the effects of technology can quite possibly cloud or color our faculties of moral reasoning.

by Timothy N. Tappan



We live in a highly technological society confronted with many moral dilemmas. Evidence exists suggesting that the source or propelling factor of many of these quandaries is the very same technology that makes people's lives easier, more efficient, more productive, and happier. Postman (1992), however, warns that "... it is a mistake to suppose that any technological innovation has a one-sided effect. Every technology is both a burden and a blessing" (pp. 4–5). Only with difficulty can one imagine living in this millennium without the benefit of technology, for not only is technology an integral part of daily living but also the implementation of technology is what propels humankind to such amazing heights of knowledge and understanding. Technology is an area where seldom does an invention pop out of the blue; rather, technology sequentially advances step by step, building on knowledge and successes of previous accomplishments. Thus we see the Wright brothers inventing a rather modestly technological flying machine instead of a space shuttle, or Edison creating a simple cylinder recording device rather than a sophisticated digital software recording program.

An important aspect of today's technology is that we are so inundated with it that it tends to become invisible to us. The situation is similar to a fish's perceptions in the fishbowl: the last one to be aware of the water is the fish (probably). According to Mander (1991):

From morning to night we walk through a world that is totally manufactured, a creation of human invention. We are surrounded by pavement, machinery, gigantic concrete structures. Automobiles, airplanes, computers, appliances, television, electric lights, artificial air have become the physical universe with which our senses interact. They are what we touch, observe, react to. They are themselves information, in that they shape how we think and, in the absence of an alternate reality (i.e., nature), what we think about and know. (p. 8)

The very nature of technology has made its effects inseparable from our lives and thus fundamental to how we see and evaluate the world. Even the most basic technological inventions—hammers, axes, wheels, language, alphabets, written words, walls, fireplaces, buttons, straws, etc.—profoundly affect people's lives. One can only guess the extent to which computers, television, and advanced genetic and medical procedures have conditioned humankind's vision of the world! As McLuhan (1964) pointed out, although technology has been with us for more than a million years, some of our most fundamental tools [technology] have affected people to an extent that we are only now beginning to understand. Technology has become an extension of our physical selves to the degree that people perceive the world through senses that rely on and encounter incredibly complex layers of technology. That is, technology influences the very way humankind perceives the world. McLuhan (1964) stated that "... the 'message' of any medium or technology is the change of scale or pace or pattern that it introduces into human affairs" (p. 8). "This fact merely underlies the point that *'the medium is the message'* because it is the medium [the scale of our cognitive perception] that shapes and controls the scale and form of human association and action" (p. 9). The medium [technology] is what provides perspectives for understanding. The use of technology nec-

continued on page 22

essarily controls how people act and think because the medium changes their frames of reference and consequently their thinking. Technology, therefore, affects not only *how* humans think but also *what* they think about. The implications of how technology affects the decision-making process, especially in moral reasoning, is significant because humankind makes decisions that are greatly influenced by how people perceive the problems or whether they even perceive a problem at all.

There is an emerging science of ethics called techno-ethics (Tappan, 2000) that deals with moral dilemmas caused or exacerbated by technology. The central premise is that technology has many unknown effects on us that quite possibly cloud or color our faculties of moral reasoning. Illegal digital downloading from the Internet is one such case.

Illegal Internet Music Downloading

Prior to the invention of the Internet and the formatting and transfer mechanisms of digital recording, piracy of intellectual properties was controlled mostly by the limitations imposed by then-current technology. Quality copies of music recordings were difficult to manufacture, particularly in large numbers. Making a profit by distributing the copies in quantity was equally difficult. Consequently, limited pathways existed for extensive pirating of copyrighted intellectual properties.

The invention of the Internet (the vehicle for transporting digital information), the World Wide Web (the software language for manipulating digital transfers of information), and digital recording technology (the means of storing digital waveforms of sound) all combined to provide unprecedented access to copyrighted music recordings to a virtual Internet worldwide audience estimated in excess of 600 million users (NUA, 2002). Widespread access to digital recordings was made possible by the Internet. The high-quality recordings were made possible by the invention of digital recording, a process that allows for digital transferring and recording of near-perfect copies.

