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Treachery and Betrayal- An Analysis of The Modern Fiduciary Behavior of Corporate Directors and Management- The Need For Schooling In The Business Ethics of Tomorrow

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TREACHERY AND BETRAYAL - AN ANALYSIS OF THE MODERN FIDUCIARY BEHAVIOR OF CORPORATE DIRECTORS AND MANAGEMENT - THE NEED FOR SCHOOLING IN THE BUSINESS ETHICS OF TOMORROW

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This article examines the fiduciary relationship between corporate officers and directors, and the shareholders they serve. In recent years, the breakdown of the fiduciary relationship and the failure of the corporate model have received much attention, as the headlines of Wall Street's endless fiduciary scandals adequately illustrate. What is the root of this failure, and what, if anything, are the remedies? Case analysis will demonstrate the pandemic problem involving fiduciary responsibility, demonstrating the need for reform. This review will identify systemic corporate fiduciary weaknesses and underlying causes. Recommendations for change to alleviate fiduciary failure will be discussed, with focus placed on ethics and need for revitalized instruction.

INTRODUCTION

When Mickey confronted Minnie about an eye popping $140 million debit in their checking account, Minnie told him to talk to their fiduciary, Mr. Michael Eisner, who allegedly was minding the Magic Kingdom's finances. When Mr. Eisner, CEO for the Disney empire, would not return Mickey's repeated phone calls, Mickey and several of his shareholder friends filed a derivative shareholder suit against Eisner and his board of directors. Investigation disclosed that all was not well in the Magic Kingdom, and Mickey's most trusted business partners may have been doing everything, but acting in his and Minnie's best interest.

Walt Disney's board of directors, together with Mr. Eisner, were defendants in a civil action in a Delaware trial alleging they breached their fiduciary duties when they blindly approved an employment agreement with Michael Ovitz, making him president of the Walt Disney Company. Furthermore, it was alleged that a little more than a year later, and again without any review or deliberation, the board of directors took no action when Mr. Eisner entered into a non-fault termination agreement wherein Mr. Ovitz received $140 million from Mickey and Minnie's bank account, also known as, the corporate coffers. The derivative shareholder suit accused Disney's fiduciaries of failing to exercise any business judgment, and of failing to make a good faith attempt to fulfill their fiduciary obligations to Disney and its stockholders (In re Walt Disney Co. Derivative Litig., 2003).

Facts

When Eisner's second-in-command died in a helicopter crash, Eisner sought to replace him with a personal friend of twenty-five years, Michael Ovitz. While Ovitz's previous business experience consisted of service as the founder and head of a talent agency, he had never been employed as an executive in any publicly owned entertainment enterprise. Undaunted, Eisner decided unilaterally to hire Ovitz, informing three members of Disney's board of directors on August 13, 1995. Even though all three directors protested the hiring, they took no action. The following day Eisner sent Ovitz a letter setting out the material terms of his prospective contract as president of Disney. Prior to this, as the record reflects, neither the board of directors nor its compensation committee ever discussed hiring Ovitz for anything, let alone president of the company.

After a draft employment contract surfaced, the compensation committee finally met to discuss the Ovitz proposition. Surprisingly, no copy of the draft employment agreement was submitted to the committee. Instead, they received a rough summary of the agreement. No spreadsheet or any analytical document showing the potential compensation package to Ovitz, or the possible cost of his severance package, was ever presented to the committee. Nor did the committee request any information or perform an investigation as to how this package compared with similar ones in the industry. After a short discussion, the committee adopted a resolution approving the contract.

Three days later the full board of directors met and approved the resolution hiring Ovitz. There were no documents, let alone a draft contract, submitted to the board for its consideration, nor did it ask for any. While Ovitz officially started serving as Disney's president on October 1, 1995, his employment agreement was not executed until December 12, 1995. However, the

effective date of the employment agreement was backdated to October 1 when he began his duties.

The final agreement differed substantially from the earlier drafts (none of which had been reviewed by the board or its compensation committee). The final employment contract and stock option plan granted Ovitz one million Disney shares for each of the three years of his employment contract. Furthermore, the stock agreement (signed on December 12, 1995) authorized an option price dating back to October 16, 1995, when a Disney share stood at \$56.87. By December 12th it had risen eight percent to \$61.50, making Ovitz a wealthy Mousekateer overnight.

