

Ethics Codes

Introduction

Ethics codes for professionals are official, public documents that explicitly set down professionals' obligations, standards and principles. They can be aspirational documents, listing the values and virtues prized by the profession – or they can have a more regulatory cast, offering specific and detailed guidance on concrete situations faced in professional work.

This title describes the distinct types of ethics codes, the various functions they can fulfil, and the challenges and opportunities they face in doing so.

Key Concepts: Different types of ethics codes

Ethics codes come in various forms, depending upon their function and content. A clear distinction should be made between 'Aspirational' and 'Disciplinary Codes'.¹

Aspirational Codes contain inspirational and exhortatory statements, invoking the highest standards, values and virtues of the profession, to which it is hoped that all members will aspire. They link more specific duties to larger organising principles, and to the important social functions that the profession collectively fill.

Disciplinary (or Regulatory) Codes provide fine-grained and practical guidance concerning obligations in specific circumstances, especially where professionals tend to encounter fraught ethical issues, such as confidentiality and conflicts of interest. Disciplinary codes focus more on concrete, enforceable actions and standards, rather than intentions, values and virtues.

While distinct, the two types of codes should be complementary, with behaviour encouraged by the former being sanctioned by the latter.

The distinction between 'codes of ethics' and 'codes of conduct' is less clear, and the terms are often used interchangeably. Generally, codes of ethics tend to be more aspirational, while codes of conduct are more likely to emphasise rules about behaviour and applicable disciplinary sanctions. However, it is not uncommon to find codes of ethics with disciplinary provisions, and codes of conduct with aspirational statements.

Different institutions – including professional organisations, the public service, and corporations – can develop their own ethics codes. Indeed, it is often valuable for particular agencies to develop their own specialised code. For example, a sector-wide code for public servants might be usefully applied to the

¹ Charles Sampford and David Wood, 'The Future of Business Ethics? Legal Regulation, Ethical Standard Setting and Institutional Design' (1992) 1 *Griffith Law Review* 56.

circumstances and challenges of its particular agencies (this approach was taken by the *Queensland Public Sector Ethics Act* in 1994).²

Professional codes often lay down a constitutive ethic. Rather than listing off an array of constraints on the agent's behaviour (a 'regulative' or 'negative' approach), the ethic puts forward a positive account of the activity or activities the professional is expected to perform – activities that 'constitute' the professional activity.³ Operating across an entire service-industry, professional codes are usually more well-known and long-established than other codes, and they typically possess significant similarities across jurisdictions.

Various levels of binding-ness can apply to distinct types of codes, and the specific prescriptions within them. Some codes effectively form part of the state's official legal or regulatory landscape, and may factor into assigning civil liability. Other codes may have sanctions attached by the professional organisation. Still others may be subject to internal compliance regimes by the employing organisation. Finally, for the more aspirational codes of ethics, there may be no (or at least no formal) accountability for breaches. Even so, aspirational codes often gather indirect but crucial support from disciplinary codes, formal law, incentives, sanctions and institutional structures that make it easy to do the right thing, difficult to do the wrong thing and easy to determine who is doing which.

Ethics codes may be distinguished from other moral declarations. *Mission statements* lay down institutional goals, but not the obligations and restraints required to realise them. Statements of *corporate social responsibility* define the *institution's* values, principles and stakeholders, rather than the values and obligations of individual decision-makers. Despite these differences, there are good reasons to expect a confluence between ethics codes, mission statements, and statements of social responsibility. In particular, well-developed ('values-based') mission statements see their mission in terms of the values the institution seeks to realise – the same animating force driving ethics codes.⁴

Key Elements: Content of ethics codes

The content of professional ethics codes aims to realise and codify the professional ethics more broadly. (For an explanation of the moral factors shaping and justifying professional ethics, see professional values.)

² See Charles Sampford, 'Institutionalising Public Sector Ethics' in Noel Preston (ed), *Ethics for the Public Sector: Education and Training* (Federation Press, 1994) 14.

³ 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, 268-9.

⁴ Sampford, 'Institutionalising Public Sector Ethics'.

Codes of professional ethics typically contain a number of elements, which can be organised in terms of their relation to key stakeholders.⁵

Duties to the public interest: Professionals possess duties that collectively contribute to an acknowledged public good, either for the society generally, or to specific social, political or economic institutions. For example, lawyers possess obligations to the court, while accountants produce trustworthy accounts of a corporation's business affairs.

Duties to clients: The professional is obliged to act in the client's best interest, providing honest, confidential, objective and independent advice and service. The professional's work must meet standards of competence and expertise, and be performed with diligence and due care.

Duties to the profession: Professional codes can include duties of professional courtesy and collegiality, and other obligations that improve the inter-relationships and the standing of the overall professional group.

As a general rule, duties to the public interest come first, duties to the client second, and duties to the profession third. The public goods' overriding social importance thus shapes other duties, so that pursuing the clients' interests is performed in a way that furthers the public good, rather than compromising it.

Key issues: Function of ethics codes

Ethics codes can serve several crucial functions – both external functions (in terms of impacting on people outside the institution) or internal functions (guiding and, where necessary, changing the behaviour of institution members).

External functions

Ethics codes can be used to showcase the admirable virtues and principles pursued by the profession, in order to improve social respect, peer standing, and status equivalent to other professions.⁶ If the codes are widely accepted by practitioners, they can over time enhance clients', prospective clients' and third-parties' trust in the profession's standards, expertise and ethics. Sometimes, codes may be a response to external regulatory pressures, or to an institution's public image problems – though in these cases there is a serious danger that codes will be purely a marketing tool, with no impact on standards.

Internal functions

The fundamental purpose of the ethics code is normally internal: it aims to shift behaviour in such a way as to promote improved ethical standards.

⁵ Grace and Cohen, *Business Ethics*; Breakey and Sampford, 'Employed Professionals'.

⁶ In the context of nursing, see Ellen Verpeet et al, 'Nurses' views on ethical codes: a focus group study' (2005) 51 *Journal of Advanced Nursing* 188.

Effective moral decision-making requires several distinct personal qualities, and codes can hope to impact beneficially on each of the requisite qualities.⁷ Codes can improve awareness of moral issues, highlighting ethical trouble-spots (such as subtle conflicts of interest). They can aid moral judgment by laying down general principles to inform professionals' decision-making, and by providing detailed guidance on accepted practices in specific cases. Moral motivation can also be enhanced. Fine-grained codes can reduce areas of ambiguity where self-interest might influence decision-making, while aspirational codes can inspire professionals to live up to the attractive moral values unique to their calling. Finally, codes of ethics support professionals when they choose to act ethically. With the ethical code – and therefore the entire profession – behind them, professionals can more confidently assert their established ethic, sure in the knowledge that their ethical standards cannot be used against them.⁸

The code's binding-ness (that is, its status as a legal, regulatory or compliance instrument) can impact on its capacity to improve ethical decision-making. On the one hand, when individuals are seen to violate the code with impunity, the lack of accountability can breed cynicism. On the other hand, regulative codes used to police behaviour can elicit a defensive and legalistic response, stripping the codes of their moral force and their capacity to empower decision-making.

Key issues: Potential problems with ethics codes

Far from offering a panacea for poor ethical standards, research shows that ethics codes have 'mixed' results, with no guarantee of improved ethical standards. There are several well-known pitfalls plaguing the development, communication and implementation of codes of ethics.⁹

First, the code of ethics may be little more than a vapid marketing tool: a matter of advertising or window dressing that amounts to little more than a slick sales ploy to a nervous market that has been burnt by unethical behaviour elsewhere. Enron's syrupy 64-page ethics code presents an all-too-striking example of such corporate hypocrisy.¹⁰

Second, rather than codes being developed to realise principled ethical standards, they may be mere compliance mechanisms, designed to promote the code-writers' institutional self-interest. This is often the case in corporate environments, with 'top down' codes prioritising employers' interests and focusing on employee wrongdoing that damages the organisation – rather than on principled behaviour more generally.¹¹

⁷ Hugh Breakey, 'Building Ethics Regimes: Capabilities, Obstacles and Supports for Professional Ethical Decision-Making' (2017) 40 *University of New South Wales Law Journal* 322.

⁸ Michael Davis, 'Thinking Like an Engineer: The Place of a Code of Ethics in the Practice of a Profession' (1991) 20 *Philosophy & Public Affairs* 150; Verpeet et al, 'Nurses' views on ethical codes'.

⁹ Nicola Higgs-Kleyn and Dimitri Kapelianis, 'The Role of Professional Codes in Regulating Ethical Conduct' (1999) 19 *Journal of Business Ethics* 363; Betsy Stevens, 'Corporate Ethical Codes: Effective Instruments for Influencing Behavior' (2008) 78 *Journal of Business Ethics* 601; Centre for the Study of Ethics in the Professions (CSEP), 'Why Ethics Codes?' *Ethics Code Collection* CSEP <<http://ethics.iit.edu/ecodes/introduction>> (accessed 1 August 2017).

¹⁰ See Enterprising Investor, *The Enron Code of Ethics Handbook From July 2000 is a Fascinating Read* <<https://blogs.cfainstitute.org/investor/2013/10/14/the-enron-code-of-ethics-handbook-from-july-2000-is-a-fascinating-read/>> (accessed 1 August 2017).

¹¹ Stevens, 'Corporate Ethical Codes'.

Similarly, codes can be written to deflect organisational responsibility for problems by imposing unrealistic obligations on employees. These self-interested designs often give rise to codes that are altogether ignored by employees, and fail to attach to any deeper moral principles that might motivate conscientious employees.¹² In professional contexts, self-interested codes written by the professional organisation can prioritise duties to the profession's economic interests and public image (e.g., in the form of restrictions on lawyers' advertising, or on doctors speaking out about poor quality colleagues).

