Volume 19 Number Three

Real Estate Issues



THE COUNSELORS OF REAL ESTATE (American Society of Real Estate Counselors)

SPECIAL EDITION

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ABOUT THE COUNSELORS OF REAL ESTATE

The Counselors of Real Estate, now in its 40th year, is an international group of high profile professionals including members of prominent real estate, financial, legal and accounting firms as well as leaders of government and academia who provide expert, objective advice on real property and land-related matters.

Membership is selective, extended by invitation only on either a self-initiated or sponsored basis. The organization's **CRE Designation** (the Counselor of Real Estate) is awarded to all members in recognition of superior problem solving ability in various areas of specialization such as litigation support, asset management, workouts, valuation, feasibility studies, acquisitions/dispositions and general analysis.

Networking is the hallmark of The Counselor organization. Throughout the year, educational programs provide Counselors with opportunities, both nationally and locally, to meet with fellow members and professional colleagues to discuss the latest trends affecting commercial real estate. A publications program, highlighted by our award winning professional journal, *Real Estate Issues*, provides a venue for members to showcase their knowledge of such areas as office buildings, retail centers, hotels/motels, real estate counseling, etc.

What is a real estate counselor?

A counselor is a real estate practitioner whose primary business is providing expert, experienced advisory services to clients for agreed-upon fees. Counseling denotes an activity that is, by its nature, relational. The client relies upon the counselor for skilled and objective aid in the client's real estate needs, implying both trust on the part of the client and trustworthiness on the part of the counselor. The counselor typically has acquired a broad range of experience in the real estate field, possesses technical competency in more than one real estate discipline, and places those competencies at the service of the client. While objective in analysis, the counselor directs his efforts toward the client's best interests through the development of particular strategies, evaluating options available to the client,

advocacy of the client's interests, and - where required - execution of strategy on the client's behalf.

Those designated as Counselors of Real Estate (CRE) have been recognized and esteemed by their peers as persons meeting the above definition in an exemplary fashion. They have demonstrated knowledge, experience, integrity and judgment in their real estate expertise. The CRE subscribes to and is bound by The Counselors' Code of Ethics and Standards of Professional Practice and endeavors to generously assist fellow CREs who are performing client services in a spirit of collegiality. Thus, the commitment to the individual client is complemented by a commitment to raise the standard of counseling practice for the industry as a whole.

Users of counseling services

The demand increases for expert counseling in real estate matters worldwide. Through the years, institutions, estates, individuals, corporations and federal, state and local governments have recognized the necessity and value of a Counselor's objectivity in providing advice. These real estate professionals honor the confidentiality and fiduciary responsibility of the client-counselor relationship.

CREs service both domestic and foreign clients. Assignments have been accepted in Africa, Asia, the United Kingdom, the Caribbean, Central and South America, Europe and the Middle East. The Counselor has the benefit of proven knowledge and experience which qualifies him for practical application and proper interpretation of trends affecting real estate. A major player in the technological revolution, the Counselor regularly accesses the most advanced methodologies, techniques and computer-generated evaluation procedures available.

Determinants of compensation

The CRE is compensated by pre-agreed fee or salary for services, rather than by commission or contingent fee. The counseling fee itself is assured and rendered for advice rather than achievement or outcome of the transaction. Overall compensation can be determined by the complexity of the service performed, its value to the client, the time and expense involved, the breadth of the Counselor's knowledge and experience, and the responsibilities assumed. Anyone involved in real estate should consider consulting with a CRE.

For more information on The Counselors of Real Estate, contact The Counselors' office, 430 North Michigan Avenue, Chicago, Illinois 60611; 312.329.8427; fax 312.329.8881.

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BOWEN H. MCCOY, CRE NAMED 1994 RECIPIENT OF THE BALLARD AWARD



Bowen H. "Buzz" McCoy, CRE

B owen H. "Buzz" McCoy, CRE, president of Buzz McCoy Associates, Inc., Los Angeles, has received the 1994 William S. Ballard Award for his two articles, "The Creative Destruction of Real Estate Capital Markets," published in Real Estate Issues' August edition and "On Business Ethics," in the December journal. The award recognizes the author whose work best exemplifies the high standards of content maintained in Real Estate Issues, published by The Counselors of Real Estate.

His article "The Creative Destruction of Real Estate Capital Markets" discusses the long-wave structural changes made in the real estate financial markets resulting from the destructive forces prevalent during the last four years. With the development of new market forms, the article cites real estate funding as it relates to commercial banks, insurance companies and Wall Street. "On Business Ethics" by McCoy presents six types of ethical systems along with a five-step ethical decision-making process intended to raise the awareness of business behavior and increase the importance of ethical values in the workplace.

McCoy served for nearly 30 years as an investment banker with Morgan Stanley & Co., Inc., where he was involved in corporate and international finance and mergers and real estate finance and investment. He presently is a real estate and business counselor with his Los Angeles firm, Buzz McCoy Associates, Inc.

Funding for the William S. Ballard Award, which carries an honorarium of \$500, is provided by the generous contribution of the William S. Ballard Scholarship Fund in memory of the late Ballard, a former member of The Counselors of Real Estate.

Articles in consideration for the 1995 competition must be submitted to *Real Estate Issues* by September 15.

REAL **ESTATE**

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BASIC COMMONALITY

ow can this be—a Special Edition of REAL ESTATE ISSUES devoted to ethics? Does this imply that we believe ethics are lacking in real estate? Or possibly does it indicate that as Counselors of Real Estate (CRE) we believe ourselves to be ethical and that other real estate consultants or practitioners are not ethical? The answer, of course, to these questions is no. We believe that most real estate practitioners are highly ethical and as a group are probably no more or less ethical than other business and professional groups. We also know, as Counselors of Real Estate, that we are particularly committed to the highest possible ethical standards. And we believe we have a role to play, both in the counseling profession and in the larger realm of real estate, to educate ourselves and other real estate professionals on ethical standards and issues.

Each profession develops its rules based on experiences specific to that profession. Typically, members of the profession must pass examinations on these rules or demonstrate high ethical standards through a distinguished career. Many professions or professional organizations have written rules of ethics, although a few do not. Nevertheless, even in those that do not, behavior detrimental to the profession can lead to a member's ouster from the profession and/or organization.

The real nitty gritty of ethics, however, often occurs beyond the rules. What happens when a CRE becomes involved in an assignment that creates a conflict of interest that was not foreseen? What should a Counselor do if he accepts an assignment for which he believes he is qualified, but later finds he is not? And should a Counselor accept an assignment in a foreign country if he does not know the country's language or culture. These are but a sampling of the types of issues that a set of rules, or code, may not cover. They can usually be resolved only by the application of principles in a context of wide experience by other members of the profession.

This Special Edition presents a variety of articles on topics ranging from the theory and historical development of ethics to the resolution of difficult, real-world ethical dilemmas. Individually, and as a group, the articles remind us of the most basic commonality we have as Counselors of Real Estate—our commitment to and our dependency upon a strict adherence to the highest standards of ethical conduct.

Halbert C. Smith, CRE

Editor in chief

THE PRESIDENT SPEAKS

ETHICS IS MUCH MORE THAN JUST A WORD

This edition of *REAL ESTATE ISSUES* is devoted to the subject of "Ethics," a topic of paramount importance. "Ethics" is defined by *The Random House Dictionary of the English Language* as "a system of moral principles—the rules of conduct recognized in respect to a particular class of human actions or a particular group, culture, etc."

Ethics relates to values that deal with conduct. One associates such words as rightness or wrongness, goodness or badness, motives and even honesty. We as real estate professionals publish our Codes of Ethics and/or Standards of Practice in our directories of membership, attach or make reference to them in our reports and use as proof of our integrity as an expert witness, the fact that we are bound by a recognized level of professionalism. Yet do we *really* live up to the standards we set? If this journal does nothing more than make us reexamine our careers, our professions and ourselves, it will have accomplished a timely and wonderful mission.

How often does a broker take "poetic license" when advertising a listing for sale or lease? Have you ever heard of real estate tax litigation where the plaintiff's appraisal expert finds a higher value than that of the defendant? Is the counselor who advocates in favor of his client conforming to the true definition of ethics and moral conduct? Does the financial statement circulated to sell an investment property conform to the "code" when it omits management, stabilizes repairs and overestimates potential income?

It is not enough to say and print the words. To be truly ethical one must perform the deeds. Hopefully the articles that follow in this printing of *Issues* will be an inspiration to every reader to improve our conduct, gain further respect from those who engage our services and, above all, allow our human actions to make us feel better within.

Kantle Hannock &

Franklin Hannoch, Jr., CRE

1994 President

The Counselors of Real Estate

REAL ESTATE ISSUES

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On Business Ethics

Bowen H. "Buzz" McCoy, CRE

The author provides a summary of his experiences over the past decade in teaching ethics at graduate business schools. In the article he addresses "Why teach business ethics?," "How to teach business ethics," and "Reasonable objectives for a course in business ethics." The material is intended to be provocative and to leave the reader thinking about his own professional stand on the topic. The article also is intended to serve as basic reading for the High Level Conference on "The Ethics of Organizations - An Exploration of the Shared Responsibility of Individuals and Their Institutions." Buzz McCoy is serving as chairman. The conference is on August 4-6, 1995, at the Resort at Squaw Creek in Olympic Valley (Lake Tahoe), California. Contact The Counselors for more information.

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Rocky Tarantello, CRE

Counselors are increasingly called upon to serve as expert witnesses in a variety of litigation contexts. An ethical dilemma develops when the counselor's duty to the client may seem to conflict with duty to the court. The expert versus advocate question is explored, basic principles of ethical standards posited and recommendations for resolving the ethical dilemma are presented.

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Richard D. Simmons, Sr., CRE

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John K. Rutledge, CRE

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Charles B. Akerson, CRE

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Lawrence A. Kell, CRE

In a diverse economy where providing real estate service stretches across broad geographical as well as functional boundaries, reliance on strict codes of ethics provides a measure of safe haven. Although subjective in nature, codes of ethics and standards of professional practice are the beacons for professional real estate practioners and clients in a rapidly changing global economy.

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John R. White, CRE

The Counselors of Real Estate should be the leader in teaching ethics to its members on a mandatory, periodic basis. A code of ethics or standards of professional practice are not sufficient to assure ethical conduct, since practical application is not identifiable from lofty statements relating to honor, integrity, trust and morality. The author suggests utilizing the case study approach and actual ethical dilemmas to effectively teach business people about ethics.

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Fair Play or Fair Game

A. C. Schwethelm, CRE

In this article, the author provides his personal experiences to illustrate how to resolve ethical questions. As real estate transactions become more complex, so does the probability of having to deal with conflicting interests in gray-area situations. Today's real estate decisions are not only more difficult, but also require that the client has absolute confidence in the real estate professional he hires to protect the integrity of ethical situations.

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Frank J. Parker, CRE

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LIPPINCOTT RECEIVES 1994 LANDAUER AWARD



J. Daryl Lippincott, CRE

he Counselors of Real Estate has presented J. Daryl Lippincott, CRE, with the 1994 James D. Landauer Award. The award is given annually, when appropriate, to a real estate professional who is recognized for having furthered the ideals of the organization and its CRE Designation (Counselor of Real Estate). Lippincott received the award in Anaheim during The Counselors' Annual Convention.

Lippincott is credited with many notable contributions as a real estate counselor in national and international assignments. He serves as a director and secretary treasurer of the Eastern European Real Property Foundation, founded by the National Association of Realtors in 1992. Funded by the U.S. Agency for International Development, the foundation was formed to assist in the development of an organized and ethical real estate profession committed to the protection of home ownership, the establishment and preservation of private property and the creation of efficient and equitable real estate markets. The foundation supports a legal and regulatory environment in the Central and Eastern European countries of Poland, Hungary, Czech Republic, Slovakia, Bulgaria, Ukraine and Russia.

According to Alfred P. Van Huyck, executive vice president of the Eastern European Real Property Foundation, Lippincott provides tireless efforts, an emotional commitment and his knowledge of real estate practices. He is considered a "patriarch" in the countries where he has worked, particularly in Poland and Bulgaria.

Currently an independent real estate counselor in Phoenix, Lippincott served as senior vice president of Coldwell Banker and Company—Commercial Real Estate Services, until his retirement in 1984. He is a former president of The Counselors of Real Estate and was elected an Honorary Member of The Royal Institution of Chartered Surveyors, London.

The Landauer Award is named for the late James D. Landauer, CRE, who played a key role in the establishment of The Counselor organization and the preeminence of the real estate counseling profession. Other recipients have included CREs Roland Rodrock Randall, James E. Gibbons, Roy P. Drachman, John R. White, Boyd T. Barnard, George M. Lovejoy, Jr., Daniel Rose and Jared Shlaes.

ON BUSINESS ETHICS*

by Bowen H. "Buzz" McCoy, CRE

*The Counselors of Real Estate is presenting its 1995 High Level Conference on "The Ethics of Organizations—An Exploration of the Shared Responsibility of Individuals and Their Institutions." Buzz McCoy, CRE, is serving as chairman. The conference, August 4-6, 1995, at the Resort at Squaw Creek in Olympic Valley (Lake Tahoe), California, will explore the question: What individual responsibility do we have for our political, social and corporate institutions? For more information contact The Counselors at (312) 329-8427.

I have been concerned with business ethics ever since I was initially entrusted with the responsibility of managing the careers of others some 20 years ago. The desire to become more aware of the ethical underpinnings of business behavior has led me on a lengthy tour of business literature and the social sciences of organizational behavior as well as moral philosophy and theology. As a result, I have found myself a teacher of ethics in graduate business schools, in churches and even in a seminary. The anecdotal behavior patterns over the past years in my chosen profession, investment banking, have added to the drama of my personal quest.

Many argue that ethics cannot be taught, especially to young adults whose values already have been formed. I shall discuss this issue in some detail below, but one might even cede this premise and still find a valuable purpose in teaching ethics. I attempt to blunt the issue by stating my purpose in an ethics class is to take a very brief tour through ethical decision making. What are the issues? Who are the stakeholders? If one can merely raise the group's ethical awareness and imagination, a great deal has been accomplished.

When I teach a 90-minute ethics orientation class to incoming MBA candidates at a major graduate school of business, I suggest they spend an extra five minutes on each case they are assigned and jot down any ethical issues they can see. After two years and hundreds of cases, their ethical imagination can be sharpened immeasurably by this process.

I caution the students not to raise all these issues in the classroom. No one wishes to be thought of as an obstructionist, always wearing one's heart on one's sleeve. As we shall discuss in this article, the truly great ethical clashes in our lives, where we must make a stand or lose our sense of humanity, are quite rare. We often magnify into great ethical issues, those issues where we lose out to others, where we are right and everyone else is wrong. If we can allow ourselves to broaden the list of potential stakeholders from a small party of one, we may come to see the issue in a new light. Warren Buffet has stated that a full business career involves possibly as few as 20 truly career-making decisions.

I urge students to develop their own awareness of ethics and to begin feeling more comfortable with the paradox and ambiguity of professional life. I urge them to develop a community in which

Bowen H. "Buzz" McCoy, CRE, is a real estate and general business counselor who has taught finance as well as ethics at several major graduate business schools. A member of The Counselors of Real Estate since 1980, he will chair The Counselors' 1995 High Level Conference on ethics.

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they can comfortably discuss and share ethical concerns which trouble them without having to "go public" every time they are uncomfortable. Above all, I urge them to begin to know what are their real limits, where they will take their stand. The worst thing that can happen is to walk through a major ethical dilemma unconsciously carried along by the crowd, only to become blind sided into doing something that would be inconceivable to you in the full light of day.

When I talk about professional ethics, I speak in the context of one who has spent 30 years as an investment banker, where the rewards and recognition are meted out primarily on the basis of one's prowess in doing deals. Accordingly, I became an expert in serving client needs, thwarting competition, dealing, negotiating, compromising, prevailing, pushing the limits, living on the edge, and living with ambiguity and paradox. Later, as a manager, I became adept at influencing others to do the same.

At the same time, a core of us built the business in our firm from an employee base of 120 thirty years ago to 7,500 today. Such dramatic growth required focus and prioritization, coherence and clarity of purpose, rewards and punishments, trading off empowerment and control. We could not be so rigid that we could not push ourselves to the edge of the envelope in creating new businesses and markets. Nor could we be so devious and amoral that we could not command the respect of our colleagues and clients. Above all, we had to build systems and procedures that supported our risk takers.

We learned that the seemingly small, informal actions of the senior managers could have far greater impact than the formal management systems. Donald Siebert, former CEO of JC Penney, liked to tell little vignettes of improper senior management behavior.

"Keep it out of the Board Report!"

"Get my niece a job!"

"I don't care what you call it—call it corporate expense!"

Thus, over time, is the culture established.

Bad practices grow incrementally. Each small twist of the wheel goes unnoticed. People are rewarded for behavior which reinforces bad practices instead of good practices. We are told from natural science that a frog will sit in a pan of tepid water as the heat is slowly turned up until it dies. While, if the frog is thrown into over-heated water, it will jump out. Entitlement replaces responsibility. We each have our own vision of organizations gone awry; and as we wonder how senior management could have condoned such bad practices, perhaps

the only answer is the incremental gradualism of evil where there is a lack of moral awareness or imagination.

Organizations where bad practices are condoned and even rewarded develop a pluralistic ignorance. Individual ethics and good practices are drowned out by the cultural norm of the group in ignoring them. We have seen examples of this in the 39 New Yorkers refusing to hear the screams of Kitty Genovese; in the Jim Jones mass suicides; in the reformed church in Nazi Germany; and in many of our large organizations.

Sometimes a single individual can change the course of an organization, though he takes great risk in so doing. Vaçlav Havel terms politics, "the art of the impossible." I am reminded of Hannah Arendt's amazing tribute to William Shawn, the great editor of *The New Yorker*: "He had perfect moral pitch." It is too bad we cannot all work for such a master.

We are each individual moral agents with great potential to do good as well as evil. The problem is that we rarely live up to our potential and that we too readily give up our moral authority to others, including the organizations where we make our living. Let me give you a couple of simple illustrations.

There was a sociological experiment where a socalled teacher and a so-called pupil were in cahoots. The unsuspecting target was told that the student was a poor learner and required motivation. The teacher had invented an electric shock device to motivate the student. The target was told to shock the student each time she gave a wrong answer, in order to test the new device. This test was administered on a college campus under the rubric of research.

Of course, the putative student always gave the wrong answer, and by and large the target kept turning up the juice, even into a danger zone marked on the device. The student appeared to be in pain. Afterwards, when the target was debriefed, he claimed he was only following instructions.

Likewise, many years ago, at the Union Theological Seminary, Columbia University, an authority figure ordered a series of seminarians to drop everything and fetch a paper off his desk, located in another office, and return it to him immediately. In order to fetch the paper, the seminarians had to step twice, going and coming, over the body of a prostrate student lying on a rug in the outer office. In most cases they performed the mission without providing assistance to their prostrate peer. Once again, afterwards, they said they were just obeying orders.

Sound familiar? This is what Hannah Arendt described as, "the banality of evil."

Types Of Ethics

A problem in discussing ethics is deciding which language to use. Few of us are accustomed to expose our individual ethics before a group. We tend to become defensive. In today's norm of cultural relativism—"I'm OK, You're OK"—we are reluctant to publicly criticize the value systems of others. In a graduate business school, learning is compartmentalized into marketing, production, control, finance, human behavior and the like. Ethics intrudes into all those areas but without a common language. I have found it useful in discussing ethics to attempt to frame a definitional language by discussing types of ethics. The following list is by no means inclusive. It is meant only to gain a primitive hold on a possible common language.

Normative ethics—In simple terms, normative ethics is that behavior which society at large condones as proper over time. Normative ethics may be codified as the law, but it embraces large areas of behavior not codified by the law. It encompasses our behavior in groups (Do not yell "Fire!" in a crowded theater.); expressions of our sexuality; our dress; and the like. Cultural relativism is a current norm, as is situational ethics. There are those who would say that today's norm is that there are no rules, no easily identifiable broad set of values in which we can all agree. It is easy to go along with the norm; but the norm can easily lead to the incremental gradualism of bad practice as well as pluralistic ignorance.

A very important aspect of normative ethics is that it changes over time as people's attitudes change. Sociologists have even described long wave rhythms of societal norms swinging back and forth between conservatism and liberality. Thus, if we base our behavior purely on societal norms, we must be prepared to have the rug pulled out from beneath us. Somewhat arcane but valid illustrations would include price fixing, anti-trust, insider trading, or the non-payment of social security taxes for part-time domestic employees. If we base our behavior on current norms, we might find ourselves a criminal 20 years in the future.

Kantian ethics—Named after the famous 19th century moral philosopher, Kantian ethics has come to mean rigid ethical rules or duties. Attributed to Kant is the categorical imperative; which is to say, there are certain things we simply must do in order to maintain our basic humanity. As much as certain elements of our normative society are crying out for at least some rules to live by, others would say that Kant's approach is too rigid for contemporary society.

An apocryphal extension of Kantian ethics would be to recount a story of World War II Amsterdam when Anne Frank knocks on your door and you hide her in your attic to save her from the Gestapo. When the Gestapo knocks on your door and inquires as to Anne's whereabouts, you tell them she is hiding in your attic. According to Kant, there is never a good excuse for a lie.

I tell this story to my students; then I tell them they are each Kantians. They object to this. As living practitioners of normative ethics, they could never be so rigid. Yet, I repeat my charge. We are all Kantians. The trouble is, we are each Kantian about different things. For each of us there are certain things we could never cause ourselves to do. In doing them we would lose our humanity. Yet for each of us the limits are somewhat different. This is what makes governance so difficult for any type of social structure; and this is why, in an age of cultural relativism, we often come together at the lowest common denominator or at the worst bad practice.

Utilitarian ethics—Stemming from Jeremy Bentham and John Stuart Mill, utilitarianism (the greatest good for the greatest number) is a powerful shaper of our normative ethic. Utilitarian ethics drives government policymaking, economic input/ output modelling, cost-benefit analysis and basically determines how our world works. Health care reform is based on utilitarian ethics. As a society we will not condone paying \$500 for a pint of blood when it is commonly available at \$100 a pint. The odds of contaminated blood may be 1:100,000 at \$100 a unit, and 1:1,000,000 at \$500 a unit. We as a society do not think that is a good trade. But if our loved one is infected through contaminated blood, we will sue the hospital for millions of dollars for not using the more expensive blood.

We can calculate the value of a human life and enter the sum into our input/output models to determine how many kidney dialysis machines we can afford economically. We can calculate your future earning power. We can also calculate how much you would be willing to pay to save your own life. A result is that people's lives are worth more in wealthy countries than in poorer countries. The Economist, for example, reports that a human life is calculated to be worth \$2.6 million in America and \$20,000 in Portugal. McNamara ran the Vietnam War on an acceptable kill ratio of 20:1. They killed 56,000 of ours, and we killed over a million of them. The Gulf War will be a prized case of a successful kill ratio (unless, of course, someone you loved was killed).

Utilitarian ethics are pervasive in our society. The majority vote wins. The only real losers are the minority.

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Social justice ethics—Social justice ethics is an antidote to the excesses of majority ruled utilitarianism. It takes care of those who lose out to the mainstream of society. The social safety net is a good example of social justice. Critics of social justice politics brand it as single issue politics, or the tyranny of the minority.

Religious ethics—As we shall discuss in this article, moral philosophy and theology play a major role even in normative ethics. Will Durant writes in "The Story of Civilization:" "Conduct deprived of its religious supports deteriorates into epicurean chaos; and life itself, shorn of consoling faith, becomes a burden alike to conscious poverty and to weary wealth." The issue for society of course is which religion do we choose? Even in a country like Nepal, with an announced state religion, religious diversity is present. The problem, of course, is that nothing has divided mankind more throughout history than religious differences. In the United States, where religion is pervasive in our normative culture, we continue to attempt to preserve the notion of the secular state. In his recent book The Culture of Disbelief, Stephen L. Carter writes of the ubiquity of religious language in our public debates as a form of trivialization of religion, as our politirepeat largely meaningless incantations.

Communitarian ethics—A more secular and perhaps less controversial approach to moral theology, but based purely on the social sciences, is communitarianism. Most recently espoused by Amitai Etzioni in his book *The Moral Dimension* and reported by *Time* magazine, communitarianism relies on: (1) the individual, (2) society, and (3) transcendent values. Transcendent values can be any of the world's religions, or even a deeply rooted humanism.

The great Protestant theologian, Paul Tillich, discussed evil in terms of isolation, loneliness and alienation. We must be in community with ourselves, our community and our God. Such a theology is validated by the great depth psychologists.

To many of us, communitarianism resonates from the one great commandment of the New Testament: we must love our neighbors as we love ourselves (which means implicitly, by the way, that we must first love ourselves), and we must love the Lord our God with all our heart and all our mind and all our strength. This commandment may be found in the Jewish and Islamic religions as well. The universality of these ideas may not be completely accidental.

This brief review of a few ethical systems is meant only to begin bringing clarity to our thinking. So often we bring all these systems to bear in a single conversation, confusing the listener as well as ourselves. I enjoy listening to a presidential debate and saying to myself, "Aha, that's utilitarian. Now he's a Kantian. No, that's normative." It is helpful to begin developing a language of ethics if we are ever to reason together.

One Ethics Model

Ethics babble persists because ethics crosses so many lines. The following illustration makes the point. Moral philosophy and theology provide the ethics underpinnings. The social scientists, including also economists and political scientists, intellectualize about how ethics actually works. Practitioners, managers and leaders have pragmatic experience which is invaluable in determining how to foster and stimulate an ethical corporate culture.

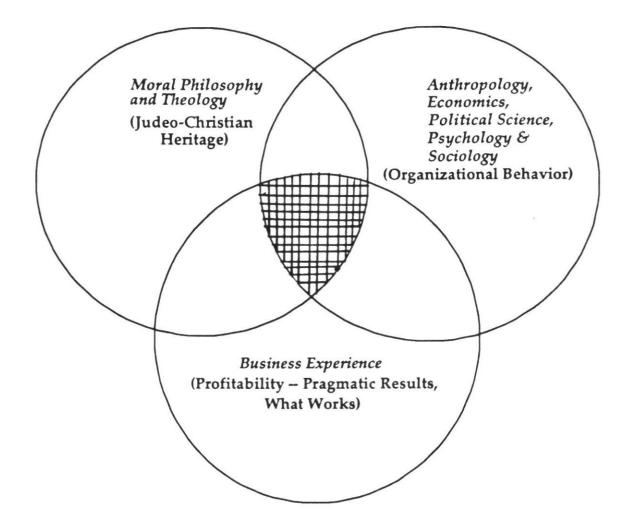
The schematic diagram indicates that all inputs are essential and that the area of overlap is small. Very few academics or practitioners are confident when expressing themselves in all three areas. Universities are not organized to foster such cross-discipline specialties. Too often we are left with business people knocking the doors down in a church, church people knocking down the doors in a business and academics lecturing to a non-audience.

Business schools and universities do not deem it appropriate to teach theology, moral philosophy or values. These must be taught at home. Such edicts ignore the fact that the majority of students were not reared in a nuclear family and that according to the findings of social scientists, in the aging of mankind the search for meaning and values becomes even more pronounced in late middle age. The younger upwardly mobile are not too old to learn values; they are too young and overwhelmed by career and family choices. I differ from the majority view in my feeling that moral philosophy is entirely appropriate to include in a business school ethics class. Students are hungering for values and for ideas upon which they can build in later stages of their continuing growth.

The other two circles—social sciences, including organizational behavior, and pragmatic business experience—are entirely appropriate curricula for a business school. A solid case can be made for a course in ethical awareness, imagination and decision-making utilizing just two of these spheres of knowledge; but, in my experience, students need and appreciate the third as well.

Finally, business school administrators assert that values certainly cannot be taught or graded. How, in an age of cultural relativism, can we grade someone's values? My own experience indicates that almost any case study has more than a single answer. We are not grading answers, we are grading the ability to ingest large amounts of data offered in a jumbled state; to provide clarity,

One Way of Thinking About a Viable Approach to Business Ethics



prioritization, and focus; and by way of an intelligent and ordered reasoning process, to discern a viable plan of action. At least that's what I thought the top business schools did.

Ethical Decision Making

I am indebted to my friend, Michael Josephson of the Josephson Institute of Ethics, for much of the structure which follows. Michael proposes a five

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Work to maximize the potential for constructive agreement in the center rather than ignoring the other disciplines and heightening the differences

step ethical decision making process which I shall discuss in some detail.

Identify the stakeholders. Paul Tillich writes that if we become insolated moral agents we are almost certain to commit immoral acts. We find our morality in community, removing our ego and letting in the world. Many social scientists echo Tillich's theology. Teachers of ethical reasoning urge us to include as many stakeholders as imaginable in our decision making process. The more creatively and imaginatively one begins to think about broadening the list of stakeholders, the more ethically aware one becomes. What about Michael Millken's children? What about the children of laid-off workers in a takeover? Moreover, the broader the community of decision makers, the broader the list of stakeholders. I urge my students to avoid isolation. A peer group on the job to discuss issues is always best. Since we do not always work in an open environment, a professional peer group of exclassmates, a church professional group or trusted close friends becomes essential.

Identify the ethical principle. We often confuse our hurt feelings or disappointments for ethical issues. Through discussion, be certain a real ethical issue exists. My father always told me: "You get your loving at home!" If there are only 20 or so key issues in a career, be certain you are not using yours up too rapidly. Ethics is tough-minded business. If utilitarianism is the norm, begin to discern the difference between the issues of being in the minority and basic unfairness or lack of integrity. Strip out the emotion. Ethics trumps expediency.

Choose one ethical principle. The true spirit crushing ethical dilemmas are when one is caught between two opposing powerful ethical issues. These are among the 20 big time life decisions. If you are to be human and act out your own life, you must make a choice. To refuse to choose is to lack integrity. This is the stuff of great drama and great literature.

Paul Tillich in his "My Search For Absolutes" wrote: ". . . no moral code can spare us from a decision and thus save us from moral risk. . . . Moral commandments are the wisdom of the past as it has been embodied in laws and traditions, and anyone who does not follow them risks tragedy. . . . Moral decisions involve moral risk. Even though a decision may be wrong and bring suffering, the creative element in every serious choice can give the courage to decide. . . . The mixture of the absolute and the relative in moral decisions is what constitutes their danger and their greatness. It gives dignity and tragedy to man, creative joy and pain of failure. Therefore he should not try to escape into a willfulness without norms or into a security without freedom."

Likewise in his autobiography, *Memories*, *Dreams*, *Reflections*, Carl Jung writes of the existential anxiety of moral decision making: "We must have the freedom in some circumstances to avoid the known moral good and do what is considered (e.g. normative) to be evil, if an ethical decision so requires. As a rule, however, the individual is so unconscious that he altogether fails to see his own potential for decision. Instead he is consistently looking around for external rules and regulation which can guide him in his perplexity."

In resolving true ethical choices, be certain to understand why you chose the path you chose and why you rejected the path you rejected. Loyalty is perhaps the weakest ethical standard, and the preservation of human life may be the strongest. You must be tough enough to make a decision when you have sought out divergent points of view and all that needs to be known cannot be known. You must at times answer questions which have no established solutions.

Creatively examine options. We so often lock ourselves into a binary decision path. The answer must be either/or. Yet so many issues come at us all jumbled amidst ambiguity and paradox. We often sail right through without even discerning the ethical issues, or else we make a snap either/or judgment. The ambiguity of many dilemmas cries out for a polyphonous response. Stop, gather your community of peers and come up with as many options as possible for consideration. Perhaps, for example, in a downsizing strategy, instead of firing everybody, you can afford to keep their health benefits going for an additional six or twelve months.

Maximize long term benefits. We are back to the utilitarian model once again. Note the key words "long term." A broad list of stakeholders will help move from my short term needs to the long term needs of others. At an earlier step, we suggested stripping out emotion. Perhaps at this final step we may re-integrate emotion and compassion. The utilitarian greater good must be balanced with the need of the minority. Solutions may appear ambiguous. We may both rely on virtue and impose sanctions. We may empower others with our solutions, but we will also insist on accountability. The best solutions may follow the tight-loose Peters and Waterman model described in *In Search of Excellence*—a model of freedom with control.

Ethics Of Organizations

We have been speaking, thus far, of individual ethics; but what of institutional ethics? How do we inculcate an ethic within an organization or an institution or a society? There are those who say that in an age of normative ethics and utilitarian ethics, our institutions no longer work for us.

In his recent book on professional compensation, Derek Bok quotes T.S. Eliot: "As a society we much prefer to leave our values undisturbed while going to great lengths to create in T.S. Eliot's words, 'a system that is so perfect that no one needs to be good."

In many ways each of us is as much a social justice or single issue politician as we are a Kantian. We take umbrage when we find ourselves in the minority within the context of an organization, institution or society at large; and we wrap ourselves in the cloak of moral self-righteousness and attack the "evil" organization that has done us in. Yet we know in our hearts that good leaders require good servants. In fact, as the late Robert Greenleaf noted, good leaders need to be good servants. We must each learn to be loyal members of institutions while retaining our individual ethical vigilance.

Perhaps John Gardner came closest to describing the covenantal relationship required between individuals and organizations in his fairly recent Stanford commencement address. Gardner stated that we must find a wholeness incorporating diversity. We must neither suppress it nor make it a tyrant. We must respect diversity. Each of us must ask what we can contribute to the whole. Gardner concludes that wholeness incorporating diversity defines the transcendent task of our generation.

Conclusion

Ethics is not easy or loose. Ethics is tough and hard. We must learn and decide who we are. Where do we draw the line? What are we willing to lose for? Ethics isn't always winning. Cheaters do prosper. Ethics is losing in the short term for a longer term sense of self-worth and transcendent values. Learning to live ethically is learning to live with oneself, learning to live in community and learning to live in that great stream of humanism, including theology and religion, that forms our Western culture. It is not a process that is completed at our mother's knee or in graduate school. For the truly conscious person, it is a lifelong process of growth and maturation which, by its very nature, can never be perfect or complete.

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EXPERT V. ADVOCATE: THE ETHICAL DILEMMA OF EXPERT TESTIMONY

by Rocky Tarantello, CRE

🕇 he legal landscape appears to be overwhelmed with real estate and property law disputes ranging from professional standards to bankruptcy reorganization. Even the relatively recent emergence of "alternative dispute resolution" or "ADR" (arbitration and mediation) has not significantly impacted the incidence of legal battles being waged in the courts. Issues including damage estimation, construction defects, standards and practice, reorganization plan feasibility and lease mitigation are but a few of the many areas in which counselors and other real estate experts are called to provide expert advice and testimony. This rapid escalation in the use of real estate experts has been particularly stimulated by the pervasive decline in real estate values as individuals and companies seek to unwind real estate transactions in an attempt to mitigate the negative effects of prior decisions. Hence, we find ourselves in an environment demanding the service of real estate experts who are generally unfamiliar with the ethical dilemma inherent in their task.

Source Of Conflict

Counselors of Real Estate (CRE's) along with other professional real estate designates are frequently called upon to perform services as real estate experts. As members of professional organizations, they agree to be bound by standards of conduct which generally require that their knowledge, experience and judgement will be applied fairly and unbiased. But there is an implied (if not contractual) duty to act in the best interest of the client. I have never personally been instructed by a client to "do as you wish" or "forget what's best for me, just do what you think is right." As a practical matter, even though clients frequently inform you as to what result or conclusion they desire, counselors are rarely instructed to provide particular conclusions nor should we provide them when we believe otherwise. Yet despite the unspoken courtesies exchanged between client and counselor, little doubt exists regarding the duty of the counselor to put the interests of his client before all others, including his own. This fiduciary relationship between counselor and client lays half the foundation of the ethical conflict.

The other half of this ethical conflict comes not from client/counselor relationships, but from the role that experts play in their service to the courts or ADR panels as expert witnesses. In my own case, this role was defined during an informal conversation with a U.S. Bankruptcy Court judge. He

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explained that not withstanding my social duty to abide by the law and provide a fair and honest opinion on behalf of my client, I had a further duty. A duty to assist the court in understanding the nuances and foundations of our opinions to assist the court in arriving at a fair and just decision. In effect, he said that I was equally obliged to the court as to my client. On the surface, this perspective appears to present the basis for the ethical dilemma. How far does an expert go to advance the cause of his client? How reasonable are the assumptions used in arriving at conclusions? How valid is the data? When is it fair to attack opposing experts? These are just a few of the myriad of questions which arise from the dilemma. In order to suggest practical solutions which assist in resolving the conflict, a review of basic ethical principles is necessary.

A Brief Overview Of Business Ethics And Principles

The University of Southern California School of Business Administration has offered special training to its faculty in the area of business ethics to encourage the integration of the topic into multiple business disciplines. My dual role as Counselor of Real Estate and USC Professor of Real Estate led me to participate in ethics seminars which were primarily useful because they provided a framework for integrating ethical conduct into business practice, something beyond the "philosophical handwaving" of doing the right thing. Ethical principles were presented in a concise and practical way. What follows is a brief synthesis of the core principles that should be and generally are followed by most business executives and experts:

- a. *Honesty*–Honest and truthful. Will not deliberately mislead, misrepresent, overstate or selectively omit information.
- b. *Integrity*–Doing what you think is right even when there is pressure to do otherwise. Will not sacrifice principle for expediency.
- c. *Trustworthy*–Will make every reasonable effort to fulfill both the letter and the spirit of promises and commitments. Will not create unreasonable justification for escaping commitments.
- d. Loyalty—Trustworthy. Loyal to persons or institutions during adversity. Will not submit to undue influence or conflict of interest. Loyal to colleagues, clients and friends. Will not engage in any activity that takes undue advantage of their previous position or relationships.
- e. Fairness-Fair and just in all dealings. Will not exercise power arbitrarily nor use overreaching or indecent means to gain or maintain advantage. Committed to justice, equality and tolerance of diversity. Will change positions and beliefs where appropriate.

- f. Concern for Others-Caring, compassionate, benevolent and kind. Seek to accomplish business objectives in a way that causes the least harm and greatest possible good.
- g. Law Abiding-Will abide by rules, standards, laws and regulations relating to their business.
- h. Commitment to Excellence-Pursue professional excellence. Informed, prepared and constantly seeking to increase proficiency.
- i. *Leadership*—Will provide a positive ethical role model to others by conduct and example.
- Accountability-Accept personal responsibility for the ethical quality of personal decisions and omissions.

While it is impossible to imagine any business professional who would openly admit to a lack of ethical principles, it is easy to see that the above definitions provide very fertile ground for professional conflict. When such a conflict arises, an ethical analysis process is required to "sort out the issues and the players" so that ethical dilemmas can be resolved. Former USC professor John Fleming suggests a stepped process originally posited by Norman Bowie and Manual Velasquez at a conference on business ethics during the summer of 1988.

- 1. What are the facts?
- 2. What is the ethical dilemma?
- 3. What are the alternatives?
- 4. Who are the stakeholders?
- 5. What is the ethical merit of the alternatives?
- 6. What are the constraints, if any?

The abbreviated process described above makes clear the necessity of exploring the primary issues associated with Step 5. In a perfect world, if everyone acted in such a way that produced the greatest good for the greatest numbers, the "utilitarian" value of society would be maximized. This "ethically correct" view of the world is fine in theory, but quite flawed in practice. First, who is to decide what is good? In many business disputes we are concerned with both economic and non-economic situations, each requiring a different if not multidimensional measurement. Secondly, the concept of justice and rights of the individual may be unethically sacrificed for the benefit of the many. Hence, while utilitarian logic may provide some moral high ground, it fails to provide the real estate expert with the ethical paradigm necessary to perform the expert's role.

Rights, Duties, Justice And Fairness

Every individual has a right, or a human entitlement, that permits him to act in a certain way or to require others to act toward him in a particular manner. In our legal context, a client has a right to

be represented by competent attorneys and experts, and has the right to expect that they will act competently in representing him. The client should not and could not reasonably consider the best interests of the court or the opposing party. He is there to win his case, and has the right to expect competent, if not the best representation available.

Conversely, Counselors as experts are bound by conflicting duties. On the one hand, we have a duty created by a right held by our client. After all, he has a right to competent representation which is not in conflict with his legal position. On the other hand, we have an additional duty which dictates that we abide by our responsibility to conform to approved social standards, obey the letter of the law, and as spoken by my aforementioned bankruptcy judge acquaintance-"provide guidance to the court." At first blush, the most sanctimonious reader simply assumes away the problem. After all, professionals in any field simply "do the right thing." But a closer look at the issue reveals no conclusion as to what the "right thing" is. Where does the duty lie? Service to the client, service to the court or both?

The basic concept of justice or fairness is to treat all members of a group fairly. Arguably, all participants of a legal proceeding are within the same group. Alternatively, our system of justice is based on adversarial representation, leading to the possible conclusion that they are not. Regardless of how you personally view the matter, equal distributive justice at the societal level is practically impossible to achieve within the context of the U.S. legal system. Within the legal context "retributive justice" recognizes fairness of blame and punishment for those that are wrong while "compensatory justice" requires that the person who wrongs another compensates the injured party. Consequently, although ethical principle suggests distributive justice as the utilitarian perspective on conduct, retributive and compensatory justice provide the expert with the proper foundation principles to represent his client to the best of his ability provided that several ethical boundaries are observed. What follows is an attempt at suggesting what these boundaries are.

Resolving The Conflict

What separates experts from advocates? And what are the ethical boundaries of providing expert real estate testimony? As previously noted, experts have both a duty to the client and a duty to the court. I believe these equal duties can be performed with equal responsibility without sacrificing the best interests of either.

Clients deserve competent representation. However, not all experts are qualified to perform in all real estate cases. The Counselor's first duty is to ensure that he is qualified to perform the assignment. This includes technical background, prior experience, familiarity with the court or judge and the necessary time or staff support to properly prepare the case. Secondly, the avoidance of conflicts with both opposing clients and counsel is essential to determine prior to engagement. With the huge number of real estate partnerships composed of multiple partners this can sometimes become an unforeseen problem when the names of individual partners do not appear in the filings. Finally, if an engagement is undertaken, the expert must provide a preliminary opinion as soon as possible. Hopefully, this opinion will support the client's position, in which case a more thorough and complete analysis is prepared. If not, the client may then seek alternative experts who are more able to provide testimony in support of the client. In many respects, the duties to the client should be obvious to most real estate professionals regardless of having or not having served as expert witnesses.

Duties to the court are a matter of how one interprets his role as expert. However, I believe that these duties are best served by following two simple rules of practice. First, all opinions should be fully supported by a solid empirical foundation. All data should be unbiased, complete to the extent possible and derived from independent third party sources when possible. All analytical assumptions should be supportable by the data. This not only helps your client prove his case, but provides the court with the necessary foundation to render a decision. No armchair wisdom, homespun tales, or pontificating from the stand. Every conclusion and opinion must be consistent with and supported by the data. Secondly, when subjective opinions are called for, they should be given within a reasonable range of possibilities. No one expects a real estate or economic expert to provide perfect answers. We rely on observations, forecasts and historical data. Simple point estimates are very often counterproductive. Judges appreciate candor, reason and the inherent difficulty of providing perfect answers. Give them the flexibility they need to render fair and just decisions.

Empirical foundation separates experts from advocates. Data bases should be reliable, unbiased and complete to the extent possible. The data must not only support the conclusion, but must do so within reasonable statistical tolerances. A few hand-picked observations will not justify a conclusion in the eyes of most judges. The data must be observable, replicable and believable on a common sense level. Do not stretch the imagination of the court with obscure or incomplete data.

Experts And The Counselors Of Real Estate

Multiple issues arise in the context of real estate litigation. Consequently, precisely who are the proper experts to call upon is a valid concern shared by all attorneys. Real estate valuations, partnership/business valuations, market analysis/ feasibility, mortgage/capital market conditions, professional standards/standard of care and real estate investments are the typical issues arising in the majority of cases. Obviously, no single individual is capable of possessing all the skills necessary to claim expertise in all areas. Certain professionals are well suited in particular cases. Appraisers, both real estate and business, are usually selected to perform valuation. Economists, financial analysts and accountants frequently perform investment and financial feasibility studies. Mortgage bankers, investment bankers and real estate brokers are generally expert in real estate investment and capital markets. The Counselors of Real Estate is the only professional society whose membership is represented by all these disciplines. This unique pool of highly qualified multi-disciplinary experts will be called upon as experts in greater numbers in the future. The ethical dilemma of expert versus advocate is an issue that can be resolved. Despite the vast differences of individual cases, certain foundation principles can be established. I am tempted to provide an early contribution to those principles. As our experience grows, so should our willingness and ability to expand those principles.



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"DO UNTO OTHERS"

by Richard D. Simmons, Sr., CRE

young man just discharged from the army enters a haberdashery to purchase some suits, shirts and other accessories. While counting out the \$100 bills to pay for his purchases, the haberdasher notices that two of the bills have stuck together. "What a dilemma," says the haberdasher as he repeats to himself "ethics, ethics, ethics. Should I tell my partner?"

Compare our haberdasher with another entrepreneur who regards his company and its product in a responsible and ethical manner. Tom Chappell of Toms of Maine, a manufacturer and distributor of health care products, wrote a book entitled *The Soul of a Business—for Profit and the Common Good.*¹ In it he talks about his company's espousing that human beings and nature deserve respect. He has made a personal commitment to manufacture only those products that are safe for both the consumer and the environment.

Neither of these stories has anything to do with real estate except to indicate that ethical behavior is universal in any business culture. There is only one categorical imperative to apply in all walks of life and that is the responsibility for any practitioner of any business or profession to act according to ethical principles.

Ethics is that branch of philosophy devoted to the examination of universal principles of conduct.² Sometimes we confuse morals with ethics and sometimes the two words are used interchangeably. Morals generally refer to modes of conduct which can and do vary according to the culture.³ Quakers are pacifists; peace to them is a moral imperative. The military is formed to conduct war; those in the military are trained to kill. Nudists want their bodies to be exposed to fresh air and sunshine. Muslims cover themselves with clothing, and Muslim women even hide their faces from strangers.

Morals and/or codes of conduct vary while ethics are the principles by which a group is governed. Standards establish the framework by which we practice as individuals or as a group. One who is ethical conforms to accepted professional standards of conduct.

A Look At Real Estate

In the real estate industry, those who are members of the National Association of Realtors must

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subscribe to the Code of Ethics. The last sentence of their preamble states The Golden Rule: "Whatsoever ye would that other should do to you, do ye even so to them."

Anyone who has been in the real estate business knows about making decisions on problems which involve a quandary or a dilemma. While an organization's code of ethics and standards of practice are helpful guides, neither can answer all the dilemmas.

For example, if one does not know the answer to a question regarding a property, this is a simple ethical problem. The solution is not to guess but to say "I do not know, but I will find out!"

A more complicated ethical dilemma might involve receiving approval of the town's planning board for a subdivision. The board is about to reject the proposal and as the realtor you know that one vote by one member can get the subdivision approved. You also know that one board member is having financial problems and that your hefty commission is at stake. Does the realtor attempt to corrupt the process by approaching the planning board member to accept a gratuity for a vote?

There are many stories in our business about agents who have withheld information so as not to lose the sale or listing. Are real estate people more or less ethical than others in the business or professional world? While I am personally not aware of any survey to determine this, a reasonable guess would be that real estate practitioners are for the most part honest, hardworking, knowledgeable people who experience the pressures of their environment as do other people in business.

Can I Trust Them?

Ethics are a concern. In dealing with a lawyer, doctor, car salesman, accountant or realtor one often questions, "Can I trust him?" We all have heard about lawyers who rifle client accounts, of doctors who improperly prescribe medications or care, of car salesmen who do not tell the whole story, of accountants who falsify records and of realtors who misrepresent a client or property.

When a professional or trade group has a code of ethics and standards of professional practice, does this guaranty the membership will be ethical? No! They do, however, provide guidelines for both the member and client to measure performance and/or conduct.

The code and standards also provide a basis for disciplining the wayward member. For example: An agent knowingly provides misleading information about a property. Article 9 of the Realtors' Code of Ethics states: "Realtors shall avoid exaggeration, misrepresentation, or concealment of pertinent facts

relating to the property or the transaction."⁵ It follows up in the Standard of Practice 9-8 with: "Realtors shall be obligated to discover and disclose adverse factors reasonably apparent to someone with expertise in only those areas required by their real estate licensing authority."⁶ Article 9 "does not impose upon the Realtor the obligation of expertise in other professional or technical disciplines."⁷ Also see Article 11 of the Code which says: "Realtors are expected to provide a level of competent service in keeping with the Standards of Practice in those fields in which the Realtor customarily engages."⁸

The agent has clear instructions from the Code on how he is to conduct himself. The client can cite, based on the facts, the Code violation. When a complaint is filed, the board sitting to hear the case has a reference from which it can issue a discussion.

Ethics Yesterday, Today And Tomorrow

The Greek philosopher Plato, in addressing a group of physicians, suggested that the physicians know what they do and whom they serve. The physicians, according to Plato, were having difficulty with what constituted the practice of medicine and whether they were there to serve themselves, collect large up front fees or care first about the welfare of the ill person.⁹

Applying Plato's thinking to the real estate business, what is our practice—brokerage, management, counseling, appraising or syndication? Who is our client—the buyer, seller, institution, or government? Whose interests come first? I often have heard people question if ethics or a lack of ethical conduct is more prevalent in business today than in years gone by. Charles Dickens, in his visit to America in the early 1800s, remarked about the land agent who sold land that didn't exist to the unsuspecting. In the 1920s land was sold in Florida that was underwater and unusable. A common expression today is "I'm going to be honest with you!" Meaning of course that with everyone else the person is dishonest.

God's chosen people were directed through Moses to observe the Ten Commandments. From the time of Moses to St. Paul's journeys and the observations of Charles Dickens, ethical conduct has been a cause for concern. At Bentley College in Waltham, Massachusetts ethics seminars are conducted once or twice a year for the benefit of the business community. There are groups of businessmen who meet regularly in the Boston suburbs to discuss ethics and how to act ethically. Ethics are a concern and have been a concern since society began.

On the lighter side, George Bernard Shaw, in his work entitled *Man or Superman*, wrote: "Do not do unto them as you would that they should do unto you. Their tastes may not be the same." ¹¹

A Member Of The Club

There has to be a dilemma in real estate offices which produce million dollar sales associates. To make the club the associate has to produce listings or sales or both to equal \$1 million. The associate gets rewarded for this kind of production with recognition in the company, in the Realtor community, in the town or city and undoubtedly with a monetary prize. The dilemma facing the salesperson concerns what it takes to bring in the sales to be a member of the club. "I can make the sale if I don't say anything about a new proposed tax." "Is what I am about to do to make this sale ethical?" Not every sale is made in the dark by any stretch of one's imagination. Sales are made to satisfy a need: a seller's need to sell and a buyer's need for shelter. But when the incentive is to be a member of the club, the opportunity exists to take short cuts and slide over some facts.

Why not recognize the sales associate who has put service above self in the office (dealing with fellow workers), in the community (providing service to the industry and town or city), and to clients (offering babysitting services, interim housing or interim financing). In many ways, agents are able to contribute to the welfare of others.

When someone does something nice for you and you respond with flowers and a personal note, have you noticed how much your thoughtfulness is appreciated by the recipient? When you volunteer to do the job that no one else wants to do, have you noticed how much you are envied? When you organize the Toys for Tots or the Thanksgiving basket for the needy or you helped clean up a house before your buyer moved in, you received satisfaction in knowing that something you did made life better for someone else.

These are the people who should be recognized. Someone should be inspired to start an ethics award in his company not to compete with the million dollar club but maybe to make everyone aware that good deeds and ethical conduct are recognizable.

"To Thine Ownself Be True"

Ethics continues to remain a topic of concern throughout the ages. Moses represented God with the Ten Commandments; Plato, Kant, Buber, Saint Paul and Jesus of Nazareth all have addressed human conduct. People are influenced in a positive way by these teachings. They also have been influenced by teachings of the Bible and Koran and other writings on how we as humans should behave. There are a small number of people who are always going to run contrary to the majority. They will, despite everything anyone can do or say, march to their own drummer. Our goal, (we who are concerned with practicing ethically), should be

to examine and re-examine our thoughts and actions. We control (to some extent) ourselves, and our actions influence others.

NOTES

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CONFLICTS OF INTEREST OR "THOU SHALT NOT STEAL" REVISITED

by John K. Rutledge, CRE

Real estate counselors and other professional practitioners depend on a reputation for ethical conduct to attract and retain clients. For guidance, they rely on codes of ethics, statements of professional standards, personal and corporate policies, and other sets of boundaries. At the most fundamental level, many ethical violations can be described as conflicts of interests. It is not enough, however, to avoid situations in which the counselor's interests are opposed to those of the client. Circumstances which merely hint that such a conflict exists can be as damaging to a counselor as an actual conflict.

A conflict of interest can be as straight forward as an appraiser holding an interest in a property being appraised, an obvious violation of the code of ethics. It may include the acceptance of an assignment with inadequate expertise and the unwillingness to seek assistance; the valuation of assets by a manager in a way to improperly affect fees; the sharing of financial data between lending and trust departments of a bank; the sales of trust assets; the provision of professional services to a corporate officer personally while advising the officer on corporate affairs; and various other activities. Often, conflicts of interest are not intentionally contrived efforts to take advantage of a relationship but rather begin with all appearances of innocence and evolve into an actual or perceived conflict.

Unfortunately, there is no ironclad approach to business (or life) that will guarantee the absence of risk to one's reputation. Awareness of the dangers, however, will sharpen the vigilance, and an unending examination of principles and standards will minimize the danger.

The Dangers Of Conflicts Of Interest

Conflicts of interest are common circumstances encountered frequently by each of us. They are not necessarily esoteric situations but may be as simple as the desire to optimize the relationship between effort expended (work) for a client or employer and reward (fee or salary) received. Failure to recognize and properly address conflicts, both real and perceived, can have extremely serious consequences to a counselor or other professional.

Counselors of Real Estate (CRE—the professional designation of The Counselors of Real Estate), rightfully say they have nothing to sell but their time and expertise. The expertise contributes

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to the delivery of advice which is intended to improve the circumstances of the client. It is implicit that the advice is provided in the context of honesty and integrity. The CRE is compensated for the advice, not as a result of the advice. It is well understood in real estate circles, for example, that an appraiser is paid for the appraisal without regard to the conclusion of value and that the appraisal is conducted with the objectivity that comes with complete independence from the property. It is assumed that the CRE will not stand to benefit from the plan of action proposed to the client. Of course, the successful conclusion of a counseling assignment may lead to further assignments. Repeat business is highly valued. Implementation or execution fees such as brokerage commissions also are common and legitimate, provided the client is fully informed and the work is conducted with no undisclosed interest.

Codes of ethics are adopted by professional organizations to guide the conduct of their members and to give comfort to the public concerning the objectivity and quality of the services offered by their members. Realtors pledge loyalty to their clients. Doctors have their Hippocratic Oath. Securities analysts subscribe to a code of ethics which limits their personal investment opportunities to assure their clients of unbiased advice. Oh, how easy this sounds!

The possibilities for entanglement, however, are everywhere. Further, it is not enough to be as pure as Caesar's wife. In terms of effect, the mere appearance of conflict may be as damaging as the real thing. For a CRE, a reputation of unquestioned honesty and independence is integral to the practice, and any act or circumstance, even unintentional, which brings character into question potentially can end a career.

Counselors are at particular risk. Some of the more difficult problems, for which CREs are particularly well suited to address, involve business and personal relationships among the client and other parties. If the client has fiduciary duties to those other parties, the CRE may become enmeshed in those duties as well and, in trying to serve the client, may unwittingly damage others.

A Simple Case—And One Not So Simple

Some situations are rather easy to conceive. Consider the appraiser who conducts an appraisal of a condominium or residential subdivision for a potential construction lender. Obviously, the appraiser should not accept this assignment if he intends to acquire a unit upon completion. The intent would introduce the possibility that the appraiser would be biased in his conclusion.

Now let's change the facts slightly and assume that the appraiser had no present or contemplated future interest in the property when undertaking and completing a fully objective appraisal. Subsequently, however, he concludes that the property would meet a personal need. He purchases a unit. Skeptics perhaps would say that a future contemplated interest was undisclosed at the time of accepting and conducting the assignment. "Subsequently" is a material consideration in the issue at hand. If the purchase is made 10 years after the appraisal, it would seem that there could be no question about the objectivity of the appraiser, but 30 days present an entirely different picture. How much time must elapse to avoid an appearance of conflict? The dividing line between enough and not enough is subjective and not easily identified.

