AN ETHICALLY INDIFFERENT CODE OF ETHICS? ANALYSIS OF THE CHARACTER OF THE CZECH BAR ASSOCIATION'S CODE OF ETHICS[1]

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Abstract: The Czech Bar Association published a text which has the words "code of ethics" in its title. The aim of this paper is to determine whether the norms contained in the code are actually related to ethics or whether they concern different fields. The paper first explains the *raison d'être* of codes of ethics in general and briefly introduces the Czech Bar Association and the origin of its code of ethics.

The principal section of the paper is dedicated to a detailed analysis of the text of the Czech Bar Association's code of ethics applying a method used in England for similar purposes by Donald Nicolson.

The analysis shows that the Czech Bar Association's code of ethics deals with ethical issues only to a lesser extent and that it contains numerous provisions which do not deal with ethics at all. The paper proposes to remedy this unsuitable state by creating two separate codes. The first would primarily regulate ethically relevant situations in legal practice. The other code would contain "other" rules of the profession.

Keywords: code of ethics; ethical code; rules of professional conduct; lawyer; legal ethics; Czech Republic; Czech Bar Association

DOI: 10.14712/23366478.2023.21

A popular Czech proverb says *appearances are deceptive*. Some may dislike it because of a shadow of misanthropy. It is more useful, however, to take it as an appeal to be vigilant and as a warning: (first) impressions or feelings do not always match reality.

The proverb foreshadows the main purpose or aim of this text. The Czech Bar Association has published a text entitled *Code of Ethics*. The title makes it appear that the document is concerned with ethics. The aim of this text is to either confirm this "appearance" or to show that it is deceptive. And because the text is based on a hypothesis, that the Code of Ethics of the Czech Bar Association is rather loosely related to ethics,

[1] The author wishes to thank Marek Zima, a kind colleague, for providing comments and much appreciated ideas on the first version of this paper. This paper has been written as part of the 2023 Cooperatio/LAWS programme at the Faculty of Law, Charles University. The author's thanks also go to the anonymous reviewers of the text for their apposite remarks and recommendations for improving the text. I reflected all that the short pre-publishing period enabled.

a more precisely stated question is to what extent are ethical issues covered in the Code of Ethics.

To answer both questions the reader is first introduced to the *raison d'être* of codes of ethics in general. Then Czech Bar Association is briefly presented as well as the origin and content of its Code of Ethics. The next part of the paper deals with the method used to analyse the Code of Ethics. The main part of the text is dedicated to an analysis of the text, while the last part evaluates the results of the analysis.

After reading the text, the reader will not only have an improved awareness of the regulation of Czech attorneys-at-law by means of the Code of Ethics of the Czech Bar Association but will also be able to state responsibly whether the "appearance" made by the title of the Code of Ethics of Czech Bar Association actually matches reality or not, and to what extent.

1. INTRODUCTION – ON LAWYERS' CODES OF ETHICS IN GENERAL

For the purposes of this text, we deem a code of ethics to be *"the formal statement of standards which the professional consults to guide his or her behaviour. It represents a statement of the roles professionals ought to assume in specific situations. To that extent, a code is a formalized statement of role morality, a unitary professional 'conscience'."*[2] We therefore base our consideration on the substance of the code rather than the name. We do not consider a text to be a code of ethics solely because it is entitled a 'code of ethics' or something similar (such as *ethical code, rules of professional conduct*, etc.). The distinction between the substantive and formal concept of a code of ethics will be used below in the analytical part of the text.[3]

The original need to formally record the moral aspirations of legal professionals can be found in legal rules or more typically the oaths or promises with varying wording.[4] But the modern day has brought, among other things, a boom in the use of codes of ethics in the legal profession. In the USA, for example, the first comprehensive code dates back to 1887 when it was adopted by the Alabama State Bar.[5] Why did many other countries and professional organisations decide to follow Alabama's example? And what are the risks of adopting codes of ethics? Let us mention at least the key benefits and risks.

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[2] LODER, R. E. Tighter Rules of Professional Conduct: Saltwater for Thirst. *The Georgetown Journal of Ethics*. 1987, Vol. 1, No. 2, p. 318.

