

# **N** **NEWS REPORTS OF CORPORATE FAILURES AND SCANDALS AROUND THE WORLD HAVE CALLED INTO QUESTION THE ROLE OF PROFESSIONS IN SERVING THE PUBLIC INTEREST.**

To what extent does an accountant, actuary, attorney, auditor, economist, engineer, journalist, physician, or other professional owe a duty beyond his or her immediate principal (i.e., client or employer) to the public as a whole? To what extent do professions owe a duty to society beyond whatever duties individual professionals owe? How might professionals' membership organizations help their members balance their duties to their principals against the broader interests of the general public?

The answers to these questions may have a significant impact on the ability of professions and their members to maintain the respected positions in society that they currently enjoy.

## **The Nature of Professions**

The common law of England, from which the common law of Canada, the United States, and other former British colonies evolved, originally recognized only three professions: attorneys, clergymen and physicians. All three professions had two traits in common: specialized training obtained through years of study and apprenticeship, and the acceptance of trust and reliance from their clients, patients, parishioners, and society at large. All three professions have established standards of ethics for their members and, at least in the case of physicians and attorneys, explicitly recognize a responsibility to the public in their codified ethical rules as part of what it means to be a profession rather than a trade.

Over time, the courts have determined that other groups

with specialized training should also be recognized as "professionals," according that status to accountants, architects, engineers, scientists, and, of course, actuaries. These groups also typically acknowledge a responsibility to the public as an essential element of their professional status, usually in their codified ethical rules. Thus, for example, the Code of Professional Conduct of the United States actuarial profession speaks to the profession's "responsibility to the public."

However, while the professions all tend to recognize that they occupy positions of trust that impose upon them a "duty to the public," few, if any, address in detail the nature and scope of that duty, whether it's owed by individual practitioners, the profession as a whole, or both, or how that duty might be fulfilled. Reading the ethical standards of most professions, it typically appears that they view service to the public as consisting primarily, if not exclusively, of providing competent and ethical service to their principals, complying with applicable law and regulations, and behaving in a manner that maintains the public's respect.

Few professions expressly assume a broader duty to the public, for example, an obligation to share information with the public, to "blow the whistle" on wrongdoing by their principals or negligent oversight by regulators, or to place the public's interest ahead of the interests of their principals in case of a conflict.

This approach to serving the public interest probably works best for professionals whose work focuses primarily on service to individual principals, such as physicians, psychiatrists, and attorneys. It may be less effective for professionals whose work is likely to have a significant impact on members of the general public who are not their principals, such as architects and en-

**Professions claim to serve the public interest. But who is the public and how should its interests be served?**

# Professions and

By Lauren M. Bloom



gineers who design and construct public buildings, or auditors for publicly-traded companies.

### The Public's Perception of Professions

It can be difficult to identify "the public," and different individuals or groups within "the public" can have conflicting views. It's not surprising, then, that different segments of the public hold at least two perceptions of professions and their members.

Some members of the public see professionals as benign experts who bring their special skills and judgment, achieved through years of intensive study and practice, to bear for the greater good of society and, in particular, for the individuals on whose behalf the professions provide services. From this perspective, professional codes of ethics can be understood as important expressions of professions' shared ideals and, in particular, their commitment to serving the greater good of society through ethical and competent practice.

A second, less flattering, perception held by other members of the public is that professions are self-serving monopolies that exaggerate their claimed contribution to the public good, thereby obtaining heightened prestige, enhanced compensation and exclusive authority. Usually through control over entry into the profession, government licensure or both, they perform work that, arguably, could be performed by others for lower fees. From this perspective, professional codes of ethics may be viewed as self-serving "publicity pieces" adopted to lull the public into a false sense of security while preserving the professions' competitive advantages.

Obviously, both of these perceptions are exaggerated here. The truth undoubtedly lies somewhere in between, and likely differs among various professions. However, perceptions like

these may have a significant impact on how the general public deals with four misperceptions that appear to be broadly held.

First, the public may have unreasonable expectations of what a profession can do, and may unfairly assume that any negative outcome (even if caused by an unforeseeable accident, wrongful conduct on the part of someone other than the professional, or human error that could not reasonably have been detected by the professional) should have been prevented by the professional in charge. If something went wrong, then someone must have been responsible, and professionals involved can become an obvious target for blame.

Hindsight can fuel this misperception, because laypersons may presume that any actual outcome was foreseeable and, therefore, should have been prevented or mitigated. The more professions hold themselves out as having special knowledge and skill, the more likely that individual professionals will be blamed if they don't anticipate or prevent bad outcomes, even if they couldn't realistically have done so.

