

Employed Professionals

Introduction

Employed professionals have ethical responsibilities. This includes those professionals employed by large organisations, whether in the private or public sectors. Such salaried professionals retain their professional obligations to the public, to the client and to their profession. Yet they also must shoulder new responsibilities directed to their employer's organisational goals, and its legitimate authority. These two distinct types of ethical responsibility, to the professional code and to the employer, can sometimes pull employed professionals in opposing directions.

How such ethical tensions should be resolved can seem unclear. Historically, professional ethics, such as for longstanding professions of medicine and law, were developed in the context of sole-providers and small partnerships. These arrangements shaped professionals' understanding of their role, and of the types of ethical challenges they needed to consider and resolve. This traditional employment situation is changing. Long-established professionals in law, accounting and medicine increasingly work in large organisations, as do many of the newer professions, including engineering, nursing, teaching and journalism.

Considering these shifts, this title considers:

- What kinds of ethical tensions are likely to occur when professionals are employed by large organisations?
- How can these tensions be resolved?
- What structures, policies and institutions can protect employed professionals in these cases?

Key elements: Different types of organisational employers

Salaried professionals can be employed by several different types of large organisational employers. These organisations include:

- A collective of professionals performing their professional work (e.g., a corporate law firm; a newspaper);
- A non-professional corporation that employs various professionals (e.g., a mining company that employs accountants, lawyers and engineers);
- The public sector/state (e.g., lawyers working in the public service).

Each type of organisational employer can confront different types of ethical challenges to the professional, as each organisation possesses its own values and goals, and offers different opportunities for ethical and unethical acts.

Key concepts: dilemmas and temptations

It is important to distinguish ethical *dilemmas* from *temptations*. A dilemma refers to a case where a person faces a choice between two (or more) alternatives – each of which seem to possess an important ethical

demand. Resolving this tension requires serious thought and often sophisticated judgment. In contrast, a temptation occurs when there is no question what the morally right answer is – but the agent nevertheless feels inclined to do the opposite, perhaps because of self-interest, social or organisational pressure, lack of courage, and so on.

This title focuses first on the resolution of ethical dilemmas (aiming to shed light on employed professionals' ultimate ethical obligations) and then turns to consider institutional mechanisms that can make temptations easier to avoid.

Ethical dilemmas of employed professionals

Employed professionals can face dilemmas because their ethical responsibilities and codes can differ from the employing organisation's values and goals. To see this, we need to survey the different types of ethical obligations applying to each case.

Professional ethics

While variations occur between different professions, and across different jurisdictions, professional codes typically include:

- Duties to an acknowledged and collectively delivered *public good*, such that pursuing the clients' interests furthers this good, rather than compromising it;
- Duties to the *client*, in the form of fiduciary duties (usually including confidentiality) to make decisions and render judgments in the client's best interests, and without concern for other factors. These duties respond to the manifold vulnerabilities of clients seeking professional services.
- Duties to the profession itself, in the form of obligations not to bring the professional community into disrepute, and various other duties that can enhance its dignity and collegiality.

In all cases, the duty to the public good comes first, the client second, and the profession third.

These professional ethics often take the form of a *constitutive ethic*.¹ Rather than listing an array of constraints on action (a 'regulative' approach), a constitutive ethic puts forward a positive account of the activity to be performed – for example the duty of an accountant to give a 'true and fair' account of a company's business affairs.

(For more details on professional ethics, see the titles on professional obligations and ethical codes).

¹ Damian Grace and Stephen Cohen, *Business Ethics* (Oxford University Press, 5th ed, 2013) 171; Hugh Breakey and Charles Sampford, 'Employed Professionals' Ethical Responsibilities in Public Service and Private Enterprise: Dilemma, Priority and Synthesis' (2017) 40 *University of New South Wales Law Journal* 262, 268.

Private sector ethics

Business ethics and Corporate Social Responsibility (CSR) obligations tend to be flexible and dynamic, and responsive to many different stakeholders, including shareholders, employees, environmental impacts, and local community.² Even as they deal with diverse ethical concerns, business ethics principles apply to more open-ended roles. Managers, for example, are given specific goals but must be flexible and innovative, responsive to myriad different factors, and able to integrate those demands together to create good outcomes and profitable returns on owners' investments. Business managers thus require the freedom allowed by a regulative ethic of negative duties ('thou shalt nots'), and a positive concern for various stakeholders, that together allow them an open-ended flexibility to pursue the organisation's goals.

