

The restraint order must provide for notice to be given to persons affected by the order and any such person may at any time apply for a variation or for the rescission of the order. The court may, furthermore, appoint a *curator bonis* to take care of and administer the property to which the order relates⁸⁴ and may order the registrar of deeds to endorse specific restrictions on the title deed of any immovable property which is subject to the restraint order.⁸⁵

In order to prevent any realisable property from being disposed of or removed contrary to a restraint order, any police officer may seize such property if he has reasonable grounds to believe that the property will be disposed of or removed.⁸⁶

3.2.8 Realisation of property

When a confiscation order has been made against the defendant and the order is no longer subject to review or appeal, the court, on application of the attorney-general concerned or any authorised public prosecutor, may make certain practical arrangements to ensure the liquidation of the relevant property.⁸⁷ If a *curator bonis* has not yet been appointed, the court may appoint one in respect of the realisable property and authorise him or her to realise such property in such manner as the court may determine. The court may, furthermore, order any person who holds realisable property to surrender it into the custody of the *curator bonis*. The court may, however, not make any order regarding the realisation of the property unless it has afforded all persons having any interest in the property concerned an opportunity to make representations to it in connection with the realisation of the property.

The *curator bonis* will, after making such payments as the high court may direct, apply the sums of money on the defendant's behalf in satisfaction of the confiscation order.⁸⁸ Any sums which remain after satisfaction of the confiscation order will be distributed among the persons who held the property which was realised and in such proportions as the court may direct, after affording such persons the opportunity to make representations in connection with the distribution.

[to be continued]

⁸⁴ s 18 of the Proceeds of Crime Act.

⁸⁵ s 19 of the Proceeds of Crime Act.

⁸⁶ s 17 of the Proceeds of Crime Act.

⁸⁷ s 20 of the Proceeds of Crime Act.

⁸⁸ In terms of s 21(2) read with s 19 of the Proceeds of Crime Act, such payments may include payment of fines or any other amounts in terms of earlier court orders where the defendant was convicted of an offence, as well as payment of obligations which would have ranked as secured or preferential in the insolvent estate of the defendant. This should be read with s 21(1) which stipulates that, where a superior court directs such payments to be made, the state shall not have a preferential claim.

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Why professional ethics in the legal profession?*

GI ROSSOUW**

Introduction

It has always been taken for granted that there should be ethical guidelines and rules in a profession if it wishes to be worthy of the title "profession". A code of professional ethics is widely regarded as one of the features that distinguishes professions from other jobs or careers.¹ Currently the need for professional ethics in the legal profession is widely questioned. This is the first matter I wish to explore in this paper. What are the considerations that lead practitioners within the legal profession to question the long-standing tradition that a profession should be guided by a professional code of ethics? Once I have explored these considerations, I will evaluate them with regards to their validity. Are these considerations indeed sufficient ground for abandoning professional ethics? Only against the background of this will I then present a response to the question raised in the title of this paper: Why professional ethics in the legal profession?

1 *The crisis of professional ethics*

There seem to be four prominent reasons why persons are losing faith in the professional ethics of the legal profession. The objections against the professional code of the legal profession that will be discussed here, were gathered from articles and letters published in *De Rebus* as well as from the Krugel Report of 1996 on alleged unprofessional conduct in the legal profession.

1.1. Professional ethics impedes proper service

A first reason for the resistance against professional ethics stems from a feeling amongst practitioners that they are being hindered in the proper execution of their duties because of the rules of the professional code. If the rules were needed in order to protect the profession or the public, they would not have objected so strongly, but they feel that the rules serve neither of these purposes. This is especially true when it comes to the rules that forbid touting. Many practitioners believe that these rules inhibit them from sufficiently marketing their services. They find it difficult to understand how either the profession or the public could be hurt by proper advertisement of their services. Instead of

* Address delivered at the National Conference on Ethics in the Legal Profession held at the University of Pretoria on 18-19 July 1997.

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¹ Cf. Hinglis "Professions" in Callahan *Ethical Issues in Professional Life* (1988) 32; Barber "Professions and emerging professions" in Callahan 36; Koehn *The Ground of Professional Ethics* (1994) 56.

servicing the profession or the public, such rules criminalise the practitioners for actions that they do not regard as unethical.

