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EXEMPLARY DAMAGES IN AUSTRALIAN TORT LAW

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ABSTRACT

The extent to which exemplary damages is available as a remedy within the context of tort law differs from jurisdiction to jurisdiction. This paper sets out the basis on which exemplary damages will be awarded according to the Australian law of tort. Although the situations in which such an award will be made are rare, Australian courts have been prepared to flexibly countenance the use of such a device in a widening range of situations. Importantly, Australian courts will countenance the use of exemplary damages irrespective of the tort used to frame the plaintiff's cause of action. It is therefore the nature of the behaviour complained of, rather than the cause of action selected, which will determine the availability or otherwise of exemplary damages.

INTRODUCTION

This necessarily brief review of the law relating to examplary damages in Australia has the following goals. Firstly, it summarises the role or function of exemplary damages within the context of actions in tort in Australia, and then goes on to examine the scope of awards of exemplary damages within the same context. Some difficult and unresolved issues arise, notably the apparent extension of exemplary damages into the realm of negligence, and the tension between criminal and civil punishment. Arguments in relation to these and other contentious issues are considered, and in conclusion, an opinion is reached as to the degree of match between the apparent reality of exemplary damages in Australia and their envisaged role according to the Law Reform Commission of the United Kingdom's report No. 247.[1]

THE ROLE OF EXEMPLARY DAMAGES IN AUSTRALIA

Unlike compensatory damages, the focus of exemplary damages is on the conduct of the defendant, and in particular, the degree to which the defendant's conduct "shocks the tribunal of fact, representing the community."[2] Exemplary damages are therefore seen as being separate from, though nevertheless parasitic on [3] compensatory damages.[4] They are awarded when the behavior of the defendant, in addition to causing some compensable damage to the plaintiff, consists of a "conscious wrongdoing in contumelious disregard of another's rights."[5] In that sense the role of exemplary damages is to punish the defendant for his or her high handed or wrongful conduct and to deter the particular defendant, as well as potential defendants, from committing such an act in future. The award of exemplary damages demonstrates the court's detestation of the action in question [6], and as such is a mark of opprobrium against the defendant. In addition, it has been argued that there are broader social considerations to be taken into account, for example to teach tortfeasors that "tort does not pay" [7], and to assuage any urge for revenge felt by victims and thus to discourage any temptation to engage in self-help likely to endanger the peace. [8]

SCOPE OF EXEMPLARY DAMAGES

It is apparent that exemplary damages have been awarded by courts in a wide range of circumstances. Traditionally, exemplary damages were only associated with intentional torts - including trespass to land [9], trespass to the person [10], trespass to chattels [11], defamation [12] and deceit [13]. Even if the scope were stopped at that point, the breadth of application of exemplary damages in Australia would be quite wide compared with the prevailing conditions in other jurisdictions, notably England among common law jurisdictions.

More recently however, Australian courts have contemplated the question of whether exemplary damages are available to plaintiffs who have framed their actions in negligence rather than in some other (intentional) tort. This trend has been noted by several authors who have voiced their concerns that the extension of exemplary damages into the realm of negligence is a dangerous state of affairs. One recent editorial claims that there is a "pressing need for the High Court to define the proper parameters for the award of exemplary damages" [14] while others have noted the confusion amongst contemporary practitioners as to the appropriate bounds and rules for the application of exemplary damages. [15]

Perhaps the confusion in relation to the award of exemplary damages in negligence matters can be best clarified with reference to the High Court's judgment in Gray v Motor Accident Commission [16] in which a general principle appears to have been developed. The court noted that it expected that awards of exemplary damages in negligence matters would be rare [17], but that in those rare instances, an important principle in determining the availability of exemplary damages was that attention should be paid to the conduct of the defendant, not the nature of the tort chosen by the plaintiff to bring action against the tortfeasor [18]. Thus although exemplary damages have been awarded in product liability cases [19], cases where employers knowingly failed to create a safe working environment and persisted with that unsafe environment irrespective of the known danger of doing so [20] as well as cases of medical negligence [21], the mere fact that those particular actions were brought in negligence is arguably of residual importance. Thus it appears that Australian courts have not seen fit to create a general principle on scope founded on the nature of the action brought, but rather, have determined that they should look behind the type of action, to determine whether the award of exemplary damages would be in accordance with the objectives for the award of such damages noted previously.

COMMON LAW RESTRICTIONS TO SCOPE

Exemplary damages are often described as anomalies within civil law remedies, perhaps due to the similarities between the language of punishment, deterrence and moral retribution within the law of civil exemplary damages and the criminal law. Indeed, one of the most difficult issues faced by courts is the extent to which they ought to take into account any punishments meted out in criminal jurisdictions to defendants subsequently the subject of an action in tort. One early consideration of this issue suggests that if criminal punishment has already been given, no exemplary damages should be awarded since this would be to punish the defendant twice for the same act. [22] A recent revisitation of the same issue resulted in the majority of the High Court of

Australia concluding that "where, as here, the criminal law has been brought to bear upon the wrongdoer and substantial punishment inflicted, we consider that exemplary damages may not be awarded…because we consider that the infliction of substantial punishment for what is substantially the same conduct as the conduct which is the subject of the civil proceeding is a bar to the award." [23]

However, the law is not as straightforward as the statement above would suggest. For example, what if the punishment meted out by the criminal court was not "substantial"? The judgment in Gray v Motor Accident Commission specifically declined to comment on what that term would be taken to mean, but an analysis of the transcript [24] reveals some division in the court. McHugh J, at p 17 states "…take a case where insulting words are used of a very bad kind, the magistrate might give a bond, might not even proceed to conviction, but in a civil case it might nevertheless, in all the circumstances call for the award of exemplary damages. So arguably, the fact that you have been punished in a criminal court would not deter the court from awarding exemplary damages."

This indicates a willingness on the part of at least some members of the court to view the "bar" as discretionary rather than absolute, but other members of the court, notably Kirby J, were not happy with such an open position. Thus Kirby J makes comments such as "…but that would mean that the sentencing judge would have to say, "now, steady on, one day somebody might come along and seek to recover damages and I've got to keep that in mind and, therefore, I've got to reduce the punishment that I impose to make sure that you do not double count." [25]

Indeed, several questions of significance have been explicitly left open. In addition to questions about the meaning of the term "substantial", questions are raised about the position when criminal proceedings are possible or probable (though have not yet commenced) at the time of civil proceedings, about the position when an accused is exonerated of criminal charges, and the necessary degree of overlap between the criminal and civil actions brought.

Thus while the position seems relatively clear when an individual has been imprisoned as a result of an earlier criminal action, and is now the subject of civil proceedings arising out of the same or substantially the same actions which resulted in the original criminal proceedings, the law is not at all clear in many other situations. In passing, prior to examining critiques of the operation and role of exemplary damages in Australia, it is noted that a further common law restriction on exemplary damages - relating to the law of contract. Simply, punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which exemplary damages are recoverable. [26]

CONCLUSION

To state that exemplary damages should be an exceptional and rarely rewarded remedy is in essence a statement of hope. If society adopts behavioral standards in which high-handed disregard for the rights of others is a less observed phenomenon, then the UK Law Reform Commission's desire will be a reality. The position in Australia, notwithstanding the apparent extension of the applicability of exemplary damages identified in this paper, is in accordance with that statement of hope. [27] The fulfillment of the second leg of the test - the reservation of such

damages for wrongdoings that would otherwise go unpunished, is less certain. This is because of the identified possibility that exemplary damages may in certain circumstances be awarded against an individual who has already been punished within the criminal system. It is in this respect that great vigilance is required, and it is in this respect that the most fundamental and as yet unresolved problems with the law of exemplary damages have arisen.

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[5] Whitfeld v De Lauret & Co Ltd [1920] 29 CLR 71 per Knox CJ at 77.
[6] Wilkes v Wood [1763] Lofft 1 at 19.
[7] Broome v Cassell & Co [1972] AC 1027 per Lord Diplock at 1130.
[8] Merest v Harvey [1814] 5 Taunt 442. This was cited with approval in: Lamb v Cotogno (1987) 164 CLR 1.
[9] XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) 155 CLR 448.
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[11] Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd (1968) 121 CLR 584.
[12] Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118
[13] Musca v Astle Corp Pty Ltd (1988) 80 ALR 251.
[14] Freckleton I, "Editorial", Journal of Law and Medicine, Vol 4, 1996, p106.
[15] Skidmore P, "Exemplary Damages in Defamation?", Tort Law Review, July 1996, p.105.
[16] (1998) 158 ALR 485.
[17] See on this point - Fleming J G, The Law of Torts, 9th Ed, (1998) at 273.
[18] Gray v Motor Accident Commission [1998] 158 ALR 485
[19] Vlchek v Koshel [1988] 52 DLR (4th) 371
[20] Midalco Pty Ltd v Rabenalt [1989] VR 461; Coloca v BP Australia Ltd [1992] 2 VR 441; Trend Management v Borg [1996] 40 NSWLR 500.
[21] Blackwell v AAA [1996] Aust Torts Reports 81-387.
[22] Watts v Leitch [1973] Tas SR 16.
[23] Gray v Motor Accident Commission [1998] 158 ALR 485 per Gleeson CJ, McHugh, Gummow and Hayne JJ at 494.
[24] High Court of Australia Transcript: Gray v Motor Accident Commission A36/1997 (28 May 1998) at p.17.
[25] High Court of Australia Transcript: Gray v Motor Accident Commission A36/1997 (28 May 1998) at p.19.
[26] Butler v Fairclough [1917] 23 CLR 78.
[27] Gray v Motor Accident Commission [1998] 158 ALR 485 at 488 "exemplary damages are awarded rarely".

HOSPITAL METAMORPHOSIS: FINANCIAL AND LEGAL CONSIDERATIONS

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ABSTRACT

The impact of the Prospective Payment System and increased enrollment in HMOs and PPOs has placed greater pressures on hospitals for discounts. In a market characterized by increased price competition, the most efficient hospitals will survive and others fail. An increase in the number and frequency of hospitals involved in merger activity suggests that merging is a way to become more efficient rather than closing. This paper presents a theoretical framework investigating the cost structure of merged and closed hospitals prior to mergers and closures and uses a cost differential model to determine all costs relevant in the decision to close or to merge. Pressure from patients and HMOs to lower costs has forced many community hospitals to consider closing. It is recommended that closing hospitals should consider merging in order to continue serving their community.

INTRODUCTION

Large HMOs, such as Kaiser Permanente, Etna/U.S. HealthCare, Blue Cross, and PacifiCare, have redefined health care in the United States. National health care inflation has ranged from twenty to twenty?nine percent depending on geography (Omachonu, 1998). A relatively few major procedures account for the rising share of the nation's medical costs. Some of the higher costs are for treatments such as MRI (Magnetic Resonance Imaging), CT scans (Computerized Tomography), nuclear medicine, liver transplants, care for premature newborns, bone marrow transplants, and coronary bypass surgery. Hospital bills for treatments such as these may exceed $100,000. Like other businesses, hospitals must compete for land, labor, capital, and entrepreneurial ability. Many community and regional hospitals lack the above mentioned factors. Therefore, small community hospitals and large acute care medical centers are hoping to enhance quality, reduce costs, eliminate unnecessary duplication and serve more people by working together.

One in 12 American community hospitals either merged, was acquired, or acquired another hospital in 1995, according to the pressure group Public Citizen. Of the 447 hospitals involved in such activities, more than two?thirds were in five states: California, Texas, Florida, Wisconsin, and Ohio (Firshein, 1996). Many of these mergers and acquisitions involved Columbia/HCA. According to the American Hospital Association's 1997 hospital statistics, the number of American community hospitals declined from more than 5,700 in 1984 to less than 5,300 in 1996. Approximately twenty percent of all community hospitals have changed ownership in the past three years (AMA, 1998).

LITERATURE REVIEW

Previous studies explaining hospital merger activity offered ambiguous findings, and mostly suffered from a lack of support in economic theory and shortcomings in the analytical procedures (Mobley, 1990). Empirical studies focused on hospital?wide efficiency (length of stay, occupancy, admissions per bed, and full?time equivalent staff per patient day) rather than inter?hospital differences in efficiency (Shortell, 1988; Shortell & Hughes, 1988; Becker & Sloan, 1985). A considerable portion of the merger literature is devoted to empirically testing the benefits of multi-hospital system affiliation, and comparing MHS hospitals and independent hospitals on hospital?specific economic performance outcomes (Ermann & Gabel, 1984).

Research on the motivation for hospital mergers usually concludes that the underlying reasons why hospitals merge are monetary (Miller, 1996). Although the monetary need may act as a catalyst in starting the merger process, many researchers do not report why there is a monetary need. Improvements in the health of older populations have been accompanied by substantial growth in medical expenditures (McClellan & Noguchi, 1998). Like any other industry, the hospital industry is experiencing a period of technological change. McClellan and Nogochi (1998) define high?tech innovations as those with large fixed or marginal costs when they are applied. Far more medical technologies have large fixed development costs. Hospitals with the latest technology and break?through treatments will better serve their patients than hospitals lacking this technology. Thus, the ability to serve patients becomes a critical issue in the argument to merge or close a hospital. Studies conducted by McClellan & Noguchi (1998) found that an outcome gap will develop between hospitals that "lead" and those that "trail" in the diffusion of new knowledge about readily available treatments. The leading hospitals are likely to be those that treat high volumes of patients, thus allowing their medical staff to be more knowledgeable and specialized. The study concludes that patients treated at hospitals slower to adopt new technology will tend to be treated with the technology later, if at all. Results from the study by McClellan and Nogochi (1998) prove that smaller hospitals with lower capital budgets will not compete nor survive against a multi-hospital system.

In addition to rapid technological change, hospitals are also experiencing an increase in the involvement of managed health care providers. HMOs and PPOs have forced hospitals to cut costs. While many support the reduction in costs, it has left some hospitals on the verge of bankruptcy. It is at this point that many hospital administrators would make the decision to close (O'Cleverly, 1993). The hospitals forced to close were relatively small; the median size for each hospital was approximately 60 beds. Closure was not an outcome that resulted from one year of bad performance. It usually took at least three years of deteriorating operations for a hospital to close (O'Cleverly, 1993). Most of the studies supporting closure for near bankrupt hospitals point to years of inefficiency and overall operational ineffectiveness. If these hospitals were to merge, they most likely would be closed anyway.

Contrary to O'Cleverly's findings (1993), some researchers have stated that for?profit hospital owners are able to bring in the necessary capital and expertise to troubled hospitals. Many hospitals studied were bankrupt and would most likely have closed had they not been bought by another organization (West, 1998). Other hospitals converted because their boards believed they

would not be able to survive in the long run as stand?alone facilities. Once integrated into a larger health network, the hospitals studied (rural and community) were given the necessary upgrades in technology and staff to support the surrounding communities. The findings of Gerson and Vernanec (1997) also illustrate the need for community hospitals to merge with more efficient providers of health care rather than closing. A continued increase in outpatient care and further reduction in the nursing staff at many hospitals has resulted in service that is less than desirable. The nursing staff is the backbone of the hospital. Without a proper nursing staff the hospital cannot operate effectively. Multi-hospital systems are able to provide the necessary staff to support the needs of their hospitals, thus supporting the community. The studies by Gerson and Vernanec (1997) and West (1998) illustrate that cost effectiveness is a benefit from merging, but most importantly, the overall quality and service a hospital provides to patients is greatly improved.

THE MODEL

A cost differential model may be used to determine all costs that are relevant in the decision to close or merge a hospital. This model is derived from traditional cost accounting models which separate value?added costs from non value-added costs. Merchandising firms that must decide if a particular segment or product line should be discontinued or expanded commonly use this approach. The traditional model intentionally does not account for sunk costs. The purchase of land and equipment would be ignored. The cost differential model, while using the same principles, must be adapted to fit the hospital industry. This means that some sunk costs in health care are relevant in decisions concerning the merging or closing of a hospital. Opportunity costs must also be determined before any decisions are made.

Due to the costs of continued service and specialization, within the last few years, hospitals have started to aggressively advertise their particular services. For example, the Memphis, Tennessee metropolitan area has four major hospitals. Each hospital claims to provide specialized care. Saint Francis Hospital advertises its stroke emergency care and assisted living facilities. Methodist?Le Bonheur offers a physician referral service. Le Bonheur is known as a leading children's hospital. Baptist Hospital operates one of the largest health care networks in West Tennessee and Northern Mississippi. Health care organizations are spending hundreds of billions of dollars on marketing, advertising, and promotional efforts aimed at attracting new customers (Omachonu, 1998). Media attention is expensive. Smaller community hospitals do not have these funds. For example, Panola Hospital in Mississippi (located about fifty miles south of Memphis) is a small, rural hospital. It is struggling to retain patients. Unfortunately, Panola Hospital will not survive against the Baptist health network. A merger with Baptist or another large institution would enable Panola to continue serving the community through specialized care. Service is the competitive edge for any business including hospitals (Omachonu, 1998).

QUALITY CONTROL COSTS

The focus on quality performance, a trend bordering on impatience on the health plan front, is sure to determine who leads and who survives among hospitals (Gerson & Vernarec, 1997). Maintaining quality control is costly, but necessary. Many people believe that most rural and community hospitals leave much to be desired with respect to quality. Hospital quality, while related to other service industries, has unique dimensions. Consumers (patients) and observers (visitors) use facilities related quality and human factor quality to gauge the quality of hospital service (Oswald, Turner & Snipes, 1998). Many smaller hospitals do not have the funds or the resources to renovate facilities and patient rooms. They may also lack the staff needed to adequately care for multiple patients. Retaining a large staff is expensive. When hospitals are on the verge of bankruptcy and/or closure, excess staff is the first to be cut.

There is a need for medical care in all communities. When failing hospitals decide to close, an opportunity cost arises. The hospital building may be sold or it may remain empty for years. The community will still be without hospital care in either case. If the hospital decided to merge with a larger hospital network, the building would serve its original purpose and the community would benefit by having a hospital.

In the hospital industry, high costs usually result in high prices. Hospitals that closed generally had higher charges. More of the hospitals that closed were classified as rural and had lower wage and salary costs. Prices increased sharply in the year prior to closure. These hospitals had extremely low levels of investment in net fixed assets, which suggests that they had not kept pace with technological developments. This failure may have driven medical staff and their patients away (O'Cleverly, 1993).

RESULTS

The cost differential model presented develops the theory that hospitals should merge rather than close. Many smaller community hospitals do not have the necessary resources and funding to continue operating in a highly competitive industry. The results from the cost model document this to be the trend.

As stated in the model, many rural and community hospitals have been forced to close because of ineffective management and overall inefficient operating procedures. Many of the problems surrounding ineffective management would be eliminated through merging. Experienced managers at the larger health care institutions would be able to run the troubled hospital as a business. This would be the first step in rebuilding operational structure at the community hospital level. The management of the partner hospital could then bring in an adequate size staff. The rural hospital is no longer responsible for paying the hospital staff. Funding for such expenditures would be allocated to each hospital in the network.

The rising cost of medical procedures is another compelling reason why troubled hospitals must merge rather than close. Community and rural hospitals are not able to raise the capital necessary to finance the latest technologies. It makes sense for the smaller hospital to develop a partnership with a larger hospital in the surrounding area. Both hospitals would benefit. The

community hospital would not have to finance expensive equipment, and the larger hospital could increase market share. Technological expenditures are the major expenditures at any hospital, regardless of size (Omachonu, 1998).

