

ETHICAL ISSUES IN BUSINESS AND THE LAWYER'S ROLE

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CAROL MORGAN

Introduction

Good afternoon everyone. I am Carol Morgan. I am with the University of Georgia School of Law's Business Law and Ethics program. I'm joined today by very distinguished panelists, Tamar Frankel from Boston University and Robert Rhee from the University of Maryland. You will hear a lot more about them during our program today. I am glad to see this interest in the topic of business ethics. Law schools have not traditionally put a lot of attention or focus on the subject of business ethics. We have done a pretty good job of talking about the law and professional ethics, but there are not a lot of courses that I can find, in my unofficial survey of law schools on the internet, that focus on business ethics. So our goal today is to brainstorm ways to better incorporate the topic of business ethics into our law school curriculum.

MBA programs, on the other hand, have heightened their focus on business ethics in light of all the scandals of this century. They have offered more business ethics courses, hired more business ethics professors, and even had students take oaths. At Harvard, students take an MBA oath or a pledge that they will act responsibly and ethically and serve the greater good. Students at Columbia Business School sign a pledge that they will not lie, steal, or cheat and won't tolerate other people who engage in that conduct. So in light of the changing climate in our business school education, and since law students will have business clients in the future, it's important for our students to understand the ethical issues and complexities that business clients face, and to figure out ways that they can more effectively represent these business clients.

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I have a particular interest in business ethics from my own experience as a practitioner. I was in-house counsel with National Service Industries here in Atlanta for 25 years, including service as general counsel. My experience was that my business client wanted me to provide guidance beyond legal guidance. It is true that a lawyer can represent a client very competently if they expound on the law, act within their professional ethics, and put a period at the end of the sentence. I suggest that maybe some of the crises we have seen in recent years might not have happened if the lawyers had thought beyond that period at the end of the sentence and had discussed some of the ethical implications that are involved. I know, based on my experience, that the business client welcomes those discussions because they rely on lawyers as wise people who can see the big picture.

I think the discussion of business ethics needs to take place more because law students are not currently prepared for that discussion. Law schools have a role in preparing our students to talk more than just the law, which is a more limited approach to counseling. Obviously, the client is the ultimate decision maker, and a lawyer has to recognize there are limitations, but I think the business ethics discussion needs to take place. So how can we do this in a law school? How can we address this issue of business ethics? There are different approaches, and each of us on the panel today represents a different approach, and there are probably others. I'm curious how many of you have business ethics courses in your curriculum currently?

COMMENT

It would help me if you gave me some guidance about what you mean. It would be helpful if you identified the elements of ethical responsibility that apply uniquely to business. Then I would be able to tell what it is we do.

CAROL MORGAN

Okay. Well I think you are asking about a number of different things. There is obviously a compliance component to ethical behavior. But beyond that there are also corporate responsibility and social responsibility issues that are part of ethical decision-making, such as understanding the implications of conduct in the community setting or in a corporate environment.

There is also the "it's the right thing to do" element. There are companies that begin their code of conduct with "we do the right thing." Well, what is that right thing? Companies define that differently. To me, it's more than just about compliance issues, but that is certainly a component of it. Compliance with the law is a minimum standard for me; there are other implications that we need to examine to see what impacts there may be on other constituencies in the community, on employees, on customers, and on vendors. I favor a broader approach. Really, it's about looking at impacts of conduct, and trust and honesty, which is the name of Tamar's book.⁵ Mark Fagan, who is here today, also co-authored the book with Tamar. Does that help at all?

COMMENT

It's a start.

⁵ MARK FAGAN & TAMAR FRANKEL, TRUST AND HONESTY IN THE REAL WORLD (2009).

CAROL MORGAN

We will get more into the definition as we continue. It would be a lot easier if I could define ethics where there are rules. To me, when you get into the area of corporate conduct that goes beyond the rules, where there really are no written rules, you're dealing with issues that are much more complicated. It's easy when you've got rules and compliance issues. It's much more difficult when you are dealing with the things that involve more than rules and their impacts. But we definitely will examine all of that. I saw a couple of hands, at least, indicating something along the line of a business ethics course.

One approach to teaching business ethics is the stand-alone approach. The stand-alone course approach is what Robert at University of Maryland teaches. Basically, it's a course that looks at business ethics from an economic theory approach coupled with practical applications, and he will expound more on that. What I have done at the University of Georgia is a more integrated approach where I have incorporated ethics into existing courses on transactional skills. We have a lot of discussion about ethical situations that a business client may face in the future and what the lawyer's role might be in helping the client think through the issues.

There is another approach that I call the collaborative, or interdisciplinary approach, that Tamar Frankel and Mark Fagan, with the Kennedy School at Harvard, have been working on. It's a course that would ideally involve both law students and business students discussing and figuring out ethical situations by examining actual case studies of corporate conduct. So, I am interested if you all have other approaches in your courses. That would be very helpful to all of us, I think. We're going to start with Robert who is going to talk about the stand-alone course approach and go from there.

ROBERT RHEE

THE STAND ALONE COURSE APPROACH TO TEACHING BUSINESS ETHICS

Good afternoon. I'm Robert Rhee with the University of Maryland and the subject of my discussion is teaching corporate ethics and social responsibility. I teach two courses, one at the law school and another one at the business school. At the law school, it's a seminar and students complete a research paper, which satisfies the advanced writing requirement. It is usually composed of 10 to 15 students. In the Business school course, it is part of the core business school curriculum, and the law school you have some joint JD/MBA students. For students in the J.D. program, they can take one or the other to satisfy both programs. I found that both courses are a switch-hit and that I really haven't changed a whole lot in the syllabus from one to the other and it seems both courses do fairly well. Most of the evaluations seem to be pretty good so far.

