



2022 CLM Construction Conference

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When You Are Between a Rock and a Hard Place

I. Defining Ethics

Balance

Ethics is a system or theory of moral principles or values that is used to denote right from wrong. However, often the balance between right and wrong or good and bad may be contingent upon one's perspective. Depending on the source or authority, the "number" of ethical principles varies greatly. Commonly found on these lists are principles such as honesty, fairness, integrity, promise-keeping, respect, law-abiding, accountability, reputation, transparency, and leadership. These most common principles provide a simple blueprint for professionals, executives, and/or anyone else in between, on concepts that are consciously or unconsciously considered when making ethical decisions. Ethical decision making extends between everyday life and in the place of business. Honesty, for example, is always one of the most referenced concepts within ethics, and a true cornerstone of earning one's trust, which is accomplished by telling the truth over misleading or deceiving others.

Domino Effect

It's important to stay on an ethical path when making decisions. If you compromise your ethics in one area, it's fair to assume that one thing will lead to another, and you will ultimately not be able to control the situation.

Staying Out of the Weeds

Establishing a firm purpose and scope of work early will help each participant understand the allegations and focus on their own tasks. If these items aren't established, or if scope creep occurs unchecked, it will be very easy to go off into the weeds and get lost. Determine what lane you want to be in and stay in your lane.

II. Strategies for Making Good Decisions

Gather Facts

"Assumptions are made, and most assumptions are wrong." Einstein

Don't jump to conclusions without the facts. Questions to ask: Who, what, where, when, how, and why. However, facts may be difficult to find because of the uncertainty often found around ethical issues. Assemble as many facts as possible before proceeding. Identify the facts

that are not available. Clarify what assumptions you are making. Gathering facts includes gathering relevant case law that might pertain to your situation.

Case Law

- It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities. Colo. RPC 8.4 (c).

Case Study

- The immediate impetus stemmed from an ethics complaint filed by a defense attorney against a district attorney whose office housed (and thereby supervised) an investigative unit that rooted out child predators on the internet—like that defense attorney’s client—by having the investigators present themselves online under fictitious identities.

Define Ethical Issues

Don’t jump into a situation without first identifying the ethical issue(s) involved. Define the ethical basis for the issue on which you want to focus. There may be multiple ethical issues, so strive to focus on one major issue at a time.

Know your role – claim handler, attorney, expert. Unethical behavior will look differently from each perspective given the three main groups within the claims team are managed differently: from claims to the attorneys to the [engineer/architect] experts. The Josephson Institute defines ethics as follows: *“Ethical principles are universal standards of right and wrong prescribing the kind of behavior an ethical company or person should and should not engage in. These principles provide a guide to making decisions, but they also establish the criteria by which your decisions will be judged by others.”*

Claims adjusters who work for insurance companies have a perceived inherent conflict of interest when dealing with insureds, as pointed out (or alleged) by plaintiff firms. Adjusters represent their employer and are perceived to be protecting the insurance company. Are the adjusters protecting their company or looking out for the insured? The question has been raised, but is it founded?

Experts, who are also licensed engineers or architects, have their own ethical obligations to their licenses. The National Society of Professional Engineers tackles the individual states’ requirements well with their fundamental canons: *“Engineers, in the fulfillment of their professional duties, shall: Hold paramount the safety, health, and welfare of the public; Perform services only in areas of their competence; Issue public statements only in an objective and truthful manner; Act for each employer or client as faithful agents or trustees; Avoid deceptive acts; and conduct themselves honorably, responsibly, ethically, and lawfully so as to enhance the honor, reputation, and usefulness of the profession.”*

Identify Affected Parties and Obligations

Identify all interested parties. Clarify who are primary or direct interested parties, and who are secondary or indirect interested parties. Determine why these parties are interested in the

specific issue at hand. Adjust your perspective and try to see the issues through the eyes of the affected parties.

Consider obligations in terms of principles and rights involved. What obligations are created because of ethical principles you might use in the situation? For example: do no harm, "do unto others as you would have them do unto you," and do what you would have anyone in your shoes do in the given context. Consider what concepts of justice (fairness) are relevant.

Identify Consequences

Think about potential positive and negative consequences for parties affected by the decision. Weigh the magnitude of the consequences and the probability that the consequences will happen. Evaluate short-term versus long-term consequences and determine if the decision will be valid over time. Each decision sends a message, and thus may result in symbolic consequences. If decisions are made in secrecy, what are the consequences if the decision or action becomes public? How would your decision appear if it were based solely on the consequences?