CONCLUSION

Merging is a win-win situation for most hospitals involved. The smaller hospital no longer must cut costs at the expense of patient care. The capital and resources available from the parent hospital would lead to an overall hospital expansion. Additional physicians and nurses could be retained. Needed technological improvements would be made, greatly increasing the level of care provided to each patient. The option of specialization in specific emergency needs or areas of patient care would attract new patients as well as additional staff. The community hospital would not specialize in acute care. Patients needing this type of care would be transferred to the parent hospital. This is a way that hospitals attempt to maximize overall efficiency. Also, larger hospital networks have been able to follow their acquisitions with deals and discounts with suppliers, giving the entire chain the best prices enjoyed by any of its partners prior to any deals (Kenkel, 1995).

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ONCALE REVISITED: WHEN IS SAME-SEX HARASSMENT "BECAUSE OF … SEX"?

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ABSTRACT

The paper reviews Justice Scalia's 1998 opinion in Oncale v. Sundowner Offshore Services, Inc., arguing that Justice Scalia, after holding that same-sex harassment could be actionable under Title VII, deliberately chose not to consider directly whether Joseph Oncale's harassment was " because of… sex" and therefore actionable, perhaps in order to get all eight of the other justices to join his opinion. But the opinion implies that it adequately addresses the statutory "because of sex" requirement in same-sex harassment and remands Oncale and a companion case, Belleville v. Doe, to the Court of Appeals for reconsideration in its light. Not surprisingly, Oncale has given minimal and confusing guidance to the Circuits of the U.S. Court of Appeals dealing with the issues of when the statutory requirement of "because of …sex" is satisfied in same-sex harassment cases.

DALTON V. CAMP: DEFINING A MANAGER'S FIDUCIARY DUTIES

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Dalton v. Camp, a case which was heard recently on appeal by the North Carolina Court of Appeals (Dalton v. Camp 2000) (Dalton v. Camp 1999), and the cases cited by the Court in its decision, highlight the current state of law in North Carolina regarding an manager's duty of loyalty to his employer. Specifically, this case focuses on a manager's fiduciary duty not to compete with his employer while still in his employ, and legal consequences of such action.

In this case, the plaintiff, Robert Earl Dalton d/b/a B. Dalton & Company ("Dalton"), publishes employment magazines for other companies. After contracting with Klaussner Furniture Industries ("KFI") in July of 1993 to publish their employment magazine, Dalton hired David Camp as General Manager and charged him with the responsibility to produce the KFI magazine. As Dalton contracted with other companies to produce their magazines, he gave Camp the responsibility for these magazines as well. In December, 1995, Camp hired Nancy Menius to work with him. Neither employee has a specific covenant not to compete with Dalton.

In January 1997, Dalton, Camp and Menius met with KFI to discuss renewing the publication contract. In the case at hand, Dalton alleges that all parties left this meeting with an understanding that the then-current relationship would continue, although perhaps with modified terms. Shortly after this meeting, Camp began meeting with KFI's representative while Camp was still employed as General Manager, sometimes at Dalton's place of business, to discuss a separate contract. Camp asserts that the KFI representative initiated the meetings.

According to Dalton, Menius and Camp discussed forming a competing company several times in February of 1997. On February 28, Menius resigned. Camp and Menius claim that no substantial talks took place until after Menius quit. After Menius left Dalton's employ, she and Camp prepared a business plan for Millennium Communication Concepts, Inc. ("MCC"), and presented it to a lender in March of 1977. In this business plan, they presented Camp as a former employee of Dalton. On March 13, 1977, Menius incorporated MCC with Camp and Menius as sole officers, directors, and shareholders.

At about the same time that MCC was incorporated, MCC contracted with KFI to publish their employment magazine. Camp signed this contract for MCC while still employed by Dalton. Then, on March 26, Camp resigned and informed Dalton of his actions in forming MCC and contracting with KFI. MCC eventually established contracts with other clients of Dalton.

Dalton filed suit against David Camp, Nancy J. Menius, and Millennium Communication Concepts, Inc., for breach of fiduciary duty of loyalty, conspiracy to appropriate customers, tortious interference with contract, interference with prospective advantage and unfair and deceptive trade practices. The plaintiff's claim for tortious interference with contractual and business relations was dismissed on September 12, 1997. Prior to trial, the defendants' motion for summary judgment on the remaining claims was granted on July 13, 1998. Dalton appealed to the NC Court of Appeals on

the summary judgment ruling, contending that the trial court erred, since there were issues of material fact in evidence.

The North Carolina Court of Appeals first heard the case and released a decision on August 16, 1999 (Ibid). However, in light of its decision in another case, Sara Lee Corp. v. Carter (Sara Lee Corp. v. Carter 1998) ("Sara Lee 2"), the North Carolina Supreme Court remanded the case back to the Court of Appeals on February 16, 2000. The Court of Appeals issued their revised ruling on June 6, 2000. Then, on October 5, 2000, the Supreme Court allowed a motion by N. C. Citizens for Business and Industry to file an Amicus Curiae brief in the case (Dalton v. Camp 2000), and on the same date allowed a motion by the defendants for discretionary review of the (more recent) decision of the Court of Appeals, on two of the three issues identified by that Court (Dalton v. Camp 2000).

In its decision on June 6, 2000, the Court of Appeals identified four separate issues for consideration. First, the Court considered the claims by Dalton of breach of the (fiduciary) duty of loyalty by the defendants. In considering this issue, the Court reasoned that a fiduciary relationship may be created by "instilling a special confidence" in another party. They cite Speck v. N.C. Dairy Foundation (Speck v. N.C Dairy Foundation 1984), specifically as it cites Abbitt v. Gregory (Abbitt v. Gregory 1931). Abbitt v. Gregory sets the precedent for modern North Carolina case law in discussing what situations might fall under the heading of "fiduciary relationship". In Abbitt v. Gregory, the Supreme Court of North Carolina explained:

> *It is difficult to define legally the exact extent of the meaning of the term "fiduciary" to include every relationship of that character, but the relationship exists where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and in due regard to the one reposing the confidence.*
>
> *……*
>
> *It is immaterial whether the relation between [plaintiff and defendant] was that of principal and agent… The courts generally have declined to define the term "fiduciary relation" and thereby exclude from this broad term any relation that may exist between two or more persons with respect to the rights of person or property of either… The relation may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.(Ibid)*

Once a fiduciary relationship is created, the Court reasoned, its existence "binds the individual to act with good faith and loyalty towards the one instilling confidence."(Dalton v. Camp 2000) Here they refer to the Court of Appeals hearing of the Sara Lee Corp. v. Carter case ("Sara Lee 1"). In Sara Lee 1, the Court of Appeals stated that an "employee is bound to the exercise of the utmost good faith, loyalty, and honesty toward his … employer".

Citing McKnight v. Simpson's Beauty Supply, Inc. (McKnight v. Simpson's Beauty Supply 1965), the Court enjoined an employee to "faithfully serve his employer and perform his duties with reasonable diligence, care and attention." In McKnight, the N.C. Court of Appeals specifically states that this promise is implied in every employment contract, not necessarily by the contract terms, but by the operation of law.

Finally if, in violation of these common tenets of all employer/employee relationships, an employee "deliberately acquires an interest adverse to his employer" (Dalton v. Camp 2000), the

Court concludes that such an employee has clearly violated his duty of loyalty. The Court found that Dalton had presented sufficient evidence a) that Dalton had instilled a special confidence in Camp; b) that with such confidence, Camp was bound to act with loyalty toward Dalton; c) that the employee/employer relationship created a duty on Camp's part to serve Dalton with reasonable care; and d) that "Camp had clearly acquired an interest adverse" to Dalton.

Camp, et. al., argued that, per Fletcher, Barnhardt & White, Inc. v. Matthews (Fletcher, Barnhardt & White, Inc. v. Matthews 1990), the lower court's grant of summary judgment in favor of Camp was correct. In that case, the Appeals Court determined that merely forming a company while in another's employ is not sufficient grounds to show breach of duty of loyalty. In this case, however, the Court states that Dalton has shown sufficient evidence that Camp went beyond merely forming a company, and they therefore reversed the lower court's grant of summary judgment in favor of Camp on the complaint of breach of duty of loyalty.

In examining the charge of breach of loyalty against Menius, however, the Court found no evidence that Menius went beyond "mere preparations to compete", and they therefore upheld the grant of summary judgment in favor of Menius.

When, in October, 2000, the N.C. Supreme Court granted the Defendants' motion for discretionary review of the (more recent) Appeals Court decision (Dalton v. Camp 2000), this issue of breach of fiduciary duty of loyalty is the issue which the Court refused to review.

The second issue addressed by the Court in Dalton v. Camp was whether the Plaintiff had presented a genuine issue of material fact regarding Defendants' unfair and deceptive trade practices. In its decision, the Court declared that he had, citing Chapter 75 of the North Carolina General Statutes, which establishes a cause of action for such practices. The Appeals Court reached this revised decision after the Supreme Court's opinion in Sara Lee 2 (Sara Lee Corp. v. Carter 1999), and remand of the case back to the Appeals Court.

Prior to the Supreme Court's review of Sara Lee Corp. v. Carter, North Carolina Courts had held that the Unfair and Deceptive Trade Practices Act did not apply to employer/employee relationships and, in fact, the Appeals Court reached this conclusion in its first hearing of the case (Dalton v. Camp 1999). However, in Sara Lee 2, the Supreme Court broke new ground on the issue.

First, quoting the Unfair Trade Practices Act, it declared "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." (North Carolina General Statutes quoted in Sara Lee Corp. v. Carter 1999) In this case, "defendant's acts were conclusively 'unfair or deceptive'" (Sara Lee Corp. v. Carter 1999), therefore the Court moved on to examine the question of whether the acts of Carter were "in or affecting commerce". They concluded that the actions of Carter were "in or affecting commerce" and therefore within the scope of the Act. Finally, and most critically for Dalton v. Camp, the Court examined whether employer/employee relationships can fall within the scope of the Act. In their conclusions, the Supreme Court declared that "Even though defendant was an employee, he nevertheless engaged in self-dealing conduct and 'business activities'… On these facts, defendant's mere employee status at the time he committed these acts does not safeguard him from liability under the Act."(Ibid)

Upon review of the Supreme Court's decision, the Appeals Court reconsidered its findings in Dalton v. Camp. Although it had found that the employer/employee relationship precluded the

Plaintiff from holding Camp, et. al., liable for deceptive trade practices, it now explored the question from a fresh perspective. Following the Supreme Court's lead, it looked for the existence of three factors in determining an issue of deceptive trade practices: "(1) an unfair or deceptive act or practice, or unfair method of competition, (2) in or affecting commerce, and (3) which proximately caused actual injury to the plaintiff or his business."(Murray v. Nationwide Mutual Ins. Co. quoted in Dalton v. Camp 2000)

The Court found that Camp had "used a position of confidence to solicit the plaintiff's customers and compete with the plaintiff while still in his employment," that he "concealed his behavior from the plaintiff," and that "these acts … amount to unfair and deceptive trade practices."(Dalton v. Camp 2000) In deciding whether Camp's acts were "in or affecting commerce," the Appeals Court again looked to the Supreme Court's decision in Sara Lee 2. Following the Supreme Court's definition of commerce, the Appeals Court found that, since Camp "solicited plaintiff's customers and obtained their business…while on official business for the plaintiff,"(Ibid) the conduct of Camp was "in or affecting commerce." Lastly, the Appeals Court determined that Dalton had presented sufficient evidence of material fact to determine his "actual injury." In conclusion, the Appeals Court reversed the grant of summary judgment for Camp on the issue of unfair and deceptive trade practices.

Examining the case against Menius, the Appeals Court found that the relevant actions of Menius all took place after she left Dalton's employ, and that these actions do not constitute unfair and deceptive trade practices under such conditions. Finally, the Appeals Court reexamined its findings in regard to MCC.

In its original decision, the Court had found that since the employer/employee relationship protected Menius and Camp from charges of unfair and deceptive trade practices, and that MCC acted solely through them, it also was not liable. Now, in light of Sara Lee 2 and its conclusions about Camp, the Appeals Court reversed itself and declared that sufficient evidence of material fact existed to justify a claim of unfair and deceptive trade practices against MCC.

The third issue that the Appeals Court examined is the issue of whether Dalton had shown sufficient evidence to bring a claim of tortious interference with prospective business advantage. In order to do so, Dalton must have shown that a contract with KFI would have ensued if not for the actions of the defendants. Further, the Court declared that the "defendants must not be acting in the legitimate exercise of their own right, 'but with a design to injure the plaintiff or gain some advantage at his expense.'" (Ibid, quoting from Owens v. Pepsi Cola Bottling Co. of Hickory, N.C., Inc. 1992)

Since evidence had been presented showing that not only was KFI satisfied with Dalton's performance under the original contract, but that the relationship had continued beyond the original terms of the contract, and that there was every indication that it would have continued, except for the actions of the defendants. The defendants claimed that Camp had "an unqualified right to compete", but the Court pointed out that "this argument impermissibly ignores Camp's ongoing duty to plaintiff as the general manager of plaintiff's company." Since it had already determined that there was a real issue as to whether Camp had breached his duty of loyalty, the Court also determined that there was a real issue as to whether Camp was "acting in the legitimate exercise of his own

rights."(Ibid) Therefore it reversed the summary judgment in regard to the claim of tortious interference with prospective business advantage against Camp.

Since it had already determined that there was not sufficient evidence to uphold a claim of breach of duty of loyalty against Menius, it also decided that there was not evidence to support a claim of tortious interference against her, and upheld the summary judgment in her favor. However, since MCC acted through Camp, and there was sufficient evidence of such a claim against Camp, the Appeals Court again reversed its earlier decision in light of Sara Lee 2, and reinstated Dalton's claim of tortious interference against MCC.

The fourth and final issue addressed by the Court of Appeals was the question of whether Dalton had shown sufficient evidence to support a claim of conspiracy against the defendants. Since the plaintiff testified that he did not have anything more than suspicions that Camp and Menius had conspired with one another, the Court upheld the grant of summary judgment in favor of the defendants.

After deciding the four main issues in the case, the Appeals Court explored the question of damages. In order to recover damages, the plaintiff must show that the amount being sought is based upon a reasonable standard, so that they may be "calculated with a reasonable certainty." Further, the plaintiff must show that the damages being sought were the "natural and probable result of the defendants' conduct." Finally, evidence of past regular profits may be used to determine the extent of damages.(Ibid)

The Appeals Court decided that sufficient evidence had been presented by the plaintiff to withstand a motion for summary judgment, based on the testimony of plaintiff's expert witness, and therefore that defendants' motion for summary judgment regarding damages should be denied.

In its decisions in Dalton v. Camp, the Appeals Court cited the North Carolina Supreme Court's decision In Re Burris (In Re Burris 1965), to wit "where an employee deliberately acquires an interest adverse to his employer, he is disloyal." (Dalton v. Camp 2000) Burris roots its opinion in a quote from an 1877 case which was heard before the Supreme Court of Wisconsin, Dieringer v. Meyer (Dieringer v. Meyer 1877). In that case, the Court 's declaration states succinctly the root philosophy, from both common and case law, of the issues in Dalton v. Camp:

> *Manifestly, when a servant becomes engaged in a business which necessarily renders him a competitor and rival of his master, no matter how much or how little time and attention he devotes to it, he has an interest against his duty. It would be monstrous to hold that the master is bound to retain the servant in his employment after he has thus voluntarily put himself in an attitude hostile to his master's interests. (Ibid)*

Given the right of the master (employer) to discharge the servant (employee) who has taken an interest against his employer, it is a small step to granting that employer the right to lay claim for damages against the employee. Although North Carolina Courts had allowed such suits for breach of fiduciary loyalty, they had seen the employer/employee relationship as a bar to claims of unfair and deceptive business practices. After the North Carolina Supreme Court's decision in Sara Lee 2, and now the Court of Appeals subsequent revision of its decision in Dalton v. Carter, the precedent has been set for other courts to set the standard higher for an employee's behavior. Particular emphasis will now be put on the importance of the employee's fiduciary relationship with the

employer and the trust that it implies and demands. Not only will directors and officers of corporations be held to this high standard of moral behavior, but also the manager who holds the power to start a business on the side in direct competition with his employer and to claim the employer's customers for his own.

CONCLUSION

As noted, the Supreme Court of North Carolina has agreed to review Issues Two and Three of the Appeals Court decision in Dalton v. Camp. Significantly, they refused to review Issue One, the decision regarding breach of fiduciary duty of loyalty against Camp. Clearly, Dalton has presented sufficient evidence to bring a claim against Camp for this charge. Regardless of the outcome of the Supreme Court's review in this case, and the eventual outcome of the trial, if it should take place, the Courts have made it clear in these cases, and the others they cited, that this immoral behavior by an employee in a position of fiduciary responsibility cannot be accepted or condoned by society, and the wronged parties in such actions may seek relief in the court system. Ethically and legally, this is as it should be.

COPYRIGHT INFRINGEMENT & FAIR USE OF PARODY

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" All rules of law contain implied extensions and implied limitations and are therefore subject to interpretation. Fair use in the current statute is a classic illustration of a very general rule, the interpretations of which vary widely. As might be expected, copyright owners, who control the playing field by carefully selecting which cases come to court, tend to give the fair use doctrine a very narrow reading, while users (always the defendants) naturally take a broader view."

The concept of copyright law, through its various incarnations, is as old as the United States. The framers of the U.S. constitution saw the law as a means to balance the rights of artistic creators with the rights of users. (Ibid) It is a common misconception that the sole purpose of copyright law is to protect creators of works against anyone trying to steal their work. The copyright law's designated intent, as stated explicitly within the U.S Constitution, and interpreted by federal courts and Congress, is not to ensure the enrichment of creators but rather to promote the public welfare by the advancement of knowledge. (Ibid)

This paper is concerned with the legal use of parody as a fair use exception to the exclusive rights granted creators under the Federal copyright laws. Specifically, the paper will address, what, in the eyes of the law, are the determining factors in whether a work of parody (e.g., music, movie, literature, photograph) captures the legal essence of parody or infringes on the creation of an earlier work, per the Copyright Act of 1976, because it does not transform the earlier work.

The Copyright Act of 1976 identifies four factors that must be considered by the courts before allowing fair use as a defense. These four factors are: The purpose and the character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole and the effect of the use upon the potential market for and value of the copyrighted work

Parody is one of four types of satire: The other types are diatribe, narrative, and burlesque. The root of the word, which is "parodia," literally means a song sung beside something. Webster's New World Dictionary defines parody as "literary or musical composition imitating the characteristic style of some other work or of a writer or composer, but treating a serious subject in a nonsensical manner, as in ridicule." (Johnson, M. & Spilger, U.) Herein lies the legal balancing act surrounding copyright infringement and parody; the parody intends to gain attention by imitation and using humor at the expense of the original work and/or creator. So, it follows that more often than not the original creator of the work that is parodied is not receptive to their work being ridiculed. U.S. case law bears this out by virtue of the numerous cases in which the target of a parody tried to prevent or discontinue the publication and/or distribution of the work of parody to consumers. This paper will highlight influential cases that illustrate how U.S. courts have

interpreted the fair use doctrine as it relates to copyright infringement and parody. Moreover, this paper will discuss in depth two cases that clearly demonstrate the legal issues one must consider when evaluating the legitimacy of a work of parody when based on an earlier copyrighted work. The first case, Campbell v. Acuff-Rose Music, Inc. (1994) (Campbell v. Acuff-Rose Music, Inc. 1994), is crucial to understanding the relationship between a work of parody, and the copyrighted work against which it is based, because it delineates the necessary factors that make such a work of parody legal. The second case, Dr. Suess Enterprises, L.P. v. Penguin Books, USA, Inc. (Dr. Seuss Enterprises, L.P. v Penguin Books, USA, Inc. 1997), is an example of how a work of so-called parody capitalizes on an earlier copyrighted work without successfully transforming the copyrighted work through targeted criticism.