As Carol mentioned, the rationale for the course is frequently offered as the business school's core curriculum. The core curriculum is called ethics and responsibility. When I went to business school in 1995 - 1997, I had to take a similar course. It is a bit of an academic orphan in law school curriculum. The curriculum, as Carol suggested, perhaps is a subject beyond the rules, regulations, statutes, and case law. I take an interdisciplinary approach and combine business, economics, law, psychology, and a little bit of philosophy. I use a lot of case studies and the students found that they like working with these case

studies because it really contextualizes the corporate and business decision-making and they are different from the highly abstract stylized fact patterns of the appellate case law. I find that students really like this approach.

The course is really taught in two parts. The first part focuses on conceptualizing the corporation; the purpose of the corporation, the role of the agency and its gatekeepers, and it provides a sort of model of these ideas and these issues. When that's done there is a capstone case study that I use. For that I use what I believe to be the symbol of corporate deviance and that is the fall of Enron. For the teaching the purpose of the corporation, I use some pretty familiar cases on business associations.

In Defining agency problems in the firm I use several articles. Michael Jensen has a clear article on the problem of agency as well as many others.⁶ I also have an article that ties in these concepts together, I think, nicely. It provides a real nice summary for some of the topics that have been discussed. And, of course, gatekeepers, Professor Coffee's book, chapter 6 on gatekeepers.⁷ Professor Frankel's book *Trust and Honesty*. Chapter 9: relationships from businesses.⁸ And here is where I produce some case studies. One of the case studies is out of a conflict that involves the .com era, the sale side analyst and the conflicts that we saw there with the conflicts of interest. It gets students to start thinking about conflicts of interest, organizational design and I segue them into the role of the professionals and the demise of Enron. So that's a nice case study. It takes a look at the role of attorneys, accountants, sale side analysts, credit rating agencies and management consultants as well.

The capstone, then, is a case study on Enron. It's a very thick 70 page, pretty dense, case study. My class spent several hours just on that case study. It's based upon Malcolm Salter's book.⁹ He's also the author of the case study. It takes a look at the question how Enron collapsed and what we can learn from it. The case study covers, of course, Enron as a huge catastrophe. It was like a plane crash. There were a number of different factors that went into its demise. So in the class we take a look at these factors, miss-modeled leadership, government monitoring, and the hedging of professionals.

Looking at the rhythm's hedge -- this was the hedge that Enron put in for emergent investments and communications. I think they had a 50 percent at stake and were concerned about the volatility of earning from an adverse soft price movement of rhythms. They wanted to hedge it's risk but couldn't find a counter party, so Enron creates its own counter party LJM1, which, of course, is run by Fastow. If you look at how the deal was structured you can see it's complex. To simplify, LJM1 becomes the counter party and issues put options so Enron can hedge the values in rhythms and investments. And thereafter, we take a look at, what the fundamental economic problem is, it's structure, and what the fundamental ethical problems are with this transaction structure. We spend a lot of time taking a look at some of the transactions that Enron engaged in. We look at what led to LJM2. And LJM2 involved other merchant's portfolios.

⁶ Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior*, 3 J. FIN. ECON. 35, 36-43 (1976).

⁷ JOHN C. COFFEE, *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* (2006).

⁸ TAMAR FRANKEL, *TRUST AND HONESTY: AMERICA'S BUSINESS CULTURE AT A CROSSROAD* (2005).

⁹ MALCOLM S. SALTER, *INNOVATION CORRUPTED: THE ORIGINS AND LEGACY OF ENRON'S COLLAPSE* (2008).

One of the most interesting things is the minimum guarantee of 30 percent returns to these firms. Why weren't questions asked? Someone should have inquired how this is possible and what really are the academics of this return?

We take a look at the collapse of LJM2 which resulted in the October of 2001 third quarter press release that led subsequently a few months thereafter and the collapse of Enron. We take a look at some of the accounting issues, specifically some of the accounting provisions that were associated with LJM2.

Part one was taking a look at theory, firm, agency, purpose of the corporation, the role of the professionals as gatekeepers and capping it off with a big case study. Then with part two we try to take a look at some discrete topics, trusts and business, competition strategy, and the effect ethics over seas has on financial prices.

For examining trust in business, we look at law review articles, and other readings and excerpts that look at the social nature of boards, and we cap it off with a case study over the Hewlett Packard war within, which is a really nice case study. I like it quite a lot because when we talk about corporate governance in law school, we talk about the rules of the corporate born nuance in law school, but here's a case study of an American corporation just completely going off the rails. How could that happen and what were the dynamics that led to this scandal? Talk about the personality. Talk about the events. Talk about the merger of Hewlett Packard and Compaq and the role of the CEO and the leadership and the personality and the relationship between the CEO and the board. All of these factors. Once again almost like a plane crash. The crash. A number of different factors lining up. The stars were lining up for this big catastrophe at that time, and it happens.

So, competition and strategy is another discreet topic that I picked out and here are some of the meanings. I have them look at the links between competitive advantage and corporate social responsibility. Once again I use a case study that illustrates some of the theoretical readings in this area, and the case study that is I picked out is on Wal-Mart sustainability. How can Wal-Mart pursue profits and sustainability at the same time? This case study talks about supply chain management issues. This case study focuses on seafood, textiles, organic cotton and waste. What I like about this case study as well is that there is a significant role for NGOs and how they helped achieve Wal-Mart's sustainability goals.