Competence Equal To The Job

Real estate counseling by definition involves problems. If the solution to a problem was widely known, the services of a CRE most likely would not be necessary. Often, frontiers of knowledge must be explored. The client is entitled to competent service, and yet the answer may not be easily determined, if at all. The CRE who accepts an assignment purports to bring expertise and creativity to the situation. Is the level of the CRE's expertise fully disclosed to and understood by the client? The CRE is faced with the implicit conflict between wanting the assignment and knowing that the solution may thoroughly challenge or even elude him. Further, an assignment may pose a familiar challenge on the surface but turn out to be much more complex. At what point does the counselor admit the need for assistance? Does the need for other, perhaps more specialized, expertise signify incompetence or failure on the part of the counselor in the eyes of the client? Does the need to maintain control of the assignment, and perhaps avoid the costs of a subcontractor, conflict with the best interests of the client? Again, the appearance may be more important than the facts to the CRE's reputation.

Investment Management Fee Structures

Historically, most real estate practitioners have been paid for services based on transactions. For the sale of a property, a broker is paid a commission based on the sale price. Managers receive a percentage of the gross revenues, and leasing agents are paid a percentage of the lease consideration. Institutional investment managers, conversely, have charged their clients a percentage of assets under management. In the marketable securities business, this is understandable because transaction costs are minimal compared to the asset value.

As real estate professionals have expanded their client base by entering the realm of institutional investment management, assisting pension fund managers to invest in real estate along with stocks and bonds, an interesting conflict has appeared. To follow practices familiar to their new clients, and in some cases to comply with regulatory requirements, real estate investment managers have adapted to their new surroundings by eliminating acquisition and sale fees (brokerage commissions in the old days) and replacing them with fees based on the value of the real estate under management.

As honest and well intentioned as the manager may be, he has a double financial incentive to influence the appraisal process. First, appraisals play a principal role in measuring investment performance. Price quotations similar to those available for securities do not exist for individual properties and probably never will. The appraisal is the only source of a valuation. An appraisal with an upward bias has a direct and favorable bearing on reported investment performance, and investment performance is critical to the success of a manager's future business survival and growth.

Second, fees which are a percentage of asset values under management obviously respond directly to appraised values. This is not a problem if valuations are drawn from public securities markets. It certainly can create the appearance of a conflict, however, if the asset valuation involves an estimate prepared under the control or direction of the investment manager, regardless of the estimate's objectivity.

Investment managers address this question by, among other things, diversifying and rotating appraisers. Others establish "independent" appraisal audit bodies composed of appraisers and advisors otherwise unaffiliated with the appraisers doing the actual valuation work. There is a question about how independent anyone can be, of course, if continued retention in a position is dependent on the will of the employer, client, or principal.

Indeed, the appraiser himself may have every intention of maintaining complete objectivity and independence. It cannot be far from his mind, however, that his client, the investment manager, will be both evaluated and compensated in the marketplace based partly on the results of the appraisal. With the manager at least subconsciously hoping for an appraisal showing a rising value, the appraiser is put in the position of desiring to please his client with a high value while remaining objective.

Acquisition Volume Vs. Prudence

The investment manager has another set of conflicts. If fees are based on assets under management, the manager is torn between "getting the money out" and prudence in the underwriting process. The former was all too evident a few years ago during the reign of tax shelter syndicators and their financiers. Limited partnership interests were sold

by brokers who were paid for bringing in the money. Developers were paid by delivering finished projects to their investors. Prudence got short shrift.

Today's investment managers are observed and evaluated more closely by sophisticated institutional clients and their consultants. The quality and integrity of their work generally are very good. Nevertheless, they are subject to the same conflicting forces.

Banking

Banks face a potential for conflict between trust and commercial lending functions. A lending officer typically gets far more detailed financial and management information than is made available publicly for the benefit of securities holders. This is inside information and, shared with a trust investment division, offers an advantage to the customers of the trust department over other investors. Use of such nonpublic information is illegal, of course, but the opportunity for its use creates the need for the so-called "Chinese Wall" to assure the avoidance of using inside information.

Banks face other potential conflicts as a result of their effort to provide a full range of services to their customers. The trust department may be named trustee or executor of an estate, a victory for the trust department sales staff. This becomes a nightmare when it is discovered that the decedent's estate owes money to the lending department, and particularly so if it is a troubled loan. Individual employees generally take great pride in their work. The trust officer in this dilemma will do his very best to carry out his fiduciary duties and to defend the estate against all creditors. Likewise, the lending officer will vigorously represent the bank's shareholders by taking every possible measure to collect the loan. Regardless of the best intentions and efforts of the officers involved, and the mandated isolation of the two sides from each other within the bank, the institution is seen by the public as a single entity with a clear conflict of interest. The final outcome will be criticized by the trust beneficiaries, the bank's shareholders, or (most likely) both.

A more easily managed problem arises when the trust department is liquidating an estate and another customer wants to purchase a property in the estate. Policy may call for a marketing program which includes thorough exposure through advertising and other means, with a competitive sale. In practice, it becomes more complex. Trust officers must maintain a very independent attitude toward such situations, and must be fully supported by management. After all, the trust department relies on its reputation as a loyal representative of the client. Any action which compromises or appears

to compromise the relationship with the trust client causes great harm to the reputation of the bank. Obviously, sound policy precludes sale to the bank or its employees.

Legal And Corporate Relationships

Other examples of potential or real conflicts abound. Is the law firm advising a merger or takeover candidate also throwing in some free advice to the senior management on a golden parachute? Since such advice independently obtained could be costly, it must be assumed that such "free" counsel is provided ultimately at the expense of the company. Is this additional compensation in the form of legal advice properly included in proxy statement disclosures? More significantly, does the advice lead toward improving the situation of the manager at the expense of the shareholders?

Senior corporate leaders may devote extensive time and effort to official duties while commuting, working at home, and attending evening functions. The line between personal and business expenses may be quite fuzzy to the executive. Are questions resolved in favor of the company or the manager? News reports from time to time explore the lapses of judgment and the moral failures of executives who face the rather simple conflict of whether to absorb a cost or charge it to the company.

Corporate directors have a fiduciary duty to all shareholders. However, the owner of a substantial block of shares may elect a representative to serve as a director. This is particularly common in the case of smaller companies. It is not uncommon for a major shareholder to have an objective that may differ from the objectives of the shareholders at large. Despite the best intentions of the director to represent all shareholders, the interests of his employer (the major shareholder) will cast doubt on the director's motives.

The Reality Of Perception

Perception becomes reality. An observer perceives improper behavior and responds accordingly. The perception may have been erroneous, but the response occurs nevertheless. The response is a reality which will have a direct result. The result may be the taking of business elsewhere, the loss of credibility on the witness stand, or the influencing of other clients or prospects, all very real effects. A reputation, which took years to build and nurture, can be demolished in an instant. In reality, the behavior may have been perfectly innocent, but the appearance of impropriety can have an impact equal to that of an actual violation of fiduciary duties.

Society is filled with traps. Where is the dividing line between a common courtesy such as a cup of coffee and a more substantive gratuity intended to influence the recipient? Some organizations attempt to legislate this line at some value, such as \$50, \$100, or even zero. Each individual, however, has a different outlook on such matters. Further, appropriateness depends on the context. An acceptable expression of sincere appreciation for going beyond the call of duty on an extended and difficult project may, in a more simple situation, appear to be nothing more than a bribe or a payoff. A friendship which develops over a lengthy and mutually prosperous business relationship may, in the minds of those involved, justify gifts that would be unacceptable in other circumstances. Perceptions by others, however, can have very real and unexpected consequences. Appropriateness therefore. judged not only by the parties directly involved but by observers who may have no apparent interest in the situation but who may influence others.

The appearance of a conflict can be even more dangerous than an actual conflict because it may not be recognized. The parties to a situation may be thoroughly innocent and may not even be aware of a nonexistent but apparent conflict. The result may be a complete surprise with serious consequences. Picture the congressman and his long time friend who now happens to be in a senior business position. The two equitably share the cost of a hunting trip. How will it be described in the front page story on an ethics investigation?

Minimizing The Danger

Clearly, conflicts of interest cannot be avoided completely. A clear set of rules for handling conflicts is rendered unlikely by the infinite shadings of circumstances. The problem is further aggravated by changing moral and ethical standards and expectations. This is illustrated frequently by the travails of elected officials who discover, to their chagrin, that formerly tolerated behavior and practices have become unacceptable. Previously overlooked as mere human foibles, these lapses suddenly become the stuff of campaign attacks or the subject of investigation by a special counsel. As standards of expected conduct change, past activities can fall outside the new code of conduct and a good reputation can be destroyed. While real estate counseling often involves confidential work, actions may be profitably guided by the possibility of being described on the front page of the local paper.

Human nature is inclined toward fairness and integrity. Various religions have taken root and survived for millennia. Commonly, they promote conduct typified by the Ten Commandments. Charities receive billions of dollars with no expectation by the donors of personal gain other than a tax deduction and perhaps some recognition. Yet within every person lies a bit of the devil which must be continually subdued.

Perfection is too much to expect, and the perception of perfection is even less likely. The only solution is to maintain a wide margin between conduct and the boundary of impropriety, and to treat appearance as reality. Every action must be directed toward the further development of a character that abhors mistreatment of those who rely on us. Constant consideration must be given to appearances, regardless of our view of reality, because the perception by others leads to their actions which create our reality. We must conduct ourselves in an exemplary manner, and be sure that appearances do not contradict the reality of that conduct.

While all conflicts of interest cannot be completely avoided, it is essential that they be acknowledged, and every effort must be made to prevent harm to the client. A material conflict may require withdrawing from the assignment, an alternative preferable to risking one's reputation. Recognition of the potential for damage is the first step toward neutralizing the risk, and full disclosure to the client, in advance, is a demonstration of good faith and an expression of paramount concern for his best interest.

Conclusion

The potential for conflicts of interest pose a major threat to the reputation for integrity and honesty so treasured by the professional, and the appearance of such a conflict can be as dangerous as an actual conflict. Some are easily recognized while others may be quite subtle and insidious. Ultimately, success in dealing with conflicts of interest, as with other ethical questions, depends on an unending examination of one's own principles and standards of conduct and a continuing firm commitment to defend them. Simply put, thou shalt not steal, and thou shalt not present the appearance of stealing.

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THE REAL ESTATE COUNSELOR-CLIENT RELATIONSHIP

by Charles B. Akerson, CRE

Inderstanding the real estate counselor-client relationship is the key to interpreting and following the Code of Ethics and the Standards of Professional Practice of The Counselors of Real Estate (CRE). Similarly, a misunderstanding of the counselor-client relationship can result in malpractice. We know the confidential nature of the relationship must be preserved, but what does this really mean? We know the relationship is fiduciary, but in what sense? These and other related questions will be addressed here from a non legal practitioner's point of view.

The counselor-client relationship is complicated because the relationship is not always the same. The confidential nature of the relationship must, of course, be preserved, but this does not necessarily mean that all the communications between the counselor and the client are confidential or privileged. Nor does it necessarily mean that all the information gathered during a counseling assignment is confidential. The requirement for confidentiality varies with the assignment, and an example will be discussed in this article to illustrate this possibility.

The counselor-client relationship is a fiduciary relationship by definition. The real estate counselor is presumed to be the client's trusted adviser, i.e. fiduciary. But, depending upon the assignment, the counselor may act either as an advocate of the client's interests, or as an impartial expert with a fiduciary duty to third parties and to the general public as well as to the client. Just as the requirement for confidentiality can vary with the assignment, the fiduciary relationship can vary. Again, an example will be offered to illustrate this possibility.

Confidentiality

The requirement to preserve the confidential nature of the client relationship is subject to misinterpretation. Certainly the counselor should not disclose private information obtained from the client without the client's permission, but, on the other hand, the requirement to preserve the confidential nature of the client relationship should not be used as a license to withhold or suppress important information that would otherwise be available to market participants in the normal course of business.

Suppose, for example, that the counselor has been engaged by the owner of a fully occupied,

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multi-tenant property to advise the owner regarding the marketability of the property in the current market and to prepare a cash flow analysis showing the expected income and expenses for the next ten years. The cash flow analysis is to be included with a rent roll and descriptive material to be distributed to brokers and prospective buyers of the property. After considering the existing leases, the current rental market for comparable space and the outlook for the renewal of existing leases, the counselor advises the client that the earning power of the subject property is low in comparison to other similar properties. The relatively low earning power is attributable to concessions granted to lessees, such as free rent and options to renew leases at favorable rental rates. The free rent concessions are temporary, but the renewal options, if exercised, would materially limit the earning power of the property during the last five years of the ten year analysis.

The counselor advises that there is a high probability that the renewal options will be exercised and that all the concessions should be considered in projecting the rental income. The owner agrees that the free rent concessions should be taken into account as long as they are in effect, but takes the position that the renewal options should not be taken into account because the options have not been exercised and there is no assurance that they will be exercised. Accordingly, the owner asks the counselor to treat the renewal options as confidential information and to project cash flow for five years only. How should the counselor respond? The counselor's dilemma is obvious. Compliance with the client's request would preserve the confidential nature of the client relationship and would not be unlawful, but the deliberate suppression of important information would be unethical in any profesdiscipline. Under these circumstances, counselor withdraw should the from the assignment?

Not necessarily. In a case such as this, the counselor has a duty to advise the client that it would be advantageous to permit full disclosure of all the lease provisions and that a prudent client would be persuaded to do so. The counselor should simply remind the client that the leases will be reviewed as a prerequisite to any sale and that it would be counterproductive to postpone the release of any information contained in the leases.

The preceding example illustrates the possibility of malpractice resulting from a misunderstanding of the requirement to preserve the confidential nature of the client relationship. The example demonstrates that confidentiality is not always ethical, the client is not always infallible and withdrawal from the engagement is not always the best way to avoid malpractice.

The Fiduciary Relationship

As already mentioned, the real estate counselor may act either as the client's advocate or as an impartial expert. When the counselor accepts an assignment to act as the client's advocate and when the assignment would not require or be perceived as requiring impartiality, there is no question that the counselor has a special fiduciary duty to the client. In such cases, the objective may be to find a solution for the problem that favors the client, to optimize the client's financial position, to minimize the client's risk or to strategize on his behalf. In these cases, the counselor-client relationship is not unlike the typical attorney-client relationship. The counselor is openly partial to the client and the special fiduciary duty to the client is obvious. This is not always the case, however.

The counselor is frequently engaged because of the counselor's reputation for objectivity, impartiality and expertise in a particular field. The purpose of the assignment might be to develop an unbiased professional opinion that the client and third parties can rely on, such as an opinion on the economic feasibility of a proposed project, or an opinion on the highest and best use of a certain parcel of land. In such cases, the counselor's findings may be presented to third parties in the form of a written report or offered in court as expert testimony. In these cases, it is clear that the counselor's fiduciary duty to the client has been extended to include a duty to all who rely on the counselor's opinion and, in the case of court testimony, a duty to the general public. Thus, the counselor-client relationship, although often described as a fiduciary relationship, is not always the simple two party relationship that one might expect. Failure to understand this complex relationship can lead to serious ethical problems.

The following example will illustrate a typical problem. Assume that the counselor has been retained to develop a professional opinion on the economic feasibility of a proposed shopping center and to prepare a written feasibility report with all the customary documentation. The client is the promoter of the project and the counselor is recognized as an impartial, objective expert in the field. The counselor's final report will be used to attract investment capital to the project. During the course of the study, the counselor discovers that another expert, engaged by the same client, recently found the same proposed project to be economically infeasible. The other expert states that no written report was prepared and refers the counselor back to the client for further information.

The client acknowledges the prior study, and explains that the study was aborted because of a misunderstanding between the other expert and the client. No written report was prepared because

the client had no use for a negative report and did not want it to be made a matter of record. The client asks the counselor to proceed with the study and expresses confidence that the proposed project is feasible and that there will not be a misunderstanding. At this point we must ask the obvious questions. Is the client seeking a predetermined conclusion? Does the client really want the counselor's independent opinion? More important, does the client understand that, in an assignment such as this, the counselor must act as an impartial expert, not as the client's advocate?

It is helpful to look at these questions from the client's point of view. Assume that the client is already convinced that the proposed shopping center is not only economically feasible, but potentially highly profitable. In this case, the client is not really seeking counsel, but is seeking confirmation of feasibility from a recognized authority in order to satisfy the prospective investors. From the client's point of view, economic feasibility is a foregone conclusion and there is no need for any independent opinion that does not confirm that conclusion. The client's position is understandable, but it is clear that the client does not fully understand that, in this case, the counselor must act as an impartial expert, not as the client's advocate or spokesman.

To illustrate the problem, assume that the client's confidence is misplaced and that the market evidence does not support a finding of economic feasibility. Under these conditions, another misunderstanding appears to be inevitable. What could the counselor have done to avoid it? Should the counselor withdraw from the engagement?

In answer to the first question, the counselor could have avoided the misunderstanding simply by discussing with the client, before accepting the assignment, the possibility that the proposed project would be found to be economically infeasible. This would give the client a chance to accept or reject that possibility, and, in the event of rejection, the counselor could decline the assignment.

In answer to the question of whether the counselor should withdraw from the engagement, the counselor should not take the initiative to terminate the engagement simply to avoid a misunderstanding or to prevent the counselor's negative finding from becoming a matter of record. A better solution to the problem would be for the counselor to complete the assignment by preparing and submitting a confidential negative report, complete with all the customary documentation and explanations required to support the counselor's conclusion. The report, although negative, would be helpful to the client, because it could be instrumental in dispelling a false notion and preventing a financial disaster.

The preceding example illustrates a typical problem resulting from a misunderstanding of the counselor-client relationship and the counselor's fiduciary duties. The example demonstrates that the problem could be avoided by better communication between the client and the counselor. Again, the example shows the client is not infallible and it offers a possible solution to the problem. There is no suggestion that the example covers all the possibilities for avoiding or solving problems such as this. In some cases the counselor might be able to advise the client in advance whether or not a particular project would be feasible and whether further study would be helpful. In other cases the counselor and the client might agree in advance to terminate the engagement or alter course in the event of certain findings. In any event, a full understanding of the counselor-client relationship and the counselor's fiduciary duties will be necessary.

Concluding Comments

The counselor-client relationship obviously involves two parties, and there is no single code of ethics or set of standards that controls the relationship. The standards that apply to the counselor may not apply to the client and vice versa. The counselor-client relationship varies, and it behooves the counselor to ascertain, when applicable, that there are no misunderstandings of the counselor's fiduciary duty to third parties and to the general public. The client can and should set the ground rules for a particular assignment, but the counselor can and should decline any assignment that compromises the counselor's standards.

The preceding example relates to a counseling assignment in which the counselor acts as an impartial expert, not as the client's advocate. It was not the intent, however, to suggest that the counselor acting as the client's advocate does not have a fiduciary duty to use independent judgment, and, if necessary, to disagree with the client. Whether the counselor is an impartial expert or a partial advocate, the relationship with the client must be open and uninhibited. If the counselor's fiduciary duty, i.e., duty as a trusted adviser, requires disagreement with the client, so be it.

BE GOOD, PLAY NICE

by Lawrence A. Kell, CRE

Share your toys—be good—don't hit. Mothers all over the world say these expressions to their children; and since everyone has a mother, we undoubtedly heard these expressions, and others similar, as children. The biblical Ten Commandments set forth a series of guidelines for human behavior. Laws, ordinances, rules, regulations, administrative decisions, uniform standards and codes of ethics are additional models or patterns for human behavior.

