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Disclosing clients' illegal activities: shall we praise the accountant?

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Disclosing clients' illegal activities: shall we praise the accountant?

In July 2016, the International Ethics Standards Board for Accountants (IESBA) issued new sections of the international Code of Ethics for Professional Accountants (Code) that deal with how accountants should respond to suspected non-compliance with laws and regulations (NOCLAR) by their employers or clients (IESBA, 2016).

This has been one of IESBA's most controversial and lengthiest projects, commencing in 2009 "to develop additional guidance for professional accountants when encountering a suspected fraud or illegal act" (IESBA, 2017), committed by their clients or employees. While, the emphasis of the project was on the provision of practical guidance, IESBA and others refer to NOCLAR as a new standard for professional accountants and it definitely creates requirements and obligations.

NOCLAR was issued by IESBA in July 2016 and it became effective in July 2017. It currently has been adopted or is being adopted by a number of member bodies of the International Federation of Accountants (IFAC) in different jurisdictions throughout the world. IFAC estimates that its members represent almost 3 million professional accountants throughout the world.

The project was initially named "Responding to Suspected Illegal Acts" and three years after it commenced an exposure draft was issued by IESBA that sought stakeholder views. IESBA's analysis concluded that of the 73 responses received, 54 were not supportive of the proposals, 10 were partially supportive with some concerns and 9 were supportive (IESBA, 2013).

The lack of support was primarily based on what was considered the extreme and unworkable position adopted by IESBA, which centered around the requirement to disclose a suspected illegal act committed by a client or employer to an appropriate authority, when

there is no legal obligation to do so, without having client or employer authority or affording any protection.

Interestingly, even regulators who many considered to be the instigators and key supporters of the project expressed the view that the pendulum had swung too much from the existing duty of confidentiality.

IESBA went back to the drawing board and revised its original stance. A second exposure draft was issued in April 2015. In the meantime the project changed its name from “Responding to a suspected illegal act” to “Responding to non-compliance with laws and regulations” (NOCLAR) in order to align the terminology with that of the International Auditing Standards.

NOCLAR is described as a response to the obligation of professional accountants to act in the public interest. IESBA, for example, states: ‘The proposed framework focuses on the desired outcomes in the public interest, i.e., that PAs [professional accountants] do not turn a blind eye to the matter, that NOCLAR consequences are addressed or that NOCLAR be deterred, and that further appropriate action be taken as needed in the public interest’ (IESBA, 2015, p. 3).

NOCLAR provides requirements for all professional accountants regardless of context, sector or professional activity. These requirements differ depending on whether the professional accountant is in public practice or not and the sort of role or engagement performed. For accountants in public practice there are different requirements for audits of financial statements and other activities. For professional accountants in business (that is everyone who is not in public practice) the requirements differ in relation to the level of seniority and power. Senior professional accountants in business have important and additional responsibilities than those who are lower down the organisational hierarchy.

Importantly, the final NOCLAR pronouncement does not impose a requirement to disclose a suspected non-compliance with laws and regulations to an appropriate authority if there is no legal requirement to do so. It allows professional accountants to override the principle of confidentiality, when doing so is in the public interest, in order to disclose a suspected non-compliance with laws and regulations to an appropriate authority.

NOCLAR deals only with non-compliance with laws and regulations and does not address unethical actions that may be legal. Further, it prohibits disclosure to an appropriate authority if it is not permitted by applicable laws and regulations. So it does not provide any prescription or relief in cases such as Luxleaks, which involve disclosing an unethical act to an appropriate authority when such a disclosure contradicts confidentiality laws.

NOCLAR permits PAs to breach the principle of confidentiality and disclose a suspected illegal act to an appropriate authority, in the public interest and in line with the framework it provides. Such a disclosure will not be considered a breach of the principle of confidentiality, a fundamental principle of the Code. So whilst an obligation to disclose a suspected non-compliance and breach confidentiality does not exist, permission to do so exists.

How could we evaluate PAs who were aware of illegal activities and did not disclose? How would we attribute blame and praise to PAs for having identified a suspected illegal act and yet not disclosed it?