At the University of Maryland we have a lot of students who are interested in doing the work on public policy and going out and doing public interest work. What I tell my students is that if you want to actually work for an NGO or public interest group, you should learn a little bit about business. Instead of taking that additional course on public policy, take a course on supply chain management. Take a course on business strategy, and I think that may give you more perspective on how to work with private firms and private corporations.

I also use a case on global sourcing challenge and the issue of child labor to discuss ethics overseas. This is nice case study because it comes with a video clip of the CEO and the business manager, who are in charge of addressing this problem, and you can see their perspective. They are real. They are human beings; you see their picture. You see them talk and there is a connection. It makes this problem concrete. It contextualizes the problem, and I found the students liked this as well.

Finally, I address financial crises with my students. In light of the distorted nature of the financial crisis in both the law school and business school class, I ask them to research a topic and give a group presentation. Some of the presentations have been pretty

interesting. In addition to that I use two case studies. One is the JP Morgan acquisition of Bear Stearns and the other is a case study that I wrote up. It is the Merrill Lynch case. I found that I really enjoyed writing the case study. It was fun. It was a lot of fun finding the materials from various sources.

We go over the Bank of America/Merrill Lynch merger. Essentially the issue in the back of the Bank of America/Merrill Lynch merger was could Bank of America terminate the merger after the signing of the merger agreement. The fact that on a daily basis billion dollars losses were accruing, was pretty scary stuff. So at one point it was an issue where the management of Bank of America got cold feet and was thinking about actually terminating the merger. Then the government stepped in and there were lots of events that were associated with the closing of the transaction, which led to a number of congressional testimonies by Hank Paulson, Ben Bernanke and Ken Lewis. We go over some of the legal issues of terminating the transaction that ultimately lead to the closing of the transaction, and the government had a heavy hand in that. I think it closed properly because there was no material adverse change. That was the opinion by the Federal Reserve. That was to opinion of the Bank of America general counsel before he was fired for taking that position. I have taken a look at that clause myself, and I find that there was no material adverse change.

That's the deal side. In terms of the social responsibility side, I ask my students to take a look at a counterfactual setting. Suppose Bank of America could have actually terminated the merger and it was a material adverse change. Should they have done so in the height of the financial crisis? This was the fourth quarter of 2008. The stock market was falling off the cliff. There was a 40 percent decline in the equity markets, and we take a look at questions of what can the board do under corporate law? What should the law be as directives and what should the board do under these circumstances? These circumstances in which Bank of America is uniquely positioned to come in and provide some sort of a rescue, just as, for example, as JP Morgan was in a position to do so back in March of that year as well. That is pretty much the course.

As for student evaluation and feedback, I tried to pick out some representative comments from course evaluations. Law school students like the course, at least that's what the evaluations show. They liked the course for two reasons I think. One is that the interdisciplinary nature and focus of the course and they like the pedagogy. They like the case studies quite a bit, and I think they like it because it contextualizes the problem. The case studies that are used are quite rich in facts and ambiguities, and so they like working through what seems to be a real live problem.

Some of the negative comments: there is some discomfort with the academic and business concepts and also the course is quite heavy in terms of reading and workload. That seems to be the universal in all the feedback comments. That they really don't like the heavy workload aspect of it. But I haven't gotten back my evaluations from my business school course yet. I have seen some of the written comments and they range from truly awful to being one of the best courses in business school they have taken thus far. So there seems to be some sort of range, and I will have a better idea once I get the full evaluations back. Some of the things that I'm thinking about offering are jointly law and business classes. I think possibly opening up joint JD and MBA classes for students and having a mix would be a good idea. I have noticed that there are differences. There are systematic differences between law school students and business school students. It would be nice to get a joint class together. I continue to reinvent course materials and update it with current events.

Another thing that I'm thinking about doing is perhaps developing more case studies. I really enjoyed writing the case study -- that's part one of the article -- as a way of compiling the history for one, and two, using it with my students. I would like to more case studies and developing some ethics case scenarios. I haven't done that yet, but I'm thinking about it. Perhaps maybe there is a need for a casebook as a supplement to this typical business association class.

So, those are my two courses at the school. I have had a fun time teaching the course. It's been very informative for me. I have been doing it. I have been doing papers. One nice thing about it is that I think at this point I'm starting to get some very high quality papers. One of which I think from my past class can perhaps be published. It is of publishable quality, so I'm encouraging my student to redraft the paper and perhaps try to get it published somewhere.

So any questions before I sit down?

QUESTION FROM RYAN JOHNSON

I am Ryan Johnson. My question is how comfortable are students actually engaged giving way to start the question -- what sort of resources and arguments and authorities will they invoke as they state their positions in these various case studies?

ROBERT RHEE

Yes. How comfortable are the students in talking about social ethics and the ambiguities and the gray areas that are associated with that topic and issue? The answer is my law school students are quite comfortable, and I think that they are comfortable with discussing ambiguities, discussing moral issues, discussing what is the right thing to do, and of course discussing the law. Where I found that law school students are not comfortable are with the economic concepts and with some of the finances that are imbedded in some of the case studies. Now the flip side of that is with business school students I noticed that some of the students are not as comfortable with the qualitative, the subjective, and the ambiguous concepts. Some of them are used to simply modeling them and getting the answer -- accounting or corporate finance -- and they were not used to open-ended questions.

Also, what I notice about the business school students is that many of them come with a very heavy predisposition for shareholder privacy. So that also comes as a shock to them. There is some active discussion that's in the business school. That's why I say that it would be really interesting to have the JD students and the MBA students mix in a course, and I am hoping to do that. One of the things that I'm hoping to do on the broader question is to perhaps have some curriculum exchanged between Maryland law school and the Maryland business school in which students will readily take course offerings from both schools. Yes.