[3] It is worth noting that *morality* and *ethics* are used interchangeably in the text, see COPP, D. Introduction: Metaethics and normative ethics. In: COPP, D. (ed.). *The Oxford Handbook of Ethical Theory*. New York: Oxford University Press, 2006, p. 4; or similarly NICOLSON, D. – WEBB, J. *Professional Legal Ethics*. New York: Oxford University Press, 1999, pp. 4–5.

[4] CHAFFE, E. C. Death and Rebirth of Codes of Legal Ethics: How Neuroscientific Evidence of Intuition and Emotion in Moral Decision Making Should Impact the Regulation of the Practice of Law. *The Georgetown Journal of Legal Ethics*. 2015, Vol. 28, No. 2, p. 328.

[5] Ibid., p. 330.

Codes of ethics may serve as a useful source of information; ideally, they record the norms, values, and ideas of a given profession. Such a source is appreciated not only by the candidates of the profession but also by those who educate them.[6] It may be valuable also for lay people who are in contact with these professionals. A commitment by a profession to follow certain values and ideas creates high expectations of professional performance.[7] The public may use the code to supervise the profession and as a source for criticising the profession's practice.[8]

It is also possible to acknowledge the fact that the mere existence of a code of ethics means that valuable attention will be focused on (selected) moral topics,[9] which benefits ethics as a whole. The wording of the code of ethics (even if formally unenforceable) serves as an internal regulation of conduct within the profession,[10] and public as well as academic debates may rely on the code.[11] A code of ethics may also serve as a point of reference for forming an idea of what makes a good attorney-at-law. It may offer an important point of stability in the complexity of attitudes in the postmodern world.[12]

Codes of ethics can, however, be subject to justified criticism. The most compelling criticism focuses on existence of the codes as such. Actual moral decision-making is based on an assumption of the freedom of the decision maker.[13] From this perspective codes of ethics represent a completely useless set of externally prescribed rules, because adherence to an external rule does not constitute moral acting.[14] Similarly we could say that the essence of morality is so difficult to express that morality in fact escapes codification, i.e., any formalised expression. By reducing the open spirit of a moral norm to a fixed formalised expression the moral norm becomes unacceptably shallow.[15]

Leaving behind the essential criticism, which is abstract in nature, we may turn to the criticism of forms of codes of ethics. The primary warning may be that the code of ethics will be a *bad* code of ethics. Despite the goodwill of the authors, if the text of the code went through a process similar to legislative procedure, the end product may resemble a work of moral compromises rather than moral aspirations.[16] From a similar point of view, the language used by codes could be criticised. Should ethical norms be formulated in as much detail as possible, or should they use general language? General

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6 NICOLSON, D. Mapping Professional Legal Ethics. *Legal Ethics*. 1998, Vol. 1, No. 1, pp. 52–53.

7 At the same time, it may attenuate unreasonable expectations of the public. KRSKOVÁ, A. *Etika právnického povolania* [Ethics of the Legal Profession]. Bratislava: Vydavateľské oddelenie Právnickej fakulty Univerzity Komenského, 1994, p. 31.

8 NICOLSON, *c. d.*, pp. 52–53.

9 JOHNSON, V. R. The Virtues and Limits of Codes in Legal Ethics. *Notre Dame Journal of Law, Ethics & Public Policy*. 2000, Vol. 14, No. 1, pp. 36–37.

10 MOORE, N. J. Lawyer Ethics Code Drafting in the Twenty-first Century. *Hofstra Law Review*. 2002, Vol. 30, No. 3, p. 924.

11 NICOLSON, *c. d.*, p. 53. This text is a proof of it.

12 For a more detailed description of the fragmentation of traditional notions of legal practice see BARON, P. – CORBIN, L. The Unprofessional Professional: Do Lawyers Need Rules? *Legal Ethics*. 2017, Vol. 20, No. 2, p. 167.

13 Cf. FISCHER, J. H. Free will and moral responsibility. In: COPP, D. (ed.). *The Oxford Handbook of Ethical Theory*. New York: Oxford University Press, 2006, pp. 321–354.

14 WILKINSON, M. A. – WALKER, C. – MERCES, P. Do Codes of Ethics Actually Shape Legal Practