

THE FORUM

Case Vignette: Inside Information. A research team at International Genetic Products (IGP) has been working quietly on a new product with significant market potential. Initial laboratory trials yielded significantly favorable results. A careful replication has now confirmed these findings, and both studies were described in a manuscript that has been accepted for publication in the prestigious journal *Genome Today*. The article will appear in print next month, and the staff at IGP are certain that it will attract considerable favorable attention to their company. The publication requirements of *Genome Today* included a pledge from all authors not to leak information on the study prior to the publication date press releases normally issued by the journal.

Meanwhile, Dr. Phil T. Lucre, who was used as a reviewer of the manuscript by the editor of *Genome Today*, has learned that the article is to be published by routine editorial feedback. Based on this "inside information," Dr. Lucre plans to make a substantial investment in IGP stock before the embargo on information in the forthcoming article is lifted. He reasons that, although he may indeed have access to special information, he should not be limited in his investment options simply because he happened to be assigned to review this manuscript.

What ethical issues are raised by Dr. Lucre's plans? Can/should journal editors take any steps to preclude problems of this sort from arising?

Discussants. We have three outstanding discussants, arranged in alphabetical order. Frederick R. Kobrick studied finance at Harvard's Graduate School of Business (MBA, 1971) in preparation for a career managing corporate pension funds and a public mutual fund, the MetLife State Street Capital Appreciation Fund. He relishes, at the heart of stockpicking, the analysis of corporate senior managers and their behavior patterns. Marc A. Rodwin is Associate Professor of Law and Public Policy at Indiana University-Bloomington's School of Public and Environmental Affairs. Previously, he practiced health law, was a health policy consultant, and taught in the legal studies program at Brandeis University and the community health program at Tufts University. His book *Medicine, Money and Morals: Physicians' Conflicts of Interest* was published by Oxford University press in May 1993. A member of our editorial board, Gary R. VandenBos received his doctorate in clinical psychology from the University of Detroit in 1973. He has served as a community mental health center director (Howell, Michigan), psychological consultant to the courts, and speaks regularly on ethics in scholarly publishing. He is co-author of *Professional Liability*

and Risk Management, published by the American Psychological Association (APA) in 1990. He currently serves as Executive Director for Communications at the APA, which includes oversight of the APA book and journal programs. The views expressed in the commentary are his own and do not necessarily reflect the position of the APA Office of Ethics or official APA policy.

Frederick R. Kobrick

The scope of this comment on Dr. Lucre's behavior regarding his intention to use "inside information" is primarily limited to ethical issues. Nevertheless, a brief comment on legalities is of some interest for two reasons. First, breaking a law is unethical, as it deprives someone else of rights and benefits the law was designed to protect. In this case, it is the right to equal access to information, and the benefit is the right to use that information for financial purposes. In addition to the protection of the individual, the entire capital formation process (and thus, society) benefits because of the resultant trust in the system and its protections. Most countries do not enjoy this trust in their process, and they pay a national price.

The second issue on legalities is an important reference, or benchmark, to which we can refer as we proceed through this comment and pass ethical judgment on the behavior and statements of Dr. Lucre. Consider, for example, a securities analyst who has the job of visiting and interviewing corporate executives in order to put together an analysis of a company's prospects. The analyst does this so that his or her investment company can make a decision as to whether or not to invest. If, in the interviewing process, the analyst realizes that an executive has made an important slip and mentioned something that constitutes inside information (not known to the public, the public has no access to this information, and it would clearly have a material effect on the stock price), he or she is in a special circumstance. The analyst is required by law, and by the industry code of ethics, either to remain silent (not using the information for personal or corporate benefit and not passing it on to someone else) or to make this information public before using it (usually by releasing it to one of the major news tapes such as the Dow Jones).