If this seemed too generous by industry standards, Ovitz's contract contained a non-fault termination provision, wherein as long as he did not act with gross negligence or malfeasance, he would receive the full benefits of his contract. This included immediate vesting of his three years of stock options totaling three million shares, even if Ovitz acted ordinarily negligent or proved unable to perform his duties. In addition, Ovitz would receive the remainder of his annual salary, and a \$7.5 million bonus for each year remaining on his contract, even though Disney was not obligated to pay an annual bonus. Finally, he was to receive a lump sum termination payment of \$10 million. The total package rang up on the register at \$140 million. Paying someone this much money to leave the company irrespective of performance, caught the attention of many shareholders once the good news gone badly leaked out.

Ovitz's presidency proved unhappy from the start. Ovitz was not accustomed to being second-in-command. Soon Mr. Eisner and Mr. Ovitz realized the work arrangement was not a good "fit." Instead of focusing on learning his new job, Mr. Ovitz admitted he spent time looking for alternative employment. If Ovitz had been required to resign outright, Disney would not have had to pay him the severance non-fault termination clause package. Instead of choosing this option, however, Eisner discussed exercising the non-fault termination clause of Ovitz's contract with him, and not surprisingly, Ovitz jumped at it. On December 12, 1996, Ovitz's exit from Disney became public, and with only a year on the job, Ovitz and his non-termination clause package left Burbank, California. Like his employment offer, neither the board of directors nor the compensation committee were consulted on the exercise of this mega million deal. Furthermore, no record exists of any board action after the non-fault termination became public on December 12, 1996.

Following a full trial on the merits and an evaluation of the extent to which each officer and director fulfilled their fiduciary duties; the court emphasized the importance of the business judgment rule and found that all of the defendants were, on the facts, entitled to a presumption of acting in good faith. The court held that acting in good faith was key to a fiduciary's duties, including the duty of care. The court subsequently set the standard for finding bad faith very high, maintaining:

> A failure to act in good faith [may be found] ...where the fiduciary intentionally acts with the purpose other than that of advancing the best interests of the company, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard of his duties (In re Walt Disney, 2005: 15452).

A finding by the court that the directors had exercised bad faith would have deprived the directors of the personal liability protection/immunity provided by the business judgment rule. The court repeatedly admonished Disney's directors for failing to live up to the ideals of corporate governance, and from an aspirational level of responsibility, the directors should have been more diligent in carrying out their duties. Nevertheless, the court found that the board's failure to meet these standards did not demonstrate actionable bad faith. Perhaps because Delaware is the home of corporate America, courts within the state tend to be reluctant to open a Pandora's Box of fiduciary derivative liability suits by lowering the bad faith or its equivalency bar.

Upset Mice

So why would the multitudes of shareholder mice in the Magic Kingdom be distraught over this state of affairs? The concern might involve the business obligation we call "fiduciary duty." Disney shareholders have an expectation interest that their entertainment business would be managed by a board of directors who would exercise the "utmost care" while discharging their fiduciary duties. A fiduciary, by definition is a special person in a confidential relationship who owes a legal duty of trust, loyalty, and confidence to another. In this case, the corporate officers and the board of directors owe this legal duty to Disney's shareholders (Mann, 2004).

A corporate officer or director who violates a fiduciary duty may be liable for losses incurred through

its breach. A famous jurist named Justice Benjamin Cardozo characterized the fiduciary relationship in 1928 in Meinhard v. Salmon as what one owe[s] to one another, while the enterprise continues, the duty of finest loyalty…A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior" (1928: 546).

How does that standard template onto Disney's corporate fiduciary-directors? We will return to this later. But first, is this a serious problem worthy of further study across the corporate kingdoms of today, or is Mickey's case an aberration, unique and limited to a few big dollar magicians? The focus of this work will address the issues of what and how to teach ethics, with the case studies providing justification for this need.