This attitude towards the professional code is clearly expressed in the words of a prominent Cape lawyer, who states that the rules are not only "antiquated" but also "irritating and designed to antagonise".² In a proposal tabled for the annual general meeting of the Law Society of the Cape of Good Hope, a similar sentiment was voiced when some of the rules were described as unfair stumbling blocks hindering lawyers from executing their duties properly.³ In the Radloff survey on professional ethics it also transpired that, especially when it comes to so-called touting, practitioners often do not regard certain forms of marketing as unethical though it is rendered unethical in terms of the professional code.⁴ These examples all testify to the legitimacy crisis the professional code is suffering from.

When the demands posed by the professional code are seen as neither serving the practitioner nor the public, one should not be surprised when the right to existence of the professional code is questioned.

1.2. Professional ethics cannot be enforced

A second reason why the need for professional ethics is questioned, stems from the enforcement of professional ethics — or rather the lack thereof. If professional ethics are merely words on paper, making no difference in practice, the ethical code is hardly worth the paper it is written on. For ethics to be viable they must be respected and enforced by the profession and transgressions thereof should be dealt with effectively.

There currently seems to be a perception amongst practitioners that the ethical code of the legal profession suffers from exactly this malaise. The Radloff survey exposed this very clearly. In response to the following statement:

"I am reluctant to report conduct which I consider to be unethical to my law society, because even if I were to make the effort and take the time to do so, the law society will probably fail to take appropriate steps to curb such conduct".

almost 50%⁵ of respondents answered affirmatively.⁶ The same lack of trust in the capability of the law societies to enforce the professional code is also reflected in a submission to the general meeting of the Law Society of the Cape of Good Hope that stated that rules should rather be scrapped when practitioners are allowed to transgress these rules repeatedly and blatantly without being punished for such transgressions.⁷

It should once again come as no surprise that persons lose their faith in the

professional code when it is not properly enforced. It is understandable that they argue that in such cases the professional code might as well be abandoned.

1.3. Professional ethics as professional ideology

It is not only the insiders of the legal profession that harbour grave doubts about the need for a professional code in the legal profession. Also those outside the profession have serious doubts about the usefulness of the current professional code, albeit for very different reasons. The main grievance outsiders might have against the ethical code and the application thereof is that it is done merely to protect the interests of the legal profession. They see it as a form of professional ideology — ideology then used in the pejorative sense of the word.⁸ The ethical code is thus regarded as serving the interests of the members of the profession, protecting their honour, status and privileges, while neglecting the interests of the clients that the profession is supposed to serve. This attitude echoes the sentiment of George Bernard Shaw who once remarked that "all professions are conspiracies against the laity".⁹

A number of factors contribute to this negative perception of the ethical code of the legal profession which some outsiders harbour. Amongst them count the relative difficulty of finding a copy of the code as well as understanding the contents thereof, as it is perceived by the public to be formulated in a rather complicated way and therefore difficult to understand.¹⁰ Most troubling however is the fact that complaints are handled by the colleagues of the accused in the legal profession. There always remains the suspicion that practitioners in the legal profession will protect their colleagues against accusations by the public. It is believed that the professional blood is thicker than the water of service to clients. The question whether the guards can be trusted to guard themselves never fails to surface in this debate.¹¹

Instead of regarding the professional code of the legal profession as an instrument that protects the client, some clients regard the professional code and the application thereof merely as an instrument for protecting legal practitioners against complaints by the public. Those who regard the professional code as a form of professional ideology would hardly shed a tear, were the professional code to disappear.

1.4. Professional ethics are not economically viable

A fourth and probably the most serious ground for the distrust in the current professional code, is that it is deemed to be out of step with the economic realities practitioners experience. A number of factors contributed to the current situation where practitioners find themselves in a struggle for economic survival. Prominent amongst these factors is the almost fivefold doubling of the numbers of attorneys over the last decade.¹² This enormous inflow of new entrants is attributed to lax entrance policies by some of the nineteenth law

² Hoffmann "The time has come for an ethics conference" 1996 *De Rebus* 631 632.

³ *C/ Krugel Kommissie vir Omdersaek vir die Nuwe van Getuents van hertsede Ongeprofesionele en/of Onerlike Opdrade deur Praktiserende Prokureurs* Report to the Transvaal Law Society (1996) 62.