Public sector ethics

The public service ethical tradition dates to the mid-nineteenth century, when considerations of merit began to eclipse a system of inherited privileges. Public servants are ethically responsible for ensuring the effective working of the government institutions to which they belong, and of upholding the integrity of the organisation's governance processes. Specially prized values for public servants include lawfulness, incorruptibility, honesty and accountability.³

This ethic shares many values in common with professional responsibilities. For example, the duties of a civil servant to give frank and fearless advice parallels the duties of professionals to give clients the advice they need to hear – rather than the advice they want to hear. However, while the professional works in a specific way (as described by their constitutive ethic) to collectively contribute to a specific public good, the public servant can create and implement policy that directly benefits the larger public. Figure 1, below, provides an illustrative snapshot of some of these key differences.

Figure 1: Differences in public, professional and private ethics.

	Nature of code	Prized values	Key stake-holders
Professions	'Constitutive ethic' positively describing the required activity.	Fiduciary care, Expertise, Independence	Clients, Specific public good
Public Service	Goal-oriented ethic to provide direct public benefits.	Accountability, Impartiality, Effectiveness.	Public; community of citizens.
Private	Negative constraints allowing flexible responsiveness to multiple stakeholders.	Profitability, Innovation, Efficiency.	Owners/shareholders, customers, employees, environment.

² Moriarty, Jeffrey, 'Business Ethics', *The Stanford Encyclopedia of Philosophy* (Fall 2017 Ed), Edward Zalta (ed) <<https://plato.stanford.edu/entries/ethics-business/>> (accessed 1 August 2017); Grace and Cohen, above n 1.

³ Leo Huberts, *The Integrity of Governance: What it is, what we know, what is done, and where to go* (Palgrave Macmillan, 2014)

Resolving dilemmas

While the ethical responsibilities of public, private and professional workers will often all push in the same direction, the different nature of the codes, values and stakeholders suggests that tensions will arise. To resolve such tensions, it may be necessary to prioritize one set of duties over the other, or to synthesize or compromise between them.

Different perspectives on professional values will approach the resolution of these tensions in different ways. However, these different approaches all press towards a similar normative conclusion, namely, the need for prioritising professional obligations in their signature applications.⁴ That is, the constitutive ethics that describes the professional activity, and the codes that specify fine-grained requirements, cannot be compromised to larger organisational goals. However, outside the professional's area of core obligations, the larger organisation's values and goals demand increased respect and priority.

Two influential approaches warrant this conclusion. First, professional ethics can be justified in terms of looking at the roles required for legitimate social institutions.⁵ This approach begins by establishing the legitimacy of a social institution that achieves an important public good. It then formulates the specific roles that members of that institution need to play for it to achieve this larger purpose. This is where the ethical duties of professionals arise, as different role-holders need to possess distinct sets of permissions, powers and obligations to play their part in the larger task.

As such, by performing their constitutive activities within its settled ethical bounds, the professional plays a vital role – as one part of a like-minded collective, and in the context of pursuing the larger institutional goal – in achieving the desired outcome. While discrete private or public benefits might in some case appear to arise from deviations from the professional code, the larger social institutions rely on trusting each professional to play their predetermined role. For example, adversarial systems of criminal justice require lawyers to give able defences of their clients, financial markets need to trust that accountants are creating reliable accounts of company's business activities, and so on.

A second approach to professional values sees ethical codes arising out of a type of 'regulative bargain' or 'social contract'.⁶ The community grants the profession a 'social license to operate' in exchange for the profession's commitment to uphold certain standards – especially standards that mitigate the risks otherwise posed by the profession. This license to operate includes special legal privileges that professionals often enjoy – such as professional's legal monopoly on service-provision and their protection of title (only professional members can advertise themselves as being 'medical doctors' or 'lawyers').

⁴ Breakey and Sampford, 'Employed Professionals'. For a detailed examination of the specific context of lawyers, see Sampford, Charles, 'Ethics of Employed Lawyers' in *Law, Lawyering and Legal Education*, Hugh Breakey (ed) 188 (Routledge, 2017).

⁵ Kenneth Kipnis, 'Ethics and the Professional Responsibility of Lawyers' (1991) 10(8) *Journal of Business Ethics* 569.

⁶ Robert Veatch, 'Professional Medical Ethics: The Grounding of Its Principles' (1979) 4 *The Journal of Medicine and Philosophy* 1.

The contractual approach dovetails with the role-requirements approach in requiring that employed professionals must remain bound to their professional ethical code. Professional activities are only acceptable to, and only empowered by, the community on the strict condition that the ethical codes will be upheld. If a private or public organisation needs the professional activity performed, they therefore have no choice but to acknowledge the strict priority of the professional codes of its employed professionals.