Contagion - Treachery and Betrayal on an Apocalyptic Scale

Public citizen advocate Ralph Nader argues American corporations are the most pernicious forms of business organizations today, which exploit investors, consumers, and workers in our society, beyond anything seen before in American history. With this as background, is Disney's (a Fortune 500 company) recent apparent fiduciary breach an aberration, or a symptom of a far more serious corporate leadership problem? The scion of business economics, Adam Smith, in his "Wealth of Nations" presciently observed, [t]he directors of companies, however, being the managers of other people's money than their own, it cannot be expected that they should watch over it with the same anxious vigilance [as owners] ….Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company (1880: 326).

If past is prologue, should we be surprised to learn between 1998 and January 2002, that Gary Winnick, founder and chairman of Global Crossing, sold $734 million in stock while his company filed for bankruptcy protection on January 28, 2002, the fourth largest bankruptcy in corporate history? In 2005, Tyco's CEO Dennis Kozlowski was found guilty of 22 counts of grand larceny, conspiracy, falsifying business records, and violating business law involving massive fraud - looting $600 million from his company. Together with his CFO Mark Schwartz, he was sentenced from 8 to 25 years in prison, and ordered to repay Tyco $134 million (NY Times, 2005). In addition, Kozlowski was fined $70 million and Schwartz $34 million. In June 2002, Adelphia Communications filed for bankruptcy as it tried to deal with over $20 billion in debt, ongoing losses, and accusations of self-dealing by the founding family (Gerena-Morales, 2003). CEO fiduciary John Rigas subsequently was sentenced to 15 years in prison for similar misconduct (Farzad, 2005).

Should it disturb shareholders that 208 executives and directors from the 25 largest U.S. companies that filed for bankruptcy between January 2001 and July 2002 made off with gross earnings of $3.3 billion, most of it realized from stock sold before the company collapsed (Cheng, 2002)? How should the investor feel about executives and directors of 1,035 corporations, whose stock fell at least 75 percent from the highs they achieved just before 2001, cashing out with $66 billion (Gimein, 2002)? If there is any remaining doubt about greed, at the 25 corporations where executives cashed out the most before their scandals broke, no one now would likely be surprised to learn 466 insiders carried off a haul of $23 billion. One might still ask: where were their fellow corporate officers and boards of directors while all this miscreant activity was occurring?

Speaking of corporate officers, the Enron leadership team takes the boldness prize for its $680 million withdrawal of corporate equity. CEO Ken Lay pocketed $67 million in compensation during the year prior to its bankruptcy, Jeffrey Skilling, president, rifled $40 million, and CFO Andrew Fastow (who has since pled guilty to fraud, receiving 6 years imprisonment that he is currently serving) made away with a mere $5.6 million. But the breath taker is the discovery that 140 Enron executives receiving a total of $680 million, averaging $4.7 million apiece, for their fiduciary performance of loyalty, and honest efforts on behalf of their shareholders. Not to be outdone, WorldCom's Bernie Ebbers made off with $360 million in personal loan guarantees, while Qwest's CEO Joe Nacchio received a $20 million severance package after losing $100 billion in shareholder value (Gimein, 2002).

Speaking of CEOs' sense of fiduciary fidelity, Disney's very own Michael Eisner mysteriously saw his annual compensation rise 498% to $6 million in 2002 while shareholder return fell 18%. Leo F. Mullin, Delta's CEO, received $13.8 million, a 104% increase over the previous year, while asking the pilots union to take a reduction in previously negotiated wages, concurrent with a shareholder loss in equity that plummeted 58%. Miles D. White, CEO at Abbott Labs, received $25,545,490 in 2002, a meager 147% increase amidst a shareholder decrease of 27% in stock price. Even departing Honeywell CEO Lawrence Bossidy received a farewell bonus of $4 million while stockholders

experienced a share loss of 27% in 2002 (Nader, 2003). So the question remains: who is minding the store for their shareholders while all these equity withdrawals are taking place? Apparently these corporations are bereft of leaders who do not understand the ethical and fiscal definition of the term "fiduciary." Do these facts reveal an exercise of "utmost good faith" on behalf of their stockholders, or attest to a serious conflict of interest?

HealthSouth's founder Richard Scrushy was accused of even more outlandish leadership, facing 85 counts of criminal behavior stemming from a $2.7 billion fraud he was accused of perpetrating involving his own interest. Federal prosecutors are sought forfeiture of $279 million in property including two luxury homes, two private airplanes, a 92-foot yacht, a fleet of luxury cars including a Lamborghini and Rolls Royce, and paintings by Picasso, Chagall, and Renoir (Whitmire, 2005). Samuel Waksal, former ImClone CEO, and tipster to one Martha Stewart who served her own jail time, even pled guilty to insider trading during his equity withdrawals involving stock options (Breeden, 2003). How many CEOs and CFOs does it take to constitute a pattern?