When asked to consider writing an article on how ethics serve the client and the real estate counselor, I began by checking my *Webster's Dictionary* for the definition. The English language is not as precise as others, German for instance, and it may not have specific words which clearly delineate specific meanings as might be expected; however it is disappointing to consult the dictionary and find the definition for ethics contains the word itself—and I quote:

ETHIC: "1. n. a system of ethics 2. adj. ethical, dealing with ethics, an ethical theory relating to morality of behavior, ethical standards conforming with an accepted standard of behavior, e.g. in a profession or trade." 1

The dictionary's definition of ethics is much like the mother's instructions to play nice—nice not being defined in terms of specific activity, but rather, in the more global sense of the result as opposed to specific actions leading to the result. In order for the child to "play nice" the child must have an understanding of what is embodied in the mother's instructions rather than reliance on the specific words used to convey the instruction.

Subjective Versus Objective Measurement

Ethics has the same position in adult society. It's almost as though if one has to define the word, one does not understand the concept; and conversely, if the concept was understood no definition would be necessary. While I believe this circumstance is well understood by professionals, and particularly by members of The Counselors of Real Estate, the lack of a specific measurement may lead to subjective interpretations rather than objective measurement. When the highway speed limit is 55 miles an hour, this is a precise measurement of whether a vehicle is traveling at the speed limit, or over or below it. The measurement is objective and the same results are derived regardless of who takes the measurement.

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Be Good, Play Nice

Subjective criteria are not susceptible to specific objective measurement. Be nice might have one meaning in our society and a different meaning in another. The measurement is subjective within each cultural group, and, perhaps, even subjective at the level of the individual parent issuing the instructions.

Subjective measurement is not appropriate for adult society, and certainly not appropriate for professional societies. Accordingly, a professional group wishing to identify its members as adhering to specific higher standards of behavior sets forth a code of ethics and professional practice guidelines for the members to follow. By establishing such objective criteria, both within and outside of the organization, there is a measurement for adherence to the adopted standards of the organization. By joining together to establish their standards, the members are expecting and inviting scrutiny of the individual and group behavior.

Different Standards For Different Groups

As part of the background research for this article, I reviewed the ethics' provisions of the National Association of Realtors' specialty groups, or affiliates; and key words identifying member activities are summarized here as follows:

- be informed, objective, honest, helpful, truthful, loyal, accountable, diligent,
- and provide fidelity, maintain confidentiality, provide full disclosure, provide competent service, and cooperation in investigations.²

In The Counselors of Real Estate's Code of Ethics, each Member is bound to:

- Conduct his professional activities in a manner that reflects credit upon himself and The Counselors of Real Estate. A Member must refrain from conduct that is detrimental to The Counselors, the real estate profession and the public.
- Cooperate with other Members and, when appropriate, share with them his knowledge and experience. A Member shall assist The Counselors in carrying out its responsibilities to the users of counseling services and the public.
- 3. Respect the professional reputation of and the confidential relationship with other Members.
- 4. Preserve the confidential nature of the client relationship.
- Avoid advertising or solicitation that is misleading or otherwise contrary to the public interest in promoting a counseling practice and soliciting counseling services.
- Decline any counseling assignment which makes the fee contingent on the substance of the advice given.
- 7. Comply with the requirements of the Standards of Professional Practice and Bylaws of The Counselors.³

The existence of differing ethical standards for different occupations, as opposed to professions, is clearly understood in our society. Commissioned sales people are not held to the same ethical standard of conduct that one would expect of a bank trust officer. I believe society clearly understands that a sales person, working on a commission basis, is first and foremost seeking his own best interest. I believe over a long period of time, the most successful of any group are those individuals who place a higher value on the client's result than on their own; and that by either defining for themselves, or within a select group, a higher standard of ethical behavior, they rise above those individuals who might place their own personal gain ahead of their client's.

As we saw in the ethics' listing of member activities, the body of ethics contains a multitude of facets. One facet is trust. Two bank robbers may trust each other in terms of performance to an expected standard; however, neither individual would be trusted by society. Where then does this discussion on ethical behavior leave us? Your mother's instructions to be good and play nice did not come with a specific set of rules and regulations; however, they were embodied in the charge.

Why Have Standards Of Professional Behavior?

The formation of a policy on ethics and standards of professional behavior has three primary purposes: The first, to identify to society as a whole and specifically to potential users of the service provided and to the professional practice community as a whole, what is expected of the particular organization's members. The second is the internal statement of those expectations and procedures to follow if concerns are raised. I would think, in practice, particularly within a professional society such as The Counselors, reference to the ethics and standards is more likely to occur in response to some event, such as a challenge within or without the organization.

Most of us are at one time or another involved with occupancy leases for real estate. A lease usually is thoroughly negotiated between the parties and then filed away. The lease remains in the file drawer until a specific question might arise which requires the parties to go back to the specifics of an understanding (the lease), as opposed to operating on what is understood between the parties on a day-to-day basis.

The same practice probably follows a professional society's code of ethics and standards of professional practice. The general canons of ethics at the professional society level are understood by the members and are practiced on a routine basis without specific reference to the guidelines for each act a person might undertake. Like "be good and play

nice," the intent of the ethical provisions is well understood, and it is only in times of scrutiny that the ethics' document would be called upon as part of the objective measure of a particular act or omission to determine if an individual's activities were within acceptable behavior, as defined by the ethical statements of the particular group. When the organization fails to uphold its own standards of professional practice, the entire organization may be tainted by the activities of a relatively few number of its members. The professional stature of one organization within the real estate community is such that the letters of its designation are used to represent performance to the desires of a client as opposed to performance that meets or exceeds the ethical standards of the group. Professional societies are not clubs in which the members are given license to behave in a manner which would not be appropriate for a candidate aspiring to join the particular professional group.

The third purpose of the standards of professional conduct and the delineation of ethical behavior is the members' protection from practices by other individuals who do not meet the standards. Strict adherence to a higher standard is what truly sets one professional organization apart from the run of the mill. Achievement of a particular

professional designation, either by virtue of intellectual accomplishments, experience or a combination of these elements, bestows upon the member a designation that sets that individual apart from the general practitioner within the industry. The designation CRE (Counselor of Real Estate), which is granted to members of The Counselors, is considered by many to be the premier real estate designation within the National Association of Realtors. CRE members of The Counselors willingly and voluntarily choose to uphold a high standard of professional behavior for the benefit of The Counselors, and to the benefit of their clients.

In a business climate that is rapidly changing and widely diverse, it is important to service providers and to inform clients that organizations exist to foster high ethical standards. Thus, clients and potential clients can choose those providers who subscribe to and support standards which work to the betterment of the industry and to the professional practitioners.

NOTES

- The New Lexicon Webster's Dictionary of the English Language, 1988 edition, s.v. "ethic."
- Code of Ethics and Standards of Practice, National Association of Realtors, Jan. 1994.
- 3. Code of Ethics, The Counselors of Real Estate, rev. 1989.

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LOFTY EXPRESSIONS OF ETHICAL CONDUCT DO NOT INSURE ADHERENCE

by John R. White, CRE

Note: This article is largely based on two chapters written by Mr. White in the Real Estate Development Manual, edited by Jerome B. Alenick, and published by Warren, Gorham & Lamont, 1990. The first is Ethics in The Development Industry and the second is Real Estate Counseling in the Development Process. Considerable new material, including the case studies, has been added

o discuss ethics and how it relates to the Counselor of Real Estate, one must define what is meant by real estate counseling. The real estate service business generally consists of brokers, who are paid commissions under the laws of agency on the basis of successful performance for sales or leasing, and, managers, who operate real estate and are paid from the gross operating income of the property, usually on an agreed percentage basis, or occasionally on flat fees. Appraisers occupy a special niche in providing detached, impartial, objective service to owners and others in the valuation of the client's property or prospective interest in the property. Counselors are unique because they may provide a wide range of passive or active services that could otherwise be performed by brokers, managers and appraisers. Counselors also are distinctive because of their special advisory relationship with the client and because of their method of compensation.

Real estate counseling is the business of analyzing specific real estate problems and needs for agreed fees, drawing conclusions and making recommendations to a client. Some real estate counselors regard themselves as professionals. However, they may better be described as business people with professional motivations. The concept of professional motivation requires adherence to a more strict code of ethics and standards of practice than may be characteristic of many businesses. But, have the CREs created a sufficiently descriptive code of ethics in keeping with their fiduciary obligations? This article will attempt to answer that question. The nature of the consulting problem frequently calls for an objective, dispassionate and professional solution. In this instance, the counselor acts in a passive way on the client's behalf. If, thereafter, the counselor is engaged to implement his recommendations, then he will serve in an active role.

Types Of Compensation

Most counselors in the larger realty companies are paid on a salary basis and also receive an annual bonus for their production and ability to obtain new business. The prevailing counselor culture is to join people together in a common mission by stressing the importance of teamwork in the consultative process. Thus, the intra-office work environment is almost wholly non-competitive, and, the concept of ethical conduct starts in-house. It is a

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comparative rarity for a counselor to be paid by his company on a piecework basis, i.e., a certain percentage of the gross fee earned by the company on each account. On the other hand, counseling fees payable by the client to the individual counselor or company are usually, but not always, agreed to in advance. If the counselor is engaged to study the feasibility of site development, he will make the study for a flat, agreed amount, or may identify a range of fees, with the final amount dependent on hours, changes in the scope of services or unusual circumstances.

Sometimes monthly or quarterly retainers are negotiated where the services are long-range or varied as to scope, or both. Where retainers are employed, there is generally some arrangement for additional compensation based on hours, performance or the success of any development effort. If the advisory services are of a non-transactional nature, the adjustment for compensation over the retainer is usually on an hourly basis. However, where a sale, purchase, lease or financing is arranged, an agreed incentive fee above the non-refundable retainer amount is paid by the client. The total fee is partially contingent, i.e., dependent on the counselor effecting a transaction on satisfactory terms for the client.

Some have criticized this method of charging on ethical grounds saying that it smacks of pure brokerage. This is simply not the case. First, brokerage implies an open agency arrangement in which brokers compete with one another to effect a sale. A counselor would never accept business on an open agency basis. If there is a similarity, it is with the exclusive agent, who acts on behalf of a client on a fiduciary basis. The counselor, also exclusively engaged, is nevertheless still distinguishable from the exclusive agent. The counselor receives a non-returnable retainer or other agreed fee in advance of services, and all marketing and promotional costs are usually borne by the client. Counselors are regarded as team players. They have a more professional philosophy in conducting their business, because they tend to be salaried and share annual bonuses. Then, counselors are schooled by The Counselors of Real Estate in offering analytical, detached and objective services.

The market realities also demand that counselors receive some type of success fee in a transaction. Otherwise, it would not be possible to attract the high-quality, educated, professionally motivated person to the counselor ranks. The professional mind-set remains, however, because of the counselors' dedication to providing quality advisory services.

Real Estate Counseling: A Business With Professional Motivations

To what extent can a counselor consider himself to be a real estate professional rather than merely a businessman? At the moment, counselors lack professional standing because the organization that represents them, The Counselors of Real Estate, (CRE) is a non qualifying society that issues invitations for membership without any formal educational or examination requirements. Nevertheless, The Counselors' invitational standards are very high. A person is invited only after extensive interviews, reference checks, and appropriate documentation which indicate the provision of past counseling services for agreed fees, negotiated in advance of performing services.

CRE has both a Code of Professional Ethics and Standards of Professional Practice. The Counselors are insistent that each member establish his contractual relationship and method of compensation before taking any overt action on the client's behalf. It also vigorously opposes conflicts of interest and compels its members to disclose such a possibility to all parties and to obtain the consent prior to providing services. CRE constantly seeks to attract, then qualify, and finally invite those who spend a portion or all of their time on counseling assignments.

There is nothing fundamentally different from any other business or profession in operating a real estate counseling practice. The question of appropriate and acceptable business conduct is indeed universal. Within an industry or profession, there may exist customs and practices that differ and on which codes of ethics and standards of professional practice are customized. Real estate comprises an important and integral part of our economic society. It fosters relationships, contractual or otherwise, with industry related business people and entities, and in the course of these relationships, ethical problems invariably arise. Thus, it naturally follows that any set of generalized statements on standards of conduct have universal application which should be expected of all business people. The problem lies in being specific about violations of ethical standards. The counselor should not be as influenced by lofty statements as by actual illustrations of improper conduct.

How Counselors Like To Regard Themselves

The quest for profits is the driving force in business. Aside from material gain, how can the counselor burnish his image in a manner that reflects positively on his business and himself? Can those qualities be identified which lead to an enviable reputation? In an informal survey I conducted of investors, brokers and counselors, the respondents were asked which traits of character they ideally

wanted to be recognized for and possess. The following five were the attributes most wanted.¹

Credibility. Credibility is the quality of being able to inspire in others belief and trust in oneself. Credibility can only be earned through the maintenance of consistently high standards of performance and conduct.

Integrity. Integrity requires an uncompromising adherence to a code of moral, artistic or other values; it requires utter sincerity, honesty, candor and avoidance of deception, expediency, artificiality or shallowness of any kind. This is a more difficult achievement than credibility because its emphasis is on setting the highest personal standard, while credibility measures the person's belief and trust of others. It may be fair to say that integrity is a prerequisite for credibility and that credibility cannot be recognized without integrity. Integrity, like many idealistic words, is frequently loosely used or abused. Society generally has reservations about those who proclaim their own integrity. The prevailing societal view is that it must be recognized by others rather than espoused. The word integrity appears to invite relative standards, since by its very definition, insistence on the word "uncompromising" seems almost incapable of complete fulfillment.

Courtesy. Courtesy is defined as well-mannered conduct indicative of respect or consideration for others. Thus, the courteous person is thoughtful about relations with others and essentially is helpful, kind and attentive. For example, it is simple courtesy not to keep a visitor waiting unduly, without explanation or accommodation. Keeping people appropriately informed is another illustration of courtesy. Much discourtesy or rudeness occurs by omission rather than commission, but lack of thoughtfulness cannot be excused on any grounds.

Discretion. Discretion is the quality of prudent silence with respect to confidences. How frequently this attribute is disregarded in a world seemingly characterized by disrespect, forgetfulness and self-importance! The need for confidences arises in every business. Those individuals and companies that respect and honor the trust inherent in confidences often rise to the fore. Those who violate confidences (in many cases, in an effort to establish their inner circle status) violate the attributes of trust in the most rank way.

Recognition. Recognition is the derivative from the prior character attributes. It is the satisfaction of being regarded as exceptional in one's field. In many instances, the gratification is basically nonmaterial and not necessarily profitoriented. For example, many scientists, technicians and professionals derive more gratification from recognition of their achievements than from material gain. The very nature of the real estate industry, however, tends to attract persons who primarily want to gain recognition for their profitable accomplishments. Whatever the motivation, counselors (and others) oftentimes value recognition.

Defining Ethical Business Standards And Practices

Modern businesses operate within certain standards of conduct that are embodied in codes of ethics and standards of professional practice. Many codes are framed in lofty generalizations, devoid of specific reference to illegal, immoral or wrongful conduct. These ideals would have more practical application if case illustrations were provided in a separate document. The document could also specify a list of prohibited practices which could result in disciplinary action against the violator.

The Urban Land Institute set forth a listing of ideals as a standard for conduct: respect for land; the profession; the consumer; the public equality of opportunity; others in the profession; the environment; the future; future generations; and personal integrity. Sprinkled throughout are references to reputation, integrity, proficiency and honesty. The code of the Associated General Contractors of America is couched in equally lofty terms of skill, integrity, responsibility, trust and honor. Neither this code nor the ULI code provide case illustrations of practices and procedures that do not meet commonly accepted standards of morality and good conduct.

Oddly, neither the Code of Ethics nor the Standards of Professional Practice of The Counselors define the word "ethics." Similar to the previously cited codes, the CRE Code of Ethics contains generalizations of a sweeping nature in which conduct, cooperation, respect for others, avoidance and compliance are the dominant words. Whatever specificity exists is found in the Standards of Professional Practice which sets forth 12 standards with which the counselor must comply. To The Counselors' credit, six of the 12 practices provide an added rationale which serves to further explain the standard's meaning and offers a concept of how it may be interpreted. Nevertheless, taken together, the Code and the Standards fall short of providing full case study illustrations of unethical conduct. The Counselors do have a Procedural Manual, separate from the Code and the Standards, which details how complaints are received and adjudicated, and it defines the four degrees of disciplinary action the member may face, namely: admonishment, censure, suspension or expulsion. The question may reasonably be raised whether the four possible actions should be mentioned as a prefatory note in either the Code or the Standards. There is no doubt

that any member of a trade association would be more aware and more serious about the consequences of probable misconduct if disciplinary action is set forth, if not in the Code, then at least in the Standards.

Turner Construction Cited

As an example, Turner Construction Corporation, founded in 1902, has maintained a high standard of personal and corporate integrity. It is one of the few national general contracting companies that publishes internally its business conduct guidelines and insists on compliance from its employees. Turner takes a serious view of its relations with clients. architects, engineers, suppliers and subcontractors. It cautions its employees against accepting gifts and entertainment that clearly exceed the bounds of propriety. "Gifts of more than minor value, gifts of cash in any form or amount, lavish entertainment or substantial favors must not be offered or accepted." "Employees must not accept gifts or entertainment where to do so might result in an obligation . . . to conduct business with the donor in such a way as to reflect less than an independent, arm's length relationship." A mechanism exists for an employee to seek guidance when he thinks a gift may exceed ethical constraints.

Turner's guidelines especially are emphatic in stating that cash or its equivalent may not be paid to any government official at any level or jurisdiction. Kickbacks, bribes or other improper payments may not be directly or indirectly made or received from anyone. If Turner has direct knowledge or suspects that a subcontractor is paying bribe money to either a government employee or a union official, it informs the subcontractor to "clean up your act," that is cease and desist illegal payments, or be stricken from Turner's approved bidding list. No political contribution may be made in the company's name without the express written consent of the corporation's general counsel. Turner also monitors compliance with its guidelines by requiring key company employees to furnish their managers with an annual statement of compliance.

Parade of Indictments

There has been much scandal concerning shoddy business practices that stain the national business character. These questionable or illegal practices are not only the hallmark of the real estate industry. Cases in point are:

- the preferences accorded some years ago to prominent political figures or politically wellrepresented developers in disregard of contrary professional staff judgments in the Department of Housing and Urban Development.
- the inadequacy of many real estate appraisals which often result from ethical misconduct by the appraiser.

- the shabby business practices by the savings and loan industry in the 1980s characterized by fraudulent loans with inadequate collateral or by considerations of personal aggrandizement.
- the Wall Street insider trading scandals which were an embarrassment to the securities industry.

This parade of indictments has heightened public consciousness to recognize the absolute need for more effective ethical controls. There are signs now that all industries are imposing higher standards of conduct and demanding vastly improved ethical behavior of their employees.

