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Doing the Right Thing

Everyone faces this dilemma: “Will I do the right thing, even if it will cost me something, or do the wrong thing, because it’s easier or others do it?” When I was a teenager, my mom would ask, “If your friends jumped off a bridge, would you?” Of course it depended on how high the bridge, and how deep the water.

Recently, a client (now a former client) asked if I would agree to contingent fees. Specifically, I would be paid for a survey only if the property closing was successful. This client identified other surveyors that allow their fees to be contingent (one wrote off \$40,000 last year as part of a contingency agreement). He also admitted that I had no chance of getting work from his firm if I refused this requirement.

In Illinois, contingent fees are prohibited. A surveyor might lose his license or be fined up to \$10,000 for “issuing a map or plat of survey where the fee for professional services is contingent on a real estate transaction closing.”

While not all states specifically address contingent fees, the Federal Real Estate Settlement Procedures Act (RESPA), prohibits “services of all types at special or free rates” as a form of kickback for professional referrals. So any contingencies related to real estate transactions are also federal offenses. (*Editor’s Note:* Sec. 3500.14 of the Federal Code of Regulations that stipulates “Prohibition against kickbacks and unearned fees” may be accessed online at http://edocket.access.gpo.gov/cfr_2004/prqtr/24cfr3500.14.htm).

Beyond statutory prohibitions, contingent fees are also an ethical issue. Attorneys or realtors are advocates on behalf of their clients, therefore contingent fees are understandable. However, a surveyor’s determinations are supposed to be impartial. We often discover boundary conflicts or site conditions

to require contingent fees, and the surveyor’s temptation to agree. Attorneys don’t want to be responsible for the survey fee if the closing fails. In their view, if they aren’t getting paid, why should the surveyor? The surveyor is tempted to agree to this practice, especially in a slow market when competition is high and

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that could jeopardize the closing of a property. If our fees are contingent, we have an incentive to avoid disclosure in order to assure payment of our fee.

Not long ago I protected a client from a serious error by discovering a conveyance of property that was missed by the title company. A multi-million dollar deal was delayed because of the discovery, but potential ramifications were avoided. Had my fee been contingent, I might have been tempted to ignore my discovery, and leave the title company as the scapegoat.

Contingent fees are also a form of bribery. In the example mentioned above, my competitor “paid” \$40,000 through contingent fees to get work. That level of graft is obscene.

Although I am adamantly opposed, I do understand the incentive for attorneys

work is scarce. Taking the “high ground” came at a loss to my business. With just this one client, I lost \$5,000 to \$8,000 worth of business per month!

My former client stated that there must be a way for surveyors to “write-off” a contingent fee as a bad debt. My response: writing off a bad debt is completely different from knowingly agreeing to contingent fees. If someone refuses to pay their bill, I don’t work for them anymore. Since most of my work is commercial, I have survey fees on some projects that exceed \$20,000. If I were to prostitute myself with contingent fees, I could be financially devastated.

We should never allow the collection of professional fees to compromise professional judgment. To do otherwise is not only unethical and illegal, it’s bad business. *A*