In addition to the fact that inside information gives one an unfair advantage

over other potential buyers and erodes the all-sacred trust in the process, it also constitutes a potential fraud. When a material impact on a stock price is *expected*, sellers wait for a higher price. Thus, the inside information user defrauds the seller by getting him or her to sell at the lower price when that seller does not have the same information. Fraud is unethical, pure and simple, because even the most sophisticated mechanisms do not belie the fact that we as a society believe morally, legally, often religiously, and ethically, that taking something from another without due process or agreement is wrong.

There are some rather interesting connections between legal and nonlegal ethical issues, also. In the example presented in the case vignette, it is a good assumption that the author of the article is a company employee. All company employees are legally prohibited from using this type of information before it is publicly released. It is also a good assumption that Dr. Lucre and others associated with this respected publication are allowed access to articles and are performing this type of job because they are trusted. Dr. Lucre was not simply assigned to an article of this nature. Clearly it is understood that a prestigious journal has impact on the scientific community, as well as the financial markets, which respond instantly to new information that is highly regarded by scientists. It is a matter of personal ethical behavior when one consciously accepts a position where integrity and trust are important and then considers a breach of trust for personal gain.

The pledge requirement and information embargo are a clear message to all that the journal wants to disseminate information to everyone at the same time. A moral person would honor that intention not only for the protection of the public and the source of the information but also to preserve the integrity of the journal and its various contributors.

Trading on inside information would raise questions about Lucre's objectivity. One unethical deed for gain can lead to another, and who is to say that Lucre might not slant a review to benefit himself or others. This would next reflect on the journal itself as to (a) who they employ, (b) whether it is important for the journal to enforce standards of ethical conduct for its own preservation of reputation, and (c) whether or not it can preserve journalistic objectivity. The next step in determining if a journal has bias in reviewing articles is to question the selection of articles for publication. For instance, one would lose scientific standing if the readers felt that there was a biased process to select articles for publication more on the basis of commercial or financial impact than on scientific importance. This would result in authors turning to other journals that had preserved their integrity. Preservation of that integrity is only ensured if the journal is widely regarded as a pure source of knowledge and is not suspected of being a vehicle to enrich some unfairly, that is, at the expense of others.

Thus, the journal should, in the interests of contributors, readers, the general public, and its own preservation with integrity, take major steps to pre-

clude any breaches of trust. Signed contracts with financial penalties as well as threats of legal action and professional citations for misconduct would be most appropriate.

Finally, the position one holds has no bearing on everyday honesty or on maintaining high moral values. There are always those that will cheat, steal, or lie. There is no such thing as separate business ethics, or medical ethics, or journalistic ethics—There is simply the question of *ethics* (i.e., the moral values of the individual, the group, and the society).

This case also relates to how society views the ethics of the individual and the larger group. Reference was made earlier to a “national price” for lack of trust in the marketplace. Acceptance of unethical individual behavior can lead to more than the deterioration of a prestigious journal. Acceptance of widespread unethical dealings in the Japanese stock market by various groups in the government, business community, and elsewhere, led to a widespread erosion of trust and confidence in the market. This was a huge contributing factor, along with financial and real estate problems, to the collapse of the Japanese market and its injury to the economy. Thus, how we all view the behavior of the individual will help set the tone for what kind of society we wish to be and even for what kind of economy we wish to have.

Marc A. Rodwin

As a result of reviewing a manuscript for a professional journal—an activity traditionally undertaken primarily as a public service—Dr. Lucre has received two kinds of “insider information.” He has learned from medical researchers working for IGP that a new product has been shown to be effective and is likely to make IGP stock profitable, and he has learned from the journal *Genome Today* that in 1 month it will publish the manuscript he reviewed that discusses these developments. Publication of the article in a well-regarded peer-review journal will add prestige and visibility to IGP and its product.

By longstanding tradition, peer reviewers are not supposed to use information obtained from manuscripts they assess for their private benefit (e.g., to publish or present the information prior to the article’s publication or to quote or disseminate the information without the author’s permission). The roles

reviewers perform are similar to those of other professionals the law has long held to fiduciary law standards, that is, high standards of accountability to ensure that they promote the interests of designated individuals or groups and do not abuse the special powers, discretion, or information they have for this purpose (Rodwin, 1993).