This article explores the principle of confidentiality as an appropriate fundamental principle of professional ethics and analyses it in terms of respect for persons, integrity and acting in the public interest. It also looks at acts of supererogation and evaluations of blame and praise as they may apply to professional accountants and further uses the ought-can principle to evaluate NOCLAR.

While most professions include the duty to confidentiality in their ethical principles, such a duty is not without exceptions. Generally, illegal activities, serious criminal offences or serious harm to self and others are exceptions to the duty of confidentiality (Mire & Parker, 2017). Bok (1983) argues that in principle confidentiality should protect only the interests of the patient or client, but in practice it can expand to cover even what professionals seek to hide from patients, clients and the public at large.

Bok (1983) also distinguishes between confidentiality owed to persons and institutions and argues that institutions should not be able to invoke confidentiality for plans that endanger others and activities such as bribery and tax evasion. Confidentiality surrounding such lucrative and damaging activities are not only shielding corporations and clients but also professionals who benefit from such illegitimate undertakings, as confidentiality is premised on respect for persons and it is not about secret undertakings that undermine such respect.

‘Can’, ‘ought’ and act supererogatory acts

The philosophical literature, primarily after Kant, has been dealing with the relationship between ‘ought’ and ‘can’. Generally it is accepted that ‘ought’ creates an obligation if the moral agent is able to fulfill it and we do not blame a person who fails to do what they are unable to do.

Brown (1977) discusses moral theory and the ought-can principle and separates obligation from praise and blame. He states that ‘blameworthiness can occur in conjunction with fulfillment of obligation; and it is equally a possibility that blamelessness can occur in conjunction with non-fulfillment of obligation’ (p. 216).

Using Brown’s (1977), Mellema’s (2001) and Widerker’s (1991) analysis of praise and blame this paper develops the potential assessments of professional accountants’ actions in response to NOCLAR. Mellema evaluates Widerker and contends that the ‘ought implies can’ principle supports the idea that human acts can be non-obligatory and praiseworthy, as well as blameworthy and permissible. Widerker argues that the statement:

“An agent S is morally praiseworthy for performing a given act A only if S has a moral obligation to perform A” is false, due to the possibility of an act being supererogatory” (p. 223). But even if we leave aside supererogatory acts, there is an asymmetry, as according to Widerker, an act can be praiseworthy and nonobligatory but an act cannot be blameworthy and permissible.

In relation to NOCLAR that could mean that an accountant that disclosed a suspected non-compliance with laws and regulations to an appropriate authority, even though such a disclosure is not obligatory would be praiseworthy, as that is acting in the public interest. However, if an accountant does not disclose to an appropriate authority something that is permissible, cannot be blameworthy. Is that the case, or is Melema's position that supports the contention that non-obligatory but praiseworthy acts are possible as are blameworthy but permissible acts?

Can disclosure of a suspected illegality be considered an act of supererogation? Curtis (1981) provides a formula for assessing acts. He claims: “If the cost or risk is considerably less significant, the action is morally required; if considerably more significant, the action is foolish or unwise. But if the cost or risk is roughly as significant as the moral value of the end, the agent has done something which is ‘above and beyond the call of duty’ - something which is morally good, but not morally require.” (p. 311). Curtis argues that supererogatory acts are not those performed by wise individuals, as they would ‘weigh the moral and prudential pros and cons’ (p. 317) in deciding what to do but by saints and heroes, neither of whom are known for their rationality and level-headedness.

Curtis summarizes his views, which align with the asymmetry of praise and blame: ‘When neither the moral reason for action, nor the reason of self-interest against it, seems clearly overriding, a man must simply choose. If he chooses the moral course, he earns our admiration and praise; if he chooses the alternative course of self-interest, he neither arouses nor deserves our condemnation’ (p. 318).

Accountants are not called to become heroes and the Code does not impose a duty to act as heroes. But the Code asks them to act in the public interest. What this means in practice and whether 'can' override confidentiality and disclose a suspected non-compliance to laws and regulations to an appropriate authority leads to 'ought' is something that will play out in practice, in professional discipline tribunals and in the courts. But as Bouville (2008) said, we cannot expect behavior that is mandatory and heroic at the same time. But we can expect accountants to do what they ought and can.

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