The Changing of the Guard

According to Hausman (2002), "There's an old saying, variously attributed, that ethics is what you do when no one's looking." Although this definition is lacking in descriptive inclusiveness, it does point out an aspect of digital downloading that is an important factor for consideration. The advanced technology of the Internet and digital recording make it feasible (if not downright easy) for people to illegally

download copyrighted recordings while operating within the almost absolute privacy of a secure residence or other safe haven, out of sight of law enforcement or other organizations that could limit or inhibit the practice. The real threat of record piracy has switched from a few rogue, criminal entrepreneurs who tried to make a profit by exploiting black-market or grey-market sales to teenagers who use their computers to download their favorite music to enjoy and share with friends.

It is no longer a few individuals making large quantities of contraband recordings but millions of individuals who make only a few apiece. The profile of the typical record pirate has changed from a sleazy criminal-type who is out for personal gain to the kids next door who just want to have fun.

"Who Done It?"

Research indicates that one of the largest demographics to participate in illegal downloading is college students. They usually have access to a computer and a broadband Internet hookup, they have the knowledge to manipulate software programs for downloading, and their social life is often driven largely by music. There are also indications that the age group from 12 to 18 is becoming a voracious consumer of "free" music on the World Wide Web.

According to Bernoff at Forrester Research (2003), file sharing (illegal downloading) has cut music sales by as much as \$700 million per year.

Research

The author (Tappan, 2005) conducted research on ethical attitudes of college students toward illegal downloading and found some interesting, generalizable results.

According to this research, even though many students were aware that it is wrong to illegally download, they did it anyway. Reasons given for such behavior varied, but all centered around the ethical concept of harm. Most students simply thought that downloading was a very minor infraction, perhaps akin to taking an extra toothpick or sugar packet at a restaurant. The perception was that no one was really getting hurt from the practice, and if there was harm, it was only big corporations, large record companies, who were being injured. Another reason given for the practice was the unlikelihood of getting caught. Students perceived that legal technology resources were insufficient (or too costly) to be a threat to their downloading activities.

Another result of the author's research was that the sole factor for students in determining whether or not to adapt a nonrelativistic, negative view of downloading (i.e., that download-



Most students simply thought that downloading was a very minor infraction, perhaps akin to taking an extra toothpick or sugar packet at a restaurant.

ing is *always* wrong) was the independent variable of the students' major course of study. In other words, students tended to think people should *always* refrain from illegal downloading if their major course of study was music industry related. Those students who majored in another field of study collectively thought it was an acceptable practice in individual situations.

The research also pointed out that students (in general) did not feel that religious ideals or ideas provided appropriate guidelines to adjudicate the moral dilemma of digital downloading. The study did indicate that students generally perceived themselves as religious. However, they simply did not see their religious views as being applicable or relevant to the moral issue of illegal downloading.

Probably the biggest "shocker" of the research was that even when students acknowledged that downloading without paying royalties was wrong, they still did it anyway. Unfortunately, the research was not designed to query that aspect of the results, so there were no data to explain that particular unexpected outcome.

Conclusions

The artistic community and others depend on the tenets of copyright law to protect financial interests in their intellectual properties. But, as some have pointed out, the technology to pluck a song out of cyberspace keeps moving forward. In fact, it moves at such a speed that our valuing systems cannot keep up with the load imposed by an ever-increasing body of knowledge and capabilities in science. The technology often renders our laws obsolete, if not impotent, and society seems powerless to protect many of the rights guaranteed to our citizens. In some cases, we are left in a confused state trying to decipher what is right and what is wrong. Often we don't have or take the time to reflect sufficiently to assess such judgments.

Digital downloading of music without paying royalties is a small part of the larger picture, but it is an important one because this is the stage upon which many future laws, rights, and responsibilities will be played. How we treat this subject now will in large part determine the course of action tomorrow.

If the financial incentive for creative works is removed, the whole face of the entertainment industry will change dramatically. Financial rewards are a significant incentive for people to create a functioning infrastructure within the entertainment industry. Remove the possibility of financial gain, and the functioning ceases and the infrastructure collapses. This is not to say that the entertainment industry will disappear, but it will look considerably different than it does today.

Two paths lie before the music industry. One leads toward a reestablishment of the principles of music copyright and maintenance of the entertainment industry infrastructure much as it has been in the past. The other leads to a whole new delivery system for music. The direction that path will take (if it is indeed the path of the future) is anybody's guess.

