

“THE ART OF SAYING NO!”

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When I was requested by Frank Cagliari to present a paper to this audience on the subject of ethics within the framework of the theme of the seminar – *“The Expanding Modern Practice of Marine Consulting”* – in the first instance I was somewhat hesitant to make such a presentation – hesitant because this is such a very difficult subject on which people in the industry, undoubtedly all acting sincerely and with the most honest intentions, sometimes seem to have differing opinions.

It is, therefore, that I would like to present to this audience that in the following address I shall try to reflect on a variety of aspects within the framework of what I consider professional ethics, without intending to sound like a scholar on the subject or like somebody who is preaching the “ethics gospel”.

The nature of marine consulting in general means being involved in situations that demand a continuous evaluation of options.

Some of these options are of a technical nature, others are of a financial or commercial nature and some are based purely on ethics.

Ethics in consulting is like a continuous undercurrent that requires a constant alertness by or from the consultant.

The Society of Marine Consultants has a published code of practices, which is available on the web site.

However, a practicing consultant will be faced with many issues that are not clearly outlined in this code, or, for that matter, any other code like SNAME (Society of Naval Architects and Marine Engineers) or the National Society of Professional Engineers, just to mention a few.

Personally, over the years that I have been in practice, I have considered three main categories of ethical behavior, which I have presented in writing on prior occasions.

These are:

- (a) Pure engineering ethics
- (b) Commercial ethics
- (c) Ethics from the heart

Pure Engineering Ethics

As an example, pure engineering ethics apply when something that is not technically sound or reliable from an engineering point of view may place people's lives into jeopardy or cause material or environmental damage.

A marine surveyor should always ask himself, *“With my knowledge and experience would I be happy/confident to let my son or daughter take this ship to sea?”*

Commercial Ethics

Commercial ethics call for a consultant's personal judgment as to what is right or wrong in the world of commerce and trade.

The consultant may not always be fully familiar with all the details, but should certainly question himself or others to determine what is proper.

Ethics from the Heart

One of my mentors used to pose the question, *“Do I like what I see when I view my own mirror reflection while shaving in the morning?”*

The National Society of Professional Engineers in their monthly publication *“The Engineering Times”* contains a column under the lead title *“You be the Judge”*, in which they discuss a great variety of engineering ethics.

I quote from the column preamble of that publication, which reads: *“Although engineers often make decisions using precise scientific principles, they work in a complex and diverse world where answers to ethical, business, human relations – and engineering – questions are often varying shades of gray.”*

In my opinion the key lies in the words *“varying shades of gray”*.

This means that the ever-controlling yardstick for a person in a situation of evaluating one's own ethical behavior is to determine which shade of gray he finds himself in, as well as asking himself, *“Where am I at this moment in time and where could this possibly lead me in the future?”*

This applies not only to the marine consultant but also to the client, shipowner, people on board the vessel and in the environment.

The constant alertness of the consultant on this aspect mentioned earlier in this presentation is essential.

Let's look a little further at the exposure in this field. One rule that applies, and which I took out of the medical profession, is *“DO NOT CAUSE FURTHER HARM”*.

Placing a client in a position that is worse than what he first got engaged in is a nightmare that we all can do without.

To reflect on a number of areas that can cause conflict and ethics issues, I would like to walk you through a range of particular situations that may be actually unethical, or border on unethical behavior.

1) **Working on Two Sides of the Fence**

If a consultant is functioning as such for a particular client on a fairly regular basis and is next being offered an assignment on the other side, one certainly wishes to buy some time to have a good look at this, if not declining to accept the assignment immediately.

It all depends very much on the relationship with the client and how well one can communicate with the particular individual involved. If it concerns a matter where there is no privileged information involved, the first client in some instances, and conceivably having already engaged expert assistance from somebody else, may be quite happy to find somebody they know well on the other side.

There is absolutely no golden rule for all situations. One has to do some in-depth soul searching.

The consultant has to determine again the shade of gray and, above all, disclose all the details of the situation to both parties at interest.

2) **What to do when Discovering Dangerous or Illegal Conditions**

Advise the potential client without hesitation and timely without delay, who then either may wish to change the situation or may wish to dismiss the consultant.

Here there are no other alternatives. If there is no change, offer to resign.

3) **Confidentiality of Information**

This is something that is determined by the brain and the heart and is a pure personal decision.

Loyalty to and protection of the client should be first in one's mind.

4) **Technical Disagreements with the Client**

If and when a consultant discovers that the client's position and/or opinion may come to haunt him at a later time on a purely technical basis, the client should be advised immediately of the problem, followed by placing the client officially on notice as to why the consultant is taking that position, substantiated by adequate reasonings.

5) **Activities of Whatever Nature that do not Reduce Conflicts, but rather tend to Enlarge an Existing Dispute**

The consultant should have no hesitation in bringing this to the client's attention in a diplomatic fashion.

As a for instance, a client demanding that the consultant **not** sign a professionally composed Field Survey report, which document only is recording and agreeing upon engineering aspects and which generally reduces the possibility of future conflicts in that area, is something that a professional consultant should strongly object against.

Likewise, a consultant functioning as an underwriter's surveyor or representing a regulatory agency should never walk off the scene without advising the assured or the owner's representative on the spot of any exceptions taken or a different opinion he is harboring. Not doing so, but issuing a letter or report to that effect at a later date, is not only cowardly, but highly unethical.

6) **Not Telling the Truth in Reports**

This requires no further explanation, I take it.

7) **Performing Useless Services**

In other words, milking the cow just for the sake of milking the cow.

This in itself is highly unethical.

8) **Being Subservient to the Client's Wishes**

Occasionally we have heard a surveyor or consultant asking his client "***Just tell me what you want.***"

The industry has various names for such individuals, which I will not repeat in the presence of this distinguished audience.

At the same time, letting the client, and particularly an Attorney at Law, believe that all is fine and that he is holding a good case and subsequently buckling under pressure because the "***facts***" are not all that factual is even worse than "***unethical***". I'll let you fill in the words describing such behavior.

Taking chances is the prerogative of the client and his lawyer – not a privilege of the consultant.

We all know that this does not particularly build up a good reputation for a consultant and more importantly for the profession as a whole. Such will affect you, me, all of us who take pride in this profession.

9) **Not Disclosing Personal Connections or Friendly Relationships with any of the Individuals on the Opponent's Side**

A consultant knowing the opposing party's consultant well, being friendly on a personal or social basis with that particular consultant, should have no hesitation to disclose the relationship to everybody in an open and frank fashion in litigation procedures or any other encounters.

I personally do not only consider such disclosure mandatory, but have received extremely positive remarks from both sides on numerous occasions.

Mutual respect among consultants on a professional basis will insure both clients that both will do the utmost to "stay honest" – and isn't this what it is all about?

10) **The Matter of "First Refusals"**

We have seen instances whereby a consultant, and for that matter an Attorney at Law, was placed on standby, or rather was tentatively advised of a pending involvement. In such instances we have noted that the individual on standby, when the second request from the opposing party came in, opted for the more potentially lucrative second assignment without giving the first requestor the courtesy of first refusal.

I think it is superfluous to explain how I feel about such behavior.

Similarly, attorneys keeping consultants off the street by putting them on "standby" (warehousing) is considered unethical, as flattering as it may seem for the consultant to be considered dangerous.

The above-mentioned categories just reflect on a number of aspects. I am certain that each of you will have other and different experiences to add.

How to Avoid Ethics Problems

Before accepting an assignment, find out in detail who the players are – not only your own potential client, but also the opponents, other participants and third parties. Once such information is available, do not jump at the assignment, but first check within your own organization to ascertain whether you or one of your colleagues dealt with the opponents and/or their vessels before. Particularly where a consultant has functioned as an appraiser in the past, not doing so may cause extremely embarrassing situations.

One of them is a situation where the appraisal is part of General Average guaranty situations.

Frequently what may appear to be a conflict of interest at first may prove not to be the case at all after all the facts have been reviewed.

Golden rule: Whatever has a **potential** of going off the track may lead into a future conflict.

Recommendation: “Disclose immediately” to all parties at interest.