The Difficulty Of Distinguishing Favors From Bribes

Favors are defined as friendly regard, goodwill or esteem toward another, especially a superior, or partiality, leniency or anything tending to somone's particular advantage. In a social setting, favors arise out of a personal relationship in which the parties are more than willing to help each other in special cases and tend to act out of regard, respect or affection. However, in a business setting the parties must carefully consider whether doing a favor constitutes responding to a bribe or making someone beholden. A bribe is defined as the giving or promising of something of value; to induce or to influence; or a price, gift or equivalent given to pervert the judgment and corrupt the conduct of another. Independence is the obvious answer to any solicitation of a bribe. One need only ask himself whether one's independence of thought or action is being compromised if a gift or its equivalent is accepted. The best solution is never to accept even the most modest gift or favor.

What Is Meant By Ethical Conduct?

The discipline known as ethics is concerned with good and bad or right and wrong. It is basically a group of moral principles or set of values. It is closely linked to morality which is defined as a positive doctrine or system of ideas concerned with personal conduct. Morality imposes the highest standards of goodness and uprightness of behavior, conforming to the customs or accepted standards of a particular culture. Ethics, on the other hand, is concerned with distinguishing good and bad practices, customs and habits.

The word propriety has a broader meaning of socially acceptable conduct expressed in terms of what is proper or fitting and acceptable in behavior and speech. On the other hand, corruption is the impairment of integrity, virtue or moral principles; it involves inducement by improper consideration. Corruption results in a change for the worse and perverts people into a state of moral weakness or wickedness.

No one is totally beyond temptation. Many cynically believe that everything has its price. Few believe there is anything close to uncompromising integrity. There is always the disposition to temporize in the interests of expediency. Sacrosanctity is an attribute that relatively few possess. Therefore, the only realistic way in which ethical conduct can be improved is through an increased awareness based on educational programs at the university and trade association level. It is simply insufficient to raise one's level of consciousness about ethical conduct by reading code of ethics that are clothed in generalities. Ultimately, exemplary conduct can become almost a reflex action. Yielding to inducements will never become extinct, but its significance can be sharply reduced by making people aware of what constitutes good from bad or right from wrong.

Examples Of Unethical Conduct

I. Contract Obligations

A well known, large urban real estate agency offered real estate consulting services in addition to the conventional brokerage, management and insurance services. It entered into a verbal contract to advise its client on how to re-lease an empty building recently vacated by a major tenant. The contemplated services were to survey the market and make direct approaches to the most logical tenants. The fee was to be based on the number of hours, times an agreed hourly rate, with a 10% bonus of the total if the consultant was successful in the releasing effort. Halfway through the search, the agency sensed that a major tenant could be obtained. It then requested a modification of its services to a contingent leasing broker status and the termination of the verbal consulting arrangement. The client refused, citing the contract in force. The lease deal was made and the broker sued for commission.

Comment: Not only was this a frivolous suit by the agency in defiance of its contract obligations, it was also a clearly unethical act even to request modification of the contract. A cardinal rule in counseling is: "Never change horses in the middle of the stream." The agency did not understand the fiduciary nature of its consulting relationship with the client. It did not perceive that any such change would deprive the client of objective, professional and detached services and leave the client at a critical moment without professional advisory services. Rather than providing its client with the best services, the agency was motivated by greed.

II. Conflict Of Interest

A real estate agency offered counseling and appraisal services in addition to the conventional brokerage and management. Its appraisal department was engaged to make an estate tax appraisal in

connection with a decedent's estate. It completed the assignment with dispatch. While it appeared to observe all the appraisal ethics, it arrived at a reasonably conservative result, i.e., low end of the market value range. The estate then decided to sell the property. The agency offered to act as a consultant in the disposition of the property. Its fee was to be a fixed, non-contingent minimum, plus an agreed amount on sale. However, it suggested a taking price that was 30% higher than the appraisal department's figure made just a few months earlier for estate tax purposes. Was there an inherent conflict of interest for the agency to propose a sale at such a significantly higher price than the appraised value? Is this a circumstance where: The appraisal department should routinely turn down estate tax appraisals knowing the sales department of the agency had an excellent chance of winning the disposition assignment The agency should adopt a rule not to conduct estate tax appraisals to avoid the appearance of a conflict of interest when it simultaneously solicited sales agencies from decedent's estates.

Comment: This is an uncomfortable situation in which the reputation of the agency can be cast in doubt because of the inconsistent and possibly insincere quality of the services rendered. This example represents a distinct conflict of interest regarding the assignment and the motives involved. The solution here is to adopt and enforce a company rule that prohibits the appraisal department from accepting such assignments.

III. Full Disclosure

A counselor entered into a six-month contract to sell a 200-unit rental apartment house located in an upscale section of the market area at a mutually agreed price for a non-contingent fee. After two months, the apartment house had not been sold although the counselor had been diligent in his sales efforts. Subsequently, the owner of a comparable property in a comparable location asked him to offer this property for sale on essentially the same contractual basis as cited in the first instance. The counselor agreed to undertake the sale but did not inform either the first or second client that he would be simultaneously offering for sale two highly competitive properties. Was this proper conduct on his part?

Comment: This is a flagrant violation of a basic rule of ethics: One must fully disclose the existence of competitive contracts. Obviously, the second client might have chosen another counselor or agent if he had been informed of the circumstances. In any event, the counselor has a duty to disclose; he cannot potentially put a client in a competitively disadvantageous circumstance with the possibility of a monetary loss because he does not disclose a possible conflict of interest.

IV. Bribery

A consultant was under contract to obtain a zoning change and an approved sub-division plan on behalf of an absentee land owner. He was able to obtain the zoning change and a sub-division into 20% more lots than had been anticipated. At the time the zoning change was under consideration, a zoning official asked for a free delivery of "excess" topsoil to his son's house. The consultant agreed. The next summer, the same official asked about a summer job for his son, and the consultant grudgingly acceded to the request. Consequently, the consultant realized he had been bribed and now was captive to the official who regarded the favors as recompense for the zoning change.

Comment: Some years later, the consultant remarked, in confidence, that he was uncomfortable about being compromised. He fully understood that disclosure would severely damage his career and would inadvertently be detrimental to the client, who was not a party to the bribes. The moral is clear: in one's anxiety to perform exceptionally well for a client, one cannot undertake unethical acts to achieve the best results.

V. Non-contingent Fees

A CRE, also a licensed real estate broker, entered into a year's exclusive contract to sell a suburban office park for the developer. Certain vexatious problems confronted the CRE. The project, consisting of 600,000 square feet of space in four buildings, was 18% vacant, and the first mortgage financing of \$40 million was a mini-perm with only a 5-year remaining term. The CRE realized that a comprehensive office marketability study was required to inform prospective purchasers about what to expect on absorption. It would also be essential to complete an in-depth IRR analysis in support of the selling price. Thus, much professional work was required to ready the property for sale.

The engagement contract provided for a minimum non-contingent fee of \$100,000, payable in 12 monthly installments. The CRE also was to receive an additional performance fee of \$200,000 if a sale was negotiated on terms and conditions satisfactory to the seller. A fellow CRE learned of the fee payment method by the developer to the counselor and complained to The Counselors' Ethics Committee asserting that non-contingent fees were unethical because they deprived the CRE of objectivity and professionalism.

Comment: Both The Counselors' Code and the Standards permit partially contingent fees under carefully defined circumstances. The fact the counselor was to receive such a substantial minimum fee served to assure that his objectivity and sense of professional obligation to his client was unimpaired. Counseling requires a certain mind-set

which assures a fiduciary relationship. The counselor also prepared studies and analyses of a high order before the property was marketed. In my opinion, such high level support and preparation could not be assured if only a fully contingent commission was offered.

The realities are the CREs could not attract to its ranks those particularly qualified marketing and negotiating specialists if those specialists knew that the Code of Ethics restricted their method of compensation to an hourly rate basis. Otherwise, the temptation to act as a broker would be too strong. The counselor in this case had fully disclosed to the prospects the general nature of his engagement, and, the substantial up-front, non-contingent fee assured the counselor's objectivity to his client.

VI. Impropriety

A counselor was engaged to make a site-specific marketability study for a proposed new office building on a major urban site. The developer had prior commitments to lease one-third of the building, but he could not obtain a permanent mortgage take-out or a construction loan without a professionally accomplished market study to analyze the economic base in the market area and all the real estate supply and demand factors. The study would serve as a basis to estimate the rental value and the critical absorption rate. The study would take 90 days.

In the first 30 days, the developer invited the counselor and his wife to his country club for dinner. The counselor considered this merely an expression of friendship and goodwill by the developer. In the next 30 days the developer invited the counselor to join a group of male friends for a weekend of hunting at his lodge. The counselor desperately wanted to go because two of the guests represented outstanding new business opportunities. He accepted, despite misgivings. On the return car trip, the developer offered his condominium in Aspen for two weeks during the following winter. The counselor never had previously been socially close to the developer, yet he agreed to the use of the condominium for his family because both his son and daughter were avid skiers. Was the counselor compromised by his acceptance of these favors?

Comment: Unquestionably, the intent of the developer was to induce the counselor to arrive at a positive answer on the probable rent level and absorption rate. It was particularly indiscreet for the counselor to accept these favors prior to the rendering of his report, especially in view of the previous non-social nature of the relationship. The counselor clearly should have understood that his independence and professional sense of objectivity had

been compromised. Even if the counselor personally believed that his integrity had been maintained, he should have avoided the appearance of an impropriety, especially since the circumstances could become known. Further, the counselor should have recognized that his conclusions in rents and absorption inevitably were colored by the favors he had received. In a sense, he was almost forced to write a report supportive of the developer's needs. This is a clear case of impropriety and a violation of ethical conduct.

Propriety As a Factor In Ethical Conduct

It is difficult to separate ideal personality traits from ethical conduct. For example, what is proper or fitting usually is considered to be ethical. A person who acts with propriety likely is ethical. On the other hand, it is possible to be ethical and not fully meet all the tests of propriety imposed by business society. The safest course is to be proper and ethical. What then constitutes ethical conduct that meets the highest standards of business society? As an ideal that only a very few can achieve, one may aspire to the following admittedly difficult status.

An ethical businessman is well-mannered, neatly attired, attentive of mind and thoughtful of others. He is direct and forthright without being blunt or intimidating. He is devoid of ulterior motivation and forms opinions and conclusions on the merit as he sees them. He never is supercilious or condescending. He has a broad and tolerant view of others and dislikes pretense and snobbery. He never acts in an obsequious or sycophantic manner. He practices respect for others but considers undue deference as insincere. He is an excellent listener who does not feel the need to dominate a conversation or impress others with his knowledge. He distains self-righteousness. He is positive and cheerful and seldom negative or morose. He prizes his independence of view and will espouse it on occasion, but never forces his views on others. Scheming is alien to his personality, while discretion is ingrained in his character. He is caring about others and does not practice self-preoccupation. His first concern is always for others rather than for himself. He is generous of spirit and always tactful. He speaks his mind and does not blow in the wind as a reed. Above all, an ethical businessman is loyal to his family, his friends and to those public and private institutions that form the basis for his being.

The description presented above represents the goals to which I think all business people should subscribe no matter how difficult the attainment.

Ethical Conduct Starts In-house

Consultants, investors, brokers and managers frequently think that adherence to a code of ethics exists mainly or only in one's relations with third

parties outside the firm. Nothing can be more wrong. The proprietor of a consulting company or department within an agency must drive home the point that ethics begins in-house. Full disclosure, honesty in one's representations, candor in one's dealings, cooperation with other employees and sharing in a common mission are precedent attributes before any employee deals with the general public. If an employee fails to live up to his company's own code of ethics, there is almost a 100% chance he will be involved in an improper act in dealing with the general public.

I strongly recommended that the real estate company - counseling, appraisal or standard brokerage - frame its own internal code of ethics and standards of professional practice, which may be modeled after those of a trade association, but in which the company's corporate culture is interwoven. Only then, can the employee venture forth, confident about the manner in which he represents himself.

Ethics Must Be Taught

Writing some years ago in *The New York Times*, Zymunt Nagorski, president of the Center for International Leadership, asked, "Can you teach business ethics? Probably not in traditional ways. But, if you expose businessmen—and students getting ready to go into business—to real ethical dilemmas, then you have a chance." This is being done currently by universities and public interest trusts. It should also be done by real estate and investment trade associations. Seminars should be conducted by the associations on the specifics of ethical conduct utilizing case studies. Associations also should create new or revised standards of practice which detail unethical acts and cite what would constitute ethical behavior in each instance.

In the same article, Nagorski said that most business people escape into gray areas when the dilemma is exposed for discussion by their peers. The exercise ultimately forces them into the black and white but not before they attempt to squirm and wiggle out of direct answers. In the end, they must make a moral choice, because there is nothing in life more precious than integrity.

A real, long-term effort should be made by The Counselors to raise the consciousness of its members to the continuing existence of unethical conduct. Both NAR and the Appraisal Institute now compel their members to take a refresher ethics course every four years as a condition of continuing membership. The CRE could do likewise but with a greater concentration on case studies. This can be accomplished effectively by devising formal curricula taught by members trained as ethicists, say, in three-hour sessions at agreed time intervals, e.g., three to five years. To heighten interest and

sharpen judgment, a few of the case studies could be truly borderline, where the counselor's examination might result in sharply divergent views and discussion on decision making and ethical judgment.

The most effective approach is to require the participants to evaluate the circumstances of each case in small breakdown sessions. Each participant would be expected to enter into a discussion on the pros and cons. Case studies would be presented in as much detail as required to identify all the influencing facts and circumstances. It is expected that the end result of the discussion would produce a surprising unanimity of opinion, and the counselor would leave the course with a heightened understanding of what constitutes propriety in business dealings. The counselor, in turn, would then impart to his employees the practical application of ethics learned in the session(s).

Conclusion

There are two guidelines in ethics that the counselor must constantly observe. The first is to be sensitive to the slightest perception of impropriety

even if none exists. What may fully satisfy the counselor regarding ethical conduct may not be as readily apparent to the public with whom the counselors deal. A second important guideline is to avoid conflicts of interest that tend to compromise the counselor's integrity. Some counselors naively believe that conflicts of interest are routinely resolved by full disclosure and by agreement with those third parties affected by the possible conflict. In many cases, it is patently insufficient to conclude that informing all parties will make the problem go away. Chances are the third party who is the most adversely affected soon will discover the disadvantage he sustains from consenting to full disclosure as a solution. Human beings are by nature susceptible to influence. Fortunately, through education, environmental, cultural and societal exposure, and parental guidance, one can improve his conduct and effectively relate to others in a trustworthy manner.

NOTE

 The definitions relating to or concerned with ethical conduct are from Webster's Third Unabridged Dictionary.

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SLEEPING WELL WHILE MAKING A LIVING

by Arnold S. Tesh, CRE

Power without ethics is profane and destructive in any community. While many have come to see that this is so in interhuman ethics—hence the outcries for human rights for justice and charity, for peace—few as yet have seen how the escalating human use of the world, unchecked by any ethic, prevents us from appreciating values on the earth where we reside. The outcry for a life ethic, a land ethic has only begun."

Holmes Rolston, III

With integrity now in the forefront, those of us in the real estate industry are constantly being confronted with ethical issues and how to deal with them. In a desire to be honorable and at the same time not paralyzed by the perception of impropriety, real estate professionals are being forced to make tough decisions. The ethical route can be viewed as either an obstacle to overcome or a standard to follow.

How the real estate counselor approaches ethical behavior in his practice is a very personal thing. The Counselors of Real Estate has established ethical standards of professional behavior which all of its members are required to follow. However, the manner in which each member abides depends upon his individual personal experiences. Becoming professional does not make us automatically honorable. We have to focus on the challenge with every assignment.

The Golden Dilemma

When we do unto others as we would have them do unto us—we are acting ethically. Unfortunately, the golden rule, though self-evident, is a tough thing to apply in practice. Depending on what the Counselor is doing, it may or may not be possible to advocate a client's position the way the client would like it advocated. When a real estate counselor is hired to help the client, he should not be expected to lie, cheat, steal or fib, trick or pilfer. Absolute moral duties are the standards within the real estate community. You cannot be half-ethical.

Ethical practice for the real estate professional presents a perplexing challenge. The professional is expected to serve the client and the public in an honest, selfless way and at the same time remain in business. However, for some real estate practitioners ethics is not natural; honesty requires conscious thought. How would you respond to the following scenarios?

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Knowledge Equals No Commission

Think about the broker who recommends to his client not to invest in real estate until the prospects are better. How many brokers separate knowledge of negative market trends from a need to make a living?

Knowledge Post Mortem

In commenting on the obvious market softness in 1993, a spokeswoman for the Chicago real estate brokerage community said, "It's no wonder—with all these people paying big prices in the 80s, the bubble was bound to burst." If the market fall was predictable or "no wonder," did those in the profession have an obligation to inform the public of the danger? Should the individual practitioner in 1989 have told his client that prices were far outpacing achievable rents and/or availability of debt capital?

Guarantee But Don't Bother Me

Those who lend or develop are also faced with tough decisions. We are experiencing the final chapter in the biggest bust in the history of real estate-the Resolution Trust Corporation sell-off. Years of de facto unregulated lending by institutions offering federally guaranted savings made it possible for even the most incompetent and dishonest to prosper. Panic set in once it was realized that the underlying real estate assets were woefully inadequate to secure the hundreds of billions of dollars circulating in the market. A lack of ethical behavior by every sector of the real estate community combined to create the crash. The thrifts needed to lend money to survive and the opportunistic developers needed to get as much money as they could. Collateral lost its meaning and the taxpayer ended up indemnifying the savings and loans in a helter skelter environment.

The structure created to solve the problem also has had its own share of ethical challenges. The RTC has been besieged by scandal resulting from interference by both congressional and executive branches. And now, halfway through the next decade the public is still supporting vacant monuments to private greed and government irresponsibility.

Pointing Fingers

Today, we have a complicated and strained relationship between the U.S. Congress, the Resolution Trust Corporation and the White House. In everyone's attempt to dodge the bullet and avoid the appearance of unethical or unprofessional behavior, more and more unsavory activity is coming to the attention of the public and, ultimately, the judiciary. When the problems started, The Counselors of Real Estate proposed that a special court be created to administer the national savings and loan bankruptcies. This was strongly opposed by those who did not wish to deal with court approvals. Today,

instead of a smooth judicial oversight of a bankruptcy, we are witnessing practically endless investigation, accusation and costly litigation. The U.S. Congress, the Resolution Trust Corporation and the White House each claim a monopoly on ethical behavior while accusing the other of self-serving deceptions and unethical practices.

Was it ethical to create an agency which was not sheltered from partisan politics? The answer lies in the perception of any wrongdoing. Did the real estate community have an ethical duty to take a stand? Clearly, the overall community did not see enough wrong with the formation of the RTC and its lack of protection from political interference to wage an ethics-based battle against the arrangement.

Failure Is An Orphan

Ethics has not always been the hot topic it is today. A failed market exposes many warts. The real estate boom of the 1980s was a time of easy leverage and inflated prices. It was a time when we heard little from within the industry about any unethical behavior. There was some strong criticism at the beginning of the Reagan years because of the administration's support to raise federal savings deinsurance limits simultaneous posit deregulating the savings and loan industry. There were a few who foresaw potential ethical dilemmas (but they were seldom heeded) until the bust occurred. The whole arrangement proved the big bang theory. Through the taxpayer, an industry was protected by government's hands-off policy.

