

Professional Ethics & Dilemma: Views of a Legal Practitioner

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All professions have rules or codes of professional conduct that members are expected to abide by.

These rules are important because people rely on the opinions and judgment of professionals in making decisions

Accounting professionals provide information on companies that allow the public to make investment decisions. They need to behave ethically to prevent fraudulent activities and gain public trust.

Ethical guidelines do not provide exact solutions to every problem, but aid the decision making process.

The rules provide the professional with a compass to direct him towards ethical behaviour.

Advocates constantly confront ethical dilemmas in the process of deciding how to defend or represent a client.

The Advocates Act and the “Code of Professional Conduct and Etiquette” guide advocates’ behaviour, as well as that of their employees.

These rules of ethics are more important than any other duty an advocate has, including the duty to make money for their firm or client. The advocate is also expected to be guided by their personal standards of integrity and honesty.

Questions of ethics are often interwoven into every day situations and may arise from a variety of circumstances.

Unfortunately, the dilemmas often do not always fall neatly within the confines of a specific rule of professional conduct, but rather into a grey area.

The task of determining how to respond to these problems adds a significant amount of stress to the everyday pressures on an advocate.

If an advocate breaks one of these rules and commits professional misconduct, charges can be laid against him and he could either be:

- . struck off the roll of advocates;
- . be suspended for up to 5 years;
- . fined; or
- . admonished.

1 Client Advocacy/Presumption of Innocence:

- Advocates representing clients they know to be guilty and perjury.
- Advocates in emotionally charged cases, such as succession, divorce or child custody.
- Balancing ethical considerations with zealous advocacy of their clients - they can withdraw from cases when balance is not possible.

2 Courts

-Civil Appeal Number 158 of 2000 *Express Kenya Limited vs Manju Patel.*

“There was a time when this Court enjoyed the integrity of Caesars wife. It was above suspicion. But that is now water under the bridge. Something has to be done to redeem the reputation and independence of this Court.”

3 Communication

- Poor or incomplete communication on charges, chances of success and status.
- Advocates required to communicate effectively with their clients

4 Confidentiality and Privilege

- Fiduciary duty of confidentiality
- Client legal privilege.
- If client has committed a criminal offence during the course of their relationship, advocate under a duty to refer the matter to the authorities.
- Privilege an on-going duty and survives the end of the instructions. An advocate may never use that confidential information to the detriment of the client.

5 Conflict of interest

- Advocates cannot sue someone he had previously represented if previous representation gave him information that would lead to an unfair advantage or the appearance of one.
- Two advocates in the same firm generally cannot represent clients with opposing interests.

- In family law cases, advocate may not act for either wife or husband if he had previously represented them jointly in other legal business.
- Courts may restrain an advocate from acting against a former client if this would be seen as being contrary to the administration of justice.

6 Emerging ethical issues:

Social media and ethical risk areas:

- Confidentiality
- Constructive waiver of privilege
- Inadvertent retainer
- Breach of no contact rule
- Duty to the proper administration of justice
- Defamation
- Employees' use of social media
- Loss of reputation

7 Staff and Management:

- Non-advocate employees not permitted to give legal advice.
- Staff have access to files. Rules to ensure client confidentiality and prohibit misappropriation of client funds.
- They must be familiar with the guidelines governing client confidentiality

8 Client Funds & Financial Concerns:

- Advocates not to misuse client funds in their custody.
- No commingling their business assets with their clients' money or withdrawing client funds for their own use.
- Advocates under duty to manage payments legally and fairly and refrain from defrauding anyone.

9 Costs and Invalid fee agreements

- Undercutting;
- Overcharging;
- Invalid fee agreements;
- Article 48 of the Constitution on access to justice.

10 Accountants Certificates:

- Advocates (Accountants Certificates) Rules

Conclusion

Deciding how to handle ethical dilemmas is an important part of every profession.

Regular continuing professional education courses on ethics necessary.

Suggestions on dealing an ethical dilemma while keeping within the law:

1 Analyze the consequences

- Who will benefit from what you do?
- Who will be hurt?
- Which option one produces the best mix of benefits over harms?

2 Analyze the actions

- Do proposed actions measure up against moral principles like honesty, fairness, equality, respecting the dignity of others and respecting people's rights?

3 Make a decision

Dealing with charges of professional misconduct

- 1 If action feels wrong - follow your instinct and don't do it. Research. Consult. Look up past decisions of disciplinary tribunal.
- 2 Get representation or ask a trusted colleague to look over your responses or documents before you submit them to a disciplinary body; Co-operate with disciplinary bodies.

- 3 Focus on an explanation of your conduct. Do not blame the client, the tribunal or your colleagues unless you have sufficient evidence to do so.
- 4 Present any aggravating and mitigating circumstances.

Thank you