Not surprisingly, as the mediums by which creative expression were delivered expanded during the 20th century, the more pressing an issue copyright infringement became with respect to parody. Never was this more apparent than with the advent of television. In 1955, when television was in its infancy, in Columbia Pictures Corporation v. National Broadcasting Company (Columbia Pictures Corporation v. National Broadcasting Company 1995), Columbia Pictures sued NBC because the network broadcast a parody of the movie From Here To Eternity in a television production called From Here to Obscurity. The parody used the same general settings and characters as in the original work, but the tone and development of the characters were noticeably different. The California District Court ruled that the NBC production was a form of parody that is a recognized literary art form that transfers a serious copyrighted work into a comic one. This means the parody must contain recognizable elements of the original copyrighted work. The 9th Circuit Court of Appeals observed in 1956 in Benny v, Loews Inc., (Benny v. Lowes Inc. 1956) the fact that a serious dramatic work is copied practically verbatim, and then presented with actors walking on their hands or with other absurdities, does not avoid copyright infringement. (Ibid)

The case of Campbell v. Acuff-Rose Music, Inc. 1994 (Campbell v. Acuff-Rose Music, Inc. 1994) was heard by the United States Supreme Court in 1993 and illustrates the high court's contemporary interpretation of parody as it relates to an earlier copyrighted work. In the early 1990s the musical rap group "2 Live Crew" produced their own version of Roy Orbison's "Pretty Woman." The rap group had asked for permission to use "Pretty Woman" from the holder of the song's copyright holder, Acuff-Rose Music. When Acuff-Rose Music refused to grant permission 2 Live Crew went ahead and put their version on their album entitled "As Clean as They Wanna Be." Acuff-Rose Music sued the rap group when 250,000 copies of the album sold. Initially, the case was brought before the U.S. district Court for the Middle District of Tennessee. The court ruled 2 Live Crew was not guilty of copyright infringement because the group had substituted "predictable lyrics with shocking ones" in order to demonstrate "how bland and banal" the Orbison song is. The court granted summary judgment for the rap group. The United States Court of Appeals for the Sixth Circuit reversed and remanded the case on the basis of the Court of Appeals' conclusions that (1) the commercial nature of parody rendered the parody presumptively unfair under the first of the four factors provided within the Copyright Act of 1976, (2) by taking the heart of the original and making it the heart of a new work, the group had qualitatively taken too much of the original under the Copyright Act's third factor, and (3) harm to the market for purposes of the Copyright Act's fourth factor had been established by a presumption attaching to commercial uses.(Ibid)

The case of Campbell v. Acuff-Rose Music, Inc. would now be heard before the United States Supreme Court. The Supreme Court reversed and remanded the case. In an opinion by Justice Souter, communicating the unanimous view of the court, he noted that the Court of Appeals had erred in basing its judgment on the conclusion that the parody's commercial nature rendered the parody presumptively unfair under the first and fourth factors of the Copyright Act of 1976. In establishing a legal definition of parody the Supreme Court noted that if the commentary has no critical bearing on the substance or style of the original work, which the alleged infringer merely uses to attract attention, the claim to fairness in borrowing from another work diminishes accordingly.(Ibid) After comparing the text of the intended parody with the text of the original song, the court observed that while we might not assign a high rank to the parodic element here, we think it fair to say that the 2 Live Crew song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with the degrading taunts, a bawdy demand for sex, and a sigh of relief from parental responsibility.(Stewart, David O. Rock around the docket.)

The case of Dr, Suess Enterprises, L.P. v. Penguin Books, USA, Inc.(Dr. Seuss Enterprise, L.P. v. Penguin Books, USA, Inc. 1997) was heard by the United States Court of Appeals for the Ninth Circuit. The case concerned the satirical parody of the O.J. Simpson double murder trial entitled The Cat NOT in the Hat! A Parody by Dr. Juice. The arguments centered on whether the authors of this so-called work of parody infringed on the copyright and trademark of the well known The Cat in the Hat by Dr. Seuss.(Ibid)

Seuss Enterprises, a California limited partnership, owns most of the copyrights and trademarks to the works of the deceased Theodor Geisel, the author and illustrator of the famous children's books written under the pseudonym "Dr. Seuss." Between 1931 and 1991, Geisel wrote, illustrated, and published at least 47 books that resulted in approximately 35 million copies currently in print worldwide. Seuss Enterprises has licensed the Dr. Seuss creations, including The Cat in the Hat character, for use on clothing, in interactive software, and in a theme park.(Ibid)

In 1995, author Alan Katz and illustrator Chris Wrinn collaborated to produce the book The Cat Not in the Hat! satirizing the O.J. Simpson double murder trial. The publishers and distributors of the book were not licensed or given permission, nor did they ask, to use the writings, illustrations, or characters owned by Seuss. Consequently, Seuss Enterprises filed a complaint for copyright and trademark infringement, submitted an application for a temporary restraining order, and sought a preliminary injunction after learning of an advertisement promoting the book. Seuss Enterprises alleged that The Cat Not in the Hat! illegally used substantial protected elements of its copyrighted works, used six unregistered and one registered Suess trademarks, and weakened the unique appeal of its well known copyrights and trademarks. In response, book author, Katz, filed a declaration stating that The Cat in the Hat was the "object for [his] parody" and portions of his book derive from The Cat in the Hat only as "necessary to conjure up the original."

Among the legal codes, acts, and statutes Suess cited as having been violated was the Copyright Act of 1976. Prior to the Ninth Circuit Court of Appeals hearing the case a California district court denied the request for the temporary restraining order, but it set a hearing date for the preliminary injunction. Meanwhile, the book was still slated for publication. On March 21, 1996, the district court granted Seuss Enterprises' request for a preliminary injunction.

To address the issues of alleged copyright and trademark infringement the district court employed a two-pronged approach that determined if (1) there was copying and (2) if an audience of reasonable people would perceive substantial similarities between the accused work and protected expression of the copyrighted work. The district court summarized the issue by noting, "In the Ninth Circuit, the issue is whether the works are substantially similar. Substantial similarity may be found whenever the works share significant similarity in protected expression both on an objective level and a subjective, audience-response level."

To counter, Penguin and Dove argued they did not infringe on any of Suess' protected copyrights because their book utilized characteristics of the copyrighted work that are not eligible to be copyrighted or that have fallen into the public domain.

In the Suess case the Ninth Circuit of Appeals observed that parody is regarded as a form of social and literary criticism, having a socially significant value as a free speech under the First Amendment. The court used the criteria whereby the work of parody is permitted as a "fair use" of a copyrighted work if it takes no more than is necessary to recall the target of the parody. Penguin and Dove underscored the point that the Supreme Court in Campbell v. Acuff-Rose determined that it was wrong to rule that the commercial, profit-making nature of the defendant's infringement created a presumption of no fair use defense, because the other elements of the fair use doctrine were not thoroughly considered. The Ninth Circuit Court of Appeals noted that the court found that The Cat Not in the Hat! was not entitled to a parody fair use defense because it failed to target the original work, not due to the commercial nature of the work.

The district court concluded that The Cat in the Hat is the central character, appearing in nearly every image of The Cat in the Hat. The court observed that Penguin and Dove used that character's image, copying the Cat's Hat and using the image on the front and back covers and in the text. The Ninth Circuit Court of Appeals affirmed the district court's decision writing, "We have no doubt that the Cat's image is the highly expressive core of Dr. Seuss' work." The Circuit Court went on to write, "We completely agree with the district court that Penguin and Dove's fair use defense is pure shtick and that their post-hoc characterization of the work is completely unconvincing" Finally, the Circuit Court summarized, "In light of the fair use analysis, we conclude that the district court's finding that Suess Enterprises showed a likelihood of success on the merits of the copyright claim was not clearly erroneous. This court can affirm the grant of the preliminary injunction based on the copyright or trademark infringement claims."(Ibid)

CONCLUSION

The Copyright Act of 1976 has served as a tool to courts in establishing parody as a fair use when based on an earlier copyrighted material. In both Campbell v. Acuff-Rose Music, Inc. (1994), 510, U.S. 569 (U.S. Supreme Court) and Dr. Suess Enterprises, L.P. v. Penguin Books, USA, Inc. we see that the courts have judged the strength of the claim of fair use of parody based on the extent to which the parody transforms the copyrighted material through targeted criticism. Campbell showed sufficient evidence in the court's eyes that the 2 Live Crew's version of "Pretty Woman" was a fair use of parody because it was intended to be a direct criticism of Roy Orbison's version of "Pretty Woman." Conversely, the California District Court ruled, and the Ninth Circuit Court of

Appeals upheld, that Penguin Books, USA, Inc. did not show sufficient proof that the book they published was a targeted criticism of Dr. Seuss' The Cat in the Hat. Rather, both courts concluded that the authors of The Cat NOT in the Hat! infringed on Suess' copyright by stealing the Cat's image. The book used the image as a vehicle to provide commentary on the O.J. Simpson double murder trial, not the work of Dr. Suess. In any case of copyright infringement involving parody the courts will establish whether the parody meets the criteria for "fair use" protection by determining whether the so-called parody transforms the copyrighted work through some sort of commentary. If the examining court finds that the work in question is a parody then it will consider each of the four factors as provided in the Copyright Act of 1976. In the eyes of the Copyright Act of 1976, when the work in question does not meet one or more of the four factors then copyright infringement has occurred.

VETERINARY MALPRACTICE: THE IMPACT OF THE HUMAN-ANIMAL BOND

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One of many factors that should be considered when discussing industry trends is the role of society. Veterinary Medicine has seen a tremendous change in recent years. Although others factors have contributed to industry changes, society and societal expectations have contributed on many levels. Among these are the change in the relationships of owners and their pets, the increase in the number of specialist and specialties available for veterinary clients, and the increase of malpractice suits filed against veterinarians throughout the United States. These changes seldom, if ever, are the sole reason for current or future industry trends, but in their own way each has contributed to the profession's progress. In what ways have relationship changes and the rise of specialist contributed to the increase of malpractice suits?

In order to explore this question it is essential to understand what prompted the other changes and what our judicial system's position was regarding animals. Until recently animals within a household were referred to as "pets." Historically these animals or pets were viewed as property, like a piece of furniture, by our judicial system and therefore judgments were limited to the market value or replacement cost of the pet. In many states this is still the case, but current case law is bringing about change. Presently, Harvard Law School offers courses in animal law and organizations such as the Animal Legal Defense Fund are developing across the country. So why are we seeing trends advocating the rights of animals and animal owners? And what do these trends mean for animal service industries?

From the beginning of time animals have filled many roles in the lives of humans, from working and service positions to companions. Times have changed, but the multitude of roles filled by our pets has not. Canines or dogs still work and serve in working capacities throughout our country. Some dogs are utilized as guard or protection canines, some for hunting or sport, others as service dogs for the handicapped or physically challenged, and others as companions for individuals and families. Whatever the role and whatever the species of animal, humans have come to place a higher value on the lives of the animals in our society.

As a result of the changes in societal views of animals, animal service industries have faced many challenges and changes recently. Among the animal service industries affected by the changes are pet food manufacturers, pharmaceutical companies, pet insurance companies, boarding kennels, groomers, breeders, animal trainers, and veterinarians. Overall consumers demand a higher quality of service because the consumer is more educated about pet related issues and generally places a higher value on the pet.

One of the recent changes directly affects our legal system. Pet owners believe that the judicial system should recognize the role animals play in the lives of people. A recent trend has led to a terminology change from "pet" to "companion animal." The term is intended to denote the significance of the human-animal bond. This bond is at the heart of the issues affecting our legal

system. Lawyers, specifically pet attorneys, deal with issues ranging from malpractice to custody battles to wills and estates. A shift in legal precedent has occurred because more attorneys are willing to battle for the rights of companion animals as family members. Lawyers do not expect animals to be viewed as equals to humans, but they are asking courts to recognize and "honor the special kinship" shared by owners and companion animals.(Traster, Tina 2001) Additionally, lawyers are learning to maneuver within a judicial system that historically treats animals as things rather than family members.

Recently, attorneys have been asking that an emotional value be placed on companion animals, therefore granting animals greater protection and empowering owners in disputes against animal service industries. Although many areas within the industry have been affected one has been greatly impacted, veterinarians. Subsequently the boundaries of the veterinarian's liability have changed. Unlike their human counterparts, veterinarians do not routinely carry malpractice insurance; rather they are covered by the American Veterinary Medical Association's (AVMA) Liability Insurance Trust. Traditionally, the relationship between the veterinarian and the pet owner has been very friendly, respectful, and built upon trust. A recent study conducted by a group of animal health professionals and funded by Pfizer Animal Health found that veterinarians were among the top three most trusted professionals according to the individuals surveyed.(Brown, John, Silverman Jon 1999) Therefore, veterinarians relied upon their bonded relationship with their clients to forego the settlement of disputes within the judicial system. According to the AVMA Liability Insurance Trust, from 1976 to 1986 claims paid involving canines amounted to $993, 277 and legal fees amounted to $886,906. In feline cases paid claims amounted to $312,161 and legal fees amounted to $155,473.(Wilson, James 1988) During this ten-year period the total expenses for small animal claims and legal fees amounted to $2,347,817. Given the number of veterinarians practicing and the number of owned pets during these years, the risk for the individual veterinarian was minimal. But times have changed and veterinarians are experiencing their own subsequent changes as more owners are seeking the services of attorneys in civil cases claiming malpractice against veterinarians.

Veterinarians need to understand tort law, specifically negligence law because most practitioners will incur some form of professional liability during their career; either in the form of negligence related to the injury of a client while on the premises of the veterinary clinic or hospital, or in the form of malpractice from injuries, death, or the escape of a client's animal. Under our judicial system the law of malpractice is an extension of the law of negligence. According to Dr. James Wilson, JD "in either case, to maintain the veterinary profession's integrity and to minimize the high costs associated with practicing defensive medicine, practitioners must learn to avoid malpractice suits." Additionally, veterinarians must consider that many clients are not willing nor can they afford to pay the high costs of defensive medicine.

How does the law define malpractice? Malpractice is "the failure of a professional, such as a veterinarian, to perform services pursuant to the 'standard of care'.(Veterinary Malpractice) The standard of care is what other professionals in the same geographic region and with similar specialization within the same field would do under the same circumstances. Therefore, the attorney for the plaintiff must prove that the animal had the specified condition, the veterinarian had a standard of care to take a certain action, the veterinarian did not take the action required by the

standard of care, and the animal became ill or died as a result of the veterinarian's failure to take the required action. The burden of proof is upon the plaintiff's attorney, as the defendant is presumed innocent.

The first element to be proved is that the animal had the specified condition. This may be the easiest of the four to prove and is generally satisfied by submitting the patient's medical record as evidence. The American Veterinary Medical Association recommends that each patient's medical record be documented according to a standard format referred to as S.O.A.P.ing the patient. The acronym stands for subjective or the history supplied by the owner, objective or the findings on the physical exam, assessment or the working diagnosis that may contain three or more diagnosis to be ruled out, and the plan or treatment. The assessment portion of the patient record can substantiate the first condition necessary to prove malpractice. If possible, a second opinion affirming the original veterinarian's diagnosis would provide support for the first element.

The second essential element to prove is the standard of care that requires veterinarians to "exercise the care and diligence as is ordinarily exercised by skilled veterinarians" and must come from an admissible source of evidence.(Posnien v Rogers 1975, Ruden v Hansen 1973, & Brockett v Abbe 1964) The source may be an authoritative veterinary textbook or source of literature such as a journal, or it may be a letter from another veterinarian stating the standard of care. Courts may ask for evidence regarding the applicable standard of care from any of the following three places: the state's veterinary practice act, rules and regulations adopted by the state board of veterinary examiners, and standards that have been established by state or national veterinary associations like the AVMA and AAHA, American Animal Hospital Association.(Wilson, James) An individual who is considered an expert in the field or is recognized as an authority will have greater credibility. If a letter is submitted as evidence it must contain the following: a statement establishing that the individual is a veterinarian in the same field of specialization and practices in the same general geographic location as the defendant; that he or she has reviewed the medical record completed by the defendant for the owner's pet; that there is a standard of care for the condition indicated; that the testifying veterinarian is familiar with the standard of care and that such standard requires specified treatment; that the defendant's patient medical record is void or absent of those treatments specified by the standard of care; that the animal would not have become ill or died had the standard of care been followed; and the failure of the defendant to treat the animal pursuant to the applicable standard of care constitutes veterinary malpractice. The difficulty for the plaintiff is locating a veterinarian willing to testify against another veterinarian. The courts can be reluctant to apply the locale rule and some states are qualifying their own standards by including additional phrases addressing locale. The state of North Carolina includes the phrase "similarly situated".(Williams v Reynolds 1980)

The issue of "skilled veterinarians" is even more complicated and subjective. Medicine, in general, changes at a rapid rate and requires individuals within the profession to stay abreast of new techniques and advances. The failure of an individual to continue one's education can lead to their failure to meet the standard of care. Veterinarians can also be subject to a higher standard of care if they perform special procedures rather than referring the patient to a specialist. This area is highly controversial because geographic and financial factors effect owner's decisions in pet care. Traditionally, veterinarians are trained to provide care in all aspects of veterinary medicine because specialist were rare, but with technological and medical advances it is nearly impossible for a single

veterinarian to master all areas of medicine. Veterinarians are used to doing it all, but in today's world this is very unrealistic. There are not enough hours in the day to read all the necessary journal articles or attend wet-labs to learn the techniques associated with new procedural and surgical techniques. These facts are forcing veterinarians to change their mentality about their profession.

The third element requires proof that the veterinarian did not take the action required by the standard of care. Again, the patient's medical record will be needed as evidence to support what treatment was provided and determine whether or not it was consistent with the applicable treatment for the condition. The treatment is recorded in the Plan (P) section of the medical record documenting the patient's visit. When the standard of care in malpractice cases is applied it may be a case of omission of a medically indicated diagnostic procedure or treatment, or the commission of an act that produces an undesired or adverse result.

The fourth element is often the most problematic because of the inherent risks associated with veterinary medical procedures. It is necessary that the plaintiff prove the animal would not have become ill or died if the standard of care were followed. In the case of death, a pathologist must perform a necropsy to determine the cause of death. In most cases the primary cause of death is reported to be failure of the heart to beat, then the secondary factors are listed. Therefore, the pathologist must testify that all the secondary factors are "consistent with only one interpretation, namely the condition resulted from the failure of the veterinarian to perform up to the standard of care".(Veterinary Malpractice) In the event that illness occurs but does not result in death the burden of proof is further complicated because again the plaintiff must find a qualified veterinarian to testify as to the animal's condition, the applicable standard of care, the required treatment, the treatment provided, and the illness resulting from treatment. In either case the expert testimony must be presented in such a manner to make it comprehensible for the layperson sitting on the jury, if the case is before a jury rather than a judge.

Each of the four elements is complicated and difficult to prove. The process can be expensive and frustrating. Therefore, the owner must weigh the expense of such an undertaking against the potential recovery. In so doing, the owner is best served by reviewing current case law in his or her state and region to determine if he or she will best be served by directly approaching the veterinarian for compensation, pursuing action in small claims court, or filing a civil suit.