QUESTION

My question may be sort of related. I've taught business ethics both in two MBA programs and at a law school, and I guess my question is where would the students get the tools to make strong counter arguments? Just as an example, you showed the supply chain thing with IKEA and using third world labor. I'm older so I taught it as the Nike factory problem. One of the things I found is that I could get students to make the argument for "doing the right thing." I could get students to make the argument that you suggested that your business students might be more comfortable with: "Oh, you can't tell the corporation what to do. You're undermining, maximizing the profits." I don't think that I could get the students on their own to make the kind of argument, for example, that others have made which is that in the long run, using third world labor even if 20 or 10 cents a day is actually beneficial to the people in those countries. I'd have to give them that reading to give them the tool to make that kind of argument. One of the limitations I found in business school cases is there's a lot of richness in context but there isn't always a development of the dilemma of an ethical problem. Enron seemed kind of after the fact. Well, obviously it was both illegal and unethical. How do you give them the tools to see the nuance -- the dilemma aspects to these?

ROBERT RHEE

The question is how do I give the students the tools to see various aspects of the ethical dilemma. One, a lot of it is through readings. The course actually has a fair amount of reading and reading from different perspectives. So, they are more theoretically limited -- reading as well. And I always get, as I said, as a part of the evaluation, just a lot of criticism for very, very heavy reading load and a very heavy workload. I have to do it though, to address the concern that you just raised. The other is sometimes I will break up the class discussion and have, for example, executive management. I will break up the students into groups and give them simulations to say you are part of management team, talk about this. How do you address this or you are board of directors, talk about this. And, what I've noticed is when observing these discussions that many different perspectives do come in and they start to discuss the richness and the ambiguities of the fact patterns.

CAROL MORGAN

TEACHING BUSINESS ETHICS IN TRANSACTIONAL SKILLS COURSES: AN INTEGRATED APPROACH

I will talk for a bit about teaching business ethics in the context of existing courses, the integrated concept. My approach is probably on a micro level. I tackle more of the day-to-day issues that you would deal with in the practice of law. I think lots of different approaches are valid, and all can be good. To step back and look at a case study is something I value as well. But the focus in my courses is really for students to see, personally, how they will be faced with issues daily in representing business clients. It's not just an Enron problem that exists out there; we all think that would never affect us since we'd never do anything that bad. It's really the little things that can happen that sometimes can lead to the erosion or the corrupt corporate culture. Lawyers have a role in counseling their clients through just the small day-to-day kinds of things. That's the context I use in my transactional skills courses.

My focus at Georgia is to teach about the practice of law, and there's great opportunity in my courses to raise these daily issues. I'm curious how many of you teach transactional skills courses or what I call practice based courses? Those who didn't raise your hand, are you more on the doctrinal side? Because I think there's a lot that can be incorporated into doctrinal courses as well. My particular focus is on the transactional skills side. Students have an opportunity to come face to face with their own personal views on issues that they haven't really thought about before. It's important for them to hear their peers' views, which are often quite different. It is important for them to really figure out how they would react to a particular circumstance before it actually happens, to make them realize this is going to be a part of their practice. We practice when it doesn't really count, so they will be prepared for the future.

What I have done is put together some scenarios to help students look at issues from a practical and pro-active point of view, and I provided some of this material to you. You have a sampling of the kinds of situations that involve ethical issues that I raise with my students. To help them, because some students aren't comfortable talking to a big group about their views on complex ethical issues, I usually do divide them and have them buzz with smaller groups and then bring them together for discussion. Generally, they are very forthright.

I'm always amazed at the different perspectives and the different thoughts that students have and different approaches that they would take to these situations where there is not always a right and wrong answer. Back to the business school students wanting that right answer. This can be tough with law students, too. They have to realize that sometimes there are very complex issues, and they have to understand that there are disputes where there may not always be a clear right or wrong thing to do. They have to look at all of the nuances and figure out what they are most comfortable with. Where do they fit into this?

There are three transaction skills courses that I teach at Georgia. I teach anatomy of a mergers and acquisitions deal, where we take a deal from start to finish. I teach the business negotiations class, and I teach the seminar in the corporate counsel externship. In the externship, our students not only have field experience working in a legal department, they attend a very intensive seminar where we talk about topics that are unique and relevant for corporate counsel. All of these courses provide a great opportunity to address business ethics issues.

In the Anatomy of an M&A Deal class, we look at the kinds of things that can come up daily in a transactional context that involve ethical dilemmas that a client may have, or that a lawyer may have as a result of what a client is asking the lawyer to do. We do a simulated negotiation involving some disclosure and non-disclosure issues. I have come up with some scenarios where students actually role-play how they deal with ethical dilemmas.

I have included some scenarios in the materials. The Anatomy of an M & A Deal class simulates a deal from a lawyer's standpoint. One scenario, which always generates some really interesting discussion, is about a situation where you are in the course of a transaction. The lawyer for the other side sends a marked draft that obviously is not intended for you since it contains comments in the margins for the other side. How do you react to this situation? Do you tell your client? Do you go and have a conversation with your client about the other side's strategy that you now learned from these comments? What would you expect a law student to say? What do you think some of the responses are? There are a myriad. It's not one or two. There are a myriad of responses.

COMMENT

I think they would say it's tough luck for the other lawyer.

CAROL MORGAN

There is the tough luck theory. I'm not my brother's keeper. That is their problem. What else?

COMMENT

What does the code tell me to do?

CAROL MORGAN

There is that issue, definitely. What conclusion do you think they reach with that?

COMMENT

I don't teach that.

CAROL MORGAN

That's an easy answer.

COMMENT

We use a similar situation in my deals skills class, and I'm always amazed every semester that the students will reference professional courtesy and they say, oh, as a professional courtesy we would call the other lawyer.

COMMENT

One thing I push the students to do is ask the question “what would their grandmother do?” because they will come back with I don't see why this is a peculiar question. It comes up in your life all the time with people you have relationships with. “We are lawyers, we don't have to” and ultimately you see how using that as an excuse somehow, the students actually begin to respond attentively to the notion that they are not special.

CAROL MORGAN

That's a good point. The grandmother theory. One response I heard recently is, “Oh, I think that I would say the other side put those notes in to throw me off and confuse me. Deception. I don't trust -- no trust here.” The deception theory. Now that's how they rationalized it right away. “Sure, I'm going to look at it,” they said. This problem generates the discussion about the need to think about an issue like this now, because situations like this will happen in their practice. Just to think about their reactions and why they are reacting that way, about simple, day to day things.

In the business negotiations class, I really like the book *Bargaining For Advantage* by Richard Shell; he discusses the three schools of bargaining ethics:¹⁰ the “it's a game” poker school; the “do the right thing even if it hurts” idealist school; and the “what goes around comes around” pragmatist school, which is sort of a combination of the first two. The book has a really good discussion about the different schools and some great examples that generate a lot of discussion in our class. Students write about where they think they fall on

¹⁰ G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* (2006).

this scale of ethics. They journal about that and then we discuss several ethical situations in light of each school of ethics; if you subscribe to this school of ethics, how would you react? Several of those examples are listed in the materials as well.

The third class, the seminar portion of the corporate counsel externship, provides a ripe opportunity to have a lot of discussion about business ethics. As a former general counsel. I have lots of personal experience and share that with my class throughout the course. I point out how ethical issues permeate everything a lawyer does in the practice of law generally. The role of the in-house counsel is a little unique because you have a closer business relationship with your client as well. You are very much a business advisor, as well as a legal advisor.

In the seminar, we take a look at codes of conduct -- what a company says its corporate culture and ethical attitude are. We look at different companies, and I give students several situations that they may face, and then they look at them in light of these codes of conduct. How would a company, with its code of conduct, react? I tell students that as a lawyer, they need to be aware of their client's code of conduct and how that might influence their own advice and decisions.

I also invite in-house counsel to speak to the class. One of the favorite panels we had was where the in-house counsel presented a business ethics situation, a real dilemma that they faced, but didn't tell the students how they handled it. They asked students how would they would handle this situation, and then the students brainstormed. Then the in-house counsel said, this is how we handled it, what do you think? That provided some very rich discussion. We wrestled with real world daily ethical issues at the ground level with the in-house counsel.

One of the really fun things we did in the course was a simulation where each student had to simulate being a general counsel and other members of the class were the senior management team. I presented some scenarios with ethical problems, as well as legal issues, and they only had 24 hour notice. Both the senior management team and the general counsel had to prepare for the discussion, and there was an exchange, where the senior management team really pressed the general counsel on issues: "Is this okay?" "I don't understand why that's not okay." Then the general counsel had to advise, in the heat of the moment, how they would respond or react, and it gave them practical experience of being in the hot seat. They actually sweated it out beforehand, and then they reported that it was a lot of fun, and it gave them really great experience.

There is an example in the corporate counsel section of the materials of a very timely topic where a furlough is being proposed to a company. The lawyer finds out that the president of the business unit that is going to be affected by the furlough is going to get a bonus if they do the furlough. The business unit will cut costs and make their budget, and then the president will be able to get a bonus. So the president of the business unit comes to his general counsel and asks what are the legal issues involved with this furlough? Well, it's perfectly legal. You can have a furlough. But then when you realize that there could be broader implications for this, long term implications, do you even raise those? Are you comfortable raising those issues to the president? If the employees learn about the bonus, he may have unhappy employees or no employees at the end of the day. They may furlough a little longer. Do you have that conversation or not? Do you feel comfortable? We talk about that. This is an example of something perfectly legal to do but there may be some ethical implications; does a lawyer even have a role in raising the ethical issues.

The other example in your materials is where you discover that your company hasn't been doing something that they should have been doing under a contract. There is a breach of contract, but the company is saying no harm, no foul. "It's not really that big a deal. We don't really want to do anything about this breach of contract." How do you respond as the general counsel to that situation?

That's the kind of the approach that I take, and it's really just to push the students. Ask them lots of questions. Play devil's advocate and try to get them to really think about issues that are not necessarily the big bad egregious stuff. It is just the daily things that can impact their lives and their practice. Any questions, ideas, or suggestions about that?

QUESTION

Simulations obviously have an artificial reality to them, but particularly in this area. In roughly analogous things, you will hear them to be very idealistic and then you think, yeah right. Then how do you get to: if they don't like you, you're fired. In other words, 2Ls don't have ethical problems; fifth year associates have ethical problems. Because it's all so contrived, until you are there, and you are going to be, how do you get that across, other than just telling them that. Do you have a way to attempt to situate them where their own position in the organization or in the firm will be effected? How will you act when you are going to take the hit personally? How do you insert that into that kind of fact pattern that you set up for them?

CAROL MORGAN

Well, I do try to push them on those kinds of discussions, and I've used some fact patterns where it's just not clear because you realize there are some real personal impacts for you as well. Mainly it's just pushing them to think about the issue from a more realistic standpoint. That it's not just this moral game we play. It's not just about right and wrong. The scenarios help them realize there are a lot of nuances to consider, and at least help them to start thinking and recognizing this without the idea of having the answer at the end of the day. That's my goal, to really push them hard in thinking, and that's when I play the devil's advocate. What about this? You could lose your job. Think about that. You've got a child at home. What do you do?

