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SPEECH

EMPLOYEE DISLOYALTY, COSTS AND REMEDIES[1]

Harvey Gelb[2]

I came to Wyoming as a professor in the fall of 1979. I must say that when George Rudolph, then the Dean, asked me to come to Laramie for an interview a few months earlier, I was pretty clueless about its location. In fact, I was largely ignorant about this big, gorgeous state of Wyoming. I know that it was fairly early in my years here that I became acquainted with the name Winston Howard. I heard of him in impressive

1. Winston S. Howard Distinguished Professor Lecture, University of Wyoming College of Law, November 1, 1996. For publication purposes, the author has made minor textual changes and added footnotes to the paper delivered on this occasion.

2. Winston S. Howard Distinguished Professor, University of Wyoming, College of Law, 1996-1999. The author is grateful to Tassma A. Powers, a student at the University of Wyoming, College of Law for her help in connection with the lecture. The author is also grateful to Peter C. Nicolaysen, a student at the University of Wyoming, College of Law for his help in preparing the lecture for publication in the LAND & WATER LAW REVIEW.

ways: first as a major figure of a famous law firm bearing his name, Sherman & Howard, and second, as an alumnus who was maintaining his links with the University of Wyoming College of Law. I became aware of his plans to establish the professorship which is the reason for my presence here today as a lecturer. His continued ties to our school, both as an outstanding graduate and as the person who established this professorship, have meant a great deal to us. I am very proud to be associated with this law school, its faculty and staff, its students, and its graduates. My colleagues are an outstanding group with whom I am pleased to spend time to achieve worthy goals — although I sure wish our faculty meetings could be shorter. It is my hope that the days will come when others step forward to do what Winston Howard has done — to encourage us in our efforts by giving recognition to our work through professorships. And I hope too that others will step forward to help our financial aid programs so that the financial roads which deserving students must travel will be made less bumpy.

I would also like to say that Winston Howard has impressed me, not only as a successful lawyer and loyal alumnus, but as a person of culture, refinement and good humor. To have my name linked with his through this professorship is indeed a great honor for me.

For many years the subject of loyalty has intrigued me. When I gave my high school valedictory address my message was that "Loyalty must be our Watchword." The loyalty of alumni to their school and to assisting others to become educated is of vital importance in the world in which we live. It is a joy to speak of the loyalty of Winston Howard to his school and to society.

On this fine day when we have just spoken so happily of the bright side of human nature, it is especially sad to turn to the dark side by contemplating the dishonest, disloyal, immoral and illegal behavior of business officials and employees who abuse their positions to achieve personal enrichment.

How serious is the bad behavior? The findings of a recent Report by the Association of Certified Fraud Examiners,[3] which is concerned with occupational fraud and abuse, are very disturbing. The Association is a private corporation which accredits "individuals who possess the specialized skills necessary to detect, investigate, and deter fraud . . . . Typical [Association] Members include fraud examiners, auditors, investigators, forensic accountants, loss prevention professionals, security

3. ASSOCIATION OF CERTIFIED FRAUD EXAMINERS, REPORT TO THE NATION: OCCUPATIONAL FRAUD AND ABUSE (1995).

directors, public accountants, law enforcement personnel, criminologists, researchers, and academicians."[4] The Report defines occupational fraud and abuse as "[t]he use of one's occupation for personal enrichment through the deliberate misuse or misapplication of the employing organization's resources or assets."[5] It estimates that occupational fraud and abuse cost U.S. organizations (including governmental and nongovernmental organizations) more than 400 billion dollars annually, with the "average organization losing about 6% of its total annual revenue to fraud and abuse committed by its own employees."[6] I repeat: According to the Report by the Association, the average organization loses about 6% of its total annual revenue to fraud and abuse committed by its own employees. Losses include direct economic loss and indirect losses such as the cost of legal actions related to the misbehavior. The Report notes that because abuse may be seen by many employees as an informal employee benefit, some sociologists suggest it may increase productivity by improving morale. Furthermore, "much abuse is silently condoned in organizations."[7] Personally, I am skeptical about notions of any significant or lasting gain resulting to an employer from such employee benefits or silent condonation. Sneaky, disloyal and illegal activity may breed behavior which goes much further than the employer could imagine and distorts the true picture of operations when undisclosed. It may not be safe behavior for its perpetrators in the face of angry shareholders or creditor claims or prosecution by authorities.

