

Strictly Speaking: Blowing the Whistle on Fellow Professionals

by Ronald F. Duska, PhD

Abstract: Most of us have been raised not to snitch on our acquaintances. On the other hand, professionals in the financial services industry express serious discomfort about not doing something to curb the behavior of mavericks whose behavior damages the profession. But what is to be done?

You discover that one of your colleagues is selling unsuitable annuities to seniors, or needlessly replacing life insurance policies to garner the commissions, or misrepresenting products to clients in order to meet production goals for the company rewards. What should you do about it?

You are at an industry meeting and you see an agent or broker being honored as a top producer, whom you know to have succeeded because he or she plays fast and loose with the rules, either selling clients products they don't need or by using other unacceptable sales practices. Should you say something to someone, or be silent?

I often hear about situations such as these when I meet with producers and they relay ethical situations that bother them. The situations above raise the question of whether one is ethically obliged to expose possible market conduct violations of fellow producers to some proper authority; whether one should blow the whistle.

During a recent Web cast I was asked, "Do we really have an ethical obligation to report the suspect behavior of our fellow producers?" Unsurprisingly,

many of the producers with whom I discuss this issue are reluctant to do so. That is understandable. Most of us have been raised not to "snitch," "drop the dime," or "rat" on our acquaintances. On the other hand, these professionals in the financial services field express serious discomfort about not doing something to curb the behavior of such mavericks that damages the profession. But what is to be done? This is a clearly a situation where you should weigh the pros and cons of blowing the whistle on a colleague. Most professional associations have some expectation that their members should police their profession. But how should it be policed? When and under what circumstances? Who is obliged to do the policing?

There are some obvious moral maxims that rule practices of financial planning:

1. Be fair.
2. Don't misrepresent products to clients.
3. Don't do harm to clients.
4. Look out for the best interests of your clients.

These flow from having a direct relationship with someone who put his/her trust in you and to whom you have made promises. In such situations the ethics are easy. They deal with your obligations to your client. But the case of blowing the whistle deals with your obligations to your profession and obligations to others who are not your clients and to whom you may have no relationship at all.

I want to offer a possible decision procedure for determining whether you have an obligation in such a situation—how to decide whether you should mind your own business or get involved. Generally

in ethics there is a maxim to "not harm" and another to "do good." Not harming is a "negative injunction." But whistle-blowing is not a case of not harming, it is a case of "doing good." Doing good is an affirmative duty, and it is difficult at times to determine what is required in affirmative duties. For example, the commandment "Honor your father and mother" is an affirmative duty, but what exactly does that honoring require you to do? Let me suggest that in between not harming and doing good, there is a category of deeds that can be called "preventing harm." I would suggest that if we examine the area of preventing harm, we may get some guidance for when we are obliged to blow the whistle.

I think it is inarguable that at times we are morally obliged to prevent harm. For example, suppose you are walking by a wading pool and you see a small child in the pool who appears to be drowning. For some reason (possibly the child wandered off from a distracted parent) there is no one else around. In such a situation, do you have an obligation to help that child? I think the answer is obviously, "Yes!" Wouldn't you think you were some sort of hard-hearted monster if you didn't help and let the child drown? There are clear situations, such as the child drowning, where it is evident that we have an obligation to prevent harm.

If we look at this example, the conditions under which we have an obligation to prevent harm become clear. You may wonder what the relation is between helping a drowning child and blowing the whistle on a fellow colleague, but we will get back to that. For now let's see what

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conditions for preventing harm we can coax out of the drowning child example.

To begin with the obvious, there must be a need. Harm is occurring; the child is drowning. A second condition to be met in order for us to have an obligation to prevent harm is that there be a capability to prevent the harm, i.e. the person must be able to help. In the case of the child drowning, I have the capability to pull him/her from the wading pool. If the child was drowning in a lake or in a large deep pool, and I couldn't swim, I would not have the capability. There is an old Latin maxim that holds for ethics: *Nemo dat quod non habet* ("no one gives what he does not have"). Or again, "ought implies can." You are only obliged to do what you are able to do. In the case of the child there is certainly capability.

Still, is saving the child your responsibility? Where are the parents? Our ethical tradition holds that we have special duties to people with whom we have relationships, but not special duties to those with whom we don't have a relationship. So if we look at the child drowning example we see two other conditions we can add to need and capability: proximity and last resort. You are at the wading pond and no one else is around. You did not cause the child's situation, but we do have an obligation to help other human beings in distress when we are capable. Our special duties to others take priority, but if there is no one available with the special duty of care for the child, such as the parent, the duty falls upon those who are near and who are the last resort. In the case of the drowning child, then, there is need, you have the capability, and you are there and the last resort. Hence the moral obligation to help falls upon you. That is part of what it means to be a member of the human community.

There is one last condition that needs

to be fulfilled for the obligation to fall upon you, and that is likelihood of success. In the case of the child, that is assumed as a given. If your efforts will not succeed in preventing the harm and create only problems for you, you do not have the obligation.

This principle of preventing harm plays a large role in our ethical tradition of helping those in need. This is the concept of "noblesse oblige" (those with the ability have the obligation). But, at this point, you can ask whether there is any similarity between saving a drowning child and blowing the whistle on a maverick producer. Is the child drowning an apt analogy to be applied to whistle-blowing? I think if we consider the conditions then we can see some relationship and gain a foothold on when whistle-blowing is required.

Clearly, the maverick producer is causing harm, and to interfere with this harmful activity would prevent harm. There is a need for someone to stop such behavior, which is why many professional organizations have governing bodies that have provisions for punishing their members. But when are you the specific individual with the obligation to help? You certainly have the capability. Not perhaps the capability to tell the producer to stop, unless you are his or her manager, in which case that is your direct obligation, but at least the capability to report his or her activity. Also, since you are aware of the untoward activity, you are proximate. However, are you the last resort? You may not be the person with the initial responsibility to help prevent such harmful activity. That would probably be the responsibility of someone in the company, the broker-dealer, the manager, or some such person in authority over this producer. But if none of them are acting, then you become the last resort and have some responsibility. It may simply be the responsibility to report the behavior to those who aren't taking

action (the manager, company, broker-dealer, governing board) under the presumption that they do not know of such activity. So while the two occurrences—the child drowning and the clients getting hurt by an unscrupulous agent—may seem quite different, there are pertinent similarities.

Let us turn to the last condition. This is the precautionary note that there should be some likelihood of success. If there are good reasons to think that reporting the behavior to the management or the company will do no good—because the company or the management secretly approves of such behavior—there is little chance of succeeding in preventing the harm and a significant chance of damaging one's own interests. In that case the obligation diminishes. However, if that is the case, one needs to recognize that one is working for a company or with management that is already ethically questionable.

In conclusion, the answer to the question "When does one have an obligation to blow the whistle?" is fairly complex. One needs to look at the situation in the light of the principle that there are times we have an obligation to prevent harm. That obligation holds when there is need, capability, proximity, last resort, and probability of success. Finally, even though the issue may be complex, we have an obligation to weigh the conditions. Not all ethical issues are easy to resolve. ■

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