What do we do about the digital/Internet road more traveled by piracy and copyright infringement? No single solution will solve this problem. It seems crucial to educate the public, including college students, that illegal downloading is not a harmless behavior. It has direct consequences that lead to driving intellectual property creators (writers and artists) and owners (publishers and record companies) out of business. Next the peripheral and support facets of the industry will most assuredly suffer. The very legal and ethical infrastructure governing copyright will then begin to collapse. When this occurs, the entire entertainment business will become unrecognizable. And if the entertainment industry cannot deal with this problem, how will other industries find ways to solve similar problems in their arenas?

Technology will continue to develop at ever-increasing speeds, and we must deal with it in a way that enables our ethical and legal mechanisms to keep pace. One thing is almost certain: as the world "advances," digital technology will take us down a road more traveled, not less. However, it promises to be a somewhat bumpy ride. ■

Timothy Tappan teaches technology and music production at Belmont University's Mike Curb College of Entertainment and Music Business.

References

- Anonymous. 2002. How Many Online? NUA www.nua.ie/surveys/how_many_online/index.html (accessed on September 28, 2005).
- Bernoff, J. 2003 (Nov). *From Discs to Downloads*. Forrester Research (accessed on November 14, 2003). www.forrester.com/ER/Research/Report/Summary/0,1338,16076,00.html.
- Hausman, C. 2002. *Like It or Not, It's Ethics*. Institute for Global Ethics (accessed on September 28, 2005). www.globalethics.org/newsline/members/issue.tpl?articleid=08260215030621.
- McLuhan, M. 1964. *Understanding Media*. Cambridge, MA: MIT Press.
- Mander, J. 1991 (Winter). "In the Absence of the Sacred." *Whole Earth Review*: 4-17.
- Postman, N. (1992). *Technopoly: The Surrender of Culture to Technology*. New York: Alfred A. Knopf.
- Tappan, T. 2000. *Techno-Ethics*. Master's thesis, Belmont University.
- Tappan, T. 2005. *Identifying Moral Reasoning by College Students Regarding Internet Copyright Infringement*. Doctoral dissertation, Trevecca Nazarene University.



Probably the biggest "shocker" of the research was the fact that, even when students acknowledged that downloading without paying royalties was wrong, they still did it anyway.



TENNESSEE GOVERNMENT ETHICS

**Are the reform dogs set loose this year by an FBI sting operation
dubbed “Tennessee Waltz” barking up the wrong tree?**

by Joseph Sweat

Old Judge Jim Tipton, who lobbied the Tennessee General Assembly on behalf of Tennessee county governments from 1959 to 1972, used to liken campaign contributions to the old-time record players that had to be mechanically wound up with a crank.