Case Law (North Carolina)

Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.

Consider your Character and Integrity

Consider what your relevant community members would consider to be the kind of decision that an individual of integrity would make in this situation. What specific virtues are relevant in the situation? Disclosure rule – what would you do if the New York Times reported your action and everyone was to read it? Think about how your decision will be remembered when you are gone.

QUALITIES OF THE HIGHLY ETHICAL INDIVIDUAL

- The "good of the consumer" is part of the individual's own philosophy, in theory and practice.
- The individual's integrity stresses that the other person's interests are as valuable as his own.
- The individual assumes personal responsibility for his actions and is responsible to himself first and then to his organization.
- The individual sees his activities in terms of purpose, which ties the individual to the organization, and the organization to the environment.
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Think Creatively about Potential Actions

Think creatively about your potential actions. Be sure you have not been unnecessarily forced into a corner. You may have some choices or alternatives that have not been considered. In essence, think things through, and make sure the decision is the best one for you and for all parties, holding ethics and morals at a high level.

Gut Check

Even though the prior steps have argued for a highly rational process, it is always good to “check your gut.” Intuition is gaining credibility as a source for good decision making – knowing something is not “right.” Call it, expert decision-making. If you hold ethics at a high level, how do you feel? Are you comfortable with the decision?

Decide Course of Action

Decide on the property ethical action and be prepared to deal with opposing arguments. Consider potential actions based on the consequences, obligations, and character approaches. How can you protect the rights of those involved (or your own character) while still maximizing the overall good for all the stakeholders? How will you respond to those with opposing viewpoints?

A survey conducted by the Economist Intelligence Unit surveyed over 400 people of varying business responsibilities and found that approximately 44 percent of respondents led to “project delays, failures, and cancellation.” Additionally, approximately 31 percent of respondents reported low morale due to such communication pitfalls. From the expert (forensic) perspective, regular shortcomings in client surveys from claims and legal professionals, communication failures lead the negative column.

To be more communicative, the conversation must be about more than just exchanging information. The information must be shared with discretion, with empathy, and with clear intentions (i.e., avoidance of misleading messages). Communication requires strong listening skills in a way that gains the full meaning of what’s being alleged, while making the other person (i.e., insured) feel heard and understood. Listen and evaluate before making decisions – a big first step in avoiding bad faith.

III. Consider What Could Go Wrong

Anticipating the Unexpected

There’s an old saying that states, “if it can go wrong, it will go wrong.” With that in mind it’s important to anticipate the unexpected so that you can be prepared. We all would make perfect decisions every time if we had the knowledge that comes from hindsight.

To prove bad faith, the word “timely” shows up often. Common denominators with bad faith and negligence cases reveal that one person says something, the other person hears something else. This leads to misunderstandings, frustration, and undoubtedly – litigation. No matter who the communication is between, developing trust and respect, will foster improved teamwork, problem solving, and a reduction in contentious situations.

Case Studies - Past Results are an Indication of the Future

A 2004 article in CFO Magazine states that 47% of finance executives they surveyed felt pressure from directors to “doctor the books” and improve the appearance of results. Even with the strict rules imposed by the U.S.’s Sarbanes-Oxley Act, and the damaging press surrounding Enron, WorldCom and Adelphia, organizations still find themselves meandering into the gray area of ethical behavior.

More than one in four professional accountants say they have been put under pressure or felt under pressure to act in an unethical way over the past three years, new research has found, with the economic effects of the pandemic, the need to hit targets and austerity identified as some of the drivers likely to increase the risk of unethical behavior.

Almost one in five cited pressures from clients and a further 10% said pressure came from their Board, Council or Cabinets. Of those who said they had been put under pressure to act unethically, almost 80% spoke up against the unethical action. Over half of professional accountants - 54% – said they felt under threat in some way. And many suffered serious consequences including being dismissed, being briefed against, facing false allegations, “gaslighting” and poor performance reviews.

Wrap Up: Don’t Be a News Story

As we all know, bad news sells. We have seen an erosion of ethics as a product of the society we live in, as each individual balances their own ethics and morals. A domino effect occurs when we compromise when element of our ethical decision making.

Our reality is that making ethical decisions is complicated and not always easy with multiple factors that comes into play that could cloud the truth. Sometimes we are caught in the middle of a rock and a hard place. We make ethical decisions consciously and unconsciously and bringing those decisions to the forefront of our thought process allows us act ethically and keeps us off the 5:00 news.