What is the nature of the employee fraud and abuse covered in the Report? There are several kinds: There is asset misappropriation, which accounted for more than four of five offenses; bribery and corruption, which accounted for 10%; and fraudulent statements, which represented the balance.[8]

What kinds of assets are misappropriated? Although any tangible asset can be misappropriated, transactions involving cash and checking accounts were more common than all other asset misappropriations combined. Other misappropriated assets include inventory, supplies, equipment, and information. As to corruption, the principal types were bribery, illegal gratuities, conflicts of interest, and economic extortion. Fraudulent financial and other statements also account for a number of occupational fraud cases.[9]

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4. *Id.* at 41.
5. *Id.* at 4.
6. *Id.* at 4-5.
7. *Id.* at 15-16.
8. *Id.* at 30-31.
9. *Id.*

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Who commits the fraud and abuse? According to the Report, in 58% of the cases: non-managerial employees; 30%: managers; and 12%: owner/executives. However, the median losses caused by non-managerial employees were significantly lower than those caused by managers and executives. Thus, according to the report, median losses caused by non-managerial employees were $60,000; by managers, $250,000; and by owner/executives, $1,000,000. The differences are attributed primarily to the degree of financial control exercised by employees, with those in the highest positions having greatest access to company funds and assets.[10] The most costly abuses occurred in organizations with fewer than a hundred employees.[11] Perhaps this should be a wake-up call to smaller organizations to protect themselves more vigorously. Median losses were higher for males, older employees, and married employees. Also, there was a relationship between education and median losses, attributed to the fact that those with more education occupy higher positions and have more access to company funds and assets.[12] In the face of such a relationship, it would be well to promote educational goals to increase ethical sensitivity and behavior. Here at the University of Wyoming, I am pleased that we have established a Center for the Advancement of Ethics.

What are some of the specific kinds of wrongdoing referred to in the Report? There are kickbacks, fictitious bills, stealing, and improper credit card purchases. Here are some examples: In one case a buyer for one company convinced his superiors that business supplies purchased from three particular vendors were better than anything else on the market. But the buyer's judgment was clouded by an important fact. These vendors together had paid him $250,000 in kickbacks to buy their goods. In another case a manager made a suggestion to an outside consultant: In addition to regular billing, submit occasional fictitious bills to the company. The manager would then approve them for payment. Together they split $300,000 of the company's money. In still another case a 78-year old real estate financier was in default on multi-million dollar bank loans. He stole 1.3 million dollars from his partners in several other real estate projects, using the money to catch up on past-due payments. In another case, a purchasing manager and another employee cost a manufacturing company 2.8 million dollars. They conspired with a supplier to send bills to the company for products never delivered which the manager and his employee would approve for payment. The trio then split the money. In another case a company was in the home repair

10. *Id.* at 18-19.
11. *Id.* at 27.
12. *Id.* at 20-23.

business. One of its employees used ten thousand dollars of its supplies and equipment to do his own remodeling jobs, pocketing the profits himself. In still another case, an employee started a software company. In doing so he used his employer's time, equipment and facilities. His employer, also a software company owner, discovered that the employee even demonstrated his *own* products to the company's customers. Ultimately the employee *diverted five hundred thousand dollars* in business away from his employer.[13]

The Ethics Resource Center did a recent report based on a survey of U.S. employees regarding their attitudes toward, and knowledge of, ethics and ethics programs within their companies.[14] The Ethics Resource Center is a Washington D.C. organization which describes its mission as "to serve as a catalyst to improve the ethical practices of individuals and organizations from the classroom to the boardroom."[15] The report was based on data provided by over 4,000 individual survey respondents[16] and reinforces the idea that employee misconduct is a serious problem.