⁴ Radloff "Professional ethics: the response of legal practitioners to a questionnaire" 1996 *De Rebus* 524 526 527; also see White "Moving the ethical goalposts" 1996 *De Rebus* 477; Gildchrist "Touting and marketing - a line must be drawn" 1997 *De Rebus* 451 -452

⁵ 389 out of 785.

⁶ Radloff (n 4) 527.

⁷ Krugel (n 3) 62.

⁸ *C/ Krugel* (n 3) 50-58; also Kullgen "The ideological use of professional codes" in Callahan (n 1) 411.

⁹ quoted by Koehn (n 1) 1

¹⁰ *C/ Willemse* "Etiese kodeks vir publieke inligting" 1996 *De Rebus* 480.

¹¹ *C/ Radloff* (n 4) 527.

¹² *C/ Krugel* (n 3) 59.

facilities in the country as well as to affirmative action policies that seek to rectify the lack of black lawyers in the country.

Without further exploring the reasons behind this enormous growth in numbers, the consequence of this "numbers explosion" is that law firms find themselves in severe competition for business with one another. This situation is aggravated by some estate agents and some financing institutions who often play law firms off against one another. This was confirmed by the Krugel report.¹³ Firms are either asked to cut their fees or to offer some reward to the estate agent or financing institution in turn for the business that they have secured for the law firm. Firms simply have to compete severely with one another in order to survive economically. The struggle for business between law firms therefore acquires the semblance of the competition between companies in the business world. The slogans that business persons often use to describe the world of business such as "cut-throat business", "dog eats dog", "survival of the fittest" and "nice guys come second" are therefore increasingly being used by legal practitioners to describe the highly competitive environment they find themselves in.

There is a growing awareness that practitioners cannot merely be casted as professionals who serve the public. The fact that they are also businessmen and women should be acknowledged, it is argued. In fact there is a school of thought that claims that professions are nothing less than "unusually effective business monopolies".¹⁴

It is believed that the current professional code makes it extremely difficult for law firms to survive as businesses. A plea is therefore lodged that the legal profession should not be treated any differently from other businesses. They should be allowed the same freedom to trade and market their services as other industries—that is strictly on a fees-for-service basis. The rather strict stipulations of professional ethics which handicap the legal profession in their business activities, should be traded for ordinary business ethics. It is not a plea to be relieved from all ethical constraints, merely from what is regarded as the rather harsh restrictions that the professional code impose on them.

2 *Can the professional code be abandoned?*

Are the objections, raised above, against the professional code of the legal profession sufficient ground for abandoning the professional code? I believe they provide sufficient ground for a profound revision of the content of the current professional code as well as the way in which it is currently enforced. But I do not believe that the above criticism provides sufficient ground for abandoning professional ethics as such. I will substantiate this claim with regard to each of the criticisms raised above.

The first argument criticised the professional code for impeding practitioners in the proper execution of their duties in serving the public. Surely this cannot be regarded as a criticism against professional ethics as such. It is only a criticism of the content of the current professional code. If a participative

process is followed in which practitioners could help rid the current code of rules they regard as unnecessary and only a hindrance, and they could further help reshape the content of the code so that it would indeed contribute towards more professional and effective service to the public, then this first objection against the professional code could be abandoned, rather than the professional code itself.

The second objection against the professional code is based on the lack of enforcement thereof. It was argued that when a code is not enforced, it might as well be abandoned. The same line of argument could again be followed here to show that this objection, too, could at most be regarded as a criticism of a current state of affairs, and not as grounds for rejecting a professional code as such. If changes are made with regard to the efficiency and visibility of the enforcement of the professional code, then this second criticism of the professional code could likewise be abandoned.

The third objection against the professional code was that it merely serves as an ideological instrument for protecting the members of the profession against the public. Although this is a very serious charge against the professional code, it also seems to have the status of an objection against a current practice and could hardly be regarded as sufficient ground for abolishing professional ethics. In order to evade the sting of this criticism, the legal profession will have to come to terms with Kuitgen's claim that "not all wisdom about the proper role of professions in society reposes in those at the top of the professional heap".¹⁵ If the controlling bodies of the legal profession are willing to admit that informed lay persons have perspectives which insiders might not have or for which they tend to have a blind spot, and they are furthermore willing to involve these perspectives either in the reformulation or the application of the professional code, this charge against the professional code could also be discharged. In short, greater participation by the public and transparency for the public will go a long way in defusing this third objection against an ethical code. Shaw would only be correct in saying that all professions can be conspiracies against the laity—he most definitely will not be correct if he were to allege that they need not be such conspiracies.