Second, no matter how carefully professionals phrase their work products, members of the general public who aren't familiar with the professions' common practices and perspectives aren't likely to understand the legitimate limits that a professional seeks to impose on the use of a particular work product. (For example, an auditor's statement of opinion that a company's financial statements were prepared in accordance with GAAP may be wrongly taken by a member of the public who is not familiar with accounting practice to mean that the financial statements are "exactly right.") Indeed, members of the public may consider caveats in a professional's work to be evidence of the professional's attempt to escape responsibility for issuing an inaccurate or misleading professional opinion, particularly if it

# the Public Interest



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turns out that the opinion was significantly flawed or emerging facts prove it wrong.

Third, the general public may misconstrue professionals' obligation to maintain confidentiality on the part of their principals. (For example, attorneys are frequently misperceived as encouraging their clients to deceive the public and evade deserved punishment by invoking their legal rights to withhold information.) Confidentiality is essential to many of the adversarial or arms-length transactions in which professionals engage, ranging from litigation to the sale of a business. But the public may tend to see the withholding of confidential information in those settings as intentional fraud rather than prudent business practice.

Fourth, the public may wrongly assume that professions have greater "whistle-blowing" responsibilities than individual professionals are able to accept. In the absence of a statute requiring a professional to report a principal's misconduct to regulators, most professionals are bound by a duty of confidentiality that severely limits their ability to blow the whistle on a principal's wrongful acts. A professional who honors that duty of confidentiality to a principal can be unfairly accused after the fact of shielding the principal when, in fact, the professional was simply following the ethical tenets of his or her profession.

### **Professions' Perceptions of the Public**

It would appear from the materials prepared by and about various professions that professionals may have perceptions of the public that complicate a discussion of "service to the public." Before discussing that point, however, it may be helpful to note at least two problems that can arise when defining "the public."

First, it can be difficult to define exactly who makes up "the public," and different groups within "the public" may have different or even competing interests. For example, with respect to a defined benefit pension plan sponsored by a publicly traded company, participants in the plan are one "public" that arguably has an interest in maximizing individual plan benefits and contributions, while the company's shareholders, another "public," arguably have an interest in minimizing plan contributions in order to maximize the funds available for dividend distribution. These "publics" have conflicting interests that cannot necessarily be easily reconciled.

Second, even a single "public" can have competing, if not conflicting, interests. Using the same example, the plan participants may have an interest in maximizing individual plan benefits and contributions, but they also have an interest in keeping the plan active, which might not happen if the plan becomes so expensive that the sponsor decides to terminate it.

Similarly, the shareholders may have an interest in minimizing plan contributions, but not to the point where large contributions are suddenly required to keep the plan in ac-

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tual balance or where benefits are cut to the point where key personnel leave the company. If it's challenging to balance the competing interests of one "public," it may be considerably more difficult to reconcile the various competing interests of "publics" whose interests are also in possible competition with each other.

Professions' understanding of the public interest and of what it means to serve the public interest may be further complicated by the very skills that make them valuable to their principals. Professional education tends to emphasize specialized, technical knowledge over a big-picture perspective. The specialized training that makes a professional able to solve a problem on a principal's behalf may limit that professional's sensitivity to public perceptions of the professional's behavior.

For example, attorneys can become so engrossed in rigorously advocating technical points of law on behalf of their clients that they lose track of the greater social good that might emerge from a more equitable approach. Physicians can become so focused on healing patients' particular illnesses that they neglect to consider the benefits of preventative care or holistic medical alternatives. Scientists can become so involved in the development of scientific theories that they fail to consider how the products of their research may be used.

This problem can be heightened when professionals become so focused on the technical aspects of their work that they neglect to realize that public expectations have evolved so that a resolution that would seem permissible, if not inevitable, to the professional seems unpalatable to the general public.

Professionals may also despair of ever explaining the technical aspects of their work to a less knowledgeable public, particularly if they believe that their explanations will be misunderstood no matter how carefully they're worded. It can be all too tempting for professionals to refuse to offer explanations to others on the grounds that "they wouldn't understand it anyway." Unfortunately, and particularly when viewed with hindsight, this approach can be perceived as arrogance rather than an understandable frustration in dealing with difficult communication problems.

### **Addressing Common Issues**

Each profession faces its own challenges in serving the public, but there are a few concerns that appear to arise consistently across professions:

#### **Improper Conduct of the Principal**

When a professional's principal wants to engage in illegal or unethical conduct, it can put the professional in an extremely awkward position. Not only is confidentiality frequently an issue, the question arises of what responsibility, if any, the professional has to prevent the principal's improper conduct. This

issue appears to come up regularly for almost all professions. It also appears that the professional membership organizations struggle with their members to resolve the very sensitive issues involved, but rarely come to definitive conclusions.