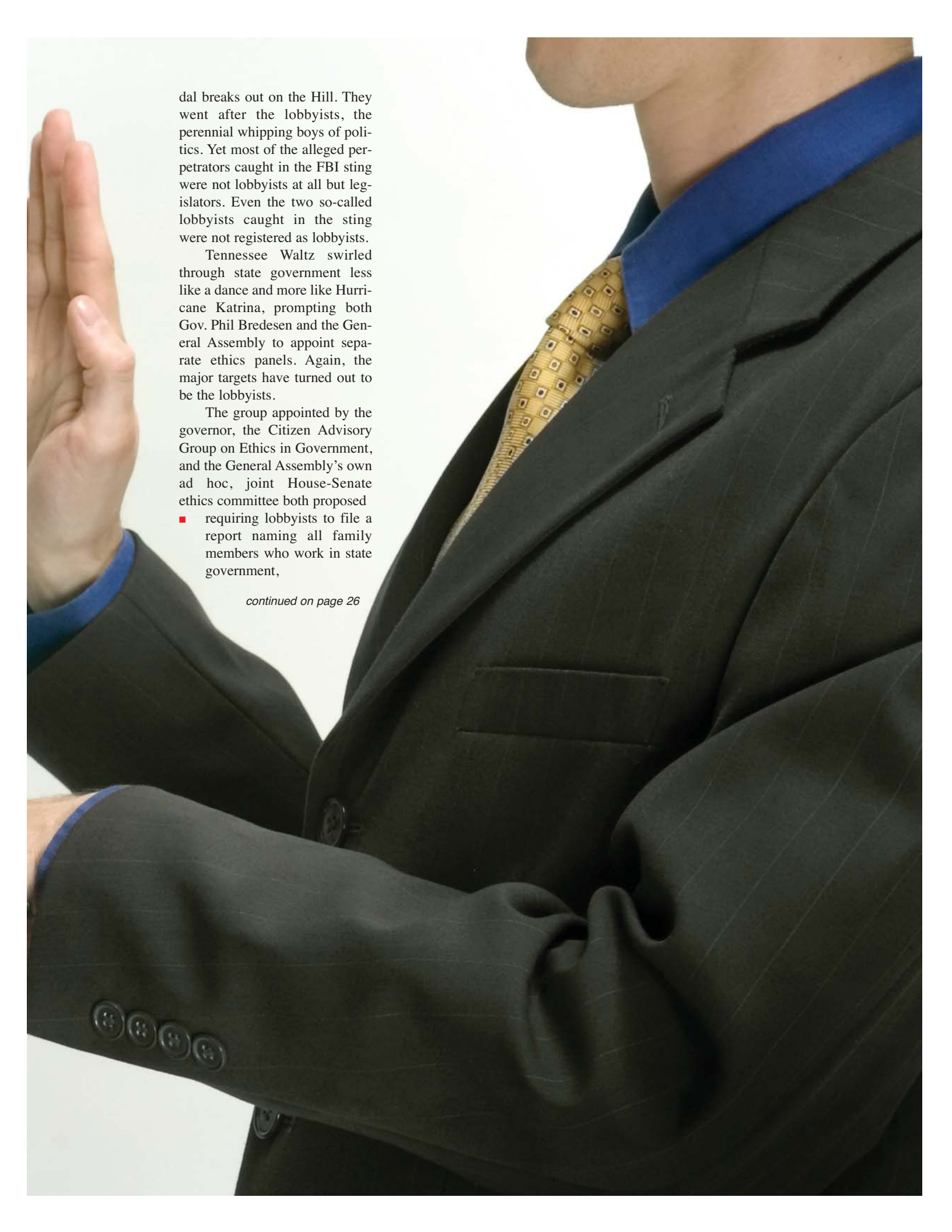
“Boys,” Tipton would say, picking his teeth and sitting in the easy chair he occupied after dinner each evening in the corner of the Hermitage Hotel lobby, “money keeps talking when the phonograph record runs down.”

Today’s ethics reformers seem to overlook much of what Judge Tipton was saying back in those rough and tumble days when the Tennessee Legislature was far, far more corrupt and free-wheeling than it is now. Yet, in those bygone days of more corruption, the observations of salty

observers like Tipton were overlooked just as much as today.

The reform dogs were set loose this year by an FBI sting operation dubbed “Tennessee Waltz.” In court records the FBI claims that federal agents hired unwitting “bag men” to give legislators bundles of cash in exchange for supporting legislation benefiting a phony computer-recycling company called E-Cycle. So far, five current or former legislators have been indicted on bribery and extortion charges, along with two unregistered lobbyists and two county commissioners.

But in the eyes of some veteran Capitol Hill observers, the reform dogs have been barking up the wrong tree for the most part. The public, the media, and many legislators went after the group they usually go after when scan-



dal breaks out on the Hill. They went after the lobbyists, the perennial whipping boys of politics. Yet most of the alleged perpetrators caught in the FBI sting were not lobbyists at all but legislators. Even the two so-called lobbyists caught in the sting were not registered as lobbyists.

Tennessee Waltz swirled through state government less like a dance and more like Hurricane Katrina, prompting both Gov. Phil Bredesen and the General Assembly to appoint separate ethics panels. Again, the major targets have turned out to be the lobbyists.

The group appointed by the governor, the Citizen Advisory Group on Ethics in Government, and the General Assembly's own ad hoc, joint House-Senate ethics committee both proposed

- requiring lobbyists to file a report naming all family members who work in state government,

continued on page 26

- requiring companies that hire lobbyists to disclose how much they spend lobbying,
- banning public officials from taking lobbying jobs for a period of time after they leave state government, and
- banning “contingency fees” that lobbyists make for successful passage or defeat of bills.

In addition, the governor’s panel would

- ban cash campaign contributions to candidates,
- require lobbyists to disclose how much they are paid and how much they spend lobbying,
- post candidate campaign finance reports instantly on the Internet and require more frequent reporting,
- require reports on travel expenditures by legislators and executive branch officials, and
- require more public disclosure of political education groups that spend money to sway elections.

The legislative ethics panel, on the other hand, has additionally proposed

- requiring lobbyists to disclose bills in which they are interested and any business arrangements they have with any candidate, legislator, or member of the executive branch; and
- banning lobbyists from making campaign contributions, organizing or hosting fundraisers, or serving on state boards or commissions related to their lobbying.

If you see a thread running through most of these proposals, you are right. In professional football the battle cry is “Get the man,” meaning get to the quarterback and sack him. In this ethics game, the cry is “Get the lobbyists.”

There are 528 lobbyists registered with the State Board of Election Finance, and my observation, after some 34 years of lobbying, is that virtually all of them faithfully adhere to the law, try hard to be ethical, and at the same time try to represent their clients as vigorously as possible. If the truth be known, because there are so many lobbyists representing so many different takes on any given bill, they often offset one another.

Given that ethics is often an amorphous subject, seen differently from different points of view, the vast majority of lobbyists take pride in being honest. And, at the very least, precious few are stupid enough to risk a prison sentence by trying to bribe a legislator for votes, as was alleged to have happened in the Tennessee Waltz sting. While each lobbyist understands that his or her job is to win for the client, each also knows that reputation counts heavily on Capitol Hill and the dishonest lobbyist who frequently skirts the law is not going to be welcome in many legislative offices.

We seem often to forget that lobbying actually is a job specifically protected by our United States Constitution, which states in the First Amendment, “Congress shall make no law . . . abridging . . . the right of the people . . . peaceably to assemble, and to petition the government for a redress of grievances.” That, in effect, is what lobbying is: people peaceably assembling to petition the government for the redress of grievances.

The Constitution could also come into play in another area related to the proposed restrictions on lobbyists: the proposal that lobbyists be banned from making campaign contributions. In *Buckley vs. Vallejo*, the U.S. Supreme Court ruled that, in effect, in regard to political campaigns, money is speech. If the ban goes into effect in Tennessee, it is conceivable that a lobbyist could sue to have it struck down on the grounds that under *Buckley* that lobbyist’s campaign contribution can be regulated—as any speech can be regulated—but it cannot be eliminated without running afoul of the Constitution. There could also arise the constitutional question of equal protection of the laws, to wit, whether or not lobbyists as a class can be singled out for a ban that does not apply to citizens in general.

On the other hand, there is the question of whether the ban on lobbyists’ campaign contributions is worth a tinker’s damn in the first place. The fact that a lobbyist cannot make a campaign contribution does not keep the lobbyist from having his client make a contribution, which is what is often done anyway these days. In such cases, the result is the same. The cause the lobbyist represents gets the political credit for the contributions.

Although many would have us believe that lobbyists are the root of all evil in politics, the real root of evil is still—as the Apostle Paul said long ago—the love of money. And in politics when you are talking about loving money usually you are talking about campaign contributions. All of which brings to mind what Ohio political boss and U.S. Senator Mark Hanna said back in 1895: “There are two things that are important in politics. The first is money and I can’t remember what the second one is.”

And just as the vast majority of lobbyists are decent, honest people, so, too, are the vast majority of legislators and members of the executive branch of government honest, decent public servants who want the best for the citizens of the state. The problem, according to some very astute observers, is not lobbyists or legislators. The problem is the system. And the current system has a lot of moral compasses pointing in a lot of different directions.

Chris Newton, the now-resigned Republican legislator who hails from the hamlet of Turtletown in Polk County, is the only person accused of dancing the Tennessee Waltz who has, so far, pled guilty. Newton said he was “caught up in business as usual in Nashville” and thought the \$1,500 he received from a person representing the fake E-Cycle company was a campaign contribution, not an absurd assumption given our pervasive system of campaign funding. If you are a legislator and I hand you money, 99 times out of a hundred you are going to assume I am giving you a contribution for your next campaign.

Senator Jeff Miller (R-Cleveland) along with Reps. Joe Armstrong (D-Knoxville), Ulysses Jones (D-Memphis), and Larry Miller (D-Memphis) also received money from E-Cycle. But, unlike Newton, they were not indicted. Why?

It all relates to a little thing called *quid pro quo* (Latin for “one thing in return for another”), and thereby hangs the tale of a nuance that gets very tricky in the system. If I am a legislator and you give me, say, \$1,000, and make it clear that this money is in exchange for my vote or influence on legislation in which you are



interested and I take the money, that's an illegal bribe and we can both go to jail for the exchange. But if I give you the same \$1,000 and say nothing, we are both in the clear. The latter is the case with Jeff Miller, Armstrong, Jones, and Larry Miller. They took the money, apparently assuming it was a campaign contribution, but there was no outright quid pro quo.

Now, to show just how capricious all this can get, let's pose another scenario. Suppose you give me the \$1,000 as a campaign contribution and then three months later you come to me and ask me to help with a particular piece of legislation but never mention the \$1,000, although it is very likely I have not forgotten it. We might be able to argue that there is no quid pro pro, in the strictest interpretation of the law. But what if the intervening time period is one month, or one week, or one day? Tough call.

All of this is why some purists argue that all campaign contributions are bribes. Some, they say, are legal bribes and some illegal bribes. Anyone who gives a campaign contribution wants something in return, even if that something is simply "good government," or "I want in return the defeat of your opponent whom I think is a crook." Something of value given, something returned.

One of the purists is my friend John Jay Hooker, twice the Democratic Party nominee for governor of Tennessee, founder of Minnie Pearl's Chicken company, one of five founders of Hospital Corp. of America, former publisher of the *Nashville Banner* daily newspaper, and a man prominently involved in a number of national and state political campaigns. Hooker, who has a pending lawsuit challenging the law that exempts campaign contributions from being tested under the bribery statute, believes that campaign contributions are unconstitutional because they favor the wealthy and violate the concept of "fair and equal elections."

In recent years, however, Hooker has spent less time on his idea that all campaign contributions are unconstitutional and instead filed a number of lawsuits that seize upon a much narrower question. It's the question raised by Article X, Section 3, of the Tennessee Constitution, which says: "Punishment of electors and candidates for bribery: Any elector who shall receive any gift or reward for his vote, in meat, drink, money or otherwise, shall suffer such punishment as the law shall direct. And any person who shall directly or indirectly give, promise or bestow any such reward to be elected, shall thereby be rendered incapable, for six years, to serve in the office for which he was elected, and be subject to such further punishment as the legislature shall direct."

Hooker, with crusading zeal, maintains that it is unlawful to have a campaign fundraiser where alcohol and food are provided—which is standard fare for most of these events—because the "meat, drink, money or otherwise" is given in exchange for votes and this, he argues, violates Article X, Section 3. So far, the courts have ruled against Hooker, saying he does not have standing. This, in itself, seems rather nitpicking, since Hooker has been a candidate in some of the challenged elections, to say nothing of his being a voter. If a voter, and certainly a candidate, in an election does not have standing to sue, who does?

On the other hand, Hooker is not likely to win anyway. It seems pretty likely that the framers of the Tennessee Constitution

put in Article X, Section 3, to strictly prohibit a quid quo pro, i.e., "I will give you this drink of whiskey or this ham sandwich if you will vote for me." It's very likely the courts would rule that the offer of food and drink at a fundraiser is *de minimis* (legal term meaning "insignificant") and offered not in exchange for a vote but as an amenity for those attending. However, at any rate, it seems Hooker should get his day in court.

Those purists who want to see campaign contributions outlawed maintain that the answer is publicly financed campaigns. Based on figures compiled by the Center for Responsive Politics, it has been calculated that all of the political campaigns in the United States, from dog catcher to president, could be financed for \$25 per voter per year. This is based on figures showing that all our elections cost a grand total of \$12 billion over a four-year period and there are 120 million voters, thus \$100 per voter each four years or \$25 in tax money per voter each year.

Although practical politics dictates that we are not likely to see tax-supported campaigns any time soon, the idea holds out the prospect of our making more realistic the promise of a democracy where each citizen-voter stands on a playing field made more level with every other voter. It also answers the charge that, in this world of big-buck campaign contributions, the waitress who serves me bacon and eggs in the morning has no more practical influence on the political system that is supposed to represent her than my dachshund, Margo, and Margo can't vote.

In 1993, U.S. Senator David Boren made a call to "take the Congress off the auction block." He added: "The buying and selling of political influence is a longstanding, though shameful, tradition in American politics." Some would say this applies to our Tennessee government as well as Congress.

