



Ethics

THE AUTONOMY OF THE PROFESSION: WHOSE AGENT ARE YOU?

Ronald F. Duska, PhD

One of the first issues I faced as a member of an ethics hearing board when I assumed the Chair of Ethics and the Professions at The American College was raised by an agent who wanted to know how he could be faithful to the CLU pledge while he was a captive agent of a company. The American College pledge promises: "In all my professional relationships...I shall, in light of all conditions surrounding those I serve, which I shall make every conscientious effort to ascertain and understand, render that service, in the same circumstances, I would apply to myself." This pledge captures the ethical imperative that binds any member of the Society of Financial Service Professionals and is present in the spirit of the Society's Code of Ethics.

That captive agent felt that he was being forced by his company to sell a product that wasn't the best product for his client. According to the agent, there were other, more suitable products available, but because of his status as a captive agent, he was unable to offer them. Since then, I have encountered a number of agents who express a similar difficulty. It is the classic problem of how to look out for the best interest of the client if you are contractually an agent of the company.

This issue of the Journal went to press in April 2005. Copyright © 2005, Society of Financial Service Professionals.

Legally, any insurance agent who signs a contract with a company acts as an agent for that company, and agency law requires the agent to act on behalf of the principal, which in this case is the company. Yet the purchaser of insurance expects the insurance agent to act according to the first principle of professionalism, which is to look out for the best interest of the client. What's more, this problem affects not only captive agents but also independent agents, for even the independent agent signs contracts with companies to function as an agent of those companies. Thus, while an independent agent might be free to choose between different companies' products, when a choice of a product has been made, the agent is then bound by the laws of agency to act on behalf of that company. Hence, the independence of even the *independent* agent seems somewhat limited.

I was reminded of this issue when Eliot Spitzer, attorney general for the state of New York, filed a civil complaint against Marsh and McLennan Companies, Inc., on October 14, 2004. One of the aspects of the complaint was the fact that Marsh was unduly influenced by contingent commissions offered by insurance companies to sell their products, and thereby breached its fiduciary responsibility to act in the client's best interests. There was, of course, a more serious complaint lodged against Marsh to the effect that it had engaged in rigged bids and price fixing. Still, the issue that struck me—because of its importance for agents in the field—was how to meet the conflicting demands of the

needs of the client and the needs of the insurer. After all, contingent commissions seem similar to bonus payments and sales incentives given by companies to their agents, and since the public reaction to Marsh indicates a mood of impatience with insurance companies and agents, it behooves members of the industry to pay attention to the problem of dual loyalties.

But why is what Marsh did relevant for agents? After all Marsh is a broker, and brokers clearly have fiduciary responsibilities to clients that agents do not have. Robert Hartwig, the chief economist at Insurance Information Institute, emphasized the difference in a *Wall Street Journal* article, "A broker works for the buyer of insurance, but an agent, *including an independent agent*, works for the insurance company."¹

Further, when the National Association of Insurance Commissioners (NAIC) in December proposed model legislation suggesting broker disclosure of contingent compensation, one of the arguments against it was that agents were not subject to the same restrictions as brokers. Craig Eiland, president of the National Conference of Insurance Legislators (NCIL) said, "Everyone agrees that we've got to have disclosure in broker agreements.... The problem is that, when we instituted Gramm-Leach-Bliley in most states, we got rid of the distinction in most places between agents and brokers, and they're now both called producers. Even though you may act as an agent for a company in most situations or as a broker for a client in others, the name now in most states is just producers."²

My understanding is that because they insist on emphasizing the difference between the “fiduciary” responsibility of the broker and the responsibility of the agent, groups such as NCIL and NAIFA are reluctant to fully endorse the NAIC’s proposed producer fee disclosure requirements.

I want to discuss several points. First, the muddling of the distinction is not a problem as Eiland suggests. I would agree with Joseph Belth of *The Insurance Forum* that:

First, although there is a technical distinction between brokers and agents, there is little substantive difference. For example, many “independent” agents represent several insurance companies and say they place insurance with companies offering the most appropriate coverages for their clients’ circumstances.

Second, many agents hold themselves out as professionals who act in the best interests of clients....