What kinds of misconduct did the employees report that they encountered?[17] "[N]early one in three respondents observed conduct at work which he or she believed violated the law or company policy." However, the majority did not report their observations to their company and those who did report were not satisfied with the outcome of the report. "Lying appeared to be the most common type of misconduct observed by employees." The majority of respondents who observed misconduct had witnessed lying to supervisors, and other employees lying on reports or falsifying records. "One-third of respondents who had observed misconduct witnessed: *sexual harassment, stealing/theft, drug/alcohol abuse and conflicts of interest.*" "Ten percent reported that their companies had violated environmental laws or regulations," a number of them "in serious enough ways to cause harm to the health or safety of employees or the public." The employees were skeptical about the ethics of their fellow employees compared to their own. Forty-two percent of them believed that their peers misrepresented information to their supervisors, although only 3% of them admitted that they themselves did so. More than a quarter of the respondents believed they were victims of discrimination in important ways during their careers, including gender, age and race discrimination.

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13. *Id.* at 21-28.

14. REBECCA GOODELL, ETHICS RESOURCE CENTER, INC., ETHICS IN AMERICAN BUSINESS: POLICIES, PROGRAMS AND PERCEPTIONS 1 (1994).

15. ETHICS RESOURCE CENTER, INC., MISSION STATEMENT (no date) (on file with the *Land and Water Law Review*).

16. *See* GOODELL, *supra* note 14, at 2.

17. *Id.* at 6 (detailing numerous forms of misconduct).

"[S]urvey respondents appeared to lack knowledge and understanding of key areas of business law and ethics such as overseas bribery, gathering competitive intelligence, anti-trust, unfair sales practices, insider trading and sexual harassment."[18] One very interesting observation in the study was that hypothetical questions on business law indicated that confidence in knowledge of the law increased *unjustifiably* with rank in the organization. For example, senior managers were not as likely as hourly employees to say that they did not know the correct answers to such questions, but senior managers were on the whole no more or less likely than those at other levels to select acceptable responses.[19]

Why is there bad behavior by business employees? Are the legal rules and remedies pertaining to such behavior too weak to deter or remedy bad behavior? Let us first look at rules involving civil remedies and then criminal ones. The law pertaining to employees is strict in holding them accountable to their employers. As we look at the law let us keep in mind the meaning of certain terms: The term "employee" is used in its usual sense. The terms agency, principal and agent would be defined in terms of the Restatement of Agency[20] in a technical way as follows: (1) Agency is the fiduciary relationship which results from the manifestation of consent by one person, Jones, to another, Smith, that Smith shall act on behalf of Jones and subject to Jones control, and consent by Smith so to act. (2) The one for whom action is to be taken, i.e., Jones, is the principal. (3) The one who is to act, i.e., Smith, is the agent. The term agent is broad enough to encompass employees and even non-employees who serve as agents. I use the term principal here to cover the employer or other person in whose behalf the employee or other agent is performing.

In this lecture, in matters of agency law, I draw primarily on the legal rules set forth in the Restatement of Agency Second, published by the American Law Institute, which I will refer to from here on as the Restatement. The audience should understand that any efforts to set forth legal principles should take account of the possibility of jurisdictional differences and judicial variations as far as such principles are concerned. Preliminarily, it should be noted that the obligations of agents and other employees to the business they serve may be covered to some degree by the contracts which they may have with the principal, and some of their bad behavior may trigger

18. *Id.*
19. *Id.* at 8.
20. RESTATEMENT (SECOND) OF AGENCY § 1 cmt. e (1958).

contract remedies including discharge, damages and may even lead to injunctions to prevent certain acts.[21] Beyond contract obligations, however, it should be emphasized that the *law requires that an agent be loyal to his or her principal.* Contracts between the principal and the agent may in certain situations expand or reduce the loyalty obligations. In the discussion which follows regarding loyalty, I am assuming that there is no contract impacting on the Restatement rules.