Round Up the Usual Suspects

The hit 1987 movie "Wall Street" portrayed business greed at its worst in the character of Gordon Gekko (played by Michael Douglas in an Oscar-winning performance). Gekko was "an investor" focused on only one business topic – greed - that he imparted passionately at a shareholders meeting where he attempted a company takeover. While one may rationalize the executive fiduciary behavior addressed above as a seductive endorsement of "Wall Street's" Gordon Gekko mantra "greed is good for America" (his stated purpose at the shareholders meeting), there may be at least one other equally plausible explanation. For investors, says senior vice president and special counsel at Institutional Shareholder Services Patrick McGurn, "poor governance is a substantial risk factor" (Burns, 2003). Dow Jones Newswires in Washington reporter Judith Burns sums it up observing. When it works as it's supposed to, a board of directors looks attentively over the shoulders of executives who smartly handle the day-to-day business decisions, and the shareholders get a full accounting of the company's operations and finances. But lately, this model has failed in some rather spectacular smash-ups, with executives acting like imperial monarchs - operating unchecked by boards, bankrupting their companies and leaving shareholders with nearly worthless stock (Burns, 2003).

Could corporate model failure be the root cause for this outbreak of corporate Gekkoism? If so, why is the model breaking down now? A joint study by the Institute for Policy Studies in Washington and the Boston-based independent research group United for a Fair Economy report on average CEO pay rose 279% from 1990 to 2002, exceeding the 166% rise in the Standard & Poor's 500-stock index over the same period. CEO salaries are determined by board of directors' compensation committees. The Wall Street Journal reports that in too many cases today, board members have been hand picked by the very parties they are supposed to oversee, the chief executives. "Often in such cases, the boards approve whatever the CEOs ask for—particularly big pay packages that aren't tied to performance" (Burns, 2003).

How true is this? During 2002 "CEOs of the 350 biggest U.S. companies enjoyed a 7% rise in their pay, despite an average 13% fall in corporate profitability during the year" (Conference Board, 2002). Should shareholders be concerned? As one blunt investment manager observed in a CATO Institute report on this subject, "[E]nron ain't the problem…The unremarked gut issue today is that over the past decade there was a landslide transfer of wealth from public shareholders to corporate managers. Enron was just the tip of the iceberg ready to happen" (Niskanan, 2002).

Should shareholders really be concerned about paying 140 company executives in one company $680 million? After all, it is their money, and are we not talking about the "C" word here—corruption? One key symptom of corporate corruption, in fact, is runaway CEO pay. During the past decade, CEO pay has grown from 42 times average employee pay to 531 times average employee pay. Comparing other industrialized nations, Japanese CEOs make only 20 times what an average worker earns, while British CEOs make 35 times, a far cry from their colonial cousins (Conference Board, 2002). Even management by objectives guru Dr. Peter F. Drucker forewarned the increasing pay gap between CEOs and employees in the early 1980's. He observed that such disparity threatens the credibility of corporate leadership, maintaining that no leader should earn more than 20 times the company's lowest paid employee.

Conundrum

So if corporate executive greed, corruption, and fiduciary duty breaches are being caused by lack of accountability on the part of boards of directors, hand-picked by the same CEOs, CFOs, and officers they are supposed to police, how can the cycle be broken? One

obvious solution is to "buck up or develop fiduciaries with an attitude" to serve on the boards of directors. A 2002 study by consultants McKinsey & Co. defined "good corporate governance as having a board with a majority of outsiders who are truly independent of the company and its managers, who have significant holdings of the company's stock, and who are paid chiefly in company stock or its equivalent." In addition, "[f]ormal evaluation of directors and responsiveness to investor requests for information are other hallmarks of well-governed companies," claiming McKinsey (Burns, 2003).

