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## Professional ethics. (Feature on Law and Ethics)

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Professionals--for example, architects, doctors, accountants--have exclusive rights to carry out certain services, for which they are qualified, usually by education and often a period of guided experience such as the articling period for lawyers. In return for monopoly rights to perform their services, and correspondingly high incomes and prestige, professionals have special ethical responsibilities to their clients and patients, to their profession, and to society. This article describes who is a professional and some of their corresponding ethical duties.

Who is a Professional?

These days, many people consider themselves to be professionals. The term can mean different things. For example, one who performs certain work to earn a living, as compared to doing it for fun without earning money from it, is said to do that work professionally. This definition of a working professional can range from the artist who works from home and barely makes enough to live on to the big-league hockey player who earns millions of dollars in salary per season.

Professionalism also can refer to a person's demeanour. In this definition, what a person does to generate income is not as important as how he or she interacts with others. Someone who is well dressed and groomed, and who interacts in a businesslike or otherwise appropriate way with others is described as acting professionally.

A third meaning of professional combines both what work one does and how that work is done. These professions are recognized, and accorded special status, by law because they carry out work where the potential to do individual or social harm is significant. The stakes--such as life, justice, safety, liberty, and health--are high. Professionals in this third category are highly educated and skilled; they perform important work for individuals and society; they are believed to be intrinsically motivated and are thought to do their best work when they regulate themselves on a day-to-day basis. This self-governance is granted exclusively to professionals although, with its law-making ability, government ultimately retains final regulatory authority over each true profession, and the courts oversee the administrative self-governance.

A list of any province's statutes would show the number and range of what are considered these true professions, including chartered accountants, optometrists, lawyers, dentists, realtors, surveyors, police, architects, physicians, engineers, veterinarians, judges, and pharmacists. Some professionals, such as nurses and teachers, are represented by large unions as well as professional associations, and there is some overlap between those in terms of specifying minimum formal

educational and conduct qualifications for that work. The designation of a true (legally recognized) profession is a government policy decision.

Membership in a profession can be held only by human beings. While corporations are considered "legal persons" and generally enjoy the same legal status and rights as humans, they cannot be professionals. Given the influence exerted and personal accountability, required of professionals, their services can only be rendered by individual human beings.

Being a professional is a privilege. No one has the legal right to attain professional status, or once attained, to keep it or to avoid regulation. Professional status is, like a licence to drive a motor vehicle, conferred as a privilege upon deserving individuals. One must continue to earn and remain worthy of that special status.

When formally admitted into a profession, one is often required to take the oath of that profession. This oath morally binds one's conscience to serve the client, the profession, and society to the highest standards of skill and integrity. The oath raises consciousness of the special professional role and responsibilities at a formative juncture in the new professional's life.

Once licensed in a profession, one can provide professional services in several ways. Working in-house for a government, a nonprofit organization, or a business is known as the one-client model. Examples include a nurse in a hospital, a lawyer in an oil company, or an engineer in a construction company, in performing the specialized work of their training, these individuals usually continue formal membership in their respective professions. They are both employees and professionals.

Many other professionals are self-employed business people, or they are members or partners in a professional services firm, such as a large international accounting partnership, in a many-clients model. The professional services are delivered through business models such as proprietorships, Professional Corporations (PC), or Limited Liability Partnerships (LLP). Self-employed professionals or those in professional service firms, thus, must also be good business persons. These professional service businesses are called practices and one is said to be practising the profession. Payment for these professionals may come entirely through government, (e.g., physicians), partially through government, (e.g., legal aid lawyers); or entirely from the client, whether private or public.

#### **Wearing More Than One Hat: Private Lives and Public Responsibilities**

Even premiers, prime ministers, cabinet ministers, and judges have codes of conduct which contain conflict of interest and other ethical guidelines that they must observe. This is part of the rule of law and their legal status as professionals. They can be disciplined for breaking these guidelines.