When employees and other agents are committing the kinds of fraud or abuse referred to in the Report of the Association of Certified Fraud Examiners, they are often being shamefully disloyal to their principals. The duty of an agent to the principal in terms of loyalty has been sweepingly stated in the Restatement as "act solely for the benefit of the principal in all matters connected with his agency."[22] Unless otherwise agreed, the agent is to give to the principal profits in connection with transactions conducted on behalf of the principal. The law is concerned that an agent, who receives a gratuity from a party with interests adverse to his principal, may be committing a breach of duty to the principal by not acting in his interest.[23] If I am using the services of a real estate agent to sell a property for me, the buyer of the property would be a party with an interest adverse to mine. If the buyer gives my real estate agent a car, that could be an indication that I cannot rely on my agent's loyalty to me. The law seeks to eliminate that problem. The following illustration, based on one from the Restatement, shows great support for agent innocence and purity, in situations which are much less shameful than those referred to earlier, such as bribes and kickbacks. Indeed the conduct in this illustration seems quite innocent when compared to other misbehavior, and yet it triggers a remedy which shows how strict is the duty of loyalty:

> Casey, who is a purchasing agent for the Union Atlantic Railroad, purchases honestly and for a fair price fifty trucks from Trucks Inc., which is going out of business. In gratitude for Casey's favorable action and without ulterior motive or agreement, Trucks Inc. gives a car to Casey. Casey holds the automobile as a constructive trustee for Union Atlantic.[24]

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21. RESTATEMENT (SECOND) OF AGENCY §§ 377 cmt. a, 399.
22. *Id.* § 387.
23. *Id.* § *388.*
24. *See id.* § 388 cmt. b, illus. 4.

What about a direct conflict of interest situation such as a situation where an agent is selling something to her own employer or leasing a property from her own employer? Under the Restatement rules, an agent is not to deal with the principal as an adverse party without the principal's knowledge and, even when the principal knows of the adversity, the agent has a duty to deal fairly with the principal and disclose all facts which the agent knows, or should know, would reasonably affect the principal's judgment.

The importance of proper disclosure and fair dealing is a recurrent theme in the legal rules pertaining to the principal-agent relationship. The following illustration based on one from the Restatement shows the importance of disclosure by an agent to her principal:

> Fashion Garments Inc. tells its employee Jones to purchase a suitable manufacturing site for it. Jones owns one which is suitable and sells it to Fashion Garments Inc. at the fair price of $25,000, telling her employer all relevant facts *except* that, a short time previously, she purchased the land for $15,000. The transaction can be rescinded by Jones' employer.[25]

Another rule provides that an agent is not to act for an adverse party without the consent of a principal in a transaction connected with his agency, and when with the knowledge of two principals, the agent acts for both in a transaction between them, he must act with fairness to each and with disclosure of all facts which would reasonably affect the judgment of each in permitting such dual agency.[26] Imagine how difficult it would be to have to worry about being fair to both sides.

Another rule which indicates that an agent is not to compete with the principal concerning the subject matter of the agency states in part:

> In the usual case, it is the agent's duty to further his principal's interests even at the expense of his own in matters connected with the agency. Thus, an agent to buy or to sell for the principal must not buy or sell in competition with the principal, unless it is so agreed. An agent employed to purchase a particular piece of land must not purchase it on his own account as long as it is possible to purchase it for the principal . . . . [A]n agent, employed to act exclusively for the benefit of the principal in looking for paying mines or oil wells, who independently and out of business hours

25. *See id.* § 390 cmt. a, illus. 2 (emphasis added).
26. *Id.* § 392.

> discovers one which he purchases for his own account, holds it as constructive trustee for the principal who is entitled to it upon payment of what it cost the agent.[27]

There are also important rules to protect the principal against the use of certain information by agents. First, an agent is "not to use or to communicate information confidentially given him by the principal or acquired by him during the course of . . . his agency or in violation of his duties as agent, in competition with or to the injury of the principal."[28] Second, an agent, after terminating the agency, is not to use confidential information, such as "trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the agent in violation of duty."[29]

What about remedies for the disloyal behavior of agents? When an agent commits a breach of duty owed to the principal, the law provides appropriate remedies against the agent. The agent is "subject to liability for loss caused to the principal by any breach of duty."[30] The agent must give to the principal anything received or its value or proceeds, where it is received in violation of a duty of loyalty to the principal. The agent is subject to liability for the value of using assets of the principal for his own purposes, and the principal may choose among remedies where an agent has received a benefit from violating his duty of loyalty.

The remedies against fiduciaries who commit breaches of loyalty can be severe. In one recent Illinois case, the Markal Sales Corporation served as a sales representative for electronics manufacturers including manufacturers of CB radios, consumer electronic components, and audio equipment.[31] Levy, a 40% shareholder of Markal, sued two of its directors, Gust a 40% shareholder and Bakal a 20% shareholder, each of whom were employees of Markal. Again, the persons sued, Gust and Bakal, were both directors of Markal, were both employees of Markal, and together owned 60% of the shares of Markal. In this case the argument could be made that they breached duties owed to Markal in all three capacities: as controlling owners, as directors and as employees. A sales manager of Apple computers contacted Gust to discuss representation of Apple. Gust and Bakal negotiated with the Apple sales manager and set

27. *Id.* § 393 cmt. b, c.
28. *Id.* § 395.
29. *Id.* § 396(b).
30. *Id.* §§ 401, 403, 407 cmt. a.
31. Levy v. Markal Sales Corp., 643 N.E.2d 1206, 1210 (Ill. App. Ct. 1994).

up G/B marketing to serve as Apple representative.[32] The court pointed out that individuals who control corporations owe them and their shareholders a fiduciary duty and said:

> Gust and Bakal, as fiduciaries, could not place themselves "in a position where their own individual interests might interfere with the performance of their duties to their corporation" and could not use their positions for their own personal gain . . . . Also, they were governed by the "the [sic] corporate opportunity doctrine, [which] prohibits a corporation's fiduciary from taking advantage of business opportunities which are considered as 'belonging' to the corporation . . . . Gust and Bakal, as the directors and fiduciaries of Markal, "have the burden of establishing the fairness and propriety of the[ir] transactions."[33]

The court concluded that Gust and Bakal had breached their fiduciary duties to the corporation and the complaining shareholder because they failed to offer the Apple opportunity to Markal and because of the use of Markal assets to benefit G/B and another corporation they formed to handle Apple sales. The court indicated that the use of assets of Markal to develop and support G/B prevented Gust and Bakal from arguing that the Apple opportunity was unavailable to Markal.[34] The damages awarded against Gust and Bakal were serious ones, including a forced buy out of Levy's shares for $499,999, forfeiture of the salary and other benefits paid to Gust and Bakal in the amount of $1,699,118, direct recovery of a portion of compensatory damages of $53,131 by Levy, and punitive damages recovered by Levy in the amount of three million dollars.[35]

Restatement of Agency rules are framed to apply to employees and agents generally. In the field of corporate law, special rules may be used to deal with certain corporate officials, that is, corporate directors and certain officers. For example, the American Law Institute "Principles of Corporate Governance" would use normal agency rules for corporate agents other than senior executives and special rules for directors and senior executives.[36] Overall, the ALI rules "reflect the underlying obligation" of a director or senior executive who has a self interest in a matter affecting the corporation

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32. *Id.* at 1210-11.
33. *Id.* at 1214 (first alteration added) (citations omitted).
34. *Id.* at 1216-17.
35. *Id.* at 1226.
36. AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, pt. V at 200 (1994).