The fourth objection against the professional code is not so easy to get around, the argument being that the professional code can be abandoned in favour of ordinary business ethics. Practitioners should thus not be restrained by the harsher demands of a professional code, but should merely be judged by the standards that apply to all other persons in business. In other words, the ethical standards that apply to all who sell goods and services at a fee should also apply to legal practitioners as a legal practice is nothing other than another form of business.

If this plea were a plea for a lack of ethical standards, it would not have been a difficult argument to counter. Immorality in business is simply intolerable for a variety of rather obvious reasons.¹⁶ These reasons are not only recognised by business ethicists, but also by the business community itself. In South Africa where the apartheid dispensation as well as the struggle for and against the system left us with the unsavoury legacy of an immoral business culture, the

¹³ (n 3) 31–35; also see Radloff (n 4) 526.

¹⁴ Koelein (n 1) 2.

¹⁵ (n 8) 419.

¹⁶ Cf. Rossouw *Business Ethics: A Southern African Perspective* (1994) 17–30.

business community is taking definite steps to turn it around. Promising signs in this regard are the "Business Against Crime" initiative, the *King Report on Corporate Governance* as well as the growing number of companies which are developing ethical codes.

The core of the fourth argument is that legal practitioners should no longer be regarded as professionals, but as ordinary business persons. In order to get around this argument, a case must be presented justifying why the legal profession should remain a profession and not become just another industry on the business scene. It is to this issue that I will now turn.

3 *Business versus profession*

A businessperson can be defined as one who trades goods or services for money in order to make a profit. That is all that is needed to qualify for the title businessman or businesswoman. Although members of professions also provide services for payment, professions are distinguished from ordinary businesses, on the basis of the following features that are generally associated with the professions:¹⁷

- specialised intellectual knowledge that has to be acquired before access can be gained to the profession;
- a commitment to promote a specific basic good;
- a commitment to serve the public with regard to the specific basic good that the profession is associated with;
- relative autonomy in the execution of duties (that is not blindly following the will of their clients or any other authority).

Some authors on this topic also include a professional ethic and the disciplining of its members in terms of this ethic as one of the core characteristics of a profession. I will however not include it in my list, not so much because it is controversial, but because it will render my argument circular. I do not want to claim in the end that professional ethics are needed because professions must have professional ethics.

Let me briefly expand on each of these core characteristics of professions: *Specialised intellectual knowledge*: Through intellectual study and training the aspiring professional needs to get access to expert knowledge that is not generally accessible or understandable to the lay person. This immediately puts the trained professional in a position of authority *vis-à-vis* his or her client. The client thus has no other option than to trust the professional that she or he commissions to act on his or her behalf.

Commitment to a basic good: Professionals serve a basic good in society. That is something without which no individual or society could hope to flourish. A basic good is something that everyone is entitled to, such as health, justice or education. In the case of the legal profession the specific good that the profession is serving is justice – that is fairness in the distribution of privileges and burdens associated with property, liberty and life.

WHY PROFESSIONAL ETHICS IN THE LEGAL PROFESSION?

Commitment to serve the public: The member of the profession commits her- or himself to serve the public in the protection and enhancement of the basic good that the profession is committed to. The word profession derives its meaning from the Greek verb *prophaino* which means to declare publicly. It later was translated in Latin as *professio* – a term that referred to a statement made by a person who wanted to occupy a position of public trust.¹⁸ To become a member of one of the learned professions thus means a higher commitment to one's client and the public, than would be the case of a business person who merely works on a fee-for-service or -goods basis. May refers to this characteristic of professions as its "public-spiritness" and goes on to say that "the term profession has a public ring to it that the term 'job' and 'career' do not".¹⁹

Relative autonomy: Because of their commitment to serve the public in the protection of a specific basic good and also on the basis of their expert knowledge, professionals should have the freedom to decide on how and also whether they want to perform instructions received from clients. This does not mean that they should have absolute autonomy and not consult with clients on the strategies they intend to use – it does however mean that they should use their discretion and not simply do whatever an able and paying client instructs them to do.