A professional may work in professional and non-professional capacities at the same time. The most common example is the employed professional who is under a duty to obey the employer as well as the profession's regulator" body. For example, a licensed physician could also be an elected politician. Is the politician constrained by the professional ethics of the physician? Can a

licensed lawyer who only operates a non-law-related business (e.g., a real estate firm) face law society sanctions for what he or she does as a business person?

General community values such as honesty, care, diligence and skill are consistent with professional ethics. Concerns arise only where a person is subject to conflicting ethical duties. To whom does the professional owe the highest ethics and duty? A professional remains under obligations to three different constituencies: the client, the society, and the professional group. In addition, the professional is expected to maintain the highest standards of personal behaviour both inside and outside of the profession.

A member always represents one's profession. A licensed professional is always bound by professional ethics, regardless of the undertaking, because integrity and good character are standards that should not be relaxed. That is why a crime or another wrong committed in the private life of a professional casts a pall over the whole profession, and why a professional can be sanctioned for it, even where it was otherwise completely unrelated to the professional's work. For example, an engineer who habitually shoplifted might be disciplined by his or her professional association even though shoplifting does not normally relate to the practice of engineering. Since professional ethics are specific and rigorous, most professions will not permit violations of their rules and ethics on the part of any licensed member.

#### Who Do Professionals Serve?

Non-Discrimination Rules Apply to Professionals: Professionals are like other business people. They can accept and turn away any client as they please. However, since they are conducting business "normally available to the public", they are subject to provincial human rights legislation that prohibits discrimination on the legislated grounds. In other words, a professional can refuse to work for any client at any time, except when the reason for the refusal or withdrawal of service has to do with the race, religion, ethnic origin, sexual orientation, age, gender, or physical or mental disability of the client.

A defining characteristic of a profession is that it is self-governing and independent of direct daily government regulation. In general, each professional worker is autonomous and free to accept any work and any client, or to turn down any work or client. However, professional ethics usually restrict this choice when the prospective client is desperate for the professional services and turning the client down would leave him or her without practical help. After agreeing to serve the client, the professional cannot terminate the relationship and abandon the client at a vulnerable stage. If a professional is going to terminate services in mid-stream, he or she should endeavour to assist the client to find another professional to carry on. A professional may have an ethical duty to render services to a client or patient, and not abandon that person, even without payment.

To the extent that professionals are officially set apart in the market, they are required to operate by more onerous rules than nonprofessionals, in return for the exclusive government grant of privilege to sell and perform certain services to the public and self-governance, professionals commit to the following obligations in the public interest:

- \* the highest standards of knowledge, competence, and skill;
- \* a minimum level of professional standards below which no professional can fall;
- \* continuous monitoring for quality and deportment;
- \* a code of professional conduct which has the force of law;
- \* mandatory liability insurance (for some professions);
- \* personal accountability outside of the profession; and
- \* clear duties to the client, to the profession, and to society.

All law societies in Canada maintain a fund established by their member lawyers that will pay to compensate innocent clients when one of their members has deliberately misappropriated the client's money.

#### Codes of Professional Conduct

Statutes, which establish professions, authorize the self-governing body to develop and enact a code of conduct that applies to all members of that profession. In other words, the government delegates to the peer regulators the power to legislate detailed professional duties and conduct. Unlike industry association codes of conduct, which are voluntary and have little or no legal effect, professional codes of conduct enjoy the status of subordinate legislation because they are enacted under legal authority from these enabling statutes. If professionals violate the code of conduct, they can be legally sanctioned and ultimately lose their licences to work in that profession.

Some codes are a few pages long; others are more than a hundred pages long. Most touch upon similar issues that cut across all professions and have the same comprehensive coverage. For example, all codes deal with general fitness for entry and continuance in the profession, misconduct, and a concept called "conduct unbecoming". All codes deal with education issues, discipline, and professional duties to the client, to the profession, and to society.

Can a Murderer be a Lawyer? Personal and character fitness are taken into account whenever a person applies for admission to a profession. Even where one has passed all the formal educational and training requirements for admission to the profession, the governing body may deny admission on the basis of personal fitness. Maurice Sychuk, a one-time law professor and well-respected lawyer in Alberta, was convicted of murdering his wife in 1989. He was disbarred by the Law Society. He served his prison sentence and was paroled. By all accounts, he was fully rehabilitated in his personal life and had paid his debt to society for this serious crime. Would rehabilitation be enough?

