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CURRENT ISSUES AND CHALLENGES IN LOCAL PROFESSIONAL ETHICS

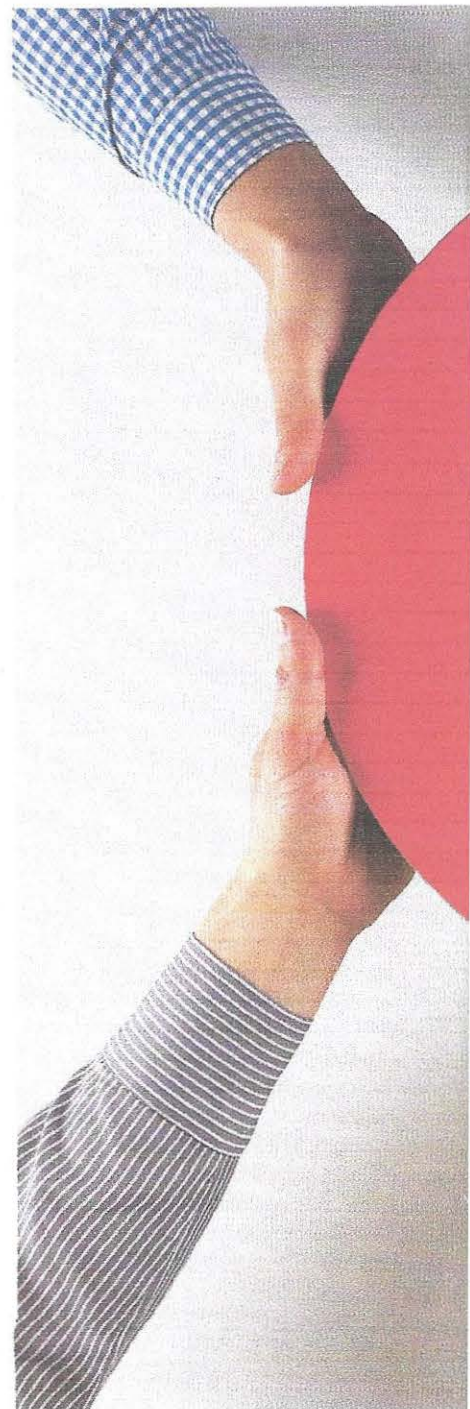
This paper is meant as a brief discussion document of interest to members of the legal profession and others. It seeks to highlight various current issues and challenges having an impact on professionals and professional ethics.

Much activity has been undertaken in past years to try to ensure that categories such as members of different professions, public officers and company officials respect a minimum standard of conduct in their behaviour. Codes of Conduct are sprouting everywhere, including Malta, and even in business where they are often found managed by marketing people rather than by compliance officials. Indeed, to take just one illustration, Enron had a wonderful Code of Ethics replete with nice positive messages.

But let us focus on the professions. Adherence to ethical rules lies at the core of the notion of a profession. Increasingly, professional bodies require their members to abide by a set of minimum so called ethical guidelines usually written by or in conjunction with a public oversight body, but not always. These guidelines may be merely voluntary and indicative, or they may be binding and enforceable. These guidelines would usually be a largely internal arrangement for the keeping of good order and ensuring correctness and predictability in a particular profession, often in response to, and in addition to, a few legal requirements. They do not

provide a solution for every ethical issue that may arise in the course of carrying out a profession, but they do support the notion that members of a profession should act ethically and correctly and should be properly trained and qualified. These rules seek to protect the integrity and reputation of the profession and its standing and role in society. They also regulate aspects of the inter-relationship between members of the same profession, and between professionals and their clients and other third parties, which may include the regulators of the profession.

The main difference between notions and perceptions of professionalism and commerce was that the practitioners of a profession possessed specialized skills or learning, were better organized and were held to account to a much higher standard. Professionals were regulated, certified and overseen by a licensing and oversight body which regulated entry and standards for entry, behaviour, continued education and learning, and possibly also disciplinary procedures, while traders were not. Professionals were mainly concerned with providing the best possible service to others, whereas business could be relied upon to be relatively single-minded in pursuit of opportunities for money and profits. A professional works not to further his own interest or to make a profit, but in the best interest of his client in full respect for the reputation of his profession and the wider interest of the



community. Professionals were considered to be less prone to resorting to unfair or dodgy practices than say businessmen.

This distinction has been rendered less clear and more complex in recent years as a result of a number of developments and a degree of semantic confusion.