But how can the control of CEOs over selection of board of director members be avoided? A panel of the Conference Board, a business research group in New York, recommended a number of changes to improve corporate governance. Among the changes, they recommended "[a]t the top of the list: splitting the role of chairman of the board from that of chief executive—preferably with the chairman's position filled by an independent director. Chairmen have far more than a ceremonial role, as they set board agendas, manage meetings and control the flow of information to the board." McKinsey's research reflects that separation of the CEO and chairman functions is the norm in Great Britain. Their recent survey of Fortune 500 companies found that 70% of directors favored splitting the two roles. A Corporate Library official reports about one-third of U.S. companies have already divided the roles (Burns, 2003).

Separation of duties may not be sufficient. Besides counteracting the "Gekko greed" factor, is there a more deep-seated training or education deficiency that deters corporate leadership from embracing their fiduciary duties? Former Federal Reserve Chairman Paul Volcker observed, "I was struck not too long ago when a leading figure on Wall Street said to me, 'What do you expect when for 20 or 30 years all our best business schools have been teaching the ideology that the stock price is the only thing that counts.' And it wasn't to stretch the corollary far to say anything you can do to get the stock price up is appropriate" (Wall Street Letter, 2003).

If our best business schools are teaching 'that the stock price is the only thing that counts and that anything you can do to get it up is appropriate' behavior, then it is not hard to see why the fiduciary duty has become a burnt offering on the altar of stock prices. When corporate executives like Disney's Eisner and Ovitz receive millions of stock options, is there a relationship involving Volcker's observation, corporate executive self-dealing, and subsequent fiduciary misconduct? When comparing this with the executive corruption and billions in shareholder wealth transfers discussed above, the culprit may be those on the professorial platforms as much as the pupils they taught so well (*Business Week*, 2003). A 2003 survey of 2,700 *Business Week* readers discovered that over half (53%) of the responders believe that present business schools do not perform a good job of grounding their graduates in ethical business practices. This same survey found that 63% believed that most executives in corporate America are "law-abiding citizens, who sometimes place profits above morals." An additional 28% said these same executives "would do just about anything for a dollar" (Business Week Online, Jan. 17, 2003).

A year later, a 2004 Wall Street Journal poll asked "How much emphasis should MBA programs place on business ethics?" This online poll revealed that 81% (1466 responders) indicated that "ethics courses should be required of all students" (Weber, 2006).

Fix

The billions shareholders lost, the collapse of the stock market in July 2002 (losing 1500 points in four weeks on reports of mounting corporate fiduciary scandals), and the enactment of the Sarbanes-Oxley Act in January 2002, all reflect a massive lack of confidence by the American people in the integrity and execution of corporate fiduciary responsibilities by business leaders today. Frustrated with out-of-control and irresponsible CEOs and boards of directors, Congress enacted a collective ethic of accountability in Sarbanes-Oxley imposing new and costly procedures to stem this behavior.

What would the late Walt Disney say about all this? He might say that it is time to go back to school to re-learn the basics. Somehow academia has focused on the means of corporate American business while losing sight of its goal - service to the consumer, the investors, the employees, and the economy as the engine of democracy (Khurana, 2004).

Can ethics be taught or is it inherent or intuitive? Business basics have traditionally included business ethics, that is - the moral compass of who you are in the dark when no one else is watching; that which guides your decision-making when determining right from wrong business decisions (Weber, 2006). When reviewing our respective business curricula, what place and role do ethics play? Whose ethics are we teaching, or more importantly, should we be teaching? Should it be Gordon Gekko's relativism - that individuals judge for themselves what is right and wrong exclusive of external considerations, or utilitarianism - holding that the course

of action seeking the greatest good for the most people is the appropriate ethical approach, or should it be Kantian duty-based standards of conduct that maintain the proposed action is ethical if everyone could universally exercise it?

At this moment in business history, this is the most important subject we should be discussing, debating, and forming a united academic consensus on. This consensus should be for the purpose of changing the direction that has brought so much fiduciary disservice to our profession, the economy, and our people. The most successful companies historically appear to be those characterizing their most treasured value as being "service." Profit is without question an indispensable component or reward to business service, but our teaching error has led to the displacement of the "service" theme, focus, and corporate purpose.