In late 1999, Sychuk was the first disbarred lawyer in Canada, who had been convicted of murder, to apply for reinstatement as a lawyer. The Committee of Inquiry of the Law Society of Alberta was unanimous in denying reinstatement.

Employers, industry associations, and other organizations such as universities also develop and publish codes of conduct for people under their jurisdiction. These codes would have legal effect only on a contractual basis. The employee or student, for example, agrees to abide by the code as a matter of contract. The code may specify what enforcement actions and sanctions may be taken. The legal reach of these codes does not extend beyond what the parties can mutually agree upon.

### Self-Governing Regulatory Bodies

Provincial legislation that organizes professions also creates, delegates, and vests each self-governing body with considerable power to regulate the profession. These bodies are composed, primarily, of senior and respected active members of the profession, who are elected every few years by the total membership to manage the profession (hence "self-governing"). Often there are a few laypersons on these regulatory bodies, which are variously known by the terms "society" (as in Law Society), "board" or "college" (as in the College of Physicians and Surgeons). These bodies are divided into a number of committees to manage various functions such as administration, education and admission, ethics, insurance, and public relations. All have a discipline committee. A client or a third party who believes that a professional has violated the code will find it easy to complain to the governing body. There is no cost or risk to the complainant to bring a concern to the governing body.

Professional status confers significant benefits for the professional as well as significant legal obligations, many of which are set out in the various codes of professional conduct. These obligations can be divided into duties owed to the client, duties to the profession, and duties to society.

### Range of Sanctions Against Professionals

Sanctions are legal consequences of wrongs committed by professionals. These can be divided into professional and extra-professional remedies and sanctions. A professional self-governing body may order that one of its members make an apology to someone. It may merely warn or reprimand the offending professional or publish an account of the wrong, resulting in stigma within the profession and in the view of the public. It may place restrictions on a member's practice for a time, or it may insist upon further education or counseling where the concerns relate to competence or personal challenges which are affecting the professional's practice. The ultimate sanction, the capital punishment of professional discipline, is the indefinite revocation of the member's professional licence.

Extra-professional sanctions arise from legal actions taken outside of any discipline by the profession itself. Professionals are subject to the general law of negligence, insurance, and crime, like all other business persons. In serious cases of wrongdoing, it would not be unusual for the

profession to discipline the professional, the client to obtain a civil judgment for money damages, and the Crown to win a conviction for a crime--all for the same misconduct.

### Unauthorized Practice

Professionals are granted a statutory monopoly to sell their services to the public to protect the public and in return, it is implied that they will have a minimum technical proficiency in the work they perform. This is a general quality control issue: we do not want just anyone performing heart transplants on needy patients. Instead, we want only well qualified surgeons to perform this service.

Clearly, then, non-professionals are prohibited from offering services, to the public, that fall within a professional group's monopoly. Thus, if someone who is not a formally licensed member in good standing of the profession offers or performs the professional services, that person may be charged with committing an offence. The legislation that sets apart the profession for self-governance contains provisions prohibiting the unauthorized practice of that profession by unlicensed persons. Sanctions include an injunction to cease performing the professional service, fines, short terms of imprisonment, or a combination of all of these.

The practice of the profession should be carefully defined in the legislation creating the profession. The profession has a monopoly only over the work specifically described within the legislation. Any work that is not clearly reserved for professionals, anyone can do. In *Pauze v. Gauvin*, 1954 the Supreme Court of Canada said, "The statutes creating these professional monopolies, sanctioned by law, access to which is controlled and which protect their members in good standing who meet the required conditions against any competition, must however be strictly applied. Anything which is not clearly prohibited may be done with impunity by anyone not a member of these closed associations."