COMMENT

I'd like to take a respectful exception on some points with what was already said. In that I developed case studies, the HP pretexting scandal and where I think in some ways the lawyers there had a wealth of ethical resources. Specifically a couple years ago, every document that's created has metadata. It can be a trick bag because you can see attorney/client privileged communications within the metadata.

So, I worked up a nice little case study about that and at one point the state bar associations were divided. Colorado had an opinion and they went one way. Couple of east coast states had their opinions and went the other way. But there were resources that lawyers could go to that if an in-house client was saying no, that this idiot is sending over a draft contract full of metadata. I'm going to take advantage of that in negotiations. So, my respectful exception is that there is a more richly resourced; set of ethical standards out there for lawyers, and it is just not what a layperson might view it. The HP pretexting scandal, not only is it a great exercise to look at your duty to the board and the entity and all of that, but the outsider investigators who employed them actually took felony convictions in Colorado. So if the in-house lawyer was thinking through it, she would have seen, well, one of the

things I know is this is not a good thing to do cause these guys just bought themselves felony indictments. So I think that lawyers are under an obligation to think about these standards in a more rigorous fashion and not on a broader, moral scale.

CAROL MORGAN

I think that's a good point. I think that segues very nicely, to what Tamar will be talking more about, and we can take some more questions at the end.

TAMAR FRANKEL & MARK FAGAN

TEACHING BUSINESS ETHICS: A COLLABORATIVE APPROACH

Thank you very much. I was listening and thinking. The first thing I said to Carol is I'm not talking about ethics. I'm talking about law. But then realized that I'm talking to some extent about ethics, as well. One of the things that the entire course of Trust and Honesty in Real Life is concerned about is the slippery slope. You start with something small. It's not really something very serious and then you continue and you continue, and you will find yourself at the end having violated the law. As far as lawyers are concerned, raising awareness of that slippery slope at an early stage may be very valuable, both for the clients and for lawyers as well. So I take back what I said and add that there is an element of ethics in this Trust and Honesty course.

This course is composed of two books, which students have to read. One is my book and the only book I ever wrote for the public.¹¹ It's not necessarily a legal book. The other is Mark Fagan's book offered here.¹² He wrote case studies and role-plays. So we have three pieces for the students. One is reading--getting in the background. The other one is the case studies. After each case study, we have three subject matter questions. One regards the law, the other one focuses on business or finance, and the third one concerns public policy. Now, we believe that any of these issues requires a lawyer to look at these three aspects of an issue. Not only the one aspect, but with all three of these aspects.

We have followed three main themes. One theme is "everybody does it." "Hey, why shouldn't we do it?" We have a number of case studies and role-plays with respect to this theme. The other theme is institutional culture. It's not merely that "everybody does it." It is "there is no other way except the way we do it, and we have been doing it for a long time." The third theme is: "Okay, we have lost the people's trust. How do we regain it?" This is another element of the same issue. So starting with "everybody does it," this is one example that I would like to expand on today. We selected a Ponzi scheme at the time when Madoff was still in the shadows, before he emerged. What the students discovered is that every entrepreneur could be a Ponzi schemer. However, there comes a point in a person's life when he or she realizes that the idea doesn't work. There is no business profits from which to pay the investors, and the only source of payment is the money of other investors. That is a Ponzi scheme; it is very simple.

¹¹ TAMAR FRANKEL, *TRUST AND HONESTY: AMERICA'S BUSINESS CULTURE AT A CROSSROAD* (2005).

¹² MARK FAGAN & TAMAR FRANKEL, *TRUST AND HONESTY IN THE REAL WORLD* (2009).

We did not manage to recruit many business students. So instead we asked speakers to come and play the role; and I'd like to describe to you what happened in that case with the role-play exercise; it was interesting. The story was there was a young girl. She had an idea. She went to a venture capitalist that gave her half a million dollars. She tried her idea and somebody beat her to it. She lost the half million dollars. Yet, she has another idea to expand on the original one. She needs more money and more time. We asked the students to prepare her speech to the venture capitalist. What was interesting in that case is that the students tried very hard to --kind of-- put under the carpet the fact that she didn't succeed, and lost the money. Instead the students focused on asking for more money and on what the venture capitalist would gain for this additional *financing* in the successful venture.

Then a speak, who is a very good lawyer, who has spent much time with venture capitalists said: Look! Every venture capitalist knows that they could take more money and more time. But if he can't trust you, it will take two seconds and then he's out of the room. Therefore, this conversation would not last very long. Goodbye! The students were stunned, and one of them said, "and you wouldn't sue us?" And the lawyer-venture capitalist said, "Sue you? For what? You don't have a penny. You are a young woman. What would we sue you for?"

After that class one of the students came to me and said: "Boy that was so embarrassing." And then his face lighted and he said: "But it's good. I know it now". So this, in some respects, is what we do in law school. We begin litigation because we use the cases. It's good to use the facts, but as a result, the students' tendency may be to say: "we will be sued." So we have to discuss this point. We thought that was one example of learning that is useful.

We did the same exercise with market timing in the mutual fund area where "everybody was doing it." Well not everybody, but 30 percent of the mutual funds were doing it. Now that's a good enough percentage. And again we worked out the issues. What was interesting, though, is that the as the SEC didn't do anything about it until Eliot Spitzer raised the flag and then, of course, the violations were discovered and were over. The third example was the sale of lemons. We derived the issue from a case, but gave the students the facts and noted the problem: no one was liable. The manufacturer was not liable. The dealer was not liable. The students had to example the law and see how the law attempts to answer the question.