Gordon Gekko and his apostles are wrong. Greed is not good for America. Greed, unchecked and unbalanced, harms workers, shareholders, consumers, and the public as Wall Street's endless fiduciary scandals more than adequately demonstrate. In the ABC News documentary "Greed—Is It Necessarily Bad?" Atlanta billionaire Ted Turner observed "that a little greed is good for all Americans," explaining that self-interest is a good motivational interest in business (ABC News, 2003). But where is the demarcation between "a little" and "excessive" greed? A relevant Jesuit aphorism observes "everything in moderation, nothing in excess."

If companies are going to engage in voluntary compliance, it is because people at the top of the corporation are going to have a culture of integrity (Kleiner, 1997). The question becomes, then, "how do we create this "culture of integrity?" Greed aside, the recent Hewlett-Packard ethics scandal involving senior executives reflects a culture of "anything goes." Determined to discover the source of information leaks occurring among its board of directors, HP executives set up bogus emails, spied on journalists using former FBI agents, and engaged in pretexting - investigators requesting information from operators over the phone pretending to be someone else. Testifying before a congressional investigation committee, former HP chairman Patricia Dunn stated "I believe these methods may be quite common," she said of pretexting, "at companies around the country" (Wall Street Journal, 2006). [Based on Catherine Pratt - latest ethics scandal.]

Does Teaching Ethics Work?

There is empirical evidence demonstrating teaching ethics has a positive effect in the workplace. One recent study involved accounting giant KPMG. Perhaps infected with some of the ethical virus that caused Arthur Andersen to succumb, KPMG, one of the Big Four accounting firms, experienced its own significant emotional event when it remorsefully entered into a settlement agreement on August 29, 2005, with the U.S. Department of Justice and Internal Revenue Service to pay fines totaling $456 million involving KPMG's sale of fraudulent tax shelters (KPMG, 2005). Perhaps realizing something seemed wrong over time at KPMG in its ethical climate, management conducted a Forensic Integrity Survey to determine: (1) How prevalent are incidents of fraud or misconduct; (2) Have conditions that facilitate the prevention of, and response to fraud and misconduct changed since 2000; and (3) Are ethics and compliance programs having any effect (KPMG Forensic Integrity Survey, 2005)?

The 2005-06 survey is based on over 4000 responses from KPMG employees nationwide. It states, "Our industry wide data delves into perceptions regarding the prevalence, prevention, and detection of misconduct, as well as corporate reactions and tone at the top" (KPMG Cover Letter, 2006). There were three key findings:

- Nearly three out of four employees nationally - 74% -- reported they had observed misconduct in companies where they were working in the prior 12-month period, with half the employees reporting that what they had observed could cause "a significant loss of public trust if discovered." These observations are virtually unchanged from employee observations in 2000.
- Although the level of observed misconduct has remained constant, employees reported that the conditions that facilitate management's ability to prevent, detect, and respond to fraud and misconduct improved since 2000. Some of those conditions involve (a) degree of pressure to do whatever it takes to meet targets; (b) lack of understanding of standards that apply to their jobs; (c) belief that policies and procedures are easy to bypass; (d) belief that rewards are based on results, not the means to achieve them; among others.
- Employees who work in companies with comprehensive ethics and compliance programs reported more favorable results across the board than those employees who work without such programs. For instance, employees who work in companies with ethics programs reported fewer observations of misconduct and higher levels of confidence in

management's commitment to integrity (KPMG Leadership Message 2006).

Examining the findings in (3) more closely, the Forensic Survey found:

- Ethics and compliance programs have a favorable impact on reducing the prevalence of misconduct in organizations - observed misconduct in prior 12 months: 65% without program, 59% with program; observed violations of organizational values and principles in prior 12 months: 55% without program, 43% with program.
- Ethics and compliance programs have a favorable impact on mitigating the conditions that give rise to misconduct - feel pressure to do whatever it takes to meet targets: 60% without program, 50% with; believe rewards are based on results, not the means used to achieve them: 57% without, 41% with program;
- Ethics and compliance programs have a favorable impact on employee willingness to report misconduct—would feel comfortable reporting misconduct to supervisor: 48% without program, 88% with program; feel comfortable reporting to internal audit: 19% without, 63% with program; comfortable reporting to board of directors: 20% without, 59% with program.
- Ethics and compliance programs have a favorable impact on Employee perceptions of the outcomes of reporting misconduct - believe appropriate action would be taken: 44% without, 87% with program; believe they would be doing the right thing: 65% without, 92% with program.
- Ethics and compliance programs have a favorable impact of employee perceptions of the tone at the top—believe CEO and other execs set right tone on ethics and integrity: 29% without, 84% with program; believe CEO and other execs value ethics and integrity over short-term business goals: 28% without, 82% with program (Weber, 2006).