Another difficulty professionals may face when dealing with an unethical principal is that their specialized training may not prepare them to distinguish unlawful conduct from that which is merely distasteful. For example, an engineer whose principal planned to file a request for proposal containing known misrepresentations or deleting critical information might not realize the principal's conduct was fraudulent, and not just extremely competitive. The engineer might find it helpful to consult an attorney to determine whether the principal's proposed course of conduct would violate the law before deciding whether and how to confront the principal's planned misconduct.

#### Advocacy

From attorneys serving as litigation counsel to any of the wide array of professionals who serve as expert witnesses, adversarial proceedings tend to bring out the advocate in all the professionals involved. When professionals function as advocates, they don't usually place abstract concepts of the public good ahead of the specific interests of the principals they serve, nor do they

usually anticipate that the public might expect them to do so. At least in common law countries, professionals tend to take the position that responsibility for telling the opponent's side of the story rests with the professionals serving the opponent, and to focus their efforts on persuasion rather than the search for absolute truth. One need only look at the public reaction to some of the more flagrant posturing of litigators in televised trials, however, to realize how severely overzealous advocacy can harm the credibility of a profession.


This problem may be exacerbated in settings that are less obviously adversarial—mergers and acquisitions, for example. There, it's usually presumed that both parties are sophisticated and operating at arm's length, and caveat emptor is usually the prevailing view in the business community. If it comes out after the fact, however, that one side had a significant advantage over the other in knowledge, sophistication, or negotiating power, professionals who rigorously supported the superior side may well be subject to public criticism.

#### Communications and Public Perception

Professional education tends to focus on technical training and not necessarily on successful communications with the public at large. Even professions that use language as their primary

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tool (e.g., attorneys) may rely on profession-specific jargon and may not appreciate the impact their presentation style can have on the general public. It's all too easy for professionals to be perceived as "arrogant" by laypersons who don't understand the intricacies of their practice.

Unless professionals are able to explain complex technical concepts in ordinary, understandable terms, they run the risk of being misunderstood by the public and, at worst, being unfairly condemned for deliberate deceit or ignoring the public's interests and concerns. The more professionals distance themselves from laypersons with technical language, the greater the risks they tend to face of being unfairly perceived as disdainful or even dishonest, particularly if their work proves with hindsight to be erroneous or incomplete.

The problems of communication can be intensified when it comes to disclosure in professional work products. Professionals can include disclaimers, caveats, and other limiting language that appears to them to be clear and complete, but less sophisticated readers may not understand the significance of the professional's statements. The public may conclude that the professionals deliberately resorted to technical "mumbo jumbo" to avoid having to clearly and fairly state the limits of their work even if the professionals made a good-faith effort to be clear.

### Professionals in Public Interest Positions

Professionals who work for the government, public interest groups, or not-for-profit organizations can face special challenges involving service to the public. The organizations that employ these professionals either portray themselves or are widely perceived to be dedicated primarily to the public interest. Consequently, professionals who work for those organizations are also understood to have a significant duty to the public, likely beyond the duties imposed by their professional bodies.

For professionals in these positions, the issues discussed in this paper may be particularly acute. These individuals also pose special challenges for their professions, because they're usually in the public eye and more vulnerable to widespread criticism if their conduct becomes the subject of public scrutiny or censure. Professionals in public interest positions often become the public face of their professions, and harm done to their reputations can cause special harm to their professions as well.

### Conclusion

The issues presented here don't lend themselves to easy answers for any profession. As a result, some professions simply avoid extended consideration of the tensions between their work and the public interest, or fall back on broad statements of principle that offer little concrete guidance to their members in particular situations.

The situation is further complicated as membership associations for skilled workers such as publicists, real estate agents, and even masseurs develop their own ethical standards for their members, complicating any discussion of what it means for a group to be a profession and what professions owe to the public interest. Courts may reach one determination concerning which groups are professions, and the various publics may come to others.

Ultimately, society would probably be best served if every group—professions, quasi-professions and other skilled workers—took appropriate account of the public interest, but it's unlikely that a consensus about what professions are and how they appropriately serve the public interest is likely to emerge in the United States anytime soon.

The U.S. actuarial profession's establishment of the Actuarial Board for Counseling and Discipline was particularly beneficial, because the ABCD offers specific guidance to individual actuaries who find themselves in ethically challenging positions on how to meet the standards of their profession, a service that very few professions appear to provide to their members.

This article is the first in a series that will describe the ways the actuarial profession in Canada, the United States, and Mexico addresses the profession's duty to the public, and is intended to encourage discussion among the members of the profession concerning the importance of taking the public interest into appropriate consideration as they provide professional services to their principals.

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