Third, the complaint will affect “captive” agents who represent only a single insurance company. A company typically offers different coverages with varying commissions, and in some instances a company offers similar coverages with varying commissions. Questions arise about the extent to which an agent’s recommendation is influenced by the size of the commission rather than the appropriateness of the coverage.³

I think if we read the mood of the public and the reaction outside the industry to Spitzer’s complaint, we see

that Belth’s analysis probably provides the insights we ought to follow. For agents to claim they do not have to disclose certain aspects of their compensation because they are not brokers is a fine legal distinction, but for most of the public it is a distinction without merit. The fact is the public expects most agents, as professionals, to be concerned first and foremost with the best interests of the client. A company’s insistence that the agent is the company’s agent is little understood and sympathized with.

In light of that, I suggest that the question of who’s agent one is is not so much an ethical problem as a misguided legal wrangle. Ethically, the agent first and foremost has an obligation to look out for the best interests of the client and only secondarily for the company. As I have stated, many companies claim that their agents are agents of the company and not the client and insist that the agent has an obligation to look out for the company’s interests before the client’s. But such emphasis is misguided, because companies that put their own interests before their policyholders’ do themselves and their customers/policyholders a disservice.

To make my point, let’s take another look at agency law. Legally, an agent is defined as “a person who has received the power to act on behalf of another, binding that other person as if he or she were themselves making the decisions.”⁴ The person who is being represented by the agent is referred to as the principal. Agency law, serendipitously perhaps, requires that an agent act on *behalf* of a principal.

What does it mean “to act on behalf of”? The phrase is usually inter-

preted as acting in the principal’s best interest or as the principal would act. So certainly an agent could not bind or underwrite a policy for a client who the agent knows is misrepresenting, for example, his or her health. In that sense, the agent is an agent of the company. But in most other areas, even as an agent of the company, the agent ought to look out for the best interest of the client, because the best interest of the client and the company should agree.

To show that agreement, we need to examine more carefully what one’s best interest is. Shakespeare’s adage comes to mind: “This above all: to thine own self be true.” We could say that one’s best interest is served if one is true to oneself. And what is it to be true to one’s self? Suppose we answer that by saying to be true to oneself is to be true to one’s mission or to one’s goals, for that mission or those goals are what *define* you. In short, in order to act in your best interest you need to be true to your mission.

Any company is a collection of contracts and people and buildings and assets, etc., but what defines a company are its goals. What sort of goals do companies have? Let’s look at the mission statements of some representative companies.

In its mission statement, Northwestern Mutual says it

...exists to help policyowners and clients protect against financial risk and achieve financial security...

Protecting the interests of policyowners and other clients requires a purposeful fairness—to ensure that policyowners and beneficiaries get what they should get. This

tradition has been carefully bred in our tradition. Long before they were popularly defined in the business press, such terms as “high ethical standards” and “integrity” were ingrained in the spirit of Northwestern Mutual.

*The mission of the Northwestern Mutual Financial Network is to develop enduring relationships with clients by providing expert guidance for a lifetime of financial security.*⁵

Clearly, to act on behalf of Northwestern Mutual as defined in its mission statement means to serve the interests of its policyowners and clients by developing enduring relationships and providing expert guidance. One might say this is okay for Northwestern because it is a mutual company, and the policyholders are the company; but what about publicly owned companies?

Consider the following statement from MetLife, which is not a mutual company.

For more than a century, MetLife has built a reputation as a company that believes in fair dealing, integrity, and trustworthiness. We firmly believe that adherence to the highest standards of ethical conduct is the only acceptable way of doing business and is the personal responsibility of every one of our associates. *The company's well-known name and good reputation are reinforced by our pledge to deliver value and world class service to all who do business with us, always keeping in mind what is best for our customers.*

Supporting these efforts are the MetLife core values of integrity and

honesty, the fundamental building blocks of our long and successful history, that shape the way we do business. These values are central to our efforts to achieve the MetLife vision—to *build financial freedom for everyone*—and emphasize our outward focus on customers and their needs. We recognize that our ongoing success will spring from these values and, as we look to the future, we remain committed to the highest standards of ethics, integrity and trustworthiness, while continuing to pursue a strategy of building financial freedom for everyone. *This defines who we are.*⁶

If the MetLife vision is to “always keep in mind what is best for its customers,” its mission is exactly parallel to the ethical pledge of looking out for the client’s best interests.