Lucre has been entrusted with confidential information and has obligations for scientific integrity to *Genome Today*, to the authors of the article and IGP, and to the public at large. In keeping with traditions of peer review, it may be reasonable to expect that reviewers will not use confidential information for their pecuniary gain if doing so violates any fiduciary-like obligations. But first one must ask: (a) Would Dr. Lucre's use of the insider information interfere with his performing his role as a peer reviewer? (b) What harm would there be in allowing Dr. Lucre's investment based on insider information? and (c) What social or personal losses would ensue from imposing such restrictions on Dr. Lucre?

ARGUMENT FOR ALLOWING DR. LUCRE TO INVEST

There are several reasons why society might not be concerned with Dr. Lucre's investment. Lucre's purchase of stock does not necessarily cause harm to any individual. If this is so, perhaps society should be indifferent to whether or not he makes a profit. In addition, although Lucre has inside information, he himself takes some risk by investing funds. His information may be wrong, or the market may not respond as he expects. Lucre's investment does not create significant market disparities. Small investors cannot compete on an equal footing with professional or full-time investors who have special information and experience. To be concerned about Dr. Lucre's advantage due to insider information may be to worry about minor inequities. Nevertheless, there are other considerations and arguments that suggest intervention may be appropriate.

THREATS TO PEER REVIEW AND THE INTEGRITY OF SCIENCE

Peer reviewers with a financial stake in recommending an article's publication or rejection have their neutrality compromised. Although they may still perform their functions well, such private financial entanglement is inconsistent with their role as reviewers. If people such as Lucre look forward to potential profits from purchasing stock prior to an article's publication, then their assessment of the article may be skewed. It may not happen often, but they might urge publication to take advantage of their insider information. Or they

might urge rejection of an article if they own stock in a firm that would be at a competitive disadvantage as a result of the article's publication. Such bias—or even potential bias—compromises the integrity of science and the journal *Genome Today*.

HARM TO OTHERS

IGP will not be harmed by Lucre's investment, but other individuals and investors might be. If Lucre purchases stock directly from an individual, the seller loses the opportunity to profit from a higher priced sale later. If Lucre purchases the stock through a broker dealer in the over-the-counter market, it may be hard to identify the individuals who are directly affected. Of course, the seller might have sold the stock to another purchaser at the same price. Nonetheless, insider trading can harm the integrity of the market. Investors are less likely to purchase and sell stock if they believe profits are skewed unfairly to insiders. The medical researchers at IGP also might be disadvantaged. If they have refrained from purchasing stock while assessing the product to maintain their neutrality—as some independent medical researchers now do—they can claim to have lost opportunities that Lucre unfairly appropriated (Healy et al., 1989).

SOCIAL LOSS FROM IMPOSING FIDUCIARY OBLIGATIONS

Would restrictions on Lucre's investing prior to publication have undesirable social effects? It is hard to see how it could hurt *Genome Today*, IGP, the public, the institution of science, the stock market, or other investors. Restricting the investments of peer reviewers would guard the integrity of science and could help create a fairer market. Lucre, however, would forgo potential earnings. But what claim does Lucre have to such profits?

Lucre did not bear the *full* risk of the investment as other market purchasers do. His profits were based on insider information unfairly appropriated in his capacity as a peer reviewer, not an independent effort or analysis of the market. In short, such profits would represent a windfall to Lucre who has no special claim to be able to make such investments.

Society may well be better off limiting Lucre's use of insider information. However, any standards restricting Dr. Lucre's investing in IGP should apply only to investments arising directly from information he received in his capacity as a peer reviewer. Any investments he may have had in IGP prior to reviewing the article, or any of his passive investments in IGP through a

mutual fund or pension plan, should be unaffected, and Lucre should still be allowed to invest in IGP after *Genome Today* publishes the article.

