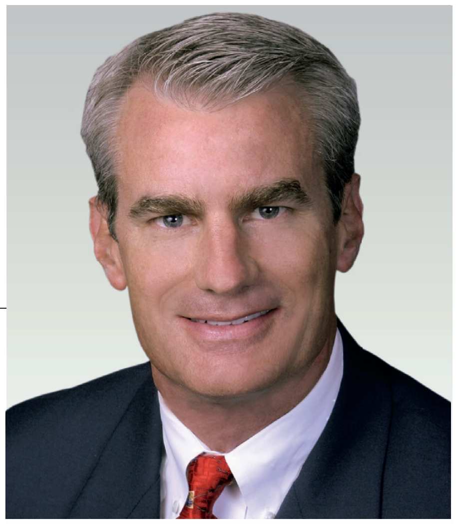

ETHICAL DILEMMAS

Making difficult decisions is an everyday task, but how often do we challenge our ethics, asks **STAN MULLIN FRICS**

WHAT THOUGHTS ARE conjured in your mind when you hear Bernard Madoff, Ivan Boesky, Allen Stanford and Goldman Sachs? At one end of the spectrum is a view of amoral greed – resulting in the economic decimation of millions of people around the globe (riots in Greece, failure of the banking system in Iceland, reduction in home values in the US to 2001 levels, etc.). Many think of these people and firms as a group of smart folks who, at a minimum, may have complied with the law but did not conform to the values of right and wrong commonly understood by most people in the United States.

The subject of 'morality' in business typically either evokes boredom ("who cares?") or debate ("who is to say that what is morally or ethically sound for you, applies to what I think is fair and reasonable?").

But now, more than at any other time in recent memory, what we are willing to do to make money has had a material and very public impact on individual wealth, corporate earnings and public sentiment. Most investments made with Madoff have been lost and Ivan Boesky served time in prison (as Allen Stanford will).

With the roughly 8% of the US population expected to lose their homes for good during the current deleveraging of the US debt markets, many Americans blame lack of disclosure/transparency, un-regulated markets and lack of concern for the customer. To be simple, many Americans view business leaders as 'moral eunuchs'.

Two of the most successful investors of the last few decades, Warren Buffett and Charlie Munger, both born in Omaha, Nebraska, have never been reluctant to voice their disdain for the greed they see as prevalent in the financial markets (hedge and bond funds, private equity firms, REITS, etc.), many of which are based in Manhattan.

Other than for those taking positions for their own account, on Wall Street the typical path to wealth is to sell product of varied types – and the earnings you and your firm earn, for the most-part, will be paid up front, not at the reversion of the investment. The incentive is to make the trade or sale, versus growth in the value of the investment.

One of the values delineated in the RICS Rules of Conduct is integrity, stating 'Members shall at all times act with integrity and avoid conflicts of interest and any actions or situations that are inconsistent with their professional obligations.' Do we as members of the commercial real estate industry have a moral obligation to operate our business in a way that meets or exceeds the ethical standards set out by our industry trade associations?

We do. In part it is because by not treating others in business as we would like to be treated, the likely result will be a highly fractured, unnecessarily contentious business environment that will detract (via disputes, mediation, arbitration and litigation) from time that should be spent working with our clients and protecting their interests.

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The choices we face

Have you even been offered money or gifts in exchange for business with the person offering those incentives? If so, did you accept them? Did you give them the business they wanted? Did you ask for your client's approval before making your decision? Did you disclose the offer and your agreement to provide that business to that third party service provider? Did you document the disclosure to, and consent from, your client in writing? Have you ever done anything that would impede the judgment of your client or anyone involved in your assignment? Going out for drinks in a business setting is a common practice but will that impact the risk, economic result or reputation of you, your client or your firm?

Is there any nepotism or favoritism involved in your decision-making? I was talking to a CMBS special servicer recently and he had run into several occasions where he had nominated a receiver to the court with jurisdiction over a commercial property, only to find that the presiding judge substituted someone of the judge's personal preference but not any more qualified to do the work. A judge no less!

Are you taking on assignments for which you are not an expert but purport to be? I was a defendant in a dual agency trial about 15 years ago and the lawyer that represented my firm (and each of the named agents) was a transaction lawyer with little trial experience. As you might expect, we lost that case. I know of cases where financial advisors have given tax or legal advice to their clients instead of directing them to accountants and lawyers. Perhaps the advisors fear that if the client is introduced to experts in other fields that the client is lost.

Do you disclose that when you are providing professional advice you may be receiving economic gain, other than the compensation your client knows about? I know of cases where a broker recommended a client acquire property in which the broker was a partner and did not make that disclosure. Nor did he obtain the client's written consent. In many states here in the United States, if a wronged party in a case like this one sues, he can win a return of actual damages (the price paid for the property), which is typically covered in an errors and omissions (E&O) policy, and punitive damages (which are typically many times higher than the actual damage award) and which are typically not covered by E&O insurance because the act was fraudulent.

Does your client know what they are buying, whether real property, equities, bonds, etc? I know of case with a tenant-in-common (TIC) purchase, where although the title company insured the US$800,000 purchase price, they only reported US$700,000 to the county as the actual property value. The sales agent involved said that, as with all property sales, the seller paid commissions. What the sales agent did not disclose was that US$100,000 of the purchase price was fees paid to the TIC sponsor and to the broker-dealers that found the buyer and raised the capital for the sponsor.

Suffice it to say that integrity in our work can and usually does have a direct positive economic impact on our clients – and on us. It is a 'third rail' that should never be stepped on.

Stan Mullin is an approved court receiver with California Real Estate Receiverships