"to act fairly toward the corporation and its shareholders."[37] Special ALI rules deal with situations involving conflict of interest, compensation to directors or senior executives, the use by them of corporate property, material non-public corporate information, or corporate position, the taking of corporate opportunities by directors or senior executives, and directors and senior executives competing with the corporation. Thus, if a director or senior executive enters into a contract to sell real estate to her own corporation, there would be special provisions applicable to the transaction. Similarly, if a director or senior executive is offered an opportunity which she is supposed to pass on to the corporation, such as the opportunity to acquire real estate, she is obligated to give the corporation a crack at the opportunity in preference to herself.[38]

Still another way in which legal rules may be invoked to discourage business employee or agent disloyalty is the ability of an employer or principal to discharge, remove or otherwise discipline persons who have been disloyal. In some cases, these remedies would arise under breach of contract theories. Where employees are covered by collective bargaining agreements, there are often provisions which preclude discharge or discipline except for "good cause" or "just cause" or offer other possible protection to employees. Absent the protection of an agreement, employment manual or employment policies, employees are often subject to discharge at will by the employer, and disloyal employees may well lose out even if there are protective provisions such as those requiring "good cause."

Still another way that the law deals with the misbehavior of employees and other agents is through criminal penalties. Some of the misbehavior may fall into easily recognized criminal categories like embezzlement or theft. There has also been a trend allowing the prosecution of breaches of fiduciary duty by employees under federal mail and wire fraud statutes. The mail and wire fraud statutes have been held to "reach any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises."[39] In *Carpenter v. United States*, the Supreme Court considered the prosecution of a Wall Street Journal reporter who wrote columns for the newspaper.[40] It was found by the District Court that the reporter had undertaken "not to reveal prepublication information about his column . . . . [I]n violation of his duty he passed along to co-conspirators confidential information belonging to the Journal, pursuant to an ongoing scheme to share profits from trading in anticipation of the column's impact on the

37. *Id.* at 199.
38. *Id.* §§ 5.02-5.06.
39. Carpenter v. United States, 484 U.S. 19 (1987).
40. *Id.*

stock market."[41] The Supreme Court took the position that "[t]he Journal's business information that it intended to be kept confidential was its property; the declaration to that effect in the employee manual merely removed any doubts on that score and made the finding of specific intent to defraud that much easier."[42] The Court held that the use of wires and mail to print and send the Journal to its customers satisfied the legal requirement that those mediums be used to execute the scheme.[43]

Congress has also passed legislation defining a scheme or artifice to defraud as including a "scheme or artifice to deprive another of the intangible right of honest services."[44] Professor Michael Dooley in his casebook, *Fundamentals of Corporation Law*, has pointed to the possible expansive use of the mail and wire fraud criminal statutes where there is alleged employee misbehavior, such as in the corporate opportunity situation or employee use of information such as customer lists or know-how.[45] The potential criminalization of such conduct may be somewhat unfair in cases where genuine disputes exist over whether fiduciary misbehavior has in fact occurred. It should be noted that mail and wire fraud violations may also lead to prosecutions under the well known RICO statute.[46]

It is safe to say that there are plenty of legal rules to prohibit or inhibit bad behavior. Yet the Report discussed earlier in this lecture indicates such behavior continues on and on in a significant manner. How can that be explained? First, some do not fear the law enough to resist temptation — they are willing to take risks and may believe they won't get caught. Second, some may be ignorant of the law and not realize that their behavior has entered a zone of possible violation of law. Recall in the Ethics Resource Center survey, referred to earlier in this lecture, it was pointed out that overall those surveyed appeared to lack knowledge and understanding of key areas of business law. Third, some may lack knowledge and understanding of or respect for ethics and morality which might prevent them from committing certain crimes and violating the law. Again, in the survey just referred to, overall the respondents appeared to lack knowledge and understanding of key areas of business ethics. Fourth, ignorance of law and ethics or condonation of misbehavior may create an environment in which employee disloyalty and illegal activity flourish.