In addition to determining the state or regions history in malpractice cases, the plaintiff needs to consider the types of damages applicable to the case. Three basic types of damages can be awarded: nominal, compensatory, and punitive. In conjunction with these three types of damages, juries may consider special damage awards, consequential, and general damages. Compensatory damages includes special damages and addresses the fair market value of the animal which can be determined by deposing expert witnesses who can testify as to the market for the type and species of animal in question.

According to Favre and Loring's Animal Law, consequential damages can be in the form of expenses incurred in attempting to prevent the death and permanent disability of the animals (including veterinary fees); lost income while animals are out of service; loss of use of the animal (e.g., as a stud or dam); or costs incurred searching for a lost animal (e.g., expenses relating to attempts to find an animal that escapes a veterinary clinic or boarding facility including posters,

classified ads, owner's trips to the pound, lost work time, and telephone expenses).(Favre DS, Loring Law 1983)

Punitive damages are not limited to the market value of the pet and are awarded in addition to compensatory damages. Recoveries for punitive or exemplary damages are awarded "only for the willful, malicious, intentional, or fraudulent acts or for gross and wanton acts of negligence."(Hannah HW 1971) Although such damages are intended to punish the defendant and are not covered by professional liability insurance, they are difficult to prove.

In Law and Ethics of the Veterinary Profession, James Wilson, DVM, JD defines general damages as "those caused by and flowing naturally from the negligence of the defendant, like damages in the form of pain and suffering or emotional distress."(Wilson) Prior to 1988 appellate courts had upheld such awards in only a few states, but more recently the courts have acknowledged the human-animal bond by imposing greater awards due to pain and suffering or emotional distress. The precedents vary in each jurisdiction, as do the damages awarded. Some courts, such as Hawaii's, "allow for recoveries absent bodily impact, the need for medical or psychiatric assistance, or the witnessing of the negligent action."(Campbell v Animal Quarantine Station 1981) At this time courts have yet to clearly define the criteria that might be used in determining the appropriate damages for situations involving the injury or loss of a pet. But courts have been affected by the comparisons between heirlooms and pets in deciding damages. In a 1978 article of the UC Davis Law Review, the author argues that damages have been awarded for the emotional distress of the loss of an heirloom, therefore similar recoveries should be allowed for losses of or injuries to pets.(Mazor, D 1978) The legal precedent allowing recovery for lost items of sentimental value should extend to include companion animals. In the eyes of the owner, their companion has significant sentimental value that exceeds the market value historically associated with animals.

> *The human-animal bond is the single element at the heart of most cases involving veterinary malpractice. Companion animal owners are fully aware that settlements and judgments can neither erase the wrongs already done nor bring back a now deceased companion, but they do want veterinarians held accountable for their actions or inactions. Most importantly, companion animal owners want the bond they share with their furry companions acknowledged and respected. As a result, the veterinary profession and animal industries are experiencing a rise in cases naming them as defendants.*

On October 12, 1999, Jean Townsend filed a class action suit in Hampton County South Carolina against Pfizer, Incorporated for the wrongful death of her beloved chocolate Labrador Retriever, George. The suit claims that Pfizer willfully misrepresented the known adverse reactions, specifically death, associated with their Non-steroidal anti-inflammatory drug (NSAID) "Rimadyl." The suit claims that Pfizer failed to sufficiently advise the veterinary profession of all the known adverse reactions, thus causing veterinarians to prescribe a potentially fatal pharmaceutical to patients without first evaluating liver and kidney values. Pfizer contends that the package insert clearly states the "potential for fatal outcomes" and that the number of known deaths directly associated to Rimadyl is less than 1%.(Jean Townsend v Pfizer, Incorporated.) The case has yet to be settled or determined.

CONCLUSION

Until recently animals were viewed by our legal system as objects, the only arguable fact is what is the current fair market value. Fortunately, our society is changing and our judicial system is committed to representing the society. No longer are animals objects; they are companions. Americans are bonded to their furry friends and many consider them children. This emotional attachment is becoming respect by our courts and owners are fighting for the rights of their companions on all legal fronts. New precedents are being set at amazing rates throughout the country with west coast systems setting the standard.

Not only are owners fighting in the legal system and for new legislation to protect animal rights and enact stricter laws, but owners demand a higher quality medicine from their veterinarians. No longer can the veterinarian provide all the services needed, but it is not in his best interest to do so. With technological and medical advances there is a greater demand for specialist in veterinary medicine. The general practitioner is held to the standard of care of a specialist if he opts to provide such treatment. Therefore, the veterinarian must weigh the needs of the patient and the risk to his own profession before embarking upon a specialty service.

Although many may argue that our legal system is being bogged down by cases that would best be settled out of the courts, the new challenges facing our system are setting tremendous precedents that exemplify the bond shared by the human owner and the animal companion. Such new standards will improve the quality of medicine provided by veterinarians and other animal industries.

SAME SEX DOMESTIC PARTNER BENEFITS

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A growing number of public and private sector employers today are offering health benefits to the same-sex domestic partners of employees as part of their total compensation packages. The Human Rights Campaign (HRC), a national organization devoted to gay and lesbian issues, has compiled a database of nearly 3700 employers offering domestic partner health benefits (Human Rights Campaign). Of the companies represented in the database, 122 are Fortune 500 companies, 100 are state and local governments, and 133 are colleges and universities. The rest are a combination of private sector for-profit and non-profit employers. HRC additionally cites a 1999 survey by The Kaiser Family Foundation and Health Research and Education Trust that found that 18% of U.S. employers provided health benefits to domestic partners (Human Rights Campaign). This figure is up five percent from a survey by KPMG Peat Marwick in 1997 (Human Rights Campaign).

Companies offer domestic partner benefits for two primary reasons. First, companies choose to offer domestic partner benefits as a competitive means of recruiting and retaining employees. Traditional benefit models use marriage as the determining factor to extend benefits. As the definition of the American family changes, these older models do not provide a safety net for employees and their families. Companies are now modifying their benefit packages to encourage existing employees to stay and to entice potential employees to join.

The other reason for offering domestic partner benefits is due to new legislation and court decisions (Kasten, Bruce J. and Edward J. Pisarcik 1998). Several courts in recent years have interpreted state nondiscrimination laws to mean that employers must provide benefits to the domestic partners of employees. These decisions have been made based primarily on laws that prohibit discrimination based on marital status and sexual orientation.

The purpose of this paper is to examine the development of case law around the issue of domestic partner benefits provided by public employers. The development of this area of law centers on the threshold question of whether a public employer is obligated to offer domestic partner benefits if state legislation prohibits discrimination based on marital status, sex or sexual orientation. "Domestic partner," for this paper, means a same-sex, spousal equivalent. Benefits for opposite-sex, unmarried partners are not discussed.

The discussion of private sector employer obligation is omitted due to the pre-emptive effect of the Employee Retirement Income Security Act (or ERISA). ERISA is a body of federal regulation that governs voluntarily established employee benefit plans of private sector employers (United States Department of Labor 2001). Its purpose is to set standards for employee benefit plans to ensure they are fair and financially sound. Benefits such as pensions and health insurance are covered. Because ERISA does not mandate benefits, private sector companies are not required by ERISA to offer benefits for domestic partners or otherwise. In addition, since no federal law prohibits discrimination based on marital status or sexual orientation, ERISA does not require

benefits to be equally available for classifications other than those covered by Title VII of the Civil Rights Act of 1964. Finally, ERISA does not regulate the benefit plans of public employers.

The findings of this paper are based on case summaries, court opinions and articles found on the issue of domestic partner benefits. It examines several essential cases that have been identified as having a significant impact on the development of case law around the issue of domestic partner benefits. Because the development of case law for domestic partner benefits has evolved in the past five to ten years, they are relatively new and seem to have relevance in today's work environment.

The development of case law around the issue of domestic partner benefits has been a confusing and perplexing path. Over the past five to ten years, numerous cases have arisen out of requests from public employees, particularly public university employees, to include their domestic partners on their health coverage benefits. These benefits are typically available to the legally married spouses of employees. They have not been so easily obtained by either same-sex or unmarried, opposite-sex partners. Unfortunately, there has been no decisive case to lead the way in answering the question of obligation among public employers to provide domestic partner benefits.

The examination of this issue begins at the federal level. There have been no cases brought before the federal circuit courts or Supreme Court to explore this question. One reason for this is there are no federal laws or regulations that prohibit employment discrimination based on either sexual orientation or marital status. Because of this, state and local governments have been left to draft nondiscrimination legislation that includes these classifications as protected classes. These cases are then tackled within the state court system.

There have been efforts over the pass twenty years or so by the U.S. Congress to pass legislation that would amend Title VII of the Civil Rights Act of 1964 to include sexual orientation (Bagley, Constance E.). Currently, protection from employment discrimination is extended based on race, religion, national origin, sex, age and disability (Human Rights Campaign). The latest attempt to include sexual orientation manifested in the form of a bill called the Employment Nondiscrimination Act. Even if this legislation were to pass, though, the terms of the act state that "it does not apply to the provision of employee benefits to an individual for the benefit of the domestic partner of such individual." (Employment Nondiscrimination Act) This has also been the case with many state laws attempting to provide equal rights protections.

The problem with leaving this issue to be addressed solely by the states is the variety of forms in which legislature-authored nondiscrimination laws come. In addition, various state trial and appellate courts enforce legislation based on the character of the court. This has produced mixed results that contribute to the lack of one decisive case. The most striking example of this variability was two cases settled simultaneously in March 1997. Both of these cases attempted to use state law that prohibits discrimination based on marital status to answer the threshold question of obligation.

The first case was Rutgers Council of AAUP Chapters v. Rutgers State University. In 1992, five employees of Rutgers State University applied to enroll their same-sex domestic partners as dependents in the New Jersey State Health Benefits Plan (SHBP). Their application was denied based on the opinion of the Deputy Attorney General that same-sex domestic partners could not be

considered eligible dependents under New Jersey law. The employees filed a complaint against the State and the case was eventually heard before the New Jersey Appellate Court. They alleged the denial of domestic partner benefits violate of the New Jersey Law Against Discrimination (LAD) which prohibits marital status and sexual orientation discrimination; violated an executive order from New Jersey's governor which banned sexual orientation discrimination within state government; and violated the right to equal protection under the New Jersey Constitution. Based on these claims, it was the position of the plaintiffs that the term "dependent" should be construed to "include domestic partners who are the functional equivalent of spouses." (Rutgers Council of AAUP Chapters v. Rutgers State University 1997)

The court unanimously denied all the claims for domestic partner benefits. In delivering its opinion, the court recognized that it had considered the changing definition of "family" in recent cases to decide whether unmarried domestic partners, both gay and straight, should be treated as dependents or family. The presiding judge went on to say, however, that "in dealing with statutory and contract interpretation, we have not been disposed to expanding plain language to fit more contemporary views of family and intimate relationships." (Rutgers Council of AAUP Chapters v. Rutgers State University) The appellate court cited that the SHBP Act presents in clear language that health insurance may be extended only to legal spouses of state employees and unmarried dependent children under the age of twenty-three.

In taking this view, the court went on to provide a brief history of same-sex marriage litigation to demonstrate that the court has recognized no such a union. Additionally, the court noted that same-sex partners were not the only couples excluded from marrying. Since cousins, siblings or anyone else related too closely by blood were not allowed to marry they were therefore excluded from obtaining spousal benefits. The court then applied this reasoning to the issue of the plaintiffs' claim of discrimination based on marital status and sexual orientation. After noting that the plaintiffs were required to show intentional discrimination in such a claim, the court found no reason to believe the legislative body that authored the SHBP Act had intentionally discriminated against gays and lesbians. It had excluded, however, a larger category of couples that could not marry and therefore could not qualify for spousal benefits.

In University of Alaska v. Tumeo, the court took a different approach to reviewing the claim of discrimination based on marital status. Again, in this case, two university employees applied to enroll their same-sex domestic partners in the state's health insurance plan. The university denied their applications stating that the self-insured plan did not allow coverage for domestic partners. The question before the court was whether the denial violated Alaska's Human Rights Act, which bars employment discrimination based on marital status. This court took the stance that by providing health coverage for married employees and not for unmarried employees, the university was compensating married employees to a greater extent. Therefore, by "using marital status as a classification for determining which of its employees will receive additional compensation . . . [the university was violating] state laws prohibiting marital status discrimination." (University of Alaska v. Tumeo 1997) The court did not focus on the definition of dependent, as did the New Jersey court.

There was one complicating factor in University of Alaska that could potentially moot the court's finding, however. After the original trial court ruled in favor of the university employees, the Alaska legislature amended its Human Rights Act by inserting a clause that exempted claims

based on employee benefits. The Alaska legislature amended the Human Rights Act to read: "Notwithstanding the prohibition against employment discrimination on the basis of marital status or parenthood . . ., an employer may, without violating this chapter, provide greater health and retirement benefits to employees who have a spouse and dependent children than are provided to other employees." (Leonard, Arthur S. 1997) Despite this action, the Alaska Supreme Court continued its examination because it found there was still a live controversy surrounding the case. Because of the legislature's actions, the result of this case may not have the impact it could have had on similar cases in the future.

Another reason for the ruling in the Rutgers case was an existing exemption clause in New Jersey's Law Against Discrimination. The court held that while the law indeed prohibited discrimination against an employee because of marital status or sexual orientation, it nonetheless, provided an exception for employee benefit and insurance programs. The court noted that the authors of this legislation had seemingly anticipated a claim of this type by explicitly stating, "nothing contained in this act . . . shall be construed . . . to interfere with the operation of the terms or conditions and administration of any bona fide retirement, pension, employee benefit or insurance plan or program." (Leonard, Arthur S.)

In the benchmark case Tanner v. Oregon Health Sciences University, the appellate court of Oregon made a drastic departure from the decision of Rutgers. The court decreed that denial of health benefits to same-sex domestic partners was a violation of both the Oregon Civil Rights Law and the equal protection provision of Oregon's Constitution. Unlike Rutgers or University of Alaska, this judgment was made on the prohibition of employment discrimination based on sex. This departure was due, in part, to the unique language of Oregon's Civil Rights Law. The law goes further than "banning discrimination based on the sex of an employee. [It also] bans discrimination based on the sex 'of any other person with whom the individual associates.'" (Leonard, Arthur S. 1999) The court interpreted this provision to include a prohibition of discrimination based on sexual orientation. Unfortunately, another provision of the Civil Rights Law exempts bona fide employee benefit plans from discrimination claims, as seen earlier. Therefore, the judge could not make a judgment solely on this provision.

The court then turned to the constitutional claim of the case. Again, unlike the equal protection provisions of the federal constitution or most state constitutions, Oregon's constitution states that no citizen or class of citizens shall be granted privileges or immunities that are not equally provided to everyone. (Leonard, Arthur S.) The court concluded the classification of sexual orientation was an "inherently suspect" classification under the "level of scrutiny" test of Oregon's constitution. Based on this reasoning, the court further concluded that the state violated the Oregon constitution by not providing benefits to one "class of citizens" that it provided to another. In other words, by not compensating gay employees with domestic partners to the same extent as straight, married employees the state violated the "privileges and immunities" clause of its constitution.

More and more cities, counties and public entities across the U.S. are implementing domestic partner benefit programs. They have created these programs as a means of employee retention and recruitment. Some of these employers are located in the southern states sometimes referred to as the Bible Belt. Atlanta, GA; Broward County and Gainesville, FL; and Chapel Hill, NC are a few public employers located in this region. In addition, cities such as Madison, WI; Denver, CO; and

Chicago, IL are some employers located in the mid-western region. Religious conservatives have attacked these programs as immoral and illegal. For the most part, however, these benefit programs have withstood attacks in court and continue to provide the safety net for which they were intended. Court cases in Atlanta, GA and Madison, WI have shown that public employers do not overstep their legal boundaries by extending health benefits to the domestic partners of employees.

Public employers and employees have also successfully used collective bargaining agreements to provide domestic partner benefits. As with bona fide state benefit plans, collective bargaining agreements must specifically state that benefits will be extended to the domestic partners of employees and they must clearly define spouse or dependent. In the conclusion of the Rutgers opinion, the court suggested that collective bargaining agreements could be one means of obtaining domestic partner benefits.

Though private sector obligation is omitted from this report, it is worth noting that the Ninth Circuit U.S. Court of Appeals is currently deciding the fate of a San Francisco ordinance that affects private sector employers. The Equal Benefit Ordinance requires contractors doing business with the city to provide the same benefit considerations to unmarried, domestic partners as they give to the legally married spouses of employees (Kasten & Pisarcik). This requirement lasts for the duration of the employment contract. U.S. District Court Judge Claudia Wilken ruled in Air Transport Association of America v. City of San Francisco (Air Transport Association of America v. City and County of San Francisco 1998) that the ordinance can apply to non-ERISA-regulated benefits such as bereavement leave, sick leave and vacations (Fried, Rinat 1999). This case is especially worth watching since Seattle and Los Angeles passed similar ordinances in 1999 (Cenicerso, Roberto 1999). If successful, other cities across the country could begin to implement comparable ordinances. Some speculate that these ordinances could possibly "withstand an ERISA challenge by arguing that they are not requiring all employers to provide domestic partner benefits, only those who want to do business with the city." (Ceniceros, Roberto)

SUMMARY & CONCLUSION

The threshold question is whether public employers are obligated to provide domestic partner benefits when state laws prohibit discrimination based on marital status, sex, or sexual orientation. In this examination, four broad issues arise: there is no federal precedent to answer this question, there has been no uniform approach to the application of nondiscrimination laws, nondiscrimination laws often have benefit exemption clauses, and state civil rights laws and constitutions are phrased such that cases have little application in other jurisdictions. Each of these issues has provided results that are a bit bewildering rather than bringing the issue into sharper focus.

The cases, while important to the development of case law, provide no clear path in answering the question of whether public employers are obligated to provide domestic partner benefits to employees. The claim of discrimination based on marital status and sexual orientation in states where civil rights laws include these classifications, have been restrained by benefit exemption clauses and restrictive language with which these laws are phrased. In addition, the outcome of each case has been subject to the character of the court and the direction in which the court searches for answers. The "frontier ethos" of the West Coast seems to propel courts to rule

in favor of expanding civil rights legislation to provide domestic partner benefits, while the East Coast remains more conservative and reluctant to such expansion. Finally, decisions made in one state court are limited to their application in other jurisdictions. Future cases are likely to provide an equally mixed bag of results until a strong, decisive case is brought before the federal court system.

The immediate reality is that Americans will continue to struggle with this issue. States and municipalities will continue to author and implement nondiscrimination legislation as well as to offer domestic partner benefit programs. For the time being, such legislation and benefit programs seem to be the best response until a decisive case is provided. For the long run, amended state and federal legislation is needed to clear up the confusion when analyzing the question of obligation. This is particularly true concerning the confusion that comes from existing definitions of spouse and dependent in state benefit plans. These benefit plans were written in a time when it was inconceivable to foresee such a broad definition of the family. New legislation and benefit programs should consider this to avoid future litigation.

NAVIGATING THE LEGAL MINEFIELDS IN NICHE MAIL ORDER BUSINESSES: MARKETING LAW PRIMER FOR CATALOG RETAILERS AND E-TAILERS

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ABSTRACT

Modern mail order businesses serve their customers through a variety of traditional and innovative marketing practices. This paper applies the discipline of marketing law to discuss a variety of legal trade requirements for niche (special product) mail order businesses at the local, national, and international levels. The paper discusses legal marketing issues relating to product development, promotion, distribution, and sale, and also discusses including emerging marketing cyberlaw.