Both these approaches thus require that within their signature 'constitutive' activities, the professional ethic must reign supreme. However, outside that domain, the organisational ethics of the private or public institution increases in significance. For example, while individual lawyers in a corporate law firm must uphold their professional obligations to courts and clients, the firm's executive and managerial decision-making must include concern for the signature priorities of private enterprise, including obligations to shareholders, employees, and so on.

Institutional protection for professional ethics in employed professions

If professional ethics must reign supreme within their signature activities, then how must institutions and organisations be structured to make it easier for professionals to do the right thing, harder to do the wrong thing, and increase the chances of wrongdoers being caught?

An 'integrity system' constitutes a network of inter-related institutions that work to facilitate and encourage the capacity of institutions and individuals to live up to their stated values (see the title on integrity systems).

While the design of integrity systems is a complex task, as a first step, two necessary features of a functioning professional integrity system would include:

1. A strong professional organisation, backed up by the legal system. The profession needs to support professionals when they stand firm on their principles – and sanction them when they do not. It is much easier to do this if the employed professionals have, and are required to have, formal membership of the profession, and be subject to its discipline.
2. Executives and managers of employing organisations need to commit to the integrity of their employed professionals. Explicit awareness and acceptance of this part of their organisation's corporate social responsibility can pave the way for reforming the many institutional mechanisms that can pressure professionals to breach their ethical obligations. These reforms would include consideration of internal incentives, performance metrics, employment contracts, and the nature of authoritative decision-making within the organisation.

Existing situation: Employed professionals in large organisations

In many circumstances, the ethical priority of the professional obligation is well-known, and entrenched in practice and public opinion. For example, it would be regarded as outrageous for someone to buy a private hospital and start to dictate the diagnoses, prognoses and treatments of patients, or to otherwise override the professional duties and decisions of the medical professionals.

In other cases, however, organisational executives clearly act to stymie their employees' professional obligations. For instance, it seems to be considered entirely within the rights of those who buy the bulk of newspapers to dictate the editorial direction of those papers. Indeed, some owners explicitly divert newspapers away from their fundamental role as *newspapers*, shifting the focus from news-reporting to 'click-bait' offerings.

The importance of cleaving to the professional ethic, and its capacity to diverge from the demands of private enterprise and public service, arise in many different circumstances.⁷ An all-too-perfect example is provided by the 1986 Space Shuttle Challenger disaster. In this case, the lead engineer was asked to 'stop thinking like an engineer' and pressured to sign off on the launch's safety by making the decision *as a manager*.⁸ In the event, the engineer acceded to his superior's pressure. Instead of upholding his professional engineering commitment to safety – which was after all *why* he was authorised to sign off on the launch – the engineer behaved as a manager and made a business-based decision to launch.

One final consideration

One oft-heard objection in the case of professionals employed by private enterprise is that corporations must put shareholder interests – interests in maximising profit specifically – as their overriding ethical obligation. This view was popularised by Milton Friedman through his influential 1970 article 'The Social Responsibility of Business is to Increase its Profits'.⁹ While much may be said in opposition to Friedman's thesis,¹⁰ the point worth stressing here is that Friedman's argument itself did not maintain such a simple obligation as his title declaimed. Friedman allowed that corporations should respect shareholders' desires to make money in accordance with the 'basic rules of society' – including the rules of law and 'ethical custom'. Since professional obligations clearly fall within these basic rules, Friedman's position provides no argument against private enterprises respecting the ethical integrity of their professionals.

⁷ See, e.g., Charles Sampford, 'Get new lawyers!' (2003) 6 *Legal Ethics* 85.

⁸ Michael Davis, 'Thinking Like an Engineer: The Place of a Code of Ethics in the Practice of a Profession' (1991) 20(2) *Philosophy and Public Affairs* 150.

⁹ Milton Friedman, 'The Social Responsibility of Business Is to Increase Its Profits', *New York Times Magazine* September 13, 1970, 33, 122.

¹⁰ Breakey and Sampford, 'Employed Professionals', 297.

Summary

Organisational employers who employ professionals should expect high professional standards from their employed professionals. If they want someone to do professional work for them subject to the highest standards of professional ethics, then they have chosen the right person. If such organisations want the professional to work contrary to the ethics of the profession, they should discover that in hiring a professional they have made the worst (and hopefully the last) employment decision of their lives. As we have seen, professionals are only legally and ethically empowered to perform their activities under the condition that they live up to their values, and so play their role in the vital social institutions to which they collectively contribute.

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