WHAT CAN BE DONE? INDIVIDUAL, ORGANIZATIONAL, AND SOCIAL ETHICS

Journal editors can develop conflict-of-interest policies for reviewers, staff, authors, and any others who are privy to information about articles they accept prior to publication. They could require that these individuals not invest in any firms making products discussed in an article pending publication or rejection of the article. Some medical care researchers have already voluntarily adopted such a standard: They have pledged not to invest in firms whose products they examine during the course of evaluation through publication (Healy et al., 1989). Several medical journals have conflict-of-interest policies for authors (see Lundberg & Flanagan, 1989; Relman, 1984).

If *Genome Today* required reviewers, authors, and others to make such a pledge, this might discourage such activity. However, journals cannot effectively monitor the investments of affiliated individuals to ensure compliance, and their range of sanctions is limited. To deter violations of their conflict-of-interest policies, journals might sever ties or publish the names of violators. Both of these sanctions would be difficult to implement and may not even produce the effect desired, but it would set a norm that judges and others could turn to as evidence of professional standards.

There are, therefore, strong reasons for addressing such issues through legal institutions in addition to voluntary ethical approaches. Legal institutions have the potential to monitor behavior for misconduct, impose significant penalties, and they can also announce societal norms precisely, definitively, and publicly and thereby have more of an effect on conduct than on ethical standards. In pluralistic societies such as ours, ethical standards (when divorced from law) rely largely on individual conscience and beliefs, which can vary from person to person. Laws, in contrast, can set standards applicable to all.

LEGAL STANDARDS

Some relevant legal standards already exist. If the stock in IGP is traded on national markets, the Securities and Exchange Act of 1934, the Insider Trading Sanctions Act of 1984, and other securities laws govern the activities of traders. Individuals with inside information are prohibited from using that information to make trades prior to the information being publicly disclosed. These laws

have been interpreted to apply to company officials, investment advisers, lawyers, printers, journalists, and most recently to doctors.

In *S.E.C. v. Willis* (1991/1992), the Securities and Exchange Commission (SEC) brought suit against a psychiatrist, Dr. Willis, alleging that in the course of treating Joan Weill, the wife of the CEO of Shearson Loeb Rhoades, Dr. Willis received confidential information about Shearson's imminent merger with American Express (*S.E.C. v. Willis*, 1991/1992). The SEC claimed that Dr. Willis disseminated this information to others and used it himself to purchase Shearson's stock, thereby breaching fiduciary duties to his patient and earning profits from insider information. The SEC brought suit to reclaim profits and impose fines. To settle the suit, Dr. Willis pleaded guilty to criminal charges and consented to final SEC orders against him.

There is a distinct risk that Dr. Lucre could be convicted for insider trading if a court finds he had a fiduciary duty to *Genome Today* or the authors of the article he reviewed. Courts might find that journal policies prohibiting authors from disseminating information prior to publication implied a fiduciary obligation on peer reviewers to follow a similar rule and not use the information for their private benefit. A journal policy requiring reviewers and others privy to information about manuscripts not to use that information for financial gain would be further evidence that a court might rely on to find a legal obligation.

One might question the wisdom of SEC rules prohibiting insider trading in such cases. Certainly the case for prohibition is stronger for individuals who are able to manipulate the market (e.g., company insiders who can affect the policies or performance of the company). Lucre's trading cannot do that. It might be argued, however, that investors like Lucre who purchase shares help the market incorporate information about the value of stock and that he performs a useful social function by purchasing shares. Be that as it may, in general, existing law prohibits insider trading, and there is certainly reason for concern when peer reviewers have financial conflicts of interest.

IMPLICATIONS

Dr. Lucre's case raises the issue of physicians' conflicts of interest more generally. Physicians face many conflicts of interest in caring for patients, for example, when they refer patients to medical facilities in which they invest, when they participate in HMO risk-sharing plans, when they receive gifts from firms to promote their products, and when they are offered a range of other financial benefits that may alter the clinical choices they make and the advice they give to patients (Rodwin, 1993). These can bias their clinical judgment and advice. Some of these conflicts are subject to federal statutes for doctors treating Medicare and Medicaid patients; others are subject to certain state laws. Yet

currently doctors are held to much lower legal standards with respect to financial conflicts of interest than other professionals such as lawyers, public servants, and certain financial professionals (Rodwin, 1993). Society, however, has yet to see a need to legislate standards governing their financial conflicts of interest. But it is unlikely that society will treat doctors differently from other professional groups in the future, especially if cases like that of Dr. Lucre come to the public's attention.

