

GLOBALIZED ETHICS

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INTRODUCTION

In the 17th and 18th Centuries international trade in land involved a European adventurer planting a flag on a piece of unexplored land on an undeveloped continent, then claiming it “for the king.” It is more complicated today in this age of globalization, in which large amounts of capital are exchanged through a myriad of marketing systems, investment, currency exchange and political consideration. Real estate professionals of all stripes are involved including lawyers, realtors, appraisers, agents, bankers and surveyors.

Laws and national policies on land markets differ from country to country and require the careful research of the various professionals involved, a complicated but achievable process. What is not so easy is navigating the labyrinth of customs and ethical practices of the many cultures participating in international real estate mercantilism. The ethics of the professions, internationally, is a subject that has become of some considerable concern.

Because real estate is integral to whole societies and economies, it shapes and influences the world we live in and represents a significant proportion of all global wealth. For this reason professionals have a duty to uphold the highest standards.

Those are the words of the International Ethics Standards Coalition (IESC) who have developed an international ethics standard for real estate activity.

The IESC is made up of over 100 international organizations of real estate professionals like FIABCI, the international appraisers, RICS the Royal Institute of Chartered Surveyors and other property-related professions. A standard with the objective to “support the creation, maintenance and use of high quality, international and principle-based ethics standards through a transparent and inclusive standard setting process,” has been published by the Coalition and distributed.

The International Federation of Surveyors (FIG) has its own “Statement of Ethical Principles and Model Code of Professional Conduct” and is supportive of the IESC code. This paper considers the intentions and implications of codes of ethical standards by professional organizations.

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1. THE CONTINUUM OF SOCIAL RESPONSIBILITY

Ethics, by one definition, is the system or code of morals of a particular person, religion, group, or profession. Stated another way, ethics is one level of social responsibility on a continuum from social norms to ethics to regulation to law, from voluntary to mandatory.

Courtesy, “boundaries” and “ground rules” are unwritten but generally recognized as social norms. Similarly, the Chinese recognize *sushi* as reflecting a person’s inner qualities of behavior, ethics, education, intellect and even taste.

Norms are an imprecise laying-out of what ought to be according to unwritten social expectations, existing for as long as there is consensus. A breach of social norms may bring social opprobrium, shame or at the worst, social outcast.

In the context of the professions regulation is the enforcement power behind licensure. A breach of a professional regulation may lead to disciplinary action by the licensing authority involving suspension or revocation of a license.

Where licensure and licensing regulations are promulgated by law, they have the force of law. But beyond licensure the professional is subject to statutory law as are all citizens and may be disciplined for a breach of law by fines or even imprisonment.

Social ethics, like social norms, may also be unwritten, generally recognized and subject to social opprobrium in the breach. But systems of ethics as embraced by nearly all professional associations are specified and encoded and are intended to be binding on all members. A breach by a professional member of the ethical code of the association to which she belongs may bring the disapproval of other professional members, but enforcement and disciplinary action by the member’s association is problematic.

The Background to the FIG “Statement of Principles and Model Code of Professional Conduct” (FIG Publication No.17) carries the following statement regarding enforcement:

2. ENFORCEMENT

“FIG recognizes that, due to international differences of culture, language, and legal and social systems, the task of preparing a detailed code of professional conduct must rest with each member association, which also has the responsibility to implement and enforce such a code.” This Statement goes on to recommend that surveyors and their associations “adopt the following ethical principles and model codes of professional conduct or, where appropriate, *adapt them to local values and customs.*” (Emphasis added.) In other words, the FIG code provides for some application of situational ethics, allowing for local values and customs. The

same is apparently true in the IES standards. A briefing document advises that “the method by which effective implementation is accomplished is at the discretion of the members themselves.”

The Internal Rules of the Federation define a Member Association as being comprised of individuals ... “who provide professional services in accordance with ethical standards.” There is no reference in the FIG Statutes and Internal Rules to the Statement of Principles and Model Code of Professional Conduct. The Council and General Assembly must assume that candidates for membership in the Federation are aware of the Statement but there is no requirement in the application process that a member recognize and respect the FIG code in all its particulars.

Enforcement of a professional association’s code of ethics is an issue. Many of the FIG codes are immeasurable. For instance, on the subject of providing professional services surveyors are told to “seek remuneration commensurate with the technical complexity, level of responsibility and liability for the services provided.” Judging the fairness of a surveyor’s fees on the basis of such requirements would involve subjective examination; there are no metrics to be applied in the judgment. It is not unusual for a surveyor and his client to dispute a fee on the basis of complexity, level of responsibility and liability assumed by the surveyor in furnishing the services; it is usually a matter of the surveyor’s experience-based judgment versus the client’s opinion. A charge of breach of ethics by a client against a surveyor in this situation would put a professional surveying association in a nearly impossible position of enforcement. In fact, unlike a charge of malpractice on the part of a surveyor, which requires objective judgment, judging a breach of ethics is nearly always a subjective process making enforcement extremely difficult.

In addition to sanctions imposed by licensing authorities the professional is also subject to charges (suits) by individuals for malpractice or negligence (on a theory of torts for private wrong or injury other than breach of contract).

3. PROFESSIONAL ETHICS/PROFESSIONAL MALPRACTICE

Is a breach of professional ethics equivalent to professional malpractice? The following examples are of cases of malpractice or negligence claims against surveyors and engineers in the United States, and an examination of the related FIG code recommendations on the subject.

Example: A surveyor provided professional services to two different clients, land developers with adjoining projects. Both developers went through the planning/permitting process almost simultaneously. The project for Developer #2 depended upon the installation of services and roadway access from development #1.

Developer #1 delayed completion of construction of the connecting road until most of his development was completed (with survey control by the surveyor) and sold, delaying the start of development #2 for several years. Developer #2 charged the surveyor with a strategy of collusion and malpractice by Developer #1. Expert testimony in the case charged the surveyor

with an ethical violation but could not opine negligence or malpractice according to local codes and regulations. The case was settled without final judgment by the court. The FIG Code of Professional Conduct recommends that “(w)hen dealing with clients, surveyors: disclose potential conflicts of interest,” and “preserve the confidences and regard as privileged all information about their client’s affairs.” Whether the surveyor in this case actually colluded with one of his clients to the detriment of the other, he was burdened by a *potential* conflict of interest by the fact of his providing services to clients with mutually exclusive interests.

Example: A surveyor performed a simple retracement survey for the owner of residential, property. A dispute over the lines arose between the surveyor’s client and the client’s neighbor. When it was discovered that the surveyor was related to the neighbor, the surveyor’s client sued him for malpractice. This case, too, was settled without judgment. The terms of the settlement were not disclosed. The issue in this case is one of *potential conflict* of interest. The surveyor may well have, and probably did, do a competent, unbiased survey for his client, but since the result of his survey favored the claim of his relative he was unable to defend successfully against the claim of a potential (or apparent) conflict and made an offer of settlement. The FIG code advises that when dealing with clients, surveyors “disclose any potential conflicts of interest...”

History and experience show that potential or apparent conflicts of interest can be as damaging as actual conflicts, demonstrating once again the difficulty of proving a negative.

Example: The FIG Code advises that as business practitioners, surveyors: “do not supplant other surveyors under agreement with their clients.” This constraint against supplanting, or attempting to take business away from a competitor, is not uncommon among US engineering and surveying associations. In a case in which an engineering association attempted to discipline a member for attempting to contract for services on a project on which another member of the association was engaged contractually, a court in the resulting suit determined that the association could not interfere in an engineer’s marketing of his services. This case raises the question of the relevance and efficacy of the constraint against supplanting as an ethical issue.

CONCLUSION

The cases cited here were heard and settled through the American judicial system. How they might have been handled in other countries with different judicial systems is unknown. Time and testing of the IES standard will determine the efficacy and applicability of the standard globally.

These cases also demonstrate the uncertainty and ambiguity in disciplinary actions for breach of ethics. The profession, as represented by an association of members, is poorly positioned to enforce its ethical codes, at least in the United States. Compliance becomes, finally, a matter of self-imposition motivated by the integrity of the individual professional.

Society judges us by its social norms; our professional associations judge us by their ethical codes. Licensing boards judge how well we comply with their regulations while the State judges how well we comply with its laws. A breach of social norms may bring opprobrium; a breach of ethics may bring chastisement; a breach of regulations may bring sanctions, and prosecution may be the penalty for a breach of law.

Ethical codes and standards are a necessary component of any profession. The FIG code is typical and the proposed IESC code for land-related professionals will be a valuable addition to international land transactions. Ethical codes are, in fact central to the scope and operation of a profession's members. But ethical codes and standards must be basically advisory rather than regulatory; enforcement may only be rarely called for and then only in response to the most egregious offense.

The IESC code, if adopted by professionals in those regions where graft and corruption are common, may provide a new ethical paradigm in cross-border transactions, and will serve as a reminder of how business is to be conducted in the more enlightened economies of the World. Commerce at every level depends upon trust. It is a principle of the IES code that the practice and conduct of the profession "bears upon the maintenance of public trust and confidence ..." in members of the profession.

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REFERENCES

1. IES, International Ethical Standards, www.ies-coalition.org
2. Statement of Ethical Principles and Model Code of Professional Conduct, Publication , No. 17, FIG International Federation of Surveyors
3. IES Coalition publication briefing document, www.ies-coalition.org
4. Statutes and Internal Rules, Fig Publication No.18

BIOGRAPHICAN NOTES:

Robert W. Foster is a Registered Professional Surveyor and a Registered Professional Engineer (Civil), having graduated from the University of Vermont in 1955 with a B.S. in Civil Engineering. He is a past president of the American Congress on Surveying and Mapping, an Honorary President of FIG and is a Fellow of the American Society of Civil Engineers. Although semi-retired he is an active member of the Dispute Resolution Panel of Neutrals of REBA Dispute Resolution, Inc., a subsidiary of the Real Estate Bar Association of Massachusetts. He has provided professional testimony in litigation involving property disputes, appeals of permit denials, eminent domain proceedings, and professional negligence. He has testified before the United States Congress and the Massachusetts legislature on pending legislation and budgetary matters.

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