### Mandatory Whistle-blowing

#### Duties to Report Professional Colleagues

An ethical duty that professionals have to their profession, and to society, is to report wrongdoing of their professional colleagues. In other words, acting professionally requires one to report those peers who are breaching ethics. As an example, the Alberta professional engineers' Code of Ethics mandates its members to "advise the Registrar of any practice by a member ... that they believe to be contrary to this Code of Ethics. "An engineer can be disciplined for not reporting on fellow engineers who are acting unethically.

#### Duties to Report Clients and Third Parties

##### (a) Child Abuse

Occasionally, legislation will mandate everyone to report specific wrongdoing. Child welfare legislation in all provinces provides an example of this. Since 1984, the Alberta Child Welfare Act has stated that "any person who has reasonable and probable grounds to believe and believes

that a child is in need of protective services shall forthwith report the matter to a director." "In need of protective services" is legally defined, but one would not expect an observer to read the Act or consult a lawyer. If one reasonably thinks that a child has been, or will be abused or neglected by a parent or guardian, one has a legal duty under the Child Welfare Act to immediately report the matter to a child welfare worker.

Health professionals, police, and teachers are in frequent contact with children and families and are often skilled in recognizing when a child might be in need of protective services. They are on the front line of social intervention services and have an independent duty of care to children. Physicians must be careful to avoid disclosure of personal health information, but this duty to report is an exception in the public interest. However, it is important to note that the legislation does not limit the legal duty to report to these service workers. Any person who is aware of a child (defined as under the age of 18) in need must report that belief to the child welfare department.

This mandatory reporting is remarkable because, although some abuses and neglect against children can be criminal offences, there is no requirement to report an offence under the Criminal Code of Canada. Recognizing the high priority given to protecting children in our society, this legal duty to report applies even where such a belief is based on confidential information and its disclosure is prohibited by other legislation. This legal duty is discharged only by making the report directly to a child welfare director or a delegated child welfare worker, even if it is known that the child welfare department is already involved. A lawyer, however, does not have to report child abuse when doing so would violate solicitor-client privilege.

Determining whether solicitor-client privilege applies is complex. Knowledge of child abuse resulting from direct communication between a lawyer and client for the purpose of obtaining professional legal advice is privileged. Thus, a lawyer defending a client against child abuse charges is not required to report on that client. By contrast, a lawyer handling a real estate transaction or an immigration file who collaterally discovers child abuse would be duty-bound to report it to the child welfare authorities.

Perhaps because the mandatory reporting requirement is so remarkable, the person making the report to the child welfare authorities cannot be pursued for defamation or any other legal action if the reporting was not malicious or if the reporter had reasonable and probable grounds for the belief.

Any person who does not blow the whistle when required to do so under this legislation can be charged and convicted of an offence and liable to pay a fine of up to \$2,000 or serve up to six months in jail.

The legislation places a higher standard on licensed professionals. A child welfare worker, who believes a report should have been made, shall advise the governing body of that profession of the failure to report under the legislation. Presumably, the professional can face both prosecution and penalty under the statute, as well as professional discipline, for failing to report a child in need of protection to the child welfare authorities.

## (b) Corporate Misconduct

In addition to child welfare, professionals must report other forms of misconduct. Lawyers must keep their client information strictly confidential, but Canadian law societies have long prescribed special circumstances under which the disclosure of confidential client information to external authorities is permitted and even required. For example, professional codes of conduct contain rules that permit lawyers to disclose confidential client information where they have reasonable grounds for believing that a crime is likely to be committed in the future. This reporting becomes a mandatory requirement, under provincial or federal statutes, when the lawyer suspects that the crime involves violence or "there is an imminent risk to an identifiable person or group of death or serious bodily harm."

In the United States, recent corporate scandals involving publicly-traded companies such as WorldCom Inc. and Enron Corp. have severely undermined investor confidence in capital markets and prompted a public outcry to detect and punish corporate wrongdoing. In response, the US Congress passed the Sarbanes-Oxley Act of 2002, with rules aimed at ensuring that lawyers of publicly-traded companies do not ignore evidence of corporate misconduct. The Act requires lawyers to blow the whistle on corporate clients that commit a "material violation of securities law or breach of fiduciary duty or similar violation." Lawyers with corporate clients must report knowledge of misconduct to managers within the organization.