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Gary R. VandenBos

The structural elements of the *Genome Today*–Lucre situation are not dissimilar from situations in which a research psychologist or a practicing psychologist might find herself or himself. What is different, however, are the external trappings of the situation under which private or inside information is obtained and the ways in which it is most likely to contribute to personal gain. Let me spell out two structurally parallel situations that would be reasonably common in or otherwise familiar to the field of psychology.

Professor Bill D. Vieta is a member of a grant review panel for the National Science Foundation (NSF). Four months earlier, the NSF had announced a special funding initiative for cognitive research exploring patterns of interpersonal information processing in interaction with strangers and the ways in which differing cognitive styles lead to violent or nonviolent behavioral outcomes. Professor Vieta did not submit a grant proposal for the first round of reviews, although he is a leading cognitive researcher (and has been invited to serve on the review panel). One submitted research proposal included one brilliant methodological innovation with the potential of providing a paradigm for such basic research for the next 3 to 5 years, but the bulk of the experimental design was fatally flawed. The proposal received a poor priority score and was not funded. A month later, Professor Vieta began drafting his own NSF grant proposal for the next round of application reviews. He applied his methodological expertise to create a sound methodological context in which to utilize a modified version of the methodological innovation in the failed proposal. Both the original researcher and Professor Vieta submitted grant applications during the second round, but Professor Vieta did not participate in the second proposal review process. Professor Vieta got an outstanding priority score, and his proposal got funded. The priority score for the first researcher's proposal improved over that of the first round, but it was still not good enough to get funding. Professor Vieta reasoned that, although he did in fact have access to special information by virtue of his earlier involvement in the review process, he should not be limited in his scholarly research options simply because he happened to be assigned to review the earlier grant; after all, he made numerous methodological enhancements in his own proposal (which in fact only drew on one element of the earlier grant proposal).

Dr. Mame Famos is seeing a depressed woman in therapy who is struggling with the aftermath of a turbulent recent divorce that has left her self-esteem shattered. The patient works as a secretary in the Property Assessment Office for the city, and many of her close friends also work for the city government.

The patient's best friend happens to be a secretary in the office that manages the schedule for the mayor and the city council. In passing in a therapy session, the patient mentions her friend commenting on the mayor feeling excessively stressed. The mayor has become interested in the issue of stress in the workplace, is planning to give a talk to the Chamber of Commerce on this topic in about a month, and plans to appoint a joint government–industry task force to look at the issue and propose local initiatives. Dr. Famos has expertise in stress management, and she writes a “spontaneous” letter to the mayor as a concerned professional and citizen on the topic. In her letter, Dr. Famos briefly discusses the problem and offers four or five ideas about ways in which local initiatives could be helpful. The mayor receives the timely letter, and the mayor incorporates several ideas in the Chamber of Commerce speech. A task force is later formed, and Dr. Famos is appointed to head it. Dr. Famos is frequently a subject of local newspaper, radio, and television coverage in conjunction with task force activities. In part because of the media exposure, she gets elected President of her State Psychological Association. Dr. Famos reasons that, although she did indeed have access to special information, she should not be limited in her professional options simply because of her accidental prior third-party knowledge of the mayor's plans. After all, given her professional reputation, the mayor's staff would have undoubtedly consulted her because of her expertise on stress.