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41. *Id.* at 27
42. *Id.*
43. *Id.* at 28.
44. 18 U.S.C. § 1346 (1994).
45. MICHAEL P. DOOLEY, FUNDAMENTALS OF CORPORATION LAW 785 (1995).
46. 18 U.S.C. §§ 1961-1968 (1994).

What can be done to reduce employee misbehavior? Businesses have a real incentive to reduce certain illegal misbehavior which may lead to criminal punishment of the businesses themselves. Under the Federal Sentencing Guidelines, there are strong incentives to establish programs to reduce the prospect of criminal conduct by employees and other agents of the corporation so that fines against the corporation can be reduced. There are strong incentives to promote compliance with the law and significant corporate policies. The Corporate Director's Guidebook, compiled by the ABA, Section of Business Law, Committee on Corporate Laws, states as follows:

> Most large, publicly owned corporations have adopted codes of conduct expressing principles of business ethics, legal compliance, and other matters relating to business conduct. Subjects commonly addressed by such codes are legal compliance (antitrust laws and policies, Foreign Corrupt Practices Act of 1977, and insider trading, to name a few), conflicts of interest, corporate opportunities, gifts from business associates, misuse of confidential information, and political contributions. The board of directors should be concerned that the corporation have such a code of conduct, that the code is widely circulated to appropriate employees, that adherence to the code is enforced, that the corporation maintain procedures for monitoring and enforcing compliance, and that the support of the CEO and the board is clearly evidenced.[47]

In the Cary and Eisenberg casebook used in our Business Organizations class, the point is made that if a corporation violates the law, "the fact that it had an 'effective compliance program' drastically lowers its fine and allows the corporation to avoid probation."[48] Our casebook indicates that the business must: "[e]stablish standards and procedures, reasonably capable of reducing the prospect of criminal conduct, to be followed by employees and other agents of the corporation"; assign appropriate persons to oversee compliance; select the overseers carefully; effectively communicate with employees and agents through training programs or dissemination of written information; use monitoring and auditing systems to detect criminal conduct and systems to encourage reporting by other employees and agents of improper conduct without fear of retribution; enforce standards to achieve compliance through disciplinary mechanisms and respond appropriately if offenses are found and to prevent additional offenses.[49] There must be *appropriate educa-*

47. AMERICAN BAR ASSOCIATION, SECTION OF BUSINESS LAW, CORPORATE DIRECTOR'S GUIDEBOOK - 1994 EDITION, 49 BUS. LAW. 1243, 1267 (1994).

48. WILLIAM L. CARY AND MELVIN ARON EISENBERG, CASES AND MATERIALS ON CORPORATIONS 583 (7th ed. 1995).

49. *Id.* at 583-84 (citing U.S. SENTENCING GUIDELINES MANUAL § 8A 1.2,

tion, detection and enforcement systems if companies are to reduce employee misbehavior. In addition, company officials should set a good example of proper behavior for other employees, and they should not ask employees to behave in ways which are inappropriate. They should avoid perception of the company as promoting an unethical culture that condones or tolerates employee misbehavior almost as a fringe benefit. Spurred on by the Federal Sentencing Guidelines and by other incentives to reduce employee illegal or unethical behavior, companies should promote a law-abiding environment in which employees work.

It is inevitable perhaps that a study of this type is distressing and leads to pessimism, but it need not. We know that we human beings are imperfect, that we make mistakes, but that we are also able to improve ourselves. The hope, as with so many other things, lies primarily with a good educational system — education in law and in ethics, so that people will be sensitized in areas where they may be vulnerable to committing wrongs and so that they will understand the need for avoiding such behavior. American business can do a great deal to help restore proper behavior by employees at the workplace and hopefully in their other roles in society. As has been indicated, there are good business incentives for doing so. In this era when there is so much concern about values and so much talk of family values which are important, learning values, in business can have a very positive impact on society in general. Honesty, for example, which is a simple value to be promoted, is one which applies across the board in our relationships in business and with each other. Honesty is right, and as the great American sage Benjamin Franklin noted — it is the best policy.

cmt.N.3(K)(1988).