If a prior client doesn't want the consultant to function against him, the consultant should immediately excuse himself in an elegant fashion. Like I said before, it would not be unethical to serve against a prior client as long as one does not possess privileged information that could be used against that client. Sometimes two conflicting parties agree on using the same consultant on a purely technical issue.

This all takes a fair amount of soul searching involving all parties at interest.

At any stage of the project the consultant should be able to summarize with a realistic prognosis on what the case is all about, and where he thinks it is going from a professional consulting point of view. This could mean that at the very first meeting one may have to tell the client that his project does not have a realistic chance of success, or that while one may be willing to investigate the project, the outcome could be negative.

One should make the client comfortable by knowing that he can terminate the consultant's services at any stage of the project without the consultant harboring bad feelings.

On the other hand, if one discovers that the client is involved in illegal activities, the consultant should not hesitate to suggest that the client immediately corrects his behavior or the consultant will request to be excused.

An interesting aspect of this is that one does not first collect a fee and then walk away from the client because of an ethical or emotional problem one may encounter in the course of action. The files will always stay with the client after the parties agree to separate. It is my distinct opinion that whatever has been produced by the consultant up until that moment in time should become the property of the client and everything, including notes and photographs, should be made available to him.

Serving the client does not mean that just anything goes.

This refers, as a for instance, to the client's demand to prepare a report that is not technically totally correct, as well as situations where the consultant detects a condition that may be hazardous to people or the environment, or may lead to a situation whereby the consultant has to admit that he or she could have prevented an injury or disaster by just standing up and speaking up at the right time.

Without having the intent of belaboring the matter of remuneration of a consultant, we all know that it is easy to get rich fast dishonestly, but that honesty also pays sufficiently over the long run with great peace of mind.

Ethics in Report Preparation

The National Academy of Forensic Engineers has an ongoing debate as to whether a technical expert should present both positive and negative opinions in their reports.

This would mean that if during the course of your research you discover something that could be damaging to your client, but the truth all the same, should you mention such in your report?

Theoretically this is a difficult problem and the nuances of and opinions on that matter are numerous. I must say that within our firm, in practice, this has never grown to become a real ongoing problem with any of our clients.

To avoid such a situation, provide the client with continuous honest updates and if in doing so anything negative with respect to the client's case is discovered, inform him immediately.

At that stage the client has three options:

- Quit employing you or your firm
- Settle quickly
- Deal with the negative aspect in an honest and straightforward fashion

A carefully reasoned report dealing with all the aspects of the matter in a balanced manner is the mark of the true consultant.

Functioning for Attorneys at Law on behalf of their and consequently also your client, the lawyer may ask the consultant to provide a report in draft style for their review. In my opinion issuing draft reports is a good thing to do and highly ethical. What is not ethical is arbitrarily changing the draft report to accommodate the attorney's wishes.

In the simplest and general terms, the following changes to the draft attorneys may suggest are helpful:

- Improvements in report organization
- Increases in readability
- Changes to reduce technical jargon
- Minor adjustments in opinion because the client located additional substantiating information based on the draft report

A confident professional consultant should resist openly and in a determined way any suggested changes that he would not have written in the first place in whatever shape or form, particularly changes that may affect the consultant's conscience or fall in the category of what an old-time southern surveyor one time called "playing loosely with the truth".

He should resist material changes in his opinion at the attorney's request, likewise deletion of what may seem to be negative facts and incorporated technically incorrect statements.

When being questioned in Arbitration procedures or in a Court of Law, and being confronted with a question whether or not there were draft report(s), the consultant does not have to be evasive if deep in his heart he will be able to attest under oath that his signature stands for what he believes to be the truth, draft or no draft report.

There is only one answer to a question in cross-examination frequently posed – ***“Did you discuss this with your attorney?”*** – and that answer is ***“Of course, sir.”***

There is more to this than your bank book. It is your basic decision who you want to be and how you want people to regard you.

I would like to thank the Board of the Society of Marine Consultants for this opportunity to give you my personal views on just a small portion of the field of ethics.

Enjoying a good night's sleep has an awful lot to do with whether or not you know when to say "No".

I thank you for your kind attention.

Henk van Hemmen