Dr. Lucre, Professor Vieta, and Dr. Famos all had access to inside information because of their professional functioning in specific professional roles and positions. In almost all fields, colleagues respond to Dr. Lucre's situation as, at least, “questionable”—because he directly gained financially as a result of his editorial knowledge. However, self-gain can also occur in nonfinancial ways or via more indirect routes. Although both Professor Vieta and Dr. Famos would obviously gain financially in the examples constructed herein, these examples illustrate familiar ways (to psychologists) in which both research psychologists and professional psychologists might come upon inside information and could possibly gain from it in ways not connected quite as directly to financial gain.

Direct monetary gain is the clearest and most obvious and typical example of self-gain, and money holds special meaning to most Americans. We hold some core values about money—We do not want others gaining “extra money” because of “special opportunities.” We have intense emotional reactions—It is not fair! It is not democratic!

The field of psychology generally views nonpublic information obtained by virtue of one's position as confidential information that should not be disclosed to others. In fact, Section 6.26 of the recently adopted American Psychological Association (APA) Ethics Code states: “Psychologists who review material submitted for publication, grant, or other research proposal review respect the confidentiality of and the proprietary rights in such information of those who submitted it” (APA, 1992, p. 1610).

However, most ethics codes describe principles, desired goals, and hoped-for behavior. Even though they may sound clear and concrete, they require interpretation as well as application to specific examples—as the *Genome Today*–Lucre situation clearly shows. Most professions, in their ethics codes, try to articulate the principles that should guide ethical professional behavior and decision making. However, questions and problems remain. Would Dr. Lucre’s behavior have been questioned if, based on his best guess of a positive impact on the stock price, he had invested a large sum of money but lost it all? On a different level, should an ethics code be expected to prevent all occurrences of professional misconduct as well as detect any and all violations?

There are limits to what professional ethics codes can do, but such codes have tremendous educational value. They help socialize young professionals into ethical self-reflection and behavior, and such professional ethics codes also have enforcement mechanisms. Most professional associations receive complaints of alleged ethical violations, and they investigate them and act on them in the hope that the handling of major and serious violations will serve to further educate the field and help to deter future misconduct by other professionals. By and large, most professional ethics codes are probably helpful inasmuch as the apparent frequency of gross misconduct is relatively small.

It clearly would be helpful if editors mentioned in their request for review letters that submitted manuscripts were confidential documents and that reviewers should not distribute copies of them to others or utilize them for personal gain. Some editors, including some APA editors, utilize such an educative reminder; others do not. Such steps are reasonable and probably would preclude many problems such as those noted before from arising.

A separate issue relates to the extent to which a journal editor (or a professional association) should go to prevent any and all potential ethical violations (or even the appearance of the possibility of a minor violation). What should be spent in time, money, and professional resources to prevent minor ethical violations? Can a behavior be “just a little unethical” any more than one can be “just a little pregnant”? Probably not, but the exact dividing line in any given situation may well be subtle, and its exact placement may be influenced by a myriad of possible factors and variations of circumstances. There is a real cost–benefit issue for any journal or any association. It is probably unrealistic, economically unfeasible, and legally impermissible to monitor every possibility for self-gain resulting from professional positions—let alone totally eliminating the possibility that someone would fantasize or otherwise perceive that someone else was benefiting from a professional position. Nonetheless, reasonable efforts are needed. Educative comments and other efforts by journal editors and ethics codes of professional associations are among these.

A professional code of ethics, and a strong ethical training during graduate study, is probably still the most essential mechanism for preventing and/or handling professional misconduct. In this context, it is essential that newly

emerging situations that present the potential for ethical misconduct must be analyzed, and this analysis must be incorporated in ethical codes and ethical training as appropriate.

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NOTES

This section of the journal features a case vignette that embodies one or more important and complex ethical dilemmas with professional or public policy overtones. Each case is accompanied by two or more independently crafted commentaries of approximately 1,000 words by experts with diverse backgrounds and perspectives. Readers are invited to submit cases and brief follow-up commentaries that raise new and important issues.

Requests for reprints of the Forum section should be sent to the Editor, Gerald P. Koocher, Department of Psychiatry, Children's Hospital, 300 Longwood Avenue, Boston, MA 02115.