At the time of the banking failures, what was touted by government as bipartisan support for deregulation and increased insurance, is now denounced by Democrats and Republicans alike. More than a decade after the enabling legislation was placed in force, it is still difficult to find an elected official who admits to any historical support of such a scheme.

Being Consistent Might Still Be Inconsistent

Whether the answer is good or bad, it is still the answer. In real estate, consistency and ethics are always inextricably intertwined. The appraiser is required to reflect the market, and what he personally believes is not necessarily germane to the appraisal. Conversely, the counselor is generally retained for advice and knowledge which does not necessarily comport with market perception. Thus, many counselors recommended against jumping aboard the "hot market" in the 80s, while many ethical appraisers reflected the market perception of unlimited hyper growth. Those inside the trilogy of equity, debt and asset were warning their clients about imbalances in the market.

Appraising and counseling often are very different functions. Appraisers are supposed to appraise. That normally means studying the market to conclude what the market reflects. Counselors generally are asked to express what they think, based on their experience and insight, even if their conclusions are contrary to market beliefs.

Multi-Disciplinary Hot Potato

In the last decade, foreign investment in real estate, particularly big city Class A office buildings, was fertile ground for the potential ethical dilemma. Though the market was chasing prices faster than the underlying income streams justified, the real estate economy was booming. Ten year rental projections in the Washington, D.C. downtown office market often reflected over \$50 per square foot. This was the level of income logically foreseen by the investors. They needed those rents, and even more, to justify the prices being paid. The rest of the story is common knowledge.

Though Washington is now probably the strongest downtown office market in the United States, top effective rents are about 60% of the forecasts given 10 years ago. Putting personal anticipations aside, the appraiser had a duty to project the rents at \$50 per square foot. The CRE, generally cognizant that the market was a balloon looking for a pin, had an ethical duty to reflect this information in rendering advice. Did the broker have a duty to do the same?

The appraiser's job was to rely on market data to determine the market value of the asset. After all, that is the job of the appraiser. The market data was all there and what was the appraiser to do? Lenders wanted to lend, builders wanted to build and buyers wanted to buy. The data was plentiful, particularly with all the limited partnership transactions then in vogue. In retrospect, many question whether the prices were truly representative of market value.

During the easy money, deregulated, open economy for most developers, the plan was to acquire land with someone else's money and then to subordinate that land to construction lending. Eventually, this lending would convert to permanent financing at the highest possible ratio to value and at the lowest possible rate. This is part of what developers were expected to do. Their opportunity to deal with ethics occurred at each point of the funding process. Is it enough to truly believe in what one is selling? After all, real estate is risky and not everyone knew the market would collapse. Besides, few of the loans were available without a professional appraisal.

The Next Challenge?

From an ethical viewpoint, the real estate counselor might want to consider the extent to which today's REIT's share prices are reflective of the pro rata value of the underlying asset. Is it possible that the limited partnership of the 80s is the REIT of the 90s? Only adequate research and impartial professional introspection will provide the answer. As CREs, will we have to defend our ethics and the behavior of the real estate profession in the first decade of the 21st century?



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> Jay L. Messer, MAI Roland D. Nelson, MAI Russell J. Chambers, MAI Donald J. Hartman, MAI Anthony Sanna, MAI

FAIR PLAY OR FAIR GAME

by A. C. Schwethelm, CRE

or the real estate counselor, the probability of dealing with conflicting interests and goals in client service is significant, since he often is confronted with having to resolve difficult, grayarea ethical situations. Real estate ethics include the relationships between the practitioner with the client; with other individuals; with other real estate professionals; with other professionals such as attorneys, title company personnel, surveyors, etc.; and with the public. What obligations exist with these relationships, and how are conflicts resolved? How does the present business world impact real estate ethics? The answer is, in short, profoundly. Deciding to do the right thing is easy. Deciding on the right thing often is very difficult. Here are several examples to consider.

A Compromising Position

Conflict

I performed real estate counseling services for a client on a ranch property in preparation for fore-closure. After the client completed the foreclosure and resold the property, I was asked by a bank to appraise part of the property for financing. Before proceeding, I first obtained the client's permission. Subsequently, the fee was not paid, and I filed suit against the bank and the owner who had agreed to pay. The owner filed bankruptcy, and I was subpoenaed for a deposition and requested to bring "all records pertaining to any services I may have performed regarding the subject property" without limit. The purpose of the deposition was to gather evidence in an attempt to prevent foreclosure, not in regard to my claim.

Clearly a conflict existed because my first client financed the remaining part of the property and also was probably involved as a creditor. To provide information on the counseling assignment might be detrimental to his position. My available alternatives were to: 1. comply with the request; 2. appear for deposition, but refuse to answer questions regarding the first assignment; 3. contact the first client for permission to reveal the information; 4. seek to quash the subpoena by contacting the attorney representing the lender trying to foreclose; 5. engage my own attorney.

Resolution

Since I felt strongly about my obligation to the first client, I engaged an attorney at my expense to prevent discovery of the counseling information. To involve an attorney representing any part in the lawsuit might have compromised my position.

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A Conflict Of Interest?

Conflict

I was engaged by an attorney representing an insurance company to investigate the effect of a range fire on value and marketability of a ranch property. The client was accused of permitting a controlled burn on his ranch to get out of control and burn hundreds of acres on adjoining ranches. In the course of the investigation, I gained the confidence of an owner who had suffered a similar fire, and he spoke frankly with me. Subsequently, I was contacted by an attorney defending another insurance company in a claim for damages—by the individual who confided in me. It would be a profitable assignment because of my previous experience, and there was no conflict of interest. Since I felt it would be taking unfair advantage of someone who had confided in me, I decided to decline the assignment.

Subsequently, I was contacted by an attorney for the property owner who asked that I work for him against the insurance company. When he learned that the insurance company attorney had previously contacted me, he was delighted because I obviously would be a persuasive witness for him to cite when he informed the jury I had been sought by the insurance company.

Resolution

Certainly, I had no conflict of interest, since a different attorney and insurance company were involved. Again, the assignment would be profitable because of my experience. However, I reluctantly declined the assignment because I felt it unfair to the insurance company.

When Is Fair-Fair?

Conflict

In another case, I was not involved directly, but my counsel was sought by a friend. A client had signed an earnest money contract to sell a property; however, it was subject to clearing up several property line encroachments—my friend's assignment. Although one of the owners agreed to sign the necessary instruments, another responded with, "I won't sign anything of the kind, but I will offer \$10,000 more than the current offer. Also the owner will save the commission if he has not signed an exclusive listing." My friend's client badly needed to sell at the best possible price.

Financially, the best results for his client would be for the contract to fail so a sale could be consummated with the neighbor. My friend could advise his client to inform the broker and buyer that it was not possible to clear the encroachment, cancel the contract and return the earnest money. This would leave him free to accept the higher offer. Ethically, however, to recommend this course of action would be questionable. Clearly, it would be disadvantageous to the listing broker who would not be protected in such a sale. It might be unfair to the buyer to simply void the contract and return the earnest money without making him aware of the alternative.

Resolution

My recommendation was to inform the owner of the neighbor's reaction and to caution him that to void the existing contract on the grounds already mentioned here and to accept the new offer might result in a lawsuit. The broker should be advised of the inability to clear up the encroachment. If the prospect was willing to close promptly, subject to the encroachment, the seller should do so. If not, the earnest money should be returned and the seller should pursue other opportunities. There should be no mention of another offer because it could be perceived as an attempt to exert pressure. My suggestion was followed, and the buyer decided to accept the encroachment and close promptly.

Client V. Client

Comal County was a previous client, and we had a good relationship. Subsequently, I was engaged by an attorney representing a client with a claim against Comal County. Ms. Odmark had purchased property, some years ago, consisting of a residence and two lots located between the beautiful Guadalupe River and a county road. She wanted to construct a second residence on the site and applied to the county for a septic tank permit and verification that the property was out of the 100 year flood plain. The county consented, but only after she dedicated a 30-foot wide drainage easement between the two residences to allow for the maintenance of a grass-lined ditch. It was anticipated that the culverts under the county road at that point would be replaced with larger ones. No construction or maintenance took place.

In 1993, a hard rain in the drainage area resulted in one of the houses flooding due to the undersized culverts and severe erosion of the drainage easement area. The erosion extended beyond the easement area, washing a substantial part of the yards into the river. Consequently, the county engaged an engineering firm to design a concrete drainage structure enclosed by a six-foot chain link fence to be constructed with the existing easement. However, an additional seven-foot wide easement on each side would be required for maintenance of the structure, such as cleaning out debris.

The new easement line came within five feet of the larger of the two residences, much to the owner's displeasure. As a concession the county agreed, as a condition of the easement, to utilize the access easement toward the smaller residence whenever possible and to use the other side only under emergency conditions. My role as a real estate counselor was to determine the proper criteria for estimating the proper compensation to the owner based on a new taking, damages resulting from flooding of the residence and erosion, and any decrease in value resulting from the failure of the county to properly fulfill its responsibilities.

In the course of reviewing all the information available, I discovered a serious problem caused by the design of the proposed structure that would prevent utilization of the easement on the smaller residence side without encroachment on the property or considerable preparation. Clearly, the concession given in the easement could not be honored. The case was scheduled to be heard by a mediator within a very short time. If I cited the design deficiency it would reflect badly upon the county whose integrity was already in question. On the other hand, if I made the county aware of the problem before the hearing, it would probably result in an increased easement area taken or the withdrawal of the concession.

Resolution

After reflecting on the alternatives, I decided to inform my client and her attorney of my findings. In accordance with their wishes, I pointed out the design fault during the hearing. Partly as a result, the client received what she and her attorney considered a fair settlement. I had concluded that my prior relationship with the county should not influence me in any way. I felt no responsibility to inform the county of a circumstance it should have known about since it had the services available of the design and county engineers.

Highest And Best Use

The property was the site of a concrete ready-mix plant and an asphalt paving plant. Part of the front of the property was being taken by the state for highway widening, and the owner had not accepted the state's offer. After a commission hearing and appeal, the case was set for jury trial, and I was employed by the condemnor to appraise the property. In the course of inspecting the property, I observed that the asphalt delivery trucks were routinely cleaned at the edge of a draw on the property. Petroleum residue was washed into the watershed and downstream. My conclusion of highest and best use was for commercial development in the future with the present usage in the interim. However, the threat of pollution resulting from the truck cleaning clearly was a problem.

In preparing my report I could comment on the need for a Phase 1 inspection and provide only minimal comment on the conditions. There was apparently little, if any, effect upon the highest and best use of the property in my opinion, and no effect

upon the compensation to the owner. On the other hand, the owner was contending that the present use was the highest and best use, and in that case, the continued pollution would be a serious consideration. Presenting such evidence would be important to refute its contention of H & B Use. I felt an obligation to my client to present evidence to support my H & B Use contention, and I described the existence of the pollution threat in my report.

As a result, the assistant attorney general handling the case felt an obligation to inform the state and federal agencies of the condition. They investigated and issued orders requiring correction, remediation and threatening fines. The owner naturally was furious. During the trial the condemnor presented evidence on the environmental violations, and the condemnee protested the use of other governmental agencies to penalize an owner who did not accept the state's offer. The verdict was favorable to the state, but the court set aside the jury verdict and found for the owner on grounds not connected with the environmental issue. The case is now in the appellate court system.

Resolution

Although admittedly controversial, I stand by my decision. Had the appraisal been prepared for another client and another purpose, I would certainly have felt obligated to reveal my findings, as I did.

One Property, One Client, Three Assignments

Sometimes the practitioner is placed in an awkward position by the client, not specifically on an ethics question, but rather on business judgment. For a number of years I performed an annual inspection of two adjoining lots of very low value for the trust department of a large bank. Although inspection consisted of photographs and visual inspection for current physical conditions, the low fee made the inspection unprofitable. This was clearly an accommodation to my client.

I was then contacted by the client and asked to perform an appraisal of the property, since I was already familiar with it. It was a difficult call because the lots were marginally large enough to accommodate a small residence after a septic tank variance was obtained from the county. Although the view was good, neighboring properties were low cost second homes with only fair maintenance. Obviously, the market was thin. Nevertheless, the appraisal was performed, again as an accommodation.

Some time thereafter I was again contacted by the client. The property was to be placed on the market and other brokers in the area were not interested in handling it. Would my sales department please sell the property as expeditiously as possible? My first impulse was to refuse the listing because of my previous involvement.

Fair Play Or Fair Game

Resolution

I saw no conflict of interest because the contract was initiated by the client, and I felt some obligation to assist. Unfortunately, the market for the property turned out to be even poorer than I anticipated. After considerable market exposure, an earnest money contract offer came in for significantly less than the appraisal. It was presented and reluctantly accepted. Although the client was apparently satisfied with the results, I think the experience probably reflected unfavorably upon our firm. Even without any conflicts of interest or questions on ethics, careful consideration must be given to circumstances that involve the rendering of several services for the same property.

An Unfair Position

A ranch property had been sold in the early 1980s when prices were rising almost daily and the sky was the limit. The owner carried the note and now, years later, payments were no longer being made. The purchaser took bankruptcy, and we were employed by the note holder to appraise the property in preparation for foreclosure proceedings. The owner agreed to our inspection, and he volunteered that the property was for sale with a price obviously far in excess of the value. He would welcome our participation in marketing the property. Our reply was that we had no interest in listing the property, but would keep it in mind if we heard of a prospect.

During testimony before the bankruptcy judge, I was asked by the attorney for the bankrupt about the conversation to market the property. He was insinuating that I had low-balled the appraisal because I had not sold it and collected a commission. I was not allowed to explain my answer and, later in the hearing, was chastised by the judge for improper action. I was absolutely furious because there was no improper action of any kind on our part.

Resolution

I told my client's attorney that I intended to write the judge, setting him straight on the facts. The attorney asked me not to do so, or at least to wait until the case was concluded. I reluctantly agreed in the client's best possible interest. Unfortunately, it was an extended time before conclusion of the case, and I never wrote the judge. In retrospect, I probably should have insisted on my right to make him aware of the facts to protect my reputation. As to the outcome of the case—the judge ruled that my valuation was too low and allowed the bankrupt to keep the property, subject to my client's note. Several years later it was finally sold for less than my appraisal in spite of rising prices in the interim. I had the last laugh, but my client suffered the loss.

Make Your Choice

These represent my recent personal experiences as a small town, small office practitioner who specializes in providing litigation-oriented real estate appraisal and counseling services. Although the specifics will obviously vary, all real estate professionals frequently have to confront ethical choices. What is best for the client? What is best for the profession? What is best for me and my practice? The answers, in the context of overall fairness and equity, are not always easy. In the final analysis, if one can say in all candor, "I have considered all facets of the matter and can defend my decision to my own conscience," the resolution probably is right.

BRING BACK THE GOOD OLD DAYS?

by Frank J. Parker, CRE

NOTE: Material in the article was drawn from Gustavas Myers, The History of the Great American Fortunes, Modern Library-Random House, New York, 1907 and 1937 and from the author's class notes. During the autumn of 1992, the then sitting governor of Arkansas was able to convince 43% of the voting American public that the previous 12 years under the Republican stewardship had been saturated with greed and pilfery. What this nation needed was a return to the more ethical days of the past. For real estate, it would be hard to prove this statement. In fact, savings and loan crises, the Keating Five and even Whitewater, notwithstanding, it can be documented that in earlier times ethics in real estate were less existent than in present day.

Generation after generation of American school children have learned about the Pilgrim's arrival, the Revolutionary War, the Louisiana Purchase and the country's westward expansion to the Pacific Ocean. However, often the reality of these events has been obscured, if not completely misrepresented. Certainly this is true regarding the accumulation of wealth in real estate by the great American fortunes of Astor, Field and others. The society scions and business capitalists carrying these names today, often had ancestors who were considered by many to be ruthless and unforgiving. Ethics in real estate, indeed!

17th And 18th Century Real Estate Seizures

To hear Thomas Jefferson tell the story, America always was the land of opportunity and equality for all. Witness this famous passage from his first presidential inaugural address:

Equal and exact justice to all men, of whatever state or persuasion, religious or political; peace, commerce and honest friendship with all nations-entangling alliances with none; the support of the state governments in all their rights as the most competent administrations for our domestic concerns, and the surest bulwarks against anti-republican tendencies; the preservation of the general government in its whole constitutional vigor, as the sheet anchor of our peace at home and safety abroad; . . . freedom of religion; freedom of the press; freedom of person under the protection of the habeas corpus; and trial by juries impartially selected—these principles from the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation.

If as Jefferson did, you were fortunate enough to be born into the landed aristocracy, life held all the promise that he outlined. Otherwise, rhetoric often outstripped reality. Such a trend clearly existed

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from the earliest days of this country, even before the pilgrims landed at Plymouth Rock.

Land Acquisition

Virginia

In Virginia, the London Company, profiting from generous grants of land from a pliant king and Parliament, established a virtual monopoly over soil suitable for the production of tobacco. The workers for this enterprise were indentured servants, purchased in England and sold to the highest bidder in Virginia. Even before 1620, land in this colony was separated between those who could and could not afford to own it. When this source of labor proved to be inadequate, the English court system sentenced many convicts to labor on the tobacco plantations. Still the demand exceeded the supply and, in 1619, the first slave ships arrived from Guinea in west Africa. Slavery had begun and the chasm between those who owned land and those who lived on it already reached a polarity extending from extreme wealth to extreme poverty and suffering. Other southern colonies carried out similar practices. After the London Company was disbanded in 1620, individual landed proprietors extended their holdings by negotiation with King and Parliament.

New England, New Netherlands (New York)

Similar patterns of land acquisition were found in New England and New Netherlands and later in New York. Farther north there was less need for an intensive supply of labor to produce crops usable in international commerce. Nevertheless, as in the south, the evolution evolved quickly from all powerful trading companies, e.g., the Plymouth Company and the Dutch West India Company, to its extension in the hands of former land owners under the trading companies. Now the land owners were free to bribe local government officials to extend their holdings, sometimes to an astonishing degree. Witness that in 1635, when the directors of the Plymouth Company assigned the land it owned to themselves, one man by lot received title to all of what is now the state of New Hampshire.

Maine

A similar saga died stillborn in Maine. What is now the state of Maine was ceded by Queen Elizabeth I to Sir Fernando Gorges, a character of questionable integrity. Ownership of Maine evolved through his family to his grandson who, eventually, in 1677 sold the land to a Boston merchant, John Usher, for 1250£. Usher deeded his entire holding to the governor and colony of Massachusetts, where it remained until Maine became an independent state of its own in 1820.