INTRODUCTION

We live in an era where various forces have helped reshape American and world economies in terms of structure and use of resources of business operations. While many of the "old guard" businesses still exist in today's economy, many of these traditional business entities either had to alter their level of operations or search for alternative methods to produce and/or sell goods to survive. The recession seen in the United States two decades ago to a great degree eliminated the large, inefficient elements in the manufacturing sector while sending warning signals to various service sector operations such as retailers. Whether because of economic realities, changes in technology, the recent terrorist attacks of September 11 (Del Franco, 2001), or the changes in consumer buying patterns, much current retail marketing is in the form of mail order cataloging and e-tailing operations by the small business community. By some estimates, as far back as 1995 roughly 40 percent of the gross national product was comprised from the small business sector with about 4 percent of the population seriously considering the development of a small business enterprise (Bursey, 1995). In addition, in spite of the burst of the popularity of e-commerce stocks, the actual practice of e-tailing is on the rise, especially those firms who were traditionally the brick-and-mortar only retailers of the past. Traditional retailers and many newer small businesses find it hard to ignore the obvious fact that e-tailing offers new ways to sell to the consumer (Ferriolo, 2000) and that the National Retail Foundation reports that total online spending averaged about $3 billion a month during the year 2000 (Abend, 2000).

All these reports indicate that niche marketing is increasing in every conceivable commodity from the traditional pharmaceutical industry with mail order prescriptions and "online drugs" to specialty products of interest to large consumer constituencies. In fact, some organizations have

reported that the use of mail order and e-commerce have significantly changed their mode of operations and their marketing strategies. For example, one pharmacist, once an independent drug store owner, closed his business to conduct a much more lucrative and successful mail order business (Ukens, 1996).

GROWTH OF MICRO-SPECIALISTS, NICHE CATALOGS, AND LEGAL PROBLEMS

Micro-specialist marketing to niche areas that were once thought of as merely interesting potentialities are now being aggressively undertaken. Companies specializing in narrow and deep assortments of specific categories have been gaining consumer support, especially those who have gone public and become leaders in their sub-categories (Doolittle, 1998). However, with all the successes and rewards of being in a rapidly growing segment of the retailing sector comes the reality of being competitive while simultaneously abiding by the legal standards at various levels of the economy.

The naive notion of not knowing the legal implications is not acceptable and can easily kill a successful enterprise. For example, whether its mail order sales of alcohol to minors (Girard, 1997) or trying to sell restricted products such as radar detectors in Virginia, hearing enhancement products in California, or alcoholic beverages in Vermont and New Hampshire (Dowling, 1995), specialty catalogers not aware of certain legal restrictions on their products have paid severe penalties.

MARKETING LAW PRIMER AND APPLICATION

Navigation of marketing law requires some knowledge of the law and also the ability to apply the law to a particular enterprise. Accordingly, the following paragraphs set forth basic components of marketing law and concurrently apply the law to an example niche catalog retailer/e-tailer of gifts for professionals (e.g. doctors).

This paper considers only marketing law issues, which are those legal issues most directly involved in developing, promoting, distributing, and selling a product. Such legal issues arise from a variety of state, national, and international laws and many involve emerging issues of cyberlaw, which is law governing the use of computers and the Internet (Ferrera, Lichtenstein, Reder, August & Schiano, 2001). This paper does not discuss generally non-marketing legal issues such as choice of entity, capitalization, licenses/permits, zoning, taxes, insurance, and hiring personnel.

With respect to developing and promoting a product, niche businesses must not infringe upon the intellectual property rights of other businesses, and they must establish and protect their own intellectual property rights. For example, a new business with a new name must avoid infringing upon the rights of other businesses by searching corporate filings and fictitious name filings in states and/or counties so as to not use a name deceptively similar to existing names. Moreover, the business should search the United States Patent and Trademark Office website (http://www.uspto.gov) to determine name and product availability under federal law. Online trademark searches are available with the Trademark Electronic Search System (TESS), and online patent searches are also available for full text and page image databases. E-tailers must find and

reserve a domain name for their web site via the Internet Corporation for Assigned Names and Numbers. Because the Internet is international, e-tailers must also consider possible infringement and protection of intellectual property at the international level.

Businesses can protect their names or products via patent, copyright, and trademark protection. Patents give inventors exclusive rights to make, use, or sell useful novel products or processes. A U.S. patent generally takes at least eighteen months and costs thousands of dollars to obtain. To be protected internationally, an inventor has to file in individual countries. Copyrights generally give owners of creative works the right to preclude others from using the works without permission for the life of the author plus seventy years. Copyrights occur automatically, but authors gain further rights with a copyright notice (© or Copyright, Year, Author) and even further rights with a copyright registration with the Copyright Office (http://www.loc.gov/copyright/). International copyright protection exists for signatories of the Berne Convention, which recognizes copyrights of other signatory countries, but enforcement mechanisms are weak. Some businesses would rather attempt to maintain a trade secret instead of registering their product. With respect to the marketer of professional gifts, the idea of the business itself would not be patentable or copyrightable. However, the paper catalog and web pages of the business would be automatically copyrighted and could be afforded greater protection with a copyright notice and a copyright registration.

Information (including product name) in marketers' catalog and web pages are critical to product promotion and may be trademarkable. Trademarks are words, symbols, sounds, smells, or anything else companies use to distinguish their goods and services from others. Generally, trademark ownership in the U.S. is by senior use. However, registration helps prove senior use and permits federal legal action. A registered mark is designated with the ®. An unregistered trademark or service mark can be designated with TM or SM. International law differs with respect to trademarks in that ownership is determined not by first to use, but instead by first to register, in each particular country. The professional gift business could register its name and any other distinguishing marks, or at least employ the TM symbol. The business must not violate other marks or copyrights. For example, the business could not use in its catalog or sell as part of its products depictions or reproductions of the profession done by prior creators unless the copyright has expired or the copyright owner has granted permission. Also, the business should obtain signed releases from persons who serve as models for the catalog. The business' Internet catalog similarly should not use copyrighted or trademarked images and also should not use links to or banners of other companies without permission so as to imply a false association between businesses (Oswald, 2002).

Marketing laws protect not only intellectual property rights of owners in the development and promotion of products, but numerous state, federal, and international laws protect consumers from the improper marketing of products. The federal Lanham Act protects both business competitors and consumers by prohibiting businesses from passing off or palming off other businesses' products as their own. It also prohibits unfair commercial disparagement of competitors' products and other types of false advertising. Similarly, the Federal Trade Commission prohibits unfair or deceptive acts or practices, and issues general guides on topics such as substantiation, bait advertising, deceptive pricing, use of the words "free" and "sale", warranty disclosures, endorsements and testimonials, and "green marketing" (product environment claims). The FTC also

issues specific guides on particular products such as dietary supplements, eye care surgery, food advertising, jewelry, furniture, and vocational/distance learning. Moreover, the FTC has specific mail order rules about shipping times, delay notifications, refunds, cancellations, and customer rescissions (FTC & DMA, 2002). Finally, the FTC has special regulations on advertising and the Internet, which state that the previous guides also apply to Internet advertising and specially mention privacy issues, including the collection and usage of customer information (FTC, 2002). Use of the Internet makes any business international, and subsequently susceptible to international privacy law, such as the European Union Data Protection Directive (Baumer and Poindexter, 2002). Countries may also have packaging and labeling requirements, including bilingual requirements. Internet advertisements also expose companies to state regulations, such as those against unsolicited email (spam). Nevada, Washington, and California have such laws, with California's law, for example, providing for no unsolicited email and requiring advertisements to contain email headers with "adv." Each violation of the California law subjects offenders to civil remedies and possible criminal remedies of a $1,000 fine and six months' imprisonment (Steingold, 2001).

Businesses also need to know marketing law that regulates the distribution and sale of products. In distributing products, marketers must be aware of antitrust and franchise laws for particular selling arrangements. In selling products, companies need to know what constitutes a binding contract, what type of payment to accept, who bears the risk of shipping loss, what express and implied warranties are present, how to reduce product liability, and how to resolve disputes. Each of these questions raises further questions. For example, does a contract become binding when a customer places an automated telephone order or when the business ships the product? Should the business accept cash, credit cards (with the attendant 3-5% fees), and/or personal checks (with bad check risks)? Does the seller have to collect and remit sales or use tax (Keup, 1993)? Who bears the risk of loss if a shipped product gets lost or destroyed? Who should the business ship with and should it purchase shipping insurance? What warranties should be offered, or should all warranties (including those that would otherwise be implied) be disclaimed? Which states (e.g. Connecticut, Kansas, and California) preclude standard disclaimers (Steingold, 2001)? What is the exposure for product liability in each state and internationally? How can product liability, including strict liability in the U. S. European Union, and Japan) be minimized? For example, should certain professional gifts (such as profession-related beany-type bears or various types of decorative pieces) be labeled as not suitable for young children or as not suitable for functional use? Does the law of the state or the country of the seller or of the buyer apply, and where would a lawsuit take place? What are other ways to resolve disputes, including ways to resolve Internet disputes (Miller & Jentz, 2002)? The marketer needs to consider all of these questions, and more, in distributing and selling its product.

CONCLUSION

Even small, niche marketers must concern themselves with a plethora of state, national, international and Internet marketing laws in order to minimize legal liability. The paper has presented an overview of such laws along with applying the laws to a typical niche marketer who sells via direct mail catalogs and Internet e-tailing.

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WHAT HAPPENS WHEN "I WILL" BECOMES "I WON'T": AN EXAMINATION OF THE LEGAL LANDSCAPE OF COURTSHIP GIFT DISPUTES

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"The courtship and engagement periods are usually happy times for a couple as they build a relationship and look toward marriage. However, happiness may fade, circumstances may change, the relationship may end, and the planned engagement may be canceled, repudiated, or frustrated, with no marriage occurring between the parties. When such a situation arises, one party to the courtship or engagement may seek to recover gifts of money or property previously given to the other party, requiring a legal determination of the parties' respective rights in the money or property."[1]

ABSTRACT

Business law/legal environment professors frequently and successfully use engagement ring disputes in the classroom to illustrate several important legal concepts, including rights in personal property, conditional gifts and transfers, contracts involving a promise to marry, availability of various legal and equitable remedies, and federal tax implications of property transfers. Equally important, students relate well to the subject matter, perhaps because it is closer to their life experience, and appreciate being appraised of the new, no-fault developments in the field. Hence, the authors of this article re-examined the topic of engagement gifts, and discovered a marvelous niche of interwoven and evolving legal concepts that can successfully be used throughout a business law/legal environment course to provide students a rich learning experience.

The article begins with a hypothetical situation involving a controversy between a formerly engaged couple fighting over ownership of a valuable engagement ring, as well as other presents given during their courtship. The hypothetical is a composite of several leading cases resolving engagement gift disputes, and should generate lively student discussion. Thereafter, questions are posed that (1) explore the principal legal theories employed by courts in resolving engagement gift quarrels, (2) examine how the outcome may change as the circumstances of the parties vary (for example, if one the engaged parties dies before the marriage can take place, is a minor, or is married to someone else at the time of their engagement), (3) assess the impact of so-called "Heartbalm Laws" on engagement gift lawsuits, (4) investigate the possibility of third-party rights to engagement gifts, (5) probe the impact of the parties' marital status, capacity, and wrongful conduct in recovering courtship gifts, and (6) examine the federal tax consequences of engagement gifts.

1 Elaine Marie Tomko, J.D., Rights in Respect of Engagement and Courtship Presents When Marriage Does Not Ensue, 44 A.L.R.5th 1 (1996).

HAM v. DELOITTE: SELF-REGULATION IN THE ACCOUNTING INDUSTRY IS CALLED INTO QUESTION

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ABSTRACT

In recent years, major public accounting firms have experienced a significant increase of malpractice claims, as disappointed investors seek deeper pockets from which they hope to gain compensation for investment losses. While such litigation is not cause for surprise, the manner in which the major accounting firms pooled their malpractice insurance coverage certainly was. Equally surprising was the disclosure that executive officers from the largest public accounting firms routinely consulted on, and routinely refrained from becoming expert witnesses in, malpractice cases pending against them. The disclosure of this conduct, which raises several significant issues related to the legal, professional and ethical responsibilities of public accounting firms, surfaced during the litigation of an intentional interference with contractual relations claim brought by a former partner in one "Big Five" public accounting firm against another "Big Five" public accounting firm and its general counsel.

The issues that emerged during the litigation and are explored in this article are: (1) the professional and ethical responsibilities of the "big-five" public accounting firms in rendering auditing and consulting services to clients and the success of the accounting profession to regulate itself, (2) the implications of cooperative, information-sharing contacts among executive officers of the large public accounting firms undertaken to minimize liability for, and malpractice insurance fees covering, negligently rendered accounting services, (3) the legal obligations imposed on professionals employed by accounting firms and the elements that must be proved to establish a claim for negligently rendered accounting services, and (4) the overlapping web of professional responsibilities as public accounting firms employ staff from more than one professional field.

In order to make the information most useful to business faculty, the factual scenario that emerged during the litigation, gleaned from the numerous depositions and discovery documents submitted to the court, is provided initially. Thereafter, specific questions addressing the above noted issues are posed and answered by the authors of this article.

SUPREME COURT TO STATE EMPLOYEES, "GET OFF THE BUS!"

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ABSTRACT

Beginning in 1996 with the Seminole Tribe of Florida case the United States Supreme Court has used the Eleventh Amendment of the U.S. Constitution to deprive state employees of rights granted to them by federal statutes to sue their state employers in federal courts. So far the court has declared that state employees may not use federal courts to protect them from their home states' governments in areas such as overtime pay, age discrimination, and disabilities. Seven of the federal circuit courts of appeal have held the same rule applies to family medical leave. Only one of the federal circuits has dared to be different on family medical leave. If one goes back to the case of Plessy v. Ferguson, an 1896 decision in which the court declared separate but equal was constitutional if based on race, language very similar to the current court holdings against state employees can be found. It is ironic that most of these cases are five to four decisions and that the extra vote needed to support this new creation of second class citizen is Justice Clarence Thomas.

INTRODUCTION

In 1991, the Seminole Tribe sued Florida and its governor alleging that Florida had refused to negotiate gaming activities in a tribal-state compact. Florida moved to dismiss the suit on the ground that the suit violated its sovereign immunity from suit in federal court. When the district court denied the motion, Florida took an interlocutory appeal. The Court of Appeals for the Eleventh Circuit reversed the district court and held Florida immune from suit. Seminole Tribe took writs to the Supreme Court which it granted. The question to be answered was did the Eleventh Amendment prevent Congress from authorizing Indian tribes to sue states to enforce rights granted to the tribes by federal statutes passed under the Indian Commerce Clause? The court's answer by that five to four vote was yes.

The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Notice there is no mention of Indian tribes or citizens of the same state in the amendment. But at the beginning of the opinion written by the Chief Justice it is noted that "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition ... which it confirms" that each state is a sovereign entity under our federal system and that a sovereign may not be sued by an individual without its consent (*Seminole,* 1996).

But Congress can abrogate the states' immunity from suit. The test the court applies is two pronged. First, did Congress clearly express its intent to abrogate the immunity. Second, did

Congress have the power under the Constitution to do so. The court agreed that Congress had clearly abrogated the states' immunity from suit in the act by permitting the tribes to go into federal district court if the state refused to negotiate a compact. The second prong of the test Congress failed to meet. The only provisions of the Constitution that the court had held authorized Congress to abrogate states' immunity from suit are the Fourteenth Amendment wherein section 5 provides that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article," and the Interstate Commerce Clause. It was this latter holding that the current court was ready to overrule, thereby ignoring *stare decisis*. In 1989, in *Pennsylvania v. Union Gas Co.* five justices had found that the Interstate Commerce Clause granted Congress the power to abrogate state sovereign immunity. But because only four justices had signed one opinion and Justice White had been the fifth vote in a separate opinion in which he wrote that he did not agree with the reasoning of the other four but concurred in their holding, the Chief Justice used this split to call it a plurality holding and got the previously mentioned four justices to join him in overturning this precedent. The four justices that had dissented in the case were Scalia joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy. And now they had their fifth vote in Justice Thomas. Thus, with this case the court removed Congress' authority to abrogate state immunity from suit under any of its Article I powers.

STATE EMPLOYEE CASES

Three years after its decision in *Seminole Tribe* the court faced a case dealing with a group of state prison guards who had not been paid overtime by their employer, the state of Maine. The employees had originally sued in federal district court in Maine. But while the suit was pending, the court issued its opinion in *Seminole Tribe*. Based on that holding, the district court dismissed the suit. The employees then filed a suit in state court. The Fair Labor Standards Act of 1938 (FLSA) which required workers to be paid overtime also authorized private actions against states in their own courts. In the case of *Alden v. Maine,* the state district court dismissed the suit on sovereign immunity ground and the Maine Supreme Judicial Court affirmed. The employees took writs to the Supreme Court. In an opinion written by Justice Kennedy with the same justices concurring as in the Seminole Tribe case, the court held that while it was clear that Congress intended to abrogate the states' immunity from suit when it passed the Fair Labor Standards Act, the Eleventh Amendment and the very basis of dual sovereignty between the states and federal governments prevented Congress from doing so. The powers delegated to Congress under Article I of the United States Constitution did not include the power to subject nonconsenting states to private suits for damages in state courts. Further, Maine had not consented to suits for overtime pay and liquidated damages under the statute in question (*Alden*, 1999).

The following year the Supreme Court was faced with a series of cases involving state employees who had sued their employers under the Age Discrimination in Employment Act of 1967 (ADEA) as amended. Three sets of employees filed suit seeking monetary damages. In all cases the respective state employer moved to dismiss on the basis of its Eleventh Amendment immunity. One district court granted the motion to dismiss and the other two denied the motion. All three appealed to the Eleventh Circuit Court of Appeals, which consolidated the cases and held that the ADEA did

not validly abrogate the states' Eleventh Amendment immunity. The Supreme Court held by the same five members as in the Alden case that Congress did not have the power to abrogate the states' Eleventh Amendment immunity because it had not provided sufficient evidence in its reported hearings of widespread states' abuse of employees based on age.

This time it was Justice O'Connor who wrote the majority opinion. She noted that the previous year the court had reaffirmed the central holding of *Seminole Tribe* in *Alden*, which was now a firmly established precedent, that if the ADEA was based solely on Congress' Article I commerce power, then private petitioners, such as the state employees, could not sue their state employers. However, the court recognized Congress' power under Section 5 of the Fourteenth Amendment: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article," to abrogate the states' sovereign immunity. But while Congress had the power to enforce restrictions on the states under the amendment, it was the court's power to determine what constitutes a constitutional violation (*Kimel*, 2000). The court used its congruence and proportionality test in analyzing Section 5, Fourteenth Amendment issues to see if the congressional hearings leading up to the passage of the ADEA established a pervasive abuse by the states of employees based on age. The court concluded that the hearings had not done so. Therefore, the ADEA was not appropriate legislation under Section 5 of the Fourteenth Amendment. Age discrimination, wrote O'Connor, was not a suspect classification like race or gender. Thus, states could discriminate based on age without violating the Equal Protection Clause of the Fourteenth Amendment if the age classification was rationally related to a legitimate state interest.