The second theme of the book was, as I said, the cultural environment. Many of you may be too young, but perhaps some of you may have heard about E. F. Hutton. This was a brokerage firm, the one and only! It was finally sold in a fire sale for nearly nothing. There were two things that happened to this brokerage organization. One was the culture. The brokers could do anything they wanted so long as they brought in the money. The second thing was that the environment changed. It was called the "big bang," fixed percentage of brokerage commissions were eliminated. Brokers had to compete ore strenuously. They had to reduce their commissions. The result was that they needed money, and they couldn't derive it from the previous business model. They began by playing with the money they had in the banks and ended with check kiting: A slippery slope, a little bit at a time. At first the activities were legal. Then -- not so legal. And then -- illegal. Well, by the time they finished they had committed 2000 claims of violating banking law. They adopted an activity that was dangerous to the banking system. Their clients may have not been harmed, but their activities threatened the banking system. This was the time of

inflation and check kiting enabled them to get interest-free money. Twelve percent is not too bad, and that's what they got.

So, students, again, have some heightened recognition of a slippery slope and where it could lead. The third example I would like to mention is the conflict of interest: the possible hard to a child as against the good of society. This is the one thing, after I'm done, that I would very much ask Mark to tell you more about it. It that's our highlighting the interest of the public over the interest over a group child. The third part of our course structure is: how do you resurrect a failed trust and when?

What we did on this issue was, first of all, to look at the conflict between seeing things as a contract and seeing things as a fiduciary duty. Fiduciary duty brings us a variety of other situations where people have to take into consideration other people's interest. In contracts you take care of yourself. We highlighted the difference and evaluated the choice of the law. The second module was subprime lending. We were hoping to avoid that, but we couldn't resist the temptation. Finally, we did deal with the whistleblowers. We talked about Enron, but the interesting part is the role and the future of Sharon Watkins. She did not go to the police; she went to her boss. She wrote him a letter. She said, "What are we doing? Let's face it. We're going the wrong way." When he didn't answer, she sold his stock, but she remained in the company.

So you have a question about her selling her corporation's stock. There is rule 10b-5 which prohibits insider trading. In addition she owed a fiduciary duty to the employer on the one hand, and duties not to violate the law on the other hand. So there was quite a bit of discussion about that.

The last point I would like to make is:, we found that sometimes it's good to push students to think outside the box. So in one role-play, a hospital was "going down the drain" and a CEO that is not a doctor was trying to keep it solvent. We had a group of CEOs, a group of doctors, and a group of the people who wrote the claims to the insurers, and there was another group as well. The CEOs said: you have machines that cost a lot, and they are only used only 40 percent; start using them 60 percent. There would be nothing wrong with that, and then you cover more of the expenses. The doctor said: "Not on your life. We are not going to use these machines if we don't need to use these machines." Then doctor students came with an idea, which was very interesting. One group one year came with the idea that they were going to ask other smaller hospitals in the area whether they need such machines, and then expand the use together with some costs. The other group, in another year said: shut the machines we do not need and sell them.

So, in both cases to some extent they were pushed to think outside the box, and we thought that was a useful way of trying to solve a problem. As far as the claimants of the insurance were concerned, there was no question. The CEO said, "Why don't you round up the claims a little bit. Just a little bit." That would come to a larger amount. The group of students who were the insurance claimants said, "we are not going to do that. The insurance company never asked us about this, and we are not going to do that." So at least we didn't tell them anything. They had some arguments among themselves, but they came to that conclusion.

Let me say a few words about teaching together. Usually Mark outlines the class. We agree, without much ado, about the division of teaching the subject. In order not to get into each other's segment, the one of us who is not talking is sitting down. When that person stands up, then it's a signal; he or I want to say something. Then the speaker

completes the thought and the other person speaks. What has happened is that this simple signaling has had good reviews. One of the students in the comments called it a “seamless kind” of agreement or presentation, and I think that was very helpful.

In simulated problems we give students about 10 minutes to discuss among themselves and come to an agreement. They decide on the spokesperson and sometimes they decide that all members of the group will speak. That's fine, too. We assign them two papers throughout the semester. We don't give grades to the first paper but give them comments. Then we grade both papers. We value about 40 percent of the grade for participation in class. They know that in advance.

MARK FAGAN

We want to provide you with a sense of how we teach the class. Tamar did a phenomenal job. I sat here and said those were really good questions for understanding what we do. I want to try a show you a little bit of how we do it as well. Had you been attending our class you would have had this particular case study that is ten pages long and you would have read it in advance. Given that we didn't give it to you in advance, I'm going to take a couple minutes and blow you very quickly through this case study so we can actually get some discussion. This actually built very nicely on your comment Robert about conflicts of interest being one of the core issues that are associated with these general scripts. Whether it's ethics, or trust and honesty. This is one in particular that deals with lead paint. We liked it because, hopefully you will see as we go through, it sets up some very interesting tension and potential conflicts.

So, just a quick background: lead paint poisoning does a lot of damage, and it doesn't take a lot. At relatively small concentrations, you have hearing impaired and the like. High exposure can cause death. So this is a very important issue. As it turns out, the group that's most influenced by it tends to be minorities and the economically disadvantaged. Lead paint was used until the 1970s and was banned after that. If you live in an old housing stock, you're likely to have lead paint which is easily ingested from peeling paint. What's interesting in particular about lead paint poisoning is it is completely preventable. Recall that photo of peeling paint I showed you a minute ago, if you immediately remove it, you're not going to have poisoning.