New Netherlands

This pattern of land distribution also developed in New Netherlands, later to be named New York. Under Dutch sponsorship of its West Indian Trading Company, land in plentiful quantities was distributed to patrons who established a colony of 48 or more adults within six years. Feudal rights of succession were granted in perpetuity to the heirs and assignees of these patrons. Everyone else on the property was to be left in tenant status. Once established on their landed estate, almost to a man, these newly enriched patrons moved immediately and ruthlessly to swindle the local Indian tribes out of their adjacent holdings. According to historians, duffel bags, knives, axes and wampum, or, in other words, nothing of value, were exchanged for legally binding grants of land many square miles in duration.

After the Dutch were supplanted by the English in New Netherlands, the newly established colony of New York took a leaf from the book of the neighboring colony of Massachusetts (sometimes they had the same governor). Landed estates of great size were freely granted by Dutch merchants to aggressive small land holders or in some cases to domestic based land agents (some of whom never visited these shores).

The granting of tracts of land was left in the hands of local governors of colonies, some of whom were spectacularly corrupt. These men often were aided in their nefarious activities by other local landholders who sat on provincial assemblies and parliaments. Often these men could have their judgments swayed if a gratuity was offered. In this manner, rules were established for auctioning off large holdings of land to the highest bidder under conditions established in advance to exclude from bidding most of those who had not made the proper financial arrangements with the local lawmakers.

It should be kept in mind that this free style distribution of land to the corrupt and privileged was occurring at a time when farm laborers worked 16 hours a day for \$.40 of pay. Equal hours were toiled by carpenters for \$.52 of pay, a blacksmith for \$.70 and a shoemaker for \$.73. The difficulty for these people to accumulate sufficient funds to purchase land holdings can be imagined. By the end of colonial times, a wide chasm already had emerged between holders of land and those who paid rent to live on the land of others.

The Momentum Of Fortune Making

The advent of the American Revolution established the first major crack in the methods of land distribution in the soon to be established United States of America. The landless soldiers who fought and died in the Revolutionary War were not inclined to remain satisfied with seeing the riches of the nation's real property in the hands of the privileged few. In addition, there was a perception on the part of the average soldier that it was the newly

emerging merchant class in the colonies that saw economic advantage in breaking free from English regulation, rather than the original land owners who were promoting this revolution. Why die yourself, just so some tea merchant could buy more land?

In the wake of the rebellion's successful outcome in the colonies, the populist moved to break up the landed estates of colonial times gathered momentum. The movement was encouraged by westward expansion, such as the Louisiana Purchase, the opening of the northwest territories, and later by the relentless expansion west and south to the Pacific Ocean and the plains of the southwest, including the state of Texas. Those who remained along the eastern sea coast, nevertheless became less accepting of tenant status. An unexpected ally in their discontent was found in the rapidly expanding merchant class which also resented the enormous holdings of the early landed eastern gentry. As any of the gentry families weakened financially, the merchant class came forth to buy the available land. As the 19th century rolled forward, a new hybrid developed - the immigrant tenant who soon graduated to the entrepreneurial merchant class. From this grouping came the founders of many great American land fortunes.

John Jacob Astor

Among the first and most successful of the immigrant tenant, turned successful merchant, turned vast landholder, was John Jacob Astor. Born in Waldorf, Germany in 1763, the son of a butcher, he came to New York at the age of 20, first serving as a baker's apprentice. Within three years he had allocated enough money to start his own fur trading business, and he also became an importer. On the return trips from Europe to America, his ships would carry British and European goods to resell at huge profits. Finally, he married a rich, well connected woman from an early New York Dutch family. No stopping Astor now.

Astor was not content to restrict his fur purchasing to the eastern portion of the United States. In fact, his company's efforts, and others like it, were so extensive that before the War of 1812 fur trapping in the east was in sharp decline. The American Fur Company, of which Astor was the sole owner, took up huge positions in the Rocky Mountains, in the southwest, along the Missouri River and by the Great Lakes.

Over the years, Astor built enormous holdings of land in Wisconsin, Missouri, Iowa and Upper New York. However, it was in New York City where he made most of his purchases. He specialized in buying underwater land from the city at extremely low prices, helped usually by bribes to willing city officials. Astor then insisted that the city of New

York, at its expense, fill in the land, creating a valuable entity. Having built momentum, Astor then switched his concentration to banking activities. In the wake of the Financial Crisis of 1837, when over 800 banks failed, Astor stepped in, especially in New York City, bought up mortgages at less than their face value, enforced their terms with great rigor, and when default occurred, bought the land at the lowest prices. This was when immigration into New York City reached impressive dimensions. Demand for housing far exceeded supply. There was Astor holding acre after acre of raw city land. On some he built tenements with himself as lessor-landlord. At times he leased the land to others who contracted to build the property at their own expense, pay all the utilities and taxes and turn over to Astor five to six percent of the land's value. Topping all, these ground leases would expire after 21 years, at which time full title would revert to Astor.

Marshall Field

By the end of the 19th century, Marshall Field was estimated to own \$30 million of land in Chicago, \$48 million in New York City and millions of dollars elsewhere. In 1835, Field was born in Conway, Massachusetts. He later moved to Chicago and started his fortune by selling dry goods to northern troops during the Civil War. From the start, Field was devoted to purchasing property in downtown Chicago. As his wholesale and retail dry goods business prospered, all excess profits were devoted to purchasing block after block of available space in the city.

Field also held significant positions in most major railroads and in a large number of industrial corporations. It has long been forgotten by most that George Pullman, of the famous railroad sleeping car company, was little more than a figurehead for Marshall Field who was the major owner. At Field's direction, the Pullman Company purchased 500 acres of land near Chicago: 300 acres were for the factory and 200 acres were for a model town. In reality however, living conditions were terrible. After his death, the estate of Marshall Field settled with the city of Chicago for close to \$2 million in unpaid back tax assessments. The Field estate was estimated conservatively at \$150 million.

In Retrospect

Throughout the history of this country there have been many real estate owners who were totally honorable and practitioners of high ethical quality. It must be said however, that they never accumulated the enormous wealth of those less ethical, e.g., Astor and Field. One point clearly is true. Even if real estate ethics are not as they should be today, they are a great deal better than they used to be. Don't bring back the good old days.

COUNSELORS' PERSPECTIVES

Ethics And The Expert Witness

by Franklin Hannoch, Jr., CRE

Strict adherence to a code of ethics and the standards of professional practice that it embraces is largely in the mind of the "professional." In other words, it is mostly a matter of self-discipline. One need only look at the canons or standards themselves to see their relationship to accepting assignments, contingent fees, sharing information, conflicts of interest, etc. There are exceptions to this personal integrity concept, such as advertising, but by far the most public involves appearing in the courtroom as an expert witness. Unlawful, unethical or improper behavior can go unnoticed, but not when one is in the witness chair or seated at counsel table.

The Appraisal Institute (formerly the American Institute of Real Estate Appraisers), recognized that ethics were on display in the courtroom, when they developed their program of "Appraisal Review." The program required that in all litigated matters where members were on opposite sides, a report showing divergency had to be filed and reviewed for advocacy, incompetency or other manifestations of unacceptable, ethical behavior. This procedure was eventually discontinued, but it does emphasize the importance attached to a public display of inappropriate conduct. Such conduct not only reflects on the moral behavior of the expert witness, but also on the professional organization whose ethics and standards he or she swears to uphold. This, of course, should not imply that concealed misconduct is acceptable or that appraisals made for other than litigation can reflect advocacy, but emphasizes instead the importance of competent courtroom performance. The ethical conduct of an expert witness before a courtroom full of interested parties, other expert witnesses, attorneys, and perhaps the media is exemplified in many ways. Some are obvious and some are subtle, apparent only to the experienced judge or well-trained litigator.

In most courtroom situations, the expert witness is expected to be objective and unbiased—a friend of the court, so to speak. Therefore, the expert who sits at the counsel table passing notes to or whispering in the ear of the attorney gives at least the appearance of advocacy. This form of

unethical conduct is equally damaging before or after providing testimony, especially if a jury is present. Certain courts invite the expert to sit at counsel table when the judge is hearing a case without a jury, especially in litigation that involves an area where the attorneys themselves lack experience. The preferred procedure, however, is to confer with counsel during recess or before and after the court is in session. Nothing, however, beats good preparation well in advance of trial. There is a big difference between thoroughness and advocacy. If one is to testify about or prepare cross-examination on comparable data, no stone should be left unturned in the research process.

Another example of advocacy in valuation testimony relates to the selection of the appropriate method or approach. "The Uniform Standards of Professional Appraisal Practice" require the implementation of three approaches, except under certain conditions such as forcing a method that does not apply. Abuse of the exception rule represents advocacy when not justified. Calling a property "special purpose" and valuing it only by summation when comparable sale and income data are available, suggest that the witness is "reaching" for a high value to sustain an assessment or receive a high award in condemnation.

The expression of bias from the witness chair does not always relate to value in real estate related matters, but money is usually involved. A witness whose livelihood is related to his testimony, such as an accountant with a single client, or an attorney who handles only closings, can be slanted in one direction depending on the nature of the case.

The opposite extreme for the witness who assists at counsel table is the trial in which the witnesses are sequestered. This is the exception to the normal proceeding, and usually occurs when the litigation involves fraud or some other criminal act where real estate is concerned, such as bribery or extortion. Under these circumstances, it is only the demeanor of the witness on the stand that will reflect on ethics as compared to others who may give contradictory testimony.

A more subtle ethical violation on the witness stand relates to giving testimony on a

Franklin Hannoch, Jr., CRE, MAI, is 1994 president of The Counselors of Real Estate. He has served both The Counselors of Real Estate and the Appraisal Institute as national chairman of the committees on Ethics and Standards of Professional Practice.

subject which is beyond the scope of the witness' competency, knowledge or experience. This can occur in either direct or cross-examination and, perhaps, both. When the expert lacks the knowledge or experience to handle a share of the assignment, he or she must either gain that knowledge by study and research, or affiliate with someone who enjoys the necessary qualifications and credentials. As an example, if an appraiser seeks to estimate functional obsolescence as the difference between reproduction cost of the subject and replacement cost of a building with like utility, it may be necessary to engage an architect to create and specify the latter.

The most obvious courtroom display of unethical behavior relates to the contingent fee. The courts have long held that a real estate witness whose fee is tied to a result—be it value or otherwise cannot be objective and, therefore, his or her testimony can be given little weight. Attempts at deception in this area, if uncovered, make the "cheese more binding." "What is the basis of your compensation?", the witness is asked. "I am on a salary.", is the reply. "Are you engaged directly by the client, or is the contract with a company?", is the following query. "A company.", is the answer. "How is the company paid?", the voir dire continues. "The company is on a contingency.", is the reply. "Who owns the company?", the lawyer asks.

When it turns out that the witness is the sole owner of the company, credibility is destroyed. The witness not only brings down himself and his client in the eyes of the court, but reflects dishonor on the professional society represented by his or her designation. The real estate professional should be ever mindful that unethical behavior in the courtroom reflects not only on himself but also on the profession of which he or she is a part.

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Ethics And The Real Estate Counselor

by Bruce P. Hayden, CRE

I first learned about real estate in a very personal way. During the 1930s, my favorite cousin worked for a major Chicago real estate firm. It was a great shock to my family when we learned she had been convicted of embezzlement and sentenced to serve four years in an Illinois penitentiary. When my father asked why she had chosen to steal, her answer was, "I've been involved in Chicago real estate for 30 years, and I have yet to meet any man or woman in this business who is honest."

As Counselors of Real Estate (CRE), we are aware that today's public often tends to take a skeptical view of the morals and ethics of professionals in the real estate industry. As members of The Counselors of Real Estate, we profess, and generally practice, a high standard of ethical behavior. I was involved in an ethics situation involving a now former CRE who was asked to resign. The case was handled by our Ethics Committee quietly and effectively.

Part of the ethics problem for real estate personnel, in general, can be traced to conflicting pressures. A broker's client, who wants to sell or lease his property, expects the broker to get him the best possible deal. The broker, who also could be a CRE, may have information on the property which might seriously hurt his client's best interest. Is the broker acting ethically if he conceals the information on the transaction? Could he take the Fifth Amendment?

Such conflicts could affect others, such as real estate appraisers. Can an appraisal business survive if, contrary to the client's best interest, the appraiser values a given property at \$450,000, when the client wants it listed for \$600,000? Will the appraiser inflate his land values and reproduction costs, make unduly optimistic estimates of future net operating income, rely on operating expenses and taxes which he knows are unrealistic, and use "comps" that are in no way comparable? If he does, he may find himself in poor repute; if he does not, another appraiser may well get the appraisal assignment.

CREs are not, of course, the only real estate professionals who should be committed to high standards of ethics. However, as CREs we are obligated to give our clients, to the best of our capacity, full and accurate information on all

pertinent aspects of the real estate problemwhen asked. We are hired for our integrity and professional knowledge to call spades spades and pitchforks pitchforks. This can generate problems for the CRE who serves as an expert witness in a client's lawsuit. As guided by the client's counsel, the CRE must answer truthfully and objectively all questions put to him by the court or opposing counsel. In doing so, the CRE usually is traveling on a narrow, curving path of truth. Stepping off the path, or appearing to, may well demolish the CRE's credibility and invalidate all his testimony. If the client's attorney is intent on getting the CRE to testify that black is, in fact, white, the counselor's role is to decline the assignment.

Above all, the CRE expert witness must be knowledgeable, factual, credible and non judgmental. Being otherwise harms rather than helps the client. In the CRE designation, the final E must also stand for Ethical.

Bruce P. Hayden, CRE, now retired, is chairman of Hayden-Tolzmann in Bloomfield, Connecticut and of counsel with Hart Advisors in Simsbury, Connecticut. Hayden is a past president of The Counselors of Real Estate.

Ethics In Real Estate

by Abram Barkan, CRE

My first reaction to writing on the topic "Ethics in Real Estate" was one of resentment. Why single out real estate? Why not ethics in business? The topic seems to perpetrate the age old image of the real estate person as some type of ogre, i.e., a slumlord who evicted a family with six children onto the street in the cold of winter for non-payment of rent.

It reminds me of the word "politician" which gives the impression that everyone in government is on-the-take. Perhaps I am more sensitive to such negativism given my real estate background. This dates back to when I was in management—a segment of the industry which should be a learning prerequisite for all those entering real estate.

Looking Back

When I returned home from army service after World War II, I rejoined my former company and was promoted to the position of field man, a fancy title for a rent collector. I was put in charge of 10 self-service elevator buildings containing 600 to 700 rent controlled dwelling units with a vacancy factor of zero—a condition resulting from the ban on residential construction during the war years, 1941-1945.

After World War II, marriage rates were at an all time high as service men returned home from the wars. With demand for apartments soaring and the supply low, renting agents (also known as field men) were offered all sorts of gratuities in the form of cash or other inducements to find veterans places to live and raise their families. It was not unusual to hear of incidents where landlords and/or their agents were given automobiles as inducements from returning GIs.

In addition to this obviously illegal practice, the industry also experienced managing agents who received substantial payoffs from contractors hired to perform all sorts of maintenance work, i.e., painting of apartments, repairs and replacements to correct deficiencies with plumbing, electrical and other mechanical systems.

I can go on and on with other examples of sales inducements. There were advertisements for rental apartments or homes which stated, "Walk to Work Location," and "Near Lakes and Recreation Areas." In many cases, the messages were overstated unless one enjoyed walking a mile or

two, twice a day, to reach his place of business or running five miles to reach those nearby lakes.

Up to this point, the examples cited might be described as petty larceny when compared to the more recent disclosures involving overstated, as well as understated, valuations in appraisals for mortgage loans and assessment purposes for real estate taxes and arbitrations to determine rental rates during an extended term of a lease.

Researching material for this article, I scanned numerous articles written by eminent individuals in our industry and came upon the following quotation: "Not infrequently the public is witness to violations of the simple precept of honest, unbiased and competent opinions on property values!" Would it be a surprise to know this quotation appeared in the April 1958 edition of the Appraisal Journal under the title, "This Matter of Ethics," by S. Edwin Kazdin, one of my appraisal teachers and also a well respected professional in the real estate community.

Although various professional organizations have attempted to correct conditions such as payoffs and misrepresentation of property value, their success is hardly noticeable. Unless a more effective program comes forward from organizations such as the Appraisal Institute and The Counselors of Real Estate, the government will be placed in the position to act as policeman, a possibility which needs to be avoided at all costs. Yet, virtually no real movement in this direction has come forward since Kazdin brought the matter of ethics to the attention of the real estate community through his writings and talks to various professional groups.

Professional Accountability

Some in the real estate business take the easy way out by saying privately that questionable practice has been going on for years, and there is really nothing to do but grin and bear it. This is not necessarily so. Earlier this year, one of the major real estate management organizations blew the whistle and said enough is enough. It exposed the practice of kickbacks that management personnel were extracting from contractors at the expense of the property owners. In the

Abram Barkan, CRE, MAI, is chairman of the Douglas Elliman Appraisal and Consulting Group headquartered in New York City with offices also in metropolitan Los Angeles. Through a national organization known as Value Guild, Douglas Elliman has representation in Boston, Washington, D.C., Atlanta, Houston, Derwer, and Los Angeles. Barkan is a past president of The Counselors of Real Estate and the New York Chapter of the Appraisal Institute.

final analysis, these payoffs were obviously offset by the contractors through inflated billings for repairs, decorating, etc. It took a great deal of courage to bring this to the public's attention, and many of us in the various service arms of the real estate industry appreciate the effort.

As a result of this exposure, various actions resulted. The following appeared in the local trade journal, *The Real Estate Weekly*, published by a chapter of the National Home Builders: "We applaud the district attorney for this investigation, and we are continuing our efforts to get managing agents licensed." Also, the president of the Counsel of New York Cooperatives (CNYC) said, "The CNYC is very dismayed and distressed. It's a sad reflection of the whole industry." The CNYC followed up with a seminar on corruption. And, the local chapter of the Institute of Real Estate Management suspended its members who were indicted pending adjudication by the courts.

While I have been complaining for years about the unsavory elements in our various professional organizations, I did little, if anything, to pull the plug. Perhaps as I grow older I grow wiser or, maybe, I just can't take it any longer. I want to see it corrected before I put my calculator away and decide to ride my bicycle rather than take the train each morning.

Inasmuch as I consider The Counselors of Real Estate a major industry force in dealing with the issue of ethics, I urge The Counselors to take the lead and bring the best ethical standards to the areas of real estate valuation and consultation; we owe such action to ourselves and the public we serve.

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All manuscripts are reviewed by three members of the editorial board with the author's name(s) kept anonymous. When accepted, the manuscript and any recommended changes is returned to the author for revision. If the manuscript is not accepted, the author is notified by letter.

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All manuscripts to be considered for the April edition must be submitted by January 15; for the August edition by May 15; for the December edition by September 15.

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- 1. Manuscripts must be submitted on disk (along with hard copy): ASCII file format, Word Perfect or Word for Windows 2.0 preferred. All submitted materials, including abstract, text and notes, are to be double-spaced on one side only per sheet, with wide margins. Recommended number of manuscript pages is not to exceed 25–30. Submit five copies of the manuscript accompanied by a 50- to 100-word abstract and a brief biographical statement.
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- 5. Whenever possible, include glossy photographs which enhance the content and clarity of the information contained in the manuscript.
- 6. Title of article should contain no more than six words including an active verb.
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