The very next term the court faced cases dealing with Title I of the Americans with Disabilities Act of 1990 (ADA). Writing for the fringe five, Chief Justice Rehnquist in a relatively short opinion, held that Alabama employees could not recover monetary damages due to the state's failure to adhere to the provisions of Title I of the Americans with Disabilities Act because the Eleventh Amendment prevented such actions. One of the plaintiffs, Ms. Garrett, had a position as Director of Nursing at the University of Alabama in Birmingham Hospital. In 1994 she had been diagnosed with breast cancer. She had a lumpectomy, radiation, and chemotherapy. Because of her course of treatment, she took leave from work. Upon returning to work in July 1995, her supervisor informed her she would have to give up her directorship. She then applied for and was given a transfer to a lower paying job as nurse manager. Ms. Garrett filed suit in federal district court against Alabama seeking money damages under the ADA. Alabama moved for summary judgment on the basis that the ADA exceeded Congress' power to abrogate its Eleventh Amendment immunity. The district court granted the state's motion. On appeal the Eleventh Circuit held that the ADA validly abrogated Alabama's Eleventh Amendment immunity. The Supreme Court granted certiorari to resolve a split among the Courts of Appeal on whether a person could sue a state for money damages in federal court under the ADA.

The Chief Justice went through the usual steps in thwarting Congress's attempt to make laws with uniform application throughout the United States. He noted the Eleventh Amendment while not mentioning suits brought by citizens against their own states had been extended to cover such suits by the courts prior holdings, such as in *Kimel* and *Seminole Tribe of Florida*. Congress could make states subject to suit in federal court if it validly exercised its power under section five of the Fourteenth Amendment. However, to do so, Congress had to prove by its official hearings and

reports "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" (*Garrett*, 2001). It was up to the court to decide whether Congress had adequately identified in its hearings and reports a history and pattern of unconstitutional discrimination by the states against the disabled. Congress had to establish a record of wide-spread abuse by a number of states to validly exercise its section five authority. The court believed the record of congressional hearings on the ADA failed to prove a pattern of irrational state discrimination against the disabled in state employment.

The last group of cases to come before the federal Courts of Appeal, although not before the Supreme Court, are those involving state employees suing for money damages under the Family and Medical Leave Act of 1987 (FMLA). Seven circuits, the first, second, third, fifth, sixth, eighth, and eleventh, have held that the FMLA was not properly passed by Congress under its Section 5 of the Fourteenth Amendment power (*Hibbs*, 2001). The one dissenter has been the ninth circuit. In the case of *Hibbs v. HDM Department of Human Resources et al.*, a three judge panel unanimously held that Congress had validly exercised its Section five power when it permitted state employees to sue their state employers in federal district court to enforce their rights under FMLA. FMLA does have four subparts and the panel noted that all of the other circuits that had held the opposite had either been looking at other subparts or had not made it clear which subparts they were addressing. Only the Fifth Circuit in *Kazmier v. Mary Widmann* had addressed the subpart which the Ninth Circuit panel was reviewing. That panel had reached the opposite conclusion of the Ninth. The subpart at issue was the right of an employee to take up to twelve weeks of uncompensated leave to care for a sick spouse, parent, or child (Section 2612(a)(1)(C)).

Hibbs had sued the Nevada Department of Human Resources for violations of FMLA. He had received permission to take leave to care for his sick spouse. Evidentially, he had sufficient accumulated leave available for paid leave. He then thought he would be able to take an additional twelve weeks of unpaid leave under FMLA. His employer disagreed and terminated Hibbs after a hearing. Hibbs then filed suit in federal district court against his state agency. Nevada moved for summary judgment which was granted on the federal claims. Hibbs appealed to the ninth circuit. The panel held that Congress had clearly intended to abrogate the states Eleventh Amendment immunity from suit in federal court and that FMLA was validly enacted under Congress' section five power. The panel noted that whereas the Supreme Court cases dealing with age and disability only required a rational basis test, FMLA dealt with gender discrimination which required a heightened scrutiny test. The Supreme Court test for Section five was the congruence and proportionality test. The panel believed that it could look at more than just the record developed in Congressional hearings. It could also look at the historical statutory treatment of women by state statutes. (*Hibbs*, 2001). The panel reversed the district court's granting of Nevada's motion for summary judgment on the FMLA claim and remanded the case for further proceedings. At this time, Nevada has not filed writs with the Supreme Court.

CONCLUSION

In reading these cases, one is struck by the language employed by the majority. If they cannot point to a law, or case holding, they do not hesitate to liberally construe the intent of the

writers. Witness their extraordinary reading of the Eleventh Amendment, which makes no mention of a citizen of a state being forbidden to sue his own state.

The language of contempt for Congress used by the court also reminds one of the language used in *Plessy v. Ferguson*. In that 1896 case, the Supreme Court confronted the state of Louisiana's attempt to enact a state law which required passenger railroads to have separate cars for white and black passengers. Mr. Plessy, who was seven eighths Caucasian and one eighth black, boarded a train in Louisiana and took a seat in the car designated for whites. A conductor ordered him to leave the car and sit in the one designated for colored. Upon Plessy's refusal to obey, he was taken off the train by a police officer and jailed in the parish prison. Plessy filed suit claiming the Louisiana statute was unconstitutional because it conflicted with the Thirteenth and Fourteenth Amendments, the former which abolished slavery and the later which prohibited states from passing laws which violated the Equal Protection Clause of its residents. The majority agreed that the aim of the Fourteenth Amendment was to enforce the equality of the races before the law; however, like the current majority, it could make its own interpretation of legislative intent, and in this case "it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality..."(*Plessy*, 1896). In an attitude very similar to the current majority's view of the disabled in the Garrett case, the Plessy majority wrote that "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences..."(*Plessy*, 1896).

One gets the feeling that the current Rehnquist majority would feel very comfortable in the company of the Plessy majority. They have the same ability to read into legislation what they want. They will go outside congressional reports when necessary to enforce their viewpoint, such as in their interpretation of the Eleventh Amendment applying to citizens of a state suing their own state, but they will demand some as yet undefined pattern of state violations before they will permit Congress to exercise its section five authority under the Fourteenth Amendment to pass legislation. Thus, under the current court majority state employees not only are paid less than private employees, but they also have fewer rights. State employees have been denied access to a federal forum. At least Mr. Plessy got to ride on the train.

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IS GENETIC TESTING THE NEXT PUBLIC POLICY ISSUE FOR MANAGERS?

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ABSTRACT

Medical science currently has the technology for DNA-based genetic testing for diseases and disorders ranging from cancer to birth defects and mental disorders such as Alzheimer's and Huntington's disease. Although genetic testing is not a routine practice, the availability of the testing technology is a controversial issue worthy of discussion and consideration. The purpose of the paper is to explore the issue of genetic testing and to compare genetic testing to drug and HIV testing.

Usage of genetic testing has increased in the United States. In March, 1999, blood banks began phasing in genetic fingerprinting tests to eliminate hepatitis C and HIV infections that were not identified by current testing methods. The cost of the new nucleic acid testing (NAT) was estimated at $6 to $7 per unit of blood (The Atlanta Journal and Constitution, March 6, 1999). Louisiana recently enacted a law that will require DNA samples from everyone arrested in that state. Similar proposals for testing all those arrested are pending in North Carolina and New York (U.S. News & World Report, March 15, 1999).

United States policymakers have begun to address the genetic testing issue on a limited basis. There have been occasional discussions about protecting individual privacy rights, preventing premium rate discrimination by insurance companies, and avoiding potential employment discrimination by employers (Wall Street Journal, March 12, 1999). President Clinton issued an executive order limiting the use of genetic test results on decisions to hire, promote, or extent particular benefits to federal employees (The Washington Post, February 12, 2000).

The debate in other countries, especially the United Kingdom, has been much more vocal. The concerns are related to how and by whom genetic tests should be used and to the prevention of discrimination based upon genetic information. A major fear is that health insurance providers will deny coverage to individuals at increased risk of a genetic disorder.

Information and knowledge of genetic testing does not appear to be widespread. In a National Opinion Research Center (NORC) poll, sixty-three percent of respondents indicated that they knew something, but not very much, about genetic screening/testing, genetic therapy, and genetic engineering. Sixteen percent reported that they knew a great deal, and 19 percent reported that they knew nothing at all about genetic screening/testing, genetic therapy, and genetic engineering (Singer, E., Corning, A., & Lamis, M., 1998). As information on the ramifications of genetic testing is communicated to the general public, the issue has the potential to escalate into a politically charged debate.

VIRTUAL MERGERS AND ANTITRUST LAW IN HEALTH CARE

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ABSTRACT

Although the health care industry has experienced tremendous consolidation during the past two decades, many hospitals have been excluded because of religious, financial or legal restrictions that have prevented their merger. More recently, however, health care organizations have employed a variety of innovative structures to permit participating entities to coordinate certain operational functions while maintaining varying degrees of independence. Because these collaborations achieve many of the benefits of a true merger, they are often referred to as "virtual mergers." Though virtual in name, these collaborations face real antitrust scrutiny. As with actual mergers, virtual mergers must meet the requirements of Section 7 of the Clayton Act, whose primary objective is to prevent mergers that have an anti-competitive effect. In addition, the operations of the virtually merged entity are subject to antitrust scrutiny under the Sherman Act, which has the potential for significant civil and criminal sanctions. In the first virtual merger case to reach the courts, the virtually merged entity was subjected to a Sherman Act analysis. Even though the U.S. Department of Justice and the New York State antitrust authorities were notified prior to the merger, as required by the Clayton Act, and did not object, the price fixing and market allocation activities of the virtual merger did not survive the Sherman Act analysis. The results of this case in conjunction with increased activism among health insurers and state attorneys general may portend a new round of antitrust enforcement under the Sherman Act, against, ironically, the operations of virtually merged entities whose formation initially survived antitrust scrutiny under the Clayton Act.

THE DOMAIN NAME GOLD RUSH MEETS ADR

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ABSTRACT

The University of Nowhere owns a trademark for the "University of Nowhere" and for the University of Nowhere "Winners," the university's sports teams. It also owns the domain name "www.un.edu." The University uses its Internet site to inform the public about its academic programs as well as its accomplishments on the sports fields. The University has been recognized as one of the top universities in the United States for many years. The University has also competed successfully for numerous NCAA titles over the years. The University discovers that Mr. First, owner of Fast Services of America, Inc., registered and is using the Internet domain name "universityof nowhere.com" and "universityofnowherewinners.com" on a continuing basis. The University contacts Mr. First, who informs the University that he has no intention of relinquishing the domain names unless the University pays him $10,000 and gives him two lifetime passes to all "Winner" games. The University declines the offer and writes a letter to Mr. First informing him that he must stop using the University domain names immediately. Mr. First responds by sending the University an invoice for $10,000 and two lifetime tickets to "Winner" events. The cover letter to the invoice states that he will not stop using the domain names until the invoice is paid. This is now a dispute. It is going to cost money for both parties, regardless of the outcome. Additionally, there is the new area of law to contend with that relates to alleged cybersquatting and the improper use of domain names. This paper will explore and review approaches for resolving this dispute through legal remedies, negotiation, mediation, and arbitration.

Special Section on Ethics and Regulatory Issues

THE FACTORS OF AGE AND SEX ON THE PERCEPTION OF ETHICS

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ABSTRACT

Ethical issues are of great interest to the nation's business schools, management professionals, men and women of business on the front lines of decision making, and the general public they serve. Are the nation's business schools adequately preparing students for the challenge of public trust?

Two (2) surveys were administered in the spring of 2000 to alumni and faculty of a mid-sized regional state university to evaluate the state of ethics in business and society and the perceived effectiveness of ethics preparation as an aspect of the education. The alumni were surveyed to determine the following: their perception of ethics in society and business, their experience in workplace decision-making, and their opinion regarding business ethics/social responsibility preparation as applied to the workplace. A separate survey was distributed to faculty members. The purpose of the survey was to determine the following: their perception of ethics in society and business, responses regarding the reasons for unethical behaviors in the workplace, and their opinion of the ethical decision-making ability of their students.

Both students and faculty believe they are living in a time of general ethical decline. Societal decline is believed to be greater than ethical decline in business. The faculty and alumni responses were cross-referenced demographically. In examining the demographic information, a pattern emerges from the data indicating that perceptions of ethical behavior are influenced by age and sex more than any other factors

IDENTIFYING THE PROSOCIAL ATTITUDES WHICH UNDERLY PROSOCIAL BEHAVIORS: THE ALTURISM, RECIPROCITY, AND CYNICISM MODEL

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ABSTRACT

Prosocial behaviors can be seen as the social glue in organizations. Organ presents the most common structure of prosocial behaviors called Organizational Citizenship Behaviors (OCBs). This article suggests a model to help describe the prosocial attitudes that underlie prosocial behaviors. The ARC Model of Prosocial Attitudes includes Altruism, Reciprocity, and Cynicism. This article reinterprets Maslow's Hierarchy of Needs and Organ's OCBs in light of the prosocial attitude model suggested Each variable in the ARC model is discussed and ideas for future research are included.

Managers and researchers alike have a strong desire to understand what predicts behaviors that provide the necessary mortar between employees that improves both the work and the workplace. There are attempts to develop a taxonomy of behaviors which describe the construct of "prosocial" within an organization (see Smith, Organ and Near, 1983; Organ, 1988; George and Brief, 1992). A metaanalysis of the construct of prosocial behaviors called Organizational Citizenship Behaviors (OCBs) shows that the five elements of Altruism, Conscientiousness, Civic Virtue, Courtesy, and Good Sport ("Sportsmanship") have stimulated a considerable amount of attention and research (Organ and Ryan, 1995). A prosocial construct that is based less upon behaviors and more upon attitudes needs to be identified. This paper presents a construct based upon attitude called the ARC Model of Prosocial Attitudes.

THE ARC MODEL OF PROSOCIAL ATTITUDES

Attitudes can be defined as the general affective, cognitive and intentional responses toward objects, other people, themselves or social issues (Petty and Cacioppo, 1981). This definition includes the "ABC" components of an attitude: affect, behavioral intentions, and cognition (Rosenberg and Hovland, 1960). Whereas the OCB conceptualization is focused upon behaviors, the three prosocial attitudes focus upon the affect, behavioral intentions, and cognitions that support prosocial acts at work. We argue that there are three fundamental attitudes that exist which facilitate social organization and organizations: Altruism, Reciprocity, and Cynicism (ARC).

Altruism is a prosocial attitude thought of as a predisposition to unselfishly help and focus upon others, associated with the affect of compassion, and manifested behaviorally into acts of

cooperation, caring, giving assistance, etc. Reciprocity is a prosocial attitude thought of as sensitivity to the behaviors and attitudes of others combined with the belief that there should be a return or balance of behaviors and attitudes. In a sense, this is an equity and social exchange concept. Reciprocity is manifested behaviorally by our being friendly in return for friendliness we received from someone else. We are courteous in return for courteousness and we often return anger when we receive anger. Cynicism is a distrusting dimension characterized by a predisposition to question the motives of others, skepticism, and wariness. In a sense, this is the only attitude in this scheme that is cast as negative. It is often manifested behaviorally into acts of distrust such as rechecking or questioning because we question the motives of the other person.

While other attitudes might be associated with prosocial activity, it is our contention that these attitudes, ARC, provide a reasonably satisfactory and parsimonious model for explaining the basis for the "social glue" in organizations (Brief and Downey, 1983). Business practitioners and researchers most often deal with the required paradox of self-interested individuals that the firm needs working together cooperatively.

EXHIBIT 1

The ARC Model of 3 Prosocial Attitudes:

Altruism ←----- *Reciprocity* -----→ *Cynicism*

We are separating the concept of skepticism from Cynicism in that the latter goes so far as to question the motivation of others. At worst, Cynicism leads to paranoia. In less severe forms, Cynicism is found in attitudes like the fundamental attribution error.

We assert that Cynicism is necessary because people are not merely one-dimensional actors who are only self-focused all of the time. If we were, organizations would fall apart and we could not exist socially. Because we are prosocial by nature and attitude, an exploiter might attempt to take advantage of our Altruism. Cynicism can protect us from the worst of possible exploitations. Cynicism also enables trust. For instance, we often cynically view those in power positions who might exploit us with their power. However, we often follow and support people in power, so we consciously determine when we can let down our defense of Cynicism. Only then can we commit fully. In order for this kind of prosocial limit on self interest to exist, we must be able to protect ourselves from opportunistic and free-riding behavior.

Altruism creates vulnerability. One weakness of Cynicism is that this attitude must not only impugn the motivations of others, it must assume in some situations that those intentions are to take advantage, to exploit. We even have a name for a common manifestation of this, the "Fundamental Attribution Error". The seer attributes failures in others to internal causes in them (Gilbert and Malone, 1995). However, situational and other causes may fully explain the failures. Positive attributions are equally enlightening.

Maslow's Hierarchy and Organ's OCBs Reinterpreted Using the ARC Model

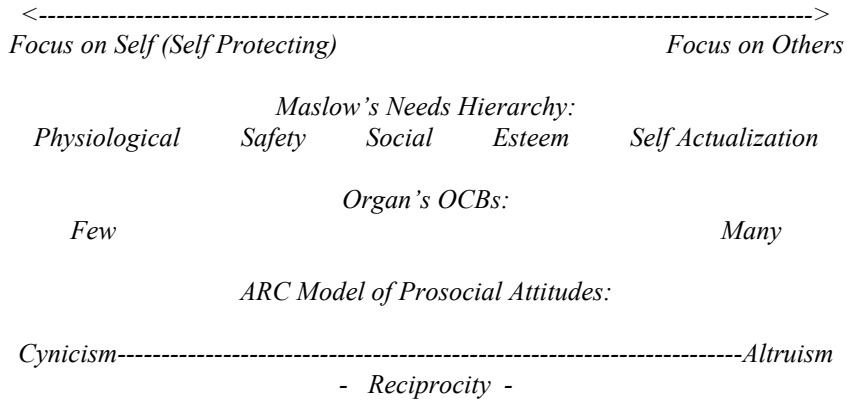
Maslow's "hierarchy of needs" (Maslow, 1970) was not designed to define prosocial attitudes or behavior, but does identify motivational elements of social behaviors. "Social" needs are the middle need. The hierarchy can be understood as series of needs that start fully focused upon oneself and then go outward; toward others. Contrary to some explanations, Maslow did not intend the self to be the highest order need. In his last interview, Maslow said, "the ultimate happiness for man is the realization of pure beauty and truth, which are the ultimate values. What we need is a system of thought - you might even call it a religion - that can bind humans together" (Hoffman, 1992). One can see that the highest level, penned as "self actualization," was always intended as something beyond the self, since "self" esteem was already listed in the fourth progressive need.

The lower order needs, Physiological and Safety, are self protecting. The focus is upon the self and the goal is to maintain security and survival. These needs correspond with the function of Cynicism. The primary goal of the attitude of Cynicism is self-protection and fending off those who might take unfair advantage of us.

The higher order needs of Social and Esteem acknowledge the importance of others, rather than focusing upon the self. Belonging, being loved, being valued, are all "other focused". We motivationally progress by satisfying these needs we are moving out toward others, just as we attitudinally move away from Cynicism and toward Altruism and responsibility.

EXHIBIT 2

ARC Model Compared to
Maslow's Needs Hierarchy and
Organ's Organizational Citizenship Behaviors (OCBs)



At the highest level, we can examine Maslow's comments about beauty and truth being most important. Having satisfied the need to reach a level of esteem and value in the eyes of others, the hierarchy suggests that we find our most enlightened and fulfilling place within the universe through actualization. At this highest level Maslow suggests we reach a system of thought "which binds all humans together" according to his words (above). At actualization we look outward, not just

inward, to see our fit within the organization and world. "Like a religion" he suggests, we will be purely Altruistic and noncynical.