What about investment firms? Consider the following first principle of Morgan Stanley’s Code of Ethics. It simply states: “Act in the best interests of clients, the firm and the public.”⁷

Under a section called “Fair Dealing,” the Morgan Stanley code says:

Every employee, officer and director must *always keep the best interests of the Firm's clients paramount* and endeavor to deal fairly with suppliers, competitors, the public and one another. No one should take unfair advantage of anyone through manipulation, abuse of privileged information, misrepresentation of facts or any other unfair dealing practice.”⁸

If we take these mission statements and codes of ethics seriously we

can construct a simple syllogism:

1. An agent is one who acts on behalf of a principal.
2. To act on behalf of a principal is to follow the principal’s goals.
3. If the principal’s goals are to benefit the client, then the agent must act to benefit the client.
4. Therefore, the agent who acts on behalf of a company must act to benefit a client.

A serious company with a commitment to serving the public would require that its agents have a fiduciary responsibility to serve that commitment. Hence, I would argue that there should be no real conflict between acting as an agent for a company and acting in the best interest of the client, because the purpose of the company should be identical to the responsibility of the professional—to look out for the client’s best interest. One might even go further and insist that if an agent finds a company’s policies such that they cause the agent to do what is detrimental to the client, the agent has an obligation to report such conflicts to the company’s management. (But that is an issue for another time.)

Let’s conclude with a final point. We reach the false dichotomy between client and company interest because we mistakenly assume that acting on behalf of a company is acting to help that company maximize a profit. This is a commercial point of view taught in schools of business and finance that needs to be challenged.⁹ Such a commercial perspective of acting primarily to maximize profit may not be congruent or consistent with a company’s mission. This is not to say that profit or bottom line

success is not important. Without it a company does not survive. However, while profit is often a motive for a company's actions, it cannot be the primary purpose of a company nor a primary determinant of a company's behavior. Morgan Stanley gets it right when its Code of Ethics says "...always keep the *best interests of the Firm's clients paramount.*" That means client interests necessarily come before profit.

The bottom line is this: the company exists for the sake of the client. Hence, the company as well as the agent has an obligation to look out for the interest of the client. In my opinion, Spitzer didn't file suit against Marsh and McClennan because they took contingent commissions. Marsh and McClennan's problems arose because they seemed concerned more with profit than their mission. They didn't pass on the savings in a fair way—to the policyholders.

Consider Marsh's mission: "MC...is a professional services firm, offering analysis, advice and transactional capabilities."¹⁰ Marsh describes itself as a professional advisory services firm. A service firm provides service. That is its *raison*

d'être. It is the nature of advice that it be concerned with the welfare of the advisee, not the adviser. An adviser who manipulates an advisee for his or her own profit or interest is corrupt. Marsh, as an advisory firm and as a broker, had ethical responsibilities to its clients that were paramount. It would seem that Marsh failed in meeting those duties; that it concerned itself with its own success and profit before the interests of its clients.

Some finance professors and economists insist that the goal of any for-profit company is to maximize shareholder value. But, as I indicated, such a view is simply the strictly commercial point of view and cannot withstand scrutiny. The goal of any advisory firm, as adviser, must be to concern itself with the best interests of its clients. Whatever one feels about the work of Eliot Spitzer, recognize that the public applauds his work (whatever his motives) because he expresses its voice. He is the "vox populi." He has touched the moral sentiment of the people—a sense of outrage. The public believes that companies who purport to exist for the sake of servicing the public have a sacred duty to do so, and if they fail

in that duty, they need to be punished. The public expects no less from the individual agent. ■

Ronald F. Duska, PhD, has served The American College as professor of ethics and chairholder of the Charles Lamont Post Chair of Ethics and the Professions since 1996. Mr. Duska received his PhD in philosophy from Northwestern University. He specializes in ethical theory and business ethics. He can be reached at Ronald.Duska@TheAmericanCollege.edu.

- (1) "Consumers Question Kickbacks," *Wall Street Journal*, 30 November, 2004.
- (2) As quoted in *Best Week*, 29 November, 2004.
- (3) Joseph Belth, "Eliot Spitzer and the Insurance Industry," *The Insurance Forum* 32 (January 2005): 138.
- (4) www.duhaime.org/dictionary/dict-a.aspx.
- (5) www.nmfn.com.
- (6) <http://www.metlife.com/Applications/Corporate/WPS/CDA/PageGenerator/0,1674,P2439,00.html> (emphasis added).
- (7) <http://www.morganstanley.com/about/inside/governance/ethics.html> (emphasis added).
- (8) *Ibid.*
- (9) I have argued this point elsewhere, especially in "The Why's of Business Revisited," *The Journal of Business Ethics* 16 (1997): 1401-1409.
- (10) <http://www.mmc.com/frameset.php?embed=about/index.php>.