On the basis of this distinction between ordinary business and professions I want to argue that it will be detrimental for the basic good that the legal profession is supposed to serve, that is justice, if the legal profession should be run merely on a fees-for-service business basis and not on a professional basis. Three reasons hopefully will suffice to justify my conviction.

First of all, the aim of justice, which is the fair distribution of privileges and burdens when it comes to property, liberty and life, will be thwarted. Should a law firm be run on a purely business basis, it could merely pick the most lucrative cases and clients, whilst denying assistance to those clients and cases it does not consider profitable enough. There is nothing that prevents a pure business from refusing to enter into deals that it does not consider profitable enough. Should legal practitioners operate purely on such a business basis, the legal industry will drift more and more in the direction of protecting the privileges of those who are able to afford the highest price for legal services, whilst forcing the burdens on the not so well-off, or those unable to pay for it. The legal industry will then be regarded as the ideological partner of the middle class and no longer as the custodian of justice for all.

Secondly, legal practices that are run on a pure business basis will undermine the public trust in the legal profession. They will no longer be seen as the custodians of justice, but merely as money-makers who serve the interests of those who pay best. If the public trust in the legal profession is destroyed, it would not only mean a blow to the legal profession, but also to the socio-political dispensation as such. If one of the basic goods of a civilised society, that is justice, is no longer protected, it would not only have grave consequences for the legal profession, but also for the legitimacy of the entire socio-political dispensation.

¹⁷ C/ Barber (n 1) 36; Bayles "The professions" in Callahan (n 1) 28; Hughes (n 1) 31–32; Koehn (n 1) 36; Lewis *Legal Ethics* (1982) 2; May "Professional virtue and self-regulation" in Callahan (n 1) 408–409.

¹⁸ C/ Koehn (n 1) 59.

¹⁹ May (n 17) 409.

Thirdly, a system where legal services are rendered on a purely business basis, inevitably will drown certain voices, making them inaudible. To enter into a business contract, one needs to be both mentally and financially capable. If there remains no more professional duty which compels the legal practitioner to act on their behalf, mentally and financially handicapped persons might find it almost impossible to find legal assistance. Their voices and their interests would simply be drowned by the money-making machine of the legal industry.

This leads me to conclude that the fourth argument raised earlier for abandoning professional ethics should also be rejected – that is that professional ethics should be abandoned in favour of ordinary business ethics. None of the arguments provide any compelling ground for rejecting professional ethics. They do however provide much support for the revision of the existing professional code and the way in which it is applied.

4 *Why professional ethics?*

In the final part of this paper, I want to present some reasons for why there should be professional ethics. However before doing so, the concept, "professional ethics" needs definition. Professional ethics refers to the work values and ethical values that should guide practitioners within the profession in the way in which they work and interact with their clients and colleagues.²⁰ These values can be casted in one of two forms. They can either be presented in an aspirational way or in a directional way.²¹ In an aspirational form, they set the standard of conduct towards which all within the profession should strive. The tone of such a standard of conduct is usually positive and inspiring. The golden rule, as formulated by Lewis, is a typical example of an aspirational code: A practitioner must avoid all conduct which, if known, could damage his reputation as an honourable lawyer and honourable citizen.²²

In a directional format a professional code prescribes very definite guidelines for specific actions that need to be taken or avoided. It is often set in a more negative-prohibiting tone explicitly forbidding certain actions. An example of such a directional guideline is the following: A practitioner shall not employ in any capacity any person who has been struck off the roll or suspended from practice, while such person is so struck off or suspended.

A choice between these two formats that a professional code could take, need not always be made. A professional code might consist of both. The aspirational side of the code could be used to pull practitioners towards a certain direction—especially aspirant practitioners during their training. The directional side of the code could be used to usher those who have not moved there out of inner control and conviction, into the right direction.

Why is such a professional ethic needed? I shall conclude by presenting six reasons why I believe professional ethics should prevail in the legal profession.

4.1 To protect the professional nature of legal services

Firstly it is essential to protect the professional nature of legal services. It should set the bounds that will prevent the profession from becoming a mere business where money is all that matters. It should thus keep practitioners focused on the specific good that the profession is serving as well as on their obligation to serve the public in this regard.