The relationship between the ARC Model and OCBs, is like the relationship between motivation and performance - the former precedes and helps explain the latter. Thus, the attitude of Altruism precedes and helps explain the acts of courtesy, civic virtue, good sport, conscientiousness, and other altruistic behaviors. The focus for all of these is that of others. Checking with others in the organization (Courtesy), doing one's own share of group maintenance activities (Civic Virtue), not complaining to others ("Sportsmanship" or Good Sport), working more carefully than necessary for the benefit of others or the "organization" (Conscientiousness), and unselfish acts of stepping forward to help some other person (Altruism), are all non protective acts focused upon the benefit of others. Since such prosocial behaviors have become a focus for many organizations, employers should be equally interested in the predictors of such behavior, including the attitudes that precede or motivate the occurrences of prosocial behaviors.

CONCLUSIONS

It is helpful to examine the concepts found in the ARC Model of Prosocial Attitudes to stimulate discussion and thought about those acts that must commonly happen for organizations and societies to thrive. We feel that examination at the level of attitudes adds depth to discussions of Organizational Citizenship Behaviors and even motivational theories like Maslow's Hierarchy of Needs. The literature indicates that predictors other than attitudes and motivations might explain prosocial behavior. For instance, Rushton (1986) has suggested that 60% of altruistic behavior is a manifestation of inherited traits, while the remaining 40% results from a combination of cultural influence and state, or situational influence. Genome research may hold explanations. Careful consideration of other such variables would be helpful in understanding prosocial behavior.

We have suggested related hypotheses in other papers that can be tested empirically (Turner and Valentine, 2001). Scales have been developed that might be helpful in that endeavor (Turner, 2000). We encourage both the conceptual and empirical examination of this model. We believe Altruism, Reciprocity, and especially Cynicism have great potential for explaining the prosocial behaviors of people in organizations.

Finally, employers and leaders can develop strategies and tactics to maximize the attitude of Altruism and minimize the need for Cynicism within their organizations. To do so, they must have a deep understanding of these attitudes and the role they play in promoting positive social behaviors. It would be helpful, therefore, if practitioners could be given suggestions for promoting Altruism specifically. Humanistic and other philosophies may have been offering implicit approaches to such promotion.

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Available on request.

ETHICAL AND SOCIAL RESPONSIBILITY CONSIDERATIONS IN ADVERTISING

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ABSTRACT

The paper reviews the history of ethics and social responsibility in the advertising industry in the light of free market economics. Possible incentives for proactive, socially responsible advertising are explored. Implications of the ban on tobacco advertising and proposed bans on alcohol advertising are discussed. Advertising in other industries, particularly education, consumer goods, and gambling are discussed as well. The paper concludes that advertising is protected by the First Amendment and contributes positively to the proper functioning of the free market system. Hence, regulation should be minimized.

INTRODUCTION

The advertising industry suffers a poor reputation concerning ethics. Polling American consumers, the Wirthlia Worldwide Agency found that 4% "strongly disagree" that advertisements deliberately stretch the truth about their products; 18% "strongly agree" that advertisements deliberately stretch the truth; and 56% "somewhat agree" that advertisements deliberately stretch the truth to sell their products (Dolleger, 1999). Several theories offer explanations why this industry is perceived as lacking in ethics a priori. Ferrell & Gardiner (1991) define an ethical act as one perceived as proper and acceptable according to a society's standards. In addition, utilitarianism is an act that leads to the greatest benefit for the greatest number of people. Also included is ethical formalism, which is an act that does not infringe on one's rights, such as life, liberty, the pursuit of happiness, privacy, speech, and due process (Ferrell & Gardiner, 1991). Fisher & Phillips (1998) define ethics or deontology as the study of clashes in moral values. Ethical dilemmas exist because one has choice. For example, one could choose to cheat on an income tax return and avoid paying taxes, or one could honestly fill out a tax return regardless of the taxes owed (Fisher & Phillips, 1998). Ethics are ultimate values, or a priori, meaning their assumed value is in their existence, with no need of justification (Fisher & Phillips, 1998). Business ethics refer to the values used to make choices by a business in its daily affairs. Businesses' values can be judged by their actions (Fisher & Phillips, 1998). Positive ethical values include making a profit, delivering the best products and services to consumers, providing workers with jobs, giving owners a good return on their investment, and being a good community citizen (Fisher & Phillips, 1998). To make a profit, businesses must have the incentive to deliver quality products because they usually have competition. Using the above criteria, one can explore the reasons that the advertising industry appears to be bereft of ethics.

ETHICS AND ADVERTISING

Murphy (1998) has developed one theory. Questionnaires were sent to 785 Fortune 500 companies, which assessed the importance that each company placed on ethics. One hundred ninety-eight, or 25%, of the companies had specific codes addressing ethics in advertising (Murphy, 1998). From this research, it may be inferred that businesses are not placing much importance on ethics in their advertising departments. With increasing government regulation and consumerism, one would hope that the statistics would be better. Obviously, businesses listen less to government than they do their customers.

Another theory developed by Murphy (1998) addresses the "unholy trinity" made up of advertisers, agencies, and the media. Advertisers want to sell their product by portraying a favorable image, and to maintain current consumption of their product. Agencies want to maintain clients, express creativity, and place advertisements in a profitable and acceptable medium. The media relies on advertising for financial support and the education and entertainment of the audience (Murphy, 1998). These goals do not emphasize ethics as being a priority.

Ethics also encompasses corporate social responsibility (CSR), especially in Europe. Balabanis, Phillips, & Lyall (1988) theorize ethics of CSR in advertising by personifying a firm's needs and comparing them to Maslow's hierarchy of needs. After a firm fulfills its psychological needs (profit), safety needs (competitive advantage), and affiliative needs (involvement in trade association), it will fulfill its internal and self-actualization needs by practicing corporate social responsibility. As in the former theory, ethics are held in abeyance until other needs and desires are fulfilled.

One possible solution for the lack of motivation present in the business world to prioritize ethics is the implementation of self-regulation. The National Advertising Review Council imposed age-restricted regulations on alcohol and tobacco advertisements (Fox & Krugman, 1998). The advertising industry's largest organization dedicated to ethical issues is the National Advertising Review Board (NARB), which is a part of the Council of the Better Business Bureau (Murphy, 1998). The NARB also has a Children's Advertisement Review Unit (Fox & Krugman, 1998). Managers of agencies volunteer to serve on these boards to investigate complaints. The review board does an effective job of regulating the advertising industry; coupled with limited government regulation and consumer awareness, review boards can be a powerful weapon in the fight against unethical advertising (Murphy, 1998).

Advertisers use many methods to intrigue consumers to purchase their product. The use of the media is popular. Schudson (1984) states that when the media brings attention to a product, without regard to the actual advertisement, this influences consumers by enticing them to purchase a product or use a service out of curiosity. Such is the case with movies and artwork. Other times, consumers are turned off and will not purchase the product or use the service (Schudson, 1984). This type of boycott takes place when a group or organization is morally opposed to a product, such as the Southern Baptist Convention boycotting Disney World and Disney products. Schudson (1984) states that consumers use their personal experience to determine what they will purchase. Even if a product has proven to be of high quality, if one has an unsatisfactory personal experience with the specific product, it will not be purchased a second time (Schudson, 1984). For example,

this could mean that if a car customer has a bad experience with a specific make of car, he or she would not purchase that type of car again. Advertisers know this, and will work very hard for that good first impression. With this idea in mind, if a consumer's first impression of a product is formed due to an advertisement, the producer will put in a great deal of time, effort, and money to reach the consumer through a quality advertisement. The power is in the consumer's hands.

EDUCATIONAL SETTINGS

Advertising in educational settings has become controversial. When firms donate products such as computers and toys to schools and display their logos, critics claim that they are attempting to influence children to buy their products. This does not allow competing products equal time. Often these products are desperately needed by financially strapped school systems (Mullins, 1996). Corporations are giving away their products and providing for many children who would not normally have the opportunity or access to high-tech, educational products.

Other types of educational advertising are criticized. Vocational schools and home study courses are typically known to be of lower quality than accredited institutions for those that are seeking serious career advancement. In the case FTC vs.Cinderella Career and Finishing Schools 404 F.2d 1308, (D.C. Cir. 1968), the FTC found that the school was guilty of fraudulent claims and deception. The school was promising "miracles after sundown," claiming the typist could be transformed into the glamorous airline stewardess, or the clerk into a fashion counselor; the school offered a broad curriculum including courses in fashion retail and courses related to airline stewardesses (Kintner, 1978). Many individuals who opt for vocational or home study courses are young and inexperienced. Students seeking this type of education are concerned with the quality of training, number of jobs available in a certain field, expected income, and job placement (Kintner, 1978). Often schools exaggerate the ability of their program to fulfill the needs of their students. Some take issue with the fact that accredited colleges and universities advertise their liberal arts programs with the unspoken promise that students will be able to obtain employment. Corporate recruiters are looking for graduates with liberal-arts degrees as long as they are computer literate and have good communication skills.

FOODS, DRUGS, AND COSMETICS

In the late 19th century, quackery was prevalent in the marketing of medicines. Claims were outrageous, and the alcohol content was high in many of the tonics. There was no fear on the part of the peddler of being held responsible for the advertising, because there were no laws governing their actions (Kintner, 1978). Today, the FTC and FDA regulate the claims of pharmaceutical advertisements and the drugs that are allowed on the market. They are concerned with protecting the public from overzealous claims of healing (Kintner, 1978). If a product claims to have medicinal properties, it must be approved by the FDA (Foulke, 1992). Even products such as deodorant and suntan lotion, since they affect the body's function and structure, are considered drugs and are regulated by the FDA (Kintner, 1978). In 1980, the FTC set the standard for an offending practice that causes injury to a consumer by stating that it must be substantial, not outweighed by an

offsetting consumer or competitive benefit the practice produces, and not be reasonably avoidable by consumers (Fisher & Phillips, 1998). Substantial harm, as defined by the FTC, includes a monetary loss or a health and safety risk to a consumer (Fisher & Phillips, 1998). The FTC has the power to order an advertiser to cease and desist from certain claims. It can also require an advertiser to correct future advertisements by disclosing certain information (Fisher & Phillips, 1998). The FTC ordered Novaris Consumer Health to run eight million dollars worth of corrective advertisements for its Doan's Pills (Teinowitz, 1999). This was the first time in 25 years that the FTC had taken this type of action. The FTC determined that advertisements running from 1987 to 1996 falsely presented Doan's Pills as a better brand for back pain than other remedies (Teinowitz, 1999).

Pharmaceutical companies have shifted much of their advertising budgets from medical journals and physicians to television and print advertisements directed to the general public. Drugs that fight obesity, such as Phen-Fen, and over-the-counter medications, such as Metabolife, are marketed as safe and effective; Phen-Fen was taken off the market by the FDA after consumers suffered severe health problems, and Metabolife is considered an herbal supplement, so it is not under federal guidelines. Consumer regulation of false and deceptive drug claims is difficult because a consumer cannot obtain all the information necessary to make an informed decision. The consumer must rely on a physician or other health care professional for guidance. This area is one where government regulation is important for the safety of consumers.

CONCLUSION

Schudson (1984) states that advertising represents values already present in society. Advertisers pick up on certain values and represent them as commonly shared values between the consumer and seller. In a perfect world, advertisers would be self-regulated. Unfortunately, it is not a perfect world. Government regulation, on a limited basis, is a necessary evil (Foley, 1998). The best way to eliminate unethical advertising is for moral and educational leaders to take a stand against it (Murphy, 1998). Professors should teach their students about ethics in advertising, and encourage them to support ethical advertising and boycott unethical advertising. The FTC's greatest challenge is to balance economic and social interests, protecting the consumer, while allowing the free market to work properly. The FTC, state governments, and consumer protection agencies can contribute to the safety of consumers. Ultimately, consumerism lies within the consumer. Advertisers are vying for consumers' attention, and the best way to send a message to an advertiser is to refuse to buy their product. The advertising industry has become a fundamental part of the American way of life, of the economy, and of corporate America. Advertising is considered protected free speech under the Constitution. A partnership between government regulation, industry regulation, consumer protection organizations, and the informed consumer will bring about ethical advertising that is beneficial to the consumer and the economy.

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RATIONALITY VERSUS MORALITY IN BUSINESS

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ABSTRACT

This paper considers ethical decision making by blending three streams of related research: cognitive moral development of the decision maker, rational choice theory and a subjective expected utility model. Ethical dilemmas can be defined as situations where moral certainty is compromised by rational cognition. In this paper, the authors assume that some people use a morality-first perspective and others a rationality-first perspective. Ethical scenarios were written and used to test hypotheses derived from this perspective. The instrument developed was shown to be in need of further refinement. Results are discussed in terms of relationships between participant-characteristics variables and overall and subscale responses to the ethical scenarios.

INTRODUCTION

Ethical views that only deal with abstract choices are often derided as too formal or unrealistic, but Louden, (1984) argued that virtue ethics should be included in any adequate justification of morality, along with deontological (Kant) and teleological (Bentham, Mills) approaches. However, researchers in various disciplines tend to approach ethical research and conceptual development, from consistently different perspectives. Most business-related ethical research has dealt with moral development (Kohlberg, 1976, Rest, 1979), having to do with how a person's views change across his or her lifetime; whereas, in criminology and sociology for example, research has often centered on rational choice. Rational choice theory says that people will assess the advantages and disadvantages of a given behavioral choice and then act in the way that maximizes their advantage (Nagin & Paternoster, 1993). A third line of research, using a subjective expected utility framework was proposed by Fudge (1999), but has received little attention.

LITERATURE REVIEW

Perhaps the most popular lines of research into ethical business behavior (indeed ethical behavior across many situations) have been the aforementioned Rational Choice Theory from sociology (Coleman, 1990) and Cognitive Moral Development from psychology and religion (Kohlberg, 1976). Kohlberg (1984) says people develop across time and experience, from complete selfishness to being influenced almost exclusively by principles derived from internalized societal and philosophical values. His Cognitive Moral Development Theory, a stage model, assumes people migrate over time, due to experience and development, from selfishness to a more principled judgment of choices. The assumption here is egoism transforming into altruism or at least a type of "moralism" or sense of duty to one's deeply held values.

At the preconventional level (stages 1 and 2), moral decisions are formulated on the basis of simple, immediate consequences to the individual (i.e., punishments and rewards). Reasoning at the conventional level (stages 3 and 4) emphasizes adhering to the rules or norms of appropriate behavior established by external groups, such as peers, family, and society. At the principled level (stages 5 and 6), moral judgment criteria transcend the authority of group norms as the individual develops an increasingly strong personal commitment to self-selected universal principles and becomes decreasingly egocentric.

Rational Choice Theory (Coleman, 1990), based on the economic man principle, assumes people make value-charged choices on the basis of how likely the alternative they choose is to maximize their own interests. This view assumes an egoistic interpretation of choices (Rest, 1979).

Another theory, closely related to Rational Choice Theory, addresses what is often called Subjective Expected Utility models, based on reasoning by the 18th-century mathematician, Daniel Bernoulli. The most popular of these models is Vroom's (1964) VIE theory. Expectancy theory, as it is often called, assumes people make rational choices, but that these choices are informed by variously reliable perceptions of expectancies, instrumentalities and valences. Expectancies are subjective estimates of the probability (ranging from 0 to 1) of one's effort leading to a desired outcome. These outcomes are assumed to vary in attractiveness or valence. The valence can range from -1 to +1, meaning it can be highly unattractive or highly attractive, something to be avoided or something to be pursued.

BUILDING THE MODEL

Suppose we retain Kohlberg's assumption that people develop different types of moral or ethical reasoning over time and that this development causes them to be relatively simplistic in their interpretations of value-charged choices or relatively complex. The simplest would be those who find themselves at the extremes of Kohlberg's framework, almost entirely egoistic (rationalists) or almost totally principle driven (moralists). Indeed, those who are selfish are perhaps somewhat "simpler" or more easily predictable than those whose judgment is guided by principle, since principles or values can themselves be quite complex. Nonetheless, both of these groups, moralists and rationalists, may be said to be relatively simple in their response to situations compared to those who are in the middle. That is, those who are what we will call rational moralists or moral rationalists.

Rational moralists are more likely to see situations through the lens of their values, however, they can be convinced of the merits of certain exceptions based on rational judgment. The rational moralist is more likely to focus on valences and expectancies, to bring in Vroom's VIE theory. That is, this person is not always a moralist, but sometimes based on the size of the outcome for himself versus others, whether good counterbalances bad, how much effort would be involved to overcome situational constraints or whether it makes good business sense; this person may be persuaded away from a strict moral interpretation. The rational moralist (RM) compromises his principles sometimes based on certain perceived outcome possibilities and expectancy-to-performance probabilities.

On the other hand, the moral rationalist (MR), the other relatively complex person in the middle, might focus first on how rational a given choice. His or her rational judgment may not be as likely to be compromised by a moral principle as it is by outcome-to-outcome relationships or instrumentalities. This person will be interested in what other people will say (deed brought to light of day leads to defamation), that is whether they condone it or not, what peers tend to do in similar circumstances (deed makes one look more or less "competitively rational"), whether there is an explicit law or rule against it (others are on formal record as being opposed to the deed), whether others will find out about it (whether deed will reach light of day to be reviewed by others), and whether it is clearly a bad thing to do or not (deed is or is not in a category of those which have previously been considered ethically wrong). You might say the MR will act in a moral fashion when it is rational to do so. The MR is trying to read the situational forces (instrumentalities) that require him or her to be ethical or moral. The MR is almost entirely consumed with his or her perception of the judgment others will bring to bear on his behavior.

From this logic, we can assert that there are four possibilities: (1) some people (rational moralists) may tend to see morality through a rational lens, (2) others (moral rationalists) may tend to see rationality through a moral lens, and (3) some (moralists) may see choices only with respect to whether they are "right or wrong", and (4) (rationalists) only see choices with respect to whether they are rational or not. The first (RM) group will tend to believe that sometimes the moral thing to do in the abstract, might not be practical given certain rational or logical evidence from the situation usually having to do with one's self- or business-interest. The second group (MR) is likely to assess what is logical or rational on the grounds of whether it meets certain ethical or moral standards, usually having to do with the opinions, values or interests of others. The third group (M) would be those people who tend to view choices only with respect to their morality implications or the effect on others. The fourth group (R) are likely to see choices only with respect to their rationality in terms of the individual's self-interest.

The basic purpose of this study then, is to see if these categories of people can be reliably discerned one from the other based on their responses across hypothetical ethical dilemmas. The ultimate product of this line of research would be an instrument to measure an individual's perceptual location on a continuum from essentially moral to essentially rational, although taken alone, this study does not achieve this goal entirely, since to do so would require assessment of individuals on measures designed to assess moral development, rational choice and VIE.

Participant-characteristic variables, such as political inclination, religiosity, age, gender, and educational background will be measured to determine their relationship to these categories. Relationships between these variables might give insight into which, if any, "types" of people naturally differ with respect to these categories. Honeycutt, E.D., Jr., Glassman, M., Zugelder, M.T. & Karande, K. (2001), found that age and education moderates whether one sees a situation as ethical or not. Kohlberg (1976) and others have found religiosity to be positively related to one's ethical development. Political inclination (Marnburg, 2001) and gender are included to explore the relationship they might have with any categories uncovered by the research.

METHODS

Participants. The participants were204 students across numerous disciplines from two southern Universities. They provided demographic information and responded to a survey designed to assess their agreement with the actions taken by an actor in seven scenarios with ethical themes. The participants ranged in ages from 18 to 55 with an average age of 23.24 and a standard deviation of 6.049. The distribution of ages was positively skewed with over 72% of respondents being under the mean age.