Indeed, it goes back a long way. George Washington was criticized because it was said that, during his campaigns for the Virginia House of Burgesses, he purchased and distributed per each person in his district more than a quart and a half of rum, wine, beer, and hard cider, and a few hams to boot. He had only 391 voters in his district.

Our first president and his fellow framers of the Constitution gave us the most marvelous framework for a democratic republic that has ever been conceived by the human mind. But they had no concept of the vexing question of how to finance a democracy. One does not have to worry about such things when, in order to run a good campaign, one must only hitch up a horse and buggy and visit a few courthouses or perhaps pass out a few hams and a jug or two of rum, wine, beer, or hard cider. But the question has become more and more vexing each year since Washington's day.

And it's a question that we are wrestling with today in Tennessee. ■

Joseph Sweat worked for more than 30 years for the Tennessee Municipal League, lobbying on behalf of Tennessee cities, and retired in 1998 as TML executive director. Now serving on the national and state boards of the American Civil Liberties Union, he is a volunteer lobbyist for ACLU and serves on the Metro Nashville Davidson County 911 Emergency Communications Board and Metro Nashville District Energy System Board.

**Those purists who
want to see
campaign
contributions
outlawed maintain
that the answer is
publicly financed
campaigns.**

THOUGHTS ON ETHICS IN THE EDUCATION

by E. James Burton

Some have put a portion, perhaps a major portion, of the blame for the assumed massive breakdown in ethics squarely on business schools.



WorldCom whistleblower Cynthia Cooper spoke at MTSU in 2005.

Numerous well-publicized cases such as WorldCom, Enron, HealthSouth, Arthur Anderson, and others have given business in general and the accounting profession in particular a black eye. Without question, there have been monumental breaches of appropriate behavior by individuals in leadership positions of these and other visible companies, and, without question, changes need to be made to try to avoid future problems of this nature. Exactly what form should those changes take?

Congress has certainly weighed in on this issue with Sarbanes-Oxley. A first-level Internet search on Sarbanes-Oxley brings up Sarbanes-Oxley Financial and Accounting Disclosure Information, Sarbanes-Oxley Act Forum, the Sarbanes-Oxley Act 2002, Spotlight on Sarbanes-Oxley Rulemaking and Reports, Sarbanes-Oxley Act/PCAOB Implementation Central, Sarbanes-Oxley Compliance Toolkit, and thousands of additional references—indicating how pervasive an influence this law is having.

This law and the rulemaking that has followed from it have been the greatest boon to the accounting profession in some time. Major accounting firms have increased staff considerably to deal with the massive compliance issues stemming from Sarbanes-Oxley. And SEC-registered companies have paid major amounts to attempt to be in compliance with the requirements. What social good has come of all of these remains to be determined.

Are Business Schools at Fault?

Some have put a portion, perhaps a major portion, of the blame for the assumed massive breakdown in ethics squarely on business schools. Dianne L. Swanson, professor and founding chair of the Ethics Initiative at Kansas State University, in an article entitled “Business Ethics Education at Bay: Addressing a Crisis of Legitimacy” (*Issues in Accounting Education*, Vol. 20, No. 3, August 2005, pp. 247–253), asserts business schools historically have not placed appropriate emphasis on ethics education. She attributes this to two basic reasons: business schools’ attempts to provide “value-free” education and the failure of the AACSB International—the Association to Advance Collegiate Schools of Business—to require a course in ethics in its accreditation mandates. Professor Swanson proposes a three-part solution:

- Require a stand-alone ethics course at the foundational level.
- Integrate ethics across the curriculum.
- Host guest speakers, do service learning projects, and establish endowed chairs.

Few others, I think, see the solution to be quite as simple as does Professor Swanson.

The 2004 Teaching Business Ethics Conference, in which Professor Swanson participated, had the following sessions: Role of Ethics in the Business Curricula; Philosophy for Ethics Education in Business Schools; Successful Programs for Teaching Business Ethics; Gadfly Programs as Facilitators of Ethics Integration; Importance of Business Ethics in the Curricula: Dean’s Perspective; Teaching Business Ethics: Integration or Courses—Which Approach Is Best?; Expectations of Business and Society for Ethics Education; Online Interactive Tools to Teach Business Ethics; Assessment of Business Ethics in the Business Curricula; Experimental Activities in Teaching Business Ethics: Role Plays, Cases, Exercises and Videos; Student Intercollegiate Competition on Business Ethics; Teaching Business Ethics in Business Disciplines: Accounting, Finance, Management, and Marketing; Materials and Frameworks for Teaching Business Ethics; and Online Business Ethics Courses (information from the Ethics Education Resource Center at <http://aacsb.edu>).