The issue is, though, the abatement is expensive - \$5,000, \$10,000, \$15,000 depending on the size and condition of the home. For the population we're concerned about, those who are economically disadvantaged, that's lot of money and unlikely to take place. Also it tends to be a landlord burden especially for this population. The question very quickly becomes, what can we do to maximize the dollars we have in terms of reducing lead paint impact. There is an organization called the Kennedy Krieger Institute associated with John Hopkins University, and it works in Center City, Baltimore. It has been part of the community for a long time and its views as mission as making the health outcomes of that community better. They understand the limited resources that are available to address lead paint removal, so they create a study to test the effectiveness of three different levels of remediation. Their goal is to find the best bang for the remediation buck.

The first level, \$1,650 dollars, eliminates peeled paint, a basic just clean up of existing conditions. The next step up, the middle level, is you put sealants in the most vulnerable places, and the third step up (\$7,000) you replace windows and encapsulate doors

which are the places that are most likely to have the chipping/peeling paint. The study design is to remediate about one hundred houses; a third of them at the low level, a third at the medium level, and a third at the high level; and see what happens to the outcomes from having done that. They recruit some landlords to do the remediation and let the apartments to families that have at least one child under the age of 5. Lead paint poisoning is largely a childhood issue. They families have to live there for at least two years because this is a two-year study. The study design is approved by the CDC, EPA, and John Hopkins review boards. The researchers keep track of the amount of lead in the air, as well as the children blood lead levels. They use two methods. The dust wipe method literally take wet rag, wipe along surfaces in the apartment and analyze the amount of lead gathered. They also use a cyclone vacuum, just like your vacuum cleaner, which intakes air, and determines lead levels. As part of the agreement with participants they are required to report the findings to the participants.

At the conclusion of the study the researchers conclude all levels of remediation result in an immediate improvement which retrogrades a bit with time but levels off at a level lower than before the remediation was done. This is good news. But here's the problem. For most people it's a great outcome. But for a few it isn't so great especially for young Miron Higgins the son of an African-American, single, poor mom. Here's what happened to Miron. About two-thirds of the way through the study, Miron is found to have elevated lead levels from his blood. The researchers knew a month earlier that the ambient air lead was also higher in the apartment with the cyclone method but not the dust wipe method. They didn't tell anyone. When they discover he actually has elevated lead levels in his blood, they go through the appropriate reporting channels and it becomes quite a "to do". We don't know what actually happens to Miron. For anyone who is a parent in the room, it's one of those things you don't know what the impact is of your child being exhibiting elevated lead levels. There is no counterfactual.

Miron Higgins' mother obtains legal assistance and she sues K.K.I. Her argument is that K.K.I. owed her a duty, and that duty was to inform her of the lead levels when it was in the air and they failed to do that. In addition she argues that they gave her a false sense of security. K.K.I goes to trial court and moves for dismissal because they didn't owe a duty arguing they are nothing more than an institutional volunteer. What do you think the trial court does? I know I am not giving you enough facts and it's a little unfair, but what do you think they do?

They agree with K.K.I. and dismiss the Higgins' case. K.K.I is an institutional volunteer. Higgins signed a consent form, and is compensated for the study. Every time they come into the home they give the family five dollars. Oh, by the way, they give the kids T-shirts and socks and gloves in the winter as well. Higgins appeals. The appeals court looks at three key areas. They look at if a special relationship that exists? Does the consent create a duty? And was the danger foreseeable?

The appellate court decides there is a duty. This is something where there was foreseeable risk. The consent was signed by someone who has no power and no information. The consent says the researchers will tell participants if they have elevated lead levels, and they were not told. The court remands the case back to trial court. Interestingly, the court takes another step. They go on to pontificate a bit. First they write about therapeutic versus non-therapeutic research. They differentiate and they say in non-therapeutic research, where the individual doesn't have anything to gain but has everything to lose, you create a duty that is much higher than if it were therapeutic. They go onto talk

about the Tuskegee syphilis studies and draw an analogy with that. They go on to criticize the study design. The opinion is almost unanimous. There is one dissenter. The dissenter is not questioning the outcome rather the process. The justice asks: why are we in the court getting into the public policy issues? Who are we to be pontificating? That's not our job. Our job is to determine should it go back to the trial court.

Interestingly, the case goes away; it is most likely settled so we don't know exactly what happened. I do want to come back to is K.K.I.'s response to the appeals court decision. If you lived in the Washington area you probably remember the headlines: "Johns Hopkins is endangering children." K.K.I. responds saying, we had good research, we received the necessary approvals, what did we do wrong? Moreover, if you can't do studies on children, if you can't write a consent that's good enough to be able to do that, then how are we ever going to test beneficial strategies such as lead paint remediation. That's the context.

Now let me tie back to how Tamar gave us structure for the class discussion. We have a series of law questions to ensure the students understand the key legal issues. Look at that consent form. What's in it? Is it viable? Does it create a duty? Tamar is making them be good lawyers. I'm trying to get them to think about the business and the public policy sides. This is more of a policy case than a business case, but it gets them to think about that question that K.K.I. raises of how do you test things for children? That's a real issue. What are you going to do? Then coming back to a question from earlier of how do you force the students to kind of think about the real implications of decision making. We start out talking about why didn't K.K.I. just tell Higgins her son had elevated blood levels when it first happened. One answer is that it ruins the study, therein lies the conflict of interest. The researchers have spend money and time. They are almost at the end. The results are so compelling and helpful to the broader population. We require the students to consider what they would you really do? Would they have the courage to stop the study? In the end our goal is to make the students consider the legal, business and policy issues they will face in the real world.