Procedure. Questionnaire Development. The authors constructed seven ethical scenarios from personal experience and stories gleaned from students, managers or colleagues. Each scenario was followed by response alternatives as to whether what the person did was "right or not". An effort was made to make the scenarios plausible and to keep response alternatives as concise and parallel as possible, with the participants being asked to agree or disagree with the responses using a five item Likert-type scale. The alternatives were chosen based on the reasoning laid out in the introduction.

Sampling. The majority of the surveys were distributed and completed in classes, although some were completed outside of class and returned to the instructor electronically or as a hard copy. The responses were then entered into a spreadsheet and the results analyzed using SPSS Verson 11.

RESULTS

Factor Analysis. We used principle components factor analysis to determine the structure of the data matrix resulting from 204 participant responses to 56 alternatives (seven scenarios with eight response choices each) . The analysis revealed 10 factors with an eigen value above one.

The "built-in" factors were essentially not found to be "coherent" in the factor analysis. However, a pattern of separation appeared to exist between moral-rational responses and rational-moral responses, as was predicted. Excluding the comprehensive factor one, the results showed, for example, that factor two had three of four variables loading that were designated as rational moralist (RM). The upshot was that 32 of 44 loadings (where the factor had more than two variables loading) showed a pattern of "comparable loadings", more than would be expected by chance.

Those who were politically "liberal" were more likely to respond rationalistic or higher on the total survey and those who were more religious were more likely to respond moralistic or lower on the total survey. The same results held for the items labeled Rational Moralist or Moral Rationalist.

Additionally, though, those who had more work experience had a lower response total on Rational Moralist (valences and expectancies) items than those with less work experience and males were more likely to have a higher response total on those items labeled Moral Rationalist (instrumentalities) than females.

DISCUSSION

The survey instrument was not content valid enough to pick up subtle differences among responders. The most salient feature of the questionnaire was its overall internal consistency. The principle component analysis demonstrated that it was basically measuring "one thing". This means the instrument as it currently exists would be more valuable to measure ethical responses across situations than to ascertain how different categories of respondents differ across the situations.

During the next phase of development, the instrument must be analyzed by subject matter experts and items phrased in such a way that they clearly articulate the construct being measured. A content validity ratio (Lawshe, 1975) should be obtained for each item, to determine prior to administration, just what that item is measuring.

A refined, reliable questionnaire, with distinct subscales for RM and MR, would allow future research to determine the extent to which people vary in their tendency to be moral first and rational second or vice versa, if indeed, they vary in this way at all.

As for the specific correlational findings, it seems clear that at least when the matter is kept at the level of speculation, those who are more religious are more likely to be moralistic in their reaction to situations and those who are more politically liberal a more likely to be rationalistic in their reaction to situations. It would be interesting to see if these results held up when such individuals are required to make actual business decisions. Would the religious principles still hold firm and would those who are more liberal on paper respond more conservatively in real life or not?

Work experience was shown to be related to one's tendency to be more morally conservative or moralistic. Roozen, de Pelsmacker and Bostyn, (2001) found less experienced workers tended to be "more ethical". It stands to reason that those with more work experience are likely to have a more nuanced or perspective on the matter of ethics, causing them to perhaps be more conservative in some cases and less so in others. Their judgment, in other words, may be more keyed into the details of the situation.

Males were more likely to have higher response totals on items that pertained to instrumentalities or how the anticipated behavioral choice would be "viewed by others". This could be an interesting subject for future research. Are males more likely to be concerned with ethical appearances than females. Strong conclusions on that issue cannot be drawn from this study.

In the end, this study leaves open the question as to whether some people are more likely to respond to situations "morally first" and others "rationally first". The fact that many of the items loaded in valence/expectancy "clusters" or instrumentality "clusters", leaves hope that the idea is not invalid. Further research should follow to consider the validity of this approach to ethical reasoning.

The extent to which the RM versus MR distinction is related to the work of Kohlberg (1984), Rest (1979) and Coleman (1990), could easily be ascertained by collecting a battery of information from the same participants and assessing both their anticipation and actual behavior across situations.

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ETHICS IN INVESTMENT ANALYSIS AND MANAGEMENT: A STUDY OF THE FACTORS AFFECTING STUDENT ETHICAL PERCEPTIONS

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ABSTRACT

This paper examines the issue of ethics in investment analysis and management. A survey instrument containing thirteen scenarios is administered to university business students at various levels. The scenarios are developed from the Standards of Professional Conduct of the Association for Investment Management and Research. The Standards are then used as an objective basis of comparison in evaluating student responses based on five demographic variables: environment, class rank, academic major, race, and gender.

The results should be useful to faculty teaching a professional ethics course or wishing to incorporate the study of ethics into a finance, accounting or investments course at any level. The results overall indicate a moderate level of ethical congruence on the part of the students, but several particularly weak areas are identified.

INTRODUCTION

The issue of ethics in investment analysis and management is examined. A survey methodology is used and the surveys are administered to university students at various levels. Studies of the ethical business decision making on the part of university students have been conducted before, but generally focus on a broad range of business topics. This study has a more specific focus and therefore provides more useful information for faculty teaching in the areas of professional ethics, finance and investments.

Ethics in finance and investment management is receiving increasing attention from lawmakers as well as academic researchers. As financial engineering progresses and new and complex financial instruments are developed, the task of the investment manager and advisor becomes more difficult and the opportunity for unethical behavior to occur is greater. Accrediting agencies for business schools such as the American Assembly of Collegiate Schools of Business are also placing increased attention on the issue of ethics.

It is difficult to define ethical behavior and unethical behavior in many situations. One person may see the actions as ethical and another person may see the same actions as unethical. Some authors have attempted to define ethical behavior but a widely accepted definition does not exist. As a result most professional organizations require their members to abide by a strict code of ethics and standards of professional conduct which govern specific ethical and professional issues in the discipline. This research utilizes the Code of Ethics and Standards of Professional Conduct set forth by the Association for Investment Management and Research (AIMR). The AIMR Code

and Standards is used to develop vignettes for the survey instrument and it also provides an objective basis for evaluating the survey results.

LITERATURE REVIEW

Most studies in the area of business ethics are general in scope rather than focusing on a particular functional area of business. Of those studies conducted, few are based on a published code of conduct which helps to provide an objective basis for evaluating the results. One exception is a study by Green and Weber (1997) which provides some evidence about the ethical development of accounting students prior to, and immediately following ethics oriented versus non-ethics oriented accounting courses. They found the ethical reasoning ability of accounting students to be improved when they took an auditing course which emphasized the AICPA Code versus those who had not taken the course. No difference was noted between accounting and non-accounting majors prior to an auditing course. They concluded that when an auditing course emphasizes the "spirit" of the Code, there is a positive impact on the ethical reasoning ability of the students completing the course.

Of those studies with a focus on general business ethics, the scenarios given to the respondent typically involve corporate actions, employment situations, advertising or sales. Respondents are typically asked to complete demographic profiles and then the responses are correlated with the demographic information to determine if different demographic groups view a particular ethical situation as more or less ethical than another. Typical demographic variables evaluated include gender, age, race, major, income and religious conviction. The following are some of the findings from studies of this nature.

Schminke and Ambrose (1997) evaluate ethical asymmetries in the way men and women approach ethical decision making in both business and non-business settings. They conclude that the models employed by men and women appear to differ in both business and non-business settings and that women are better predictors of both genders' most likely ethical model.

Ruegger and King (1992) and Dawson (1997) also evaluate gender as a differentiating factor in ethical decision making. Ruegger and King study the effect of age and gender upon student business ethics by evaluating students enrolled in business courses at the University of Southern Mississippi. They conclude from their sample that gender is a significant factor in ethical decision making and that females are more ethical than males in their perception of ethical situations in business. With respect to the age of the respondent, their results indicate that older students (40 years and older) are the most ethical in their business decision making. Dawson (1977) evaluated ethical differences between men and women in the sales profession by surveying 209 subjects. Each subject responded to 20 ethical scenarios of which 10 were non-relational (situations essentially confined to ones own conscience). He found significant differences between the sexes in situations involving relational issues, but not in situations involving non-relational issues. Secondly, he found that ethical differences based on gender change with age and years of experience.

McNichols and Zimmerer (1985) attempted to find differences in undergraduate student attitudes toward ethical situations based on gender and major and were unable to identify any significant differences with respect to either variable.

Barnett, Brown and Bass (1994) evaluate the ethical judgements of college students and attempt to differentiate the responses based on academic major, gender, age and income. They found no significant differences in the ethical responses based on academic major or age. With respect to gender, they found the ethical responses of males to be less harsh in all 24 of the scenarios presented. Males consistently evaluated the actions as less unethical than females. The authors suggest that this could mean that the moral development of males is somewhat slower than that of females. With respect to the income variable, the study found that in 23 of the 24 scenarios, students in the higher income group rated the situation as less unethical.

Some studies have addressed possible cultural differences in the way respondents evaluate an ethical business scenario. Allmon, Chen, Pritchett and Forrest (1997) evaluate cultural differences in the business ethics perceptions of students in Australia, Taiwan and the United States and concluded that "although statistically significant differences do exist there is significant agreement with the way students perceive ethical/unethical practices in business." They suggest that there appears to be "a universality of business ethical perceptions."

Whipple and Swords (1992) conduct a cross-cultural comparison between students in the United States and the United Kingdom. They conclude that "differences in the students' demographic profiles do not influence their ethics judgement." They do note consistently higher business ethics of female students from both countries.

METHODOLOGY

Most survey research on the issue of ethics utilizes vignettes to present an ethical or unethical situation to the respondent and then asks the respondent to rate the situation on a scale. Typically rating scales vary from 5 to 9 points. A 5 point rating scale is used in this study.

The mean response score is evaluated in two ways. First, it is compared with the AIMR Code of Ethics and Standards of Professional Conduct to determine if the respondents' evaluation of the ethical dilemma is in agreement with the spirit of the Code and Standards. Second, the mean response scores are computed for each demographic category of respondent to see if there is any significant difference in the respondents evaluation of the ethical dilemma by demographic category. The various demographic categories analyzed include the respondents environment, class ranking, major, race and gender. Past studies of ethics in a general business context have found some of these demographic variables to be significant and others to be insignificant.

The survey instrument was administered to students at two medium sized state universities and one medium sized private university. Most of the students surveyed were business majors. Hypothesized relationships are that there should be no significant differences in the ethical congruence of the respondent with respect to the demographic variables of environment, class ranking, major, race or gender.

The survey instrument contains 13 scenarios which relate to various standards set forth by AIMR in their Code of Ethics and Standards of Professional Conduct. The respondents completed a profile containing the demographic variables. Each of the thirteen scenarios is then ranked by the respondent on a scale of 1 to 5 with 1 being fully ethical or appropriate behavior and 5 being fully unethical or inappropriate behavior.

RESULTS

With respect to the characteristics of the respondents, 55.1 percent were male and 44.9 percent were female. All of the respondents were juniors, seniors or graduate students. Fifteen percent were juniors, 67 percent were seniors and 17 percent were graduate students. Nearly half (48 percent) of the respondents were finance majors and 18 percent were management majors. With respect to environment, 41 percent of the respondents reported being raised in a rural environment, 37 percent reported being raised in a suburban environment and 22 percent reported being raised in an urban environment.

The responses are analyzed with respect to the five categories contained in the Standards of Professional Conduct of the Association for Investment Management and Research: fundamental responsibilities, relationships with and responsibilities to the profession, relationships with and responsibilities to the employer, relationships with and responsibilities to clients and prospects, and relationships with and responsibilities to the investing public.

Only one of the scenarios on the survey related to fundamental responsibilities and involved a foreign based analyst employed by a U.S. company trading on inside information in a country where there were no insider trading laws. This scenario received a mean response of 3.0 on the scale of 1 to 5 which indicates no strong opinion on the part of the respondents.

Four of the scenarios concerned relationships with and responsibilities to the profession. These involved such behaviors as misuse of a professional designation, repeated arrests for minor misdemeanors, and citation of references used in a report. Mean response scores for these four scenarios ranged from 2.373 to 3.576. Respondents' viewed individual scenarios in this category as generally ethical or unethical, but with an overall mean score of 2.936 no clear pattern emerged within the category.

With respect to relationships with and responsibilities to the employer, there were 5 scenarios posed to the respondents. Mean scores for these 5 scenarios ranged from 2.280 to 3.458. Each of the scenarios described a situation where the person in question was not acting in a manner consistent with the Standards of Professional Conduct. These scenarios involved informing employer of a duty to abide by a code of conduct, taking clients with you when leaving an employer, conflicts of interest, and disclosing confidential non-public information.

When considering all respondents as a single group, the overall mean response score for this category of 2.923 does not indicate particularly strong or weak ethical orientation.

The fourth category examined was relationships with and responsibilities to clients and prospects. There was only one scenario in this category and the mean response score was 3.288. The scenario described a situation where the analyst had made some estimates based on information he believed to be reliable, but then presented these estimates as factual information in a report prepared for public dissemination, which is in violation of the Standards of Professional Conduct. Respondents viewed these actions as only somewhat unethical overall and didn't seem to identify the significance of making a statement such as "Company X will have earnings of two dollars per share next quarter" when the earnings are actually only an estimate.

The final category involves relationships with and responsibilities to the investing public. Two scenarios were presented in this section and they had mean response scores of 2.805 and 3.085

which would indicate that respondents overall have no strong ethical orientation. Each of these scenarios involved the use of material non-public information to make a trading decision. Failure to clearly identify the unethical nature of the scenarios presented in this category likely results from two factors. First, the respondent may not recognize the information presented in the scenario as material and non-public. Second, even if the respondent does recognize the information as "insider" information, they may not see how any harm is done if the insider trades on the information.

Further analysis evaluated ethical congruence by respondent category. Significant differences in ethical congruence were identified for several scenarios by subdividing the respondents according to variables included in the respondent profile. Tables 1 through 5 summarize the respondent categories in which significant differences were identified with respect to several of the scenarios.

With respect to fundamental responsibilities, no significant differences were identified with respect to any of the respondent categories. However, differences in all 5 respondent categories were identified for scenarios involving relationships with and responsibilities to the profession. The most significant source of differences in this category was related to the class of the respondent. For all four scenarios in the profession category, the mean response score was higher for undergraduate students than for graduate students. In three of the four cases the difference was statistically significant. This is consistent with a higher degree of ethical congruence on the part of undergraduate students with regard to interacting with ones profession. At first this may seem to indicate that ethics with respect to ones profession are being "un-learned" as the student progresses from undergraduate to graduate school. Since graduate students typically have worked or are currently working in a professional environment, they may see some marginally unethical behavior as "accepted" in the real world whereas, an undergraduate student is much more likely to not have professional experience and offer a much more idealistic response to the scenario.

Ethical judgement differences regarding relationships with and responsibilities to employers were identified with respect to all categories except gender. Two of the five scenarios in this category demonstrated significantly higher mean scores for urban respondents which is consistent with a higher degree of ethical congruence on the part of urban respondents. One possible explanation here is that urban respondents would tend to work for, or be influenced by family members who work for, relatively large urban employers. Such employers would be more likely to have adopted a code of ethics and/or standards of professional conduct than relatively smaller employers in rural areas. This exposure could result in more ethically congruent responses on the part of the urban respondents.

Only the environment and class variables were found to have any significance in explaining ethical judgements relating to clients and prospects. Undergraduate and urban respondents had higher mean scores for scenarios involving relationships with and responsibilities to clients and prospects. This is again consistent with a higher degree of ethical congruence on the part of urban undergraduate respondents.

The final category of scenarios involved relationships with and responsibilities to the investing public. Both scenarios in this category had significantly different response scores with respect to major and race. The mean response score was significantly higher for white respondents than black respondents and the mean response score for finance majors was higher than that of

management majors. With respect to gender, the mean response scores were higher for female respondents than for male respondents which indicates a higher degree of ethical congruence on the part of the female respondents. Overall, in the category of relationships with and responsibilities to the investing public, the respondent will likely evaluate the scenario from the perspective of the analyst or from the perspective of the investor. Although a scenario identifies the specific action to be judged, it does not identify a perspective from which the actions should be judged other than "ethically". These differences in perspective would likely help to explain some of the significant differences observed with respect to major, race and gender in relationships with and responsibilities to the investing public.

SIGNS OF TROUBLE IN THE PROFESSION: A LOOK AT THE ETHICAL PERCEPTIONS AND EXPERIENCES OF ACCOUNTING PRACTITIONERS (PRE-ENRON)

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ABSTRACT

The Enron debacle is one in a string of headlines focusing on accounting firms and individual CPAs who have "crossed the line" by engaging in unethical, or at least what is widely perceived as highly questionable and ill-advised conduct. The purpose of this study is to provide further insight into issues of ethical and professional conduct in accounting via an examination of the perceptions of practitioners regarding the extent of ethical misconduct in accounting, the likelihood of serious sanctions being imposed for selected misconducts, and their direct personal experience with ethical issues. The data for this study was gathered prior to the disclosure of the events surrounding Enron.

The results provide evidence that accounting practitioners are largely comfortable with the ethical environment of the profession with few perceiving ethical misconduct as pervasive and most having a high opinion of the profession's concern about ethics. Practitioners perceived that the frequency of selected unethical activities is low and that those guilty of such acts will face severe sanctions. Relatively few accountants reported having felt pressured to engage in unethical conduct. However the findings reported in this study also provide evidence in contrast to the general sense of ethical well-being. Most of the misconducts listed in the study were perceived as occurring relatively infrequently. Yet, for many of these misbehaviors, a majority or close to a majority of the respondents had direct evidence of such behaviors occurring in practice. Thus, it appears that the profession of accounting does not, in reality, subscribe to a zero-tolerance policy regarding non-compliance with rules with the result being the recent major setbacks to accounting's professional reputation.

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THE CONTENT AND STRUCTURE OF ACCOUNTING ETHICS CURRICULA: A COMPARISON OF ACCOUNTING EDUCATORS' AND PUBLIC ACCOUNTANTS' PERCEPTIONS

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ABSTRACT

Ensuring the relevance of curricular coverage is an important and ongoing challenge for accounting educators. As the amount of information that may potentially be included in the accounting curriculum continues to increase, care must be taken with respect to decisions about what should be included in a student's course of study. Recent research suggests that there may be important differences between educators and practitioners with regard to such issues (Albrecht and Sack, 2000).

One area of particular concern is that of ethics. Some schools teach ethics by integrating them into existing courses and others teach them as a standalone course. Even if taught as a separate course, there is some disagreement over the 'ideal' nature and content of the course (e.g., should it be taught by a business school faculty member or by a philosophy professor?). Additionally, evidence exists to suggest that practitioners consider ethics to be a more important topic than do accounting educators (Albrecht and Sack, 2000).

The present study examines issues concerning both the format and potential content of ethics in the accounting curriculum. A survey instrument was distributed to accounting professors and public accounting professionals asking for indications of the perceived importance of over three dozen ethics topics, and the pedagogical format in which these topics should be delivered. Potential topics were selected from accounting ethics textbooks and journal articles. Responses to these items were provided on 7-point scales, and additional information was solicited regarding possible means by which ethical topics could be covered in the classroom. Demographic information was also collected.

Responses of 176 accounting faculty members (mean = 15.7 years teaching experience) and 60 Big 5 accountants (mean = 40.9 months' experience) indicate the existence of both significant areas of agreement and disagreement with regard to the absolute and relative importance of topics. There was generally consistent agreement with respect to the optimal delivery format of ethical coverage. Both groups agree that there should be some lecture and discussion but that primary emphasis should be placed on case analysis. The overall findings of the study are discussed and placed in contexts that should assist educators in the consideration of ethical coverage in their own courses.

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