Such a variety of topics on the central theme indicates that the issue has many facets and complications.

Certainly, the AACSB has not ignored concerns about ethics education. In addition to the ethics conference cited above, the board of directors of AACSB International formed the Ethics Education Task Force, composed of 19 members from academe, the AACSB, the accounting profession, and others interested in the issue. That task force issued its report in June 2004. In the foreword, Chairperson Susan Phillips, dean of the School of Business and Public Management at George Washington University, said, “The main purpose of this document is to urge and encourage administrators and faculty in business education to contemplate their current approaches to ethics education and to explore methods to strengthen this vital part of the curriculum.”

Specifically, the task force recommended that the AACSB “support and encourage a ren-

assistance in ethics education and exercise its leadership role to ensure the commitment of business schools.” They suggested four key initiatives:

- an ethics education resource center,
- accreditation team training,
- AACSB publications and educational events, and
- curriculum development.

The AACSB is to be commended for its follow-through on these initiatives and for strongly encouraging its member and accredited schools to pursue ethics education vigorously.

What Do They Want?

If one accepts the premise (and I do not) that both the fault and the solution lies with business schools, then what? The task force report rather casually mentions that traditional decision-making frameworks include the consequentialist, deontological, and value ethics approaches. A comprehensive examination of any of these alone could easily fill a complete semester.

With reference to corporate governance, it also says appropriate topics may include the role and responsibilities of the board of directors; the role and responsibilities of the audit committee; an understanding of internal controls, the role and responsibilities of management, and critical monitoring activities such as internal auditing; elements of an effective code of conduct; an understanding of U.S. federal sentencing guidelines and Sarbanes-Oxley, the U.K. Cadbury Code, the King Report of South Africa, and similar regulations and recommendations from other parts of the world; components of an effective corporate compliance program; and the role and responsibilities of independent public accountants, counsel, and regulatory bodies. These topics would certainly fill a semester—perhaps several semesters.

One of the most interesting sentences in the task force report is, “Learning how to name and locate the problem, analyze and map the power structure and politics that influence the problem, build allies and mentors, and apply effective persuasion skills can equip students with the skills they need to put their values to work in the corporate world.” That skill set is too rarely found among senior executives. To expect it from undergraduate students is certainly ambitious.

What Can We Do?

Clearly business schools must take an aggressive and active role in solving this complicated problem. We must not only take every opportunity to teach about ethics but also make every opportunity to do so. For that reason, I agree with Professor Swanson, whom I referenced at the beginning of this discussion. We should have a stand-alone ethics course, integrate ethics across the curriculum, and have emphasis initiatives to place the issue in the spotlight.

In the Jennings A. Jones College of Business, we have a stand-alone course—not at this time required of all majors. We try to integrate ethics across the curriculum—not succeeding as well as we would like. We bring speakers to highlight the issue—such as WorldCom whistleblower Cynthia Cooper.

We in the schools and colleges of business must do our part, but not everyone who works for or becomes an executive of a corporation will have attended, much less graduated from, one of those schools. What about the history, art, and computer science majors or engineers, doctors, and entrepreneurs who may never attend business school at all? Where do they learn ethics?

Business schools should do everything within their power to improve the situation, but let’s be realistic. The problem is not limited to and will not be eliminated by courses within the business schools. It is too pervasive—it is woven into the very fabric of our society.

Let’s teach character and values starting in primary school and teach right and wrong in our religious institutions. Let’s emphasize family values and demand that parents be moral and ethical examples for their children, appropriately discipline them, and help them learn about consequences when those consequences are not life altering.

If we wait and expect that all of these things can and will be taught to and learned by the few who go through business schools on their way to the executive or other influential suites of the world, then Albert Einstein will be proven correct again:

“Insanity is doing the same thing over and over again and expecting different results.” ■

E. James Burton is dean of the Jennings A. Jones College of Business at MTSU.



E. James Burton, dean of the Jennings A. Jones College of Business at MTSU.

Business schools should do everything within their power to improve the situation, but let’s be realistic. The problem is not limited to and will not be eliminated by courses within the business schools.