Third, a problem arises when compliance measures do not properly accord with the code's prescriptions. Ethics codes may use aspirational prescriptions (e.g., exhorting professionals to live up to the 'highest standards' of their profession), but then attach disciplinary consequences to these prescriptions. A converse failure occurs when minimum standards proscriptions are treated as optional and provided with no sanctions (not even informal sanctions), allowing the code to fall into disuse. In general, codes fail when their prescriptions' legal and disciplinary status do not match the content of the obligations imposed, or the institutional and organisational possibilities for policing those obligations.

A final problem may arise if professionals are bound by two codes – a professional code and an employees' code. While business and public service ethics codes will normally synergise well with professional ethics, tensions between the different sets of obligations are not impossible.¹³ In such cases, there is good reason to believe that the professional code – at least in its signature obligations to the public good and to the clients' interests – must be prioritised, and that employee codes must take into consideration the pre-existing ethical commitments of professionals.¹⁴

Lessons learned: Making ethics codes work effectively

Empirical research and institutional experience have isolated several factors that improve the effectiveness of codes.¹⁵

Most importantly, as well as stakeholders from across the community, the development of the code's content requires the close involvement of those who will shoulder the code's responsibilities and duties – that is, the professionals themselves. This involvement is crucial for several reasons. To achieve conscientious compliance, the ethical code must attach to the duty-bearers' existing or nascent moral convictions. If the code does not make moral sense to them, or provide helpful guidance to them, it will not be respected. As well, involvement of the duty-bearers ensures that the code's prescriptions are workable, given the concrete challenges, resource limitations, time pressures, and information available to duty-bearers. Without this involvement, purely abstract or top-down codes can be unrealistic. Ethical issues often look different in the boardroom and at the coalface. Involving members of an institution in the development of the code ensures

¹² Breakey, 'Building Ethics Regimes'.

¹³ Higgs-Kleyn and Kapelianis, 'The Role of Professional Codes'.

¹⁴ Breakey and Sampford, 'Employed Professionals'.

¹⁵ Higgs-Kleyn and Kapelianis, 'The Role of Professional Codes'; Stevens, 'Corporate Ethical Codes'.

that it can address the challenges, temptations and apparent dilemmas in various parts of an organisation and can provide realistic guidance for the differing circumstances faced by those members.

Even the activity of developing the code with the duty-bearers can itself be an ethics-promoting mechanism. If duty-bearers see the code as arising from their own contributions and lived experience, they feel greater ownership of, and identification with, its prescriptions (promoting conscientious compliance). The code's development by practitioners can also trigger fruitful personal reflection and deliberation on the profession's ideals and vital social functions and promotes knowledge about the code and its requirements. These several benefits can be extended beyond the code's development, by processes that allow ongoing stakeholder and practitioner deliberation, refinement and feedback about the code.

A further key factor is to ensure that the code (or codes, or different parts of the code) are fit for purpose and accord with the regulatory and compliance processes surrounding them. In particular, disciplinary codes must accord with the deeper moral principles invoked by the aspirational code, in order to avoid practitioners taking a legalistic, defensive mindset towards the code. So too, those who develop and apply codes should not expect that all members will attain the highest standards of the profession. Professional behaviour is spread out over what Sampford and Blencowe call a 'normative continuum' from those who set the highest standards of the profession, through to exemplars; good practitioners; those who 'stretch' the rules; and those who break them.¹⁶ In the face of this normative continuum, sanctions for breaches must be graduated and proportionate – from warnings, to censure, to disbarment, and finally to gaol. Conversely, it is important that those who follow, and especially set, the highest standards should receive professional and public recognition and honours.

All codes require interpretation and application. While all members should be encouraged to recognise and address ethical issues, professionals almost always require access to independent ethical advice outside the chain of command.

Finally, to become a lived reality within the professional culture, practitioners must be educated about the code. Senior professionals and mentors (and, where applicable, supervisors, managers and boards of directors) must be seen to exemplify and model the code in their actions and decision-making, both using the code and explaining how and when they use it.

¹⁶ Charles Sampford and Sophie Blencowe 'Raising the Standard: An Integrated Approach to Promoting Professional Standards and Avoiding Professional Criminality' in Russel Smith (ed) *Crime in the Professions* (Ashgate, Aldershot 2002).

Summary

Codes of ethics have become an increasingly common part of professional integrity systems. To be sure, professions can maintain reliable and high standards without employing codes, by using other devices to fulfil the requisite tasks (e.g., in nursing).¹⁷ However, both aspirational and disciplinary codes provide unique resources for improving standards. Indeed, the aspirational and constitutive parts of the code help clarify the overall purpose and principles that all integrity system elements are designed to produce. For this reason, the code can come to occupy a central place in the integrity system: it describes the values that give overall direction to the system.¹⁸

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¹⁷ Verpeet et al, 'Nurses' views on ethical codes'.

¹⁸ Breakey, 'Building Ethics Regimes'.