4.2 To guide new entrants to the profession

Secondly, the professional ethic should guide new entrants with regards to that which is expected from them in their work and in their interaction with colleagues and clients—as far as work and ethical values are concerned. It should thus be used as an instrument to socialise them into the professional environment and to cultivate in them the virtues required for professional conduct. It goes almost without saying that this guidance process should not be terminated as soon as practitioners have entered the profession—to the contrary, there should be an ongoing process of reinforcement of professional values.

4.3 To offer assistance in moral decision-making

Practitioners do not only deal with situations where they are lured to act unethically. They are also often faced with morally ambiguous situations where they have to decide whether a proposed action is moral or immoral. These kinds of dilemmas will always arise in professional life. The professional code should provide practitioners with the broad parameters that could be used to make a morally responsible choice within such a testing situation.

4.4 To ensure fair competition between legal practitioners

The unique nature of a profession makes it possible that some could take advantage of the privileges of the profession without shouldering some of the burdens or obligations thereof. The professional code should ensure that those who follow the professional code are not put in a position of financial disadvantage *vis-à-vis* those who do not adhere to it. In short, the professional ethics should contribute towards fair competition between practitioners and to professional co-operation between practitioners.

4.5 To secure the trust of clients

The professional code should further be an assurance to the public that they can trust the legal practitioner and the profession that they are dealing with. The code should thus guide members of the profession to act in such a way that their conduct will manifest trust in their clients. Clients should furthermore know that they possess an avenue for rectifying what they perceive to be unprofessional conduct via the professional ethics of the profession. This role an ethical code should play, certainly demands skilful verbalisation and should clearly be communicated to the public. It can only fulfil this function if it is available and accessible.

4.6 To discipline unprofessional behaviour

Finally, the professional code should be used as an instrument to discipline

²⁰ Cf. Heister and Brockbank "Values at work: a case study in business" in Natale and Rothschild

Index: Work, Education the Accountings of Work (1995) 272.

²¹ Cf. Bishop and Tondkar "Development of a professional code of ethics" 1987 *Journal of Accountancy* 99.

²² Lewis (n 17) 8.

those who treat clients or colleagues unfairly and/or who bring the profession in disrepute, thus undermining the public trust in the profession. If the code is not seen to be respected, it will lose its legitimacy and will no longer be taken seriously by members of the profession.

SAMEVATTING

WAAROM PROFESSIONELE ETIEK IN DIE REGSPROFESSIE?

Die doel van die artikel is om krities ondersoek in te stel na 'n huidige tendens in die regsprofesse, naamlik om die versliktheid van professionele etiek vir die regsberoep te hervraagteken. Die artikel begin met die beskrywing van die vier vernamste argumente teen die bestaan van sodanige professionele etiek. Hierdie argumente is eerstens dat professionele etiek in die weg staan van effektiewe dienslewering aan die publiek. Tweedens word argumenteer dat professionele etiek net sowel geskryf kan word, aangesien dit nie toegepas word nie. Derdens word dit bevestig dat deur die publiek, wat die professionele kode as professionele ideologie beskou wat hoër die belang van regspraktisyne beskerm. Vierdens word die argument bespreek dat die professionele kode liefst ingetuig moet word vir gewone sake-etiek wat vir alle besighedsondernemings geld. Daar word dus argumenteer dat die regsberoep sy professionele status sal inruil vir die status van 'n gewone sake-praktijk.

Elk van hierdie argumente word dan beoordeel vir hulre geldigheid. Die eerste drie argumente word afgewys as onvoldoende grond vir die verworping van professionele etiek in die regsprofesse, aangesien dit argumente teen 'n bestaande praktijk verteenwoordig en nie argumente teen 'n professionele kode as sodanig nie. Die vierde argument word as die sterkste beoordeel. Ten einde ook hierdie argument van die hand te wys, word die begrippe sake-etiek en professionele etiek onderskeidelik analiseer. Teen hierdie agtergrond word daar 'n pleidooi gelewer vir die behoud van professionele etiek in die regsprofesse.

Ten slotte word aangedui watter vorme sodanige professionele etiek kan aanneem en welke doelendes dit kan dien.