Some provincial codes of conduct in Canada have recently been amended to incorporate rules that require lawyers' reports of misconduct to internal authorities, corporate clients in particular. Such lawyers are occasionally knowledgeable of misconduct which falls short of crimes involving violence, death, or serious harm. In these scenarios, the lawyer in Alberta and Ontario is bound to not disclose to any external authority, but may still have a professional duty to report the misconduct to internal authorities.

In 1995, the Law Society of Alberta amended its Code of Professional Conduct to add these specific rules for lawyers in corporate governance. Chapter 12 of the Code, entitled "The Lawyer in Corporate and Government Service", features rules that require lawyers to report knowledge of corporate misconduct to superiors in the organization. If the organization fails to properly address the matter, lawyers are required to withdraw representation of that organization as a client.

Early in 2004, in response to the Sarbanes-Oxley Act of 2002, the Law Society of Upper Canada amended its Rules of Professional Conduct to include similar whistle-blowing requirements. The Law Society of Upper Canada now requires lawyers practising in the province to report up-the-ladder when confronted with evidence of corporate misconduct; that is, where the lawyer knows the organization has acted, or intends to act, "dishonestly, fraudulently, criminally, or illegally." Ontario lawyers must first report misconduct to superiors in the organization, including the Chief Legal Officer (CLO) and Chief Executive Officer (CEO). If the misconduct does not cease, lawyers must then report the evidence to the board of directors, board of trustees, or an appropriate committee of the board. If the wrongdoing persists, lawyers must then withdraw from representing the client.



As self-governing professionals, corporate lawyers have a duty to protect and promote the public interest. Since these lawyers are hired to render legal advice to private parties and powerful interests, they are particularly well situated to encourage corporate compliance with the law, and they must do so in discharging their duty to the public. Lawyers representing corporations must also be mindful that, at least under Alberta and Ontario codes of conduct, the organization is the client--not the shareholders, regulators, directors, officers, or employees. Accordingly, the lawyer has a duty to ensure that the interests of the public, along with those of the organization, are served and protected. This is part of the new system of corporate governance and regulation of professionals.

#### Legal Obligations of Members of Professions

	Substance
To the Client	<ul style="list-style-type: none"> <li>* competence, and up-to-date knowledge and methods</li> <li>* no conflict of interest (without disclosure, or recommending independent legal advice)</li> <li>* special skill</li> <li>* care and diligence</li> <li>* high quality services</li> <li>* confidentiality</li> <li>* accountability for client's money and property</li> <li>* vigorous pursuit of the client's interests</li> </ul>
To the Profession	<ul style="list-style-type: none"> <li>* submit to governing jurisdiction of the professional regulatory body</li> <li>* obey rules of the profession</li> <li>* suffer any sanctions imposed</li> <li>* compete fairly with others in same profession</li> <li>* pay annual fees to regulatory body</li> <li>* serve the profession in governance, committees, and training new members</li> </ul>
To Society	<ul style="list-style-type: none"> <li>* maintain proper books of accounting</li> <li>* "do no harm"</li> <li>* educate the public about the profession (e.g., through media outlets)</li> <li>* work for free (pro bono) where necessary</li> <li>* report wayward colleagues to the profession</li> <li>* maintain liability insurance where required</li> <li>* advance human welfare generally through the profession</li> </ul>
	Professionalism
To the Client	<ul style="list-style-type: none"> <li>* honesty and integrity</li> <li>* regular communication</li> <li>* timeliness in performance of work</li> <li>* reasonable fees</li> <li>* strict separation of the professional service from personal or business interests</li> </ul>
To the Profession	<ul style="list-style-type: none"> <li>* maintenance of the honour of the profession (24 hours per day, and while working in other capacities)</li> <li>* prompt and complete communication and co-operation with regulatory body</li> <li>* fair and proper interaction with other professional colleagues</li> </ul>
To Society	<ul style="list-style-type: none"> <li>* volunteering and applying one's professional</li> </ul>

- skills for the greater good in the community
- \* upholding and obeying the law
- \* acting as a fair employer

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