What Can We Teach That Matters Involving Ethics?

Accounting, legal environment, and business law faculty should teach the requirements of the Sarbanes-Oxley Act, and in particular Section 404. This provision requires companies and their auditors to evaluate the effectiveness of their internal control over financial reporting based on a suitable control framework. In support of this, most companies in the U.S. are applying the integrated control framework developed by the Committee of Sponsoring Organizations (COSO) of the Treadway Commission. COSO addresses ethics and compliance program elements in components that have a pervasive influence on corporate behavior. They indicate we should be teaching:

- The importance of establishing the ethics tone by the board of directors and management
- Usefulness of establishing codes of conduct and other policies regarding acceptable business practices
- The level at which employees should be made aware of management's expectations
- How to address pressure to meet unrealistic or short-term performance targets?
- How to address management's attempts to override established controls?
- The extent to which adherence to the code of conduct should be a criterion in performance appraisals
- How management should be monitoring whether internal control systems are working?
- The importance of establishing channels for people to report suspected improprieties
- What responses involving remedial action are appropriate when addressing violations of the company code of conduct?

If this is part of what business faculty today should be teaching about ethics and compliance programs, what other methodology opportunities might be useful for educational exploitation?

Recommendations for an Ethics Revival

The following is a list of recommendations that if implemented, would make academia more responsive to the needs of the public and investors:

- Formulate and teach a Business Ethics course during the business student's first or second year (ideally in an Introduction to Business course) (*Business Week*, Jan. 22, 2003)
- Imbed ethics problems or games such as Prisoners' Dilemma (this is a type of non-zero-sum game in which two players can "cooperate" with or "defect" (i.e. betray) the other player. The only concern of each individual player ("prisoner") is maximizing his/her own payoff, without any concern for the other player's payoff) in each course taught in business schools; include ethics in exit or proficiency exams (*Business Week*, Jan. 17, 2003)
- Offer advanced courses in business ethics that challenge a student's moral compass requiring a

foundation with which to make difficult fiduciary decisions

- Establish a student service-learning project during the senior year in business school to integrate in a practical setting the knowledge, principles, and ethics of a four-year business curriculum teaching the aspirational service ethic, not the moral minimum of ever more profit (Weber, 2006)
- Increase the number of symposia, lectureships, and similar programs, which give specific attention to ethics and value issues. These should offer "real world" scenarios—students understand the point better when they get to speak with and hear from individuals that have actually dealt with situations you discuss in class (Weber, 2006)
- Increase professors' awareness of their significance as role models for students. If professors take ethics more seriously, then students will do the same
- School of Business faculty should conduct annually a continuing business education workshop to update themselves on the requirements of SOX (Sarbanes-Oxley Act) and judicial enforcement actions involving fiduciary obligations
- Create a list of "Guiding Principles" that illustrate how management can apply ethical standards of conduct, and define "the way management works." These Guiding principles should contain principles such as uphold the law, create a culture of open and honest communication, do the right thing, report results accurately, and build trust and credibility

Not My Money

We conclude where we began. While the Business Judgment Rule protects corporate officers and boards of directors in the exercise of honest mistakes and poor judgment that results in loss to shareholders, it does not provide total immunity. The protection is available only so long as the decision complies with management's fiduciary duties, acting in good faith, in what they consider the best interests of the corporation, and with the care that an ordinarily prudent person in a similar position would exercise in like circumstances. "This requires an informed decision with a rational basis, and with no conflict between the decision maker's personal interest and the interest of the corporation" (Cross, 2004).

So Disney shareholders and Mickey want to know how that ethically squares with the $140 million non-fault termination deal Mr. Eisner made and executed with Mr. Ovitz? Under the circumstances, would a reasonable person - or even Pluto, conclude that the board of directors exercised "utmost good faith" in their fiduciary duties, acting with the care an ordinarily prudent person would in handling $140 million of Mickey's and his friends' assets?

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