- First, many professionals today carry out business activities and sometimes confuse and mix their professional services with their business pursuits. The recent controversy regarding lawyers in business is a case in point.
- Second, professionals are often credited with carrying on their profession in a "business-like" manner. Similarly, businessmen are often complemented for conducting themselves "professionally".



Third, professionals have started being included within the definition of "trader" in various measures, including consumer protection directives of the EU, with the unfortunate result that professionals and traders are being lumped together and considered one and the same for certain legal purposes.

Fourth, while not every occupation qualifies as a profession, efforts are repeatedly made to obfuscate the difference so that every occupation under the sun now aspires to be deemed a profession. In this landscape of semantic abuse and unclear thinking, the true sense of being a professional and the value of belonging to a professional risk being misunderstood and diluted.

Some professionals seem no longer ready to accept that their chosen profession sufficiently fills up their full time and attention. Instead we are seeing increasing attempts by some to follow two often very different professions simultaneously. No doubt we shall soon have some bright sparks taking up – why not – three or more professions. Let me here clarify: it is not a problem at all for a person to obtain additional qualifications and knowledge, but at one point that person needs to decide – and he has to be made to decide if necessary – which one profession he is pursuing so that parties dealing with him and seeking his assistance will know full well what hat he is wearing and what rights, obligations, skills and expectations govern their relationship. This

new uncertainty is yet another failure and weakness in our regulatory culture and behaviour. Attempts will be made to adopt the least regulated stance according to one's best advantage – a form of arbitrage that will cause inevitable confusion and prejudice to third parties.

In Malta, various professions are subject to voluntary and/or state level oversight. Self-regulation is not considered effective and public opinion generally favours some type of state licensing and monitoring to ensure acceptable service and prevent abuse. Various regulatory and oversight bodies have been established by law. These try to preserve high standards and safeguard the reputation of the profession.



Current challenges being faced by many classes of professionals therefore include:

- professionals in employment,
- hybrid members who belong to more than one profession,
- the introduction of professional indemnity insurance,
- effective or ineffective disciplinary procedures,
- competence standards – which seem to be falling,
- Instances of over-charging,
- lack of ethical awareness (some adopt a trial and error approach),
- continued professional education or the lack of it,
- the advent of foreign participation and competition in the local environment,
- the circumstances where client confidentiality may be set aside.

Even the professional bodies themselves need to make sure that their own house is in order before they stand in judgement over their members' behaviour. One should remember that self-regulation is a form of regulation and should not be confused with non-regulation. Whereas it is probably true that members of the profession may be the best-placed to investigate and discipline fellow members, they are expected to do their job in a competent and objective manner. I believe the enforcement of professional ethics in Malta is generally perceived as

rather weak and unsatisfactory. Consequently, it is not just about the quality of the members of the profession, but also the quality of the members elected on the governing body of the professional bodies. Are they really equipped with the competence, objectivity, resilience and mind-set of a regulator and compliance-enforcer? Do they really know how to investigate complaints and how to discipline their fellow members?

In some professions, lawyers and accountants are two examples, members of the profession may not even need to be members of their professional bodies. Membership is voluntary. We have seen a recent case where an accounting firm did not accept to be investigated by its professional body and simply resigned its membership. The body thereupon terminated the investigation. This is an unsatisfactory situation on many levels. The public expects and deserves better.

It is also worth seeing whether whistleblowing procedures have been introduced as part of the professional bodies' structure and culture. From what I have seen, not enough attention has been given here. This is hopefully bound to change. The procedures should allow, indeed encourage, the transmission of complaints against wayward members of the profession. If there is in place a

complaints procedure, is it efficient and effective and does it adequately safeguard confidentiality and due process?

When the legal profession finally introduces a Continued Professional Education scheme, and this might happen in the near future, professional ethics training should form an integral part of it. The scheme would presumably be administered in tandem by the Chamber and the Malta Law Academy which have already been busy organizing various seminars and conferences for members during these past years.

So to conclude, we need to remain vigilant to these various current challenges, and refrain from giving an unwelcome elasticity to the terms "professions" and "professional" and allowing any occupation, whether part-time or full-time, to claim professional status. The parameters of what constitutes a professional should remain certain and clear, with no room for muddled thinking and conceptual confusion. The professional status is, and has to remain, a special one, which attracts and implies special skills, qualifications, competence, integrity, and ongoing training and ethical responsibilities and obligations. The professional status is not about personal entitlement or a vanity project. It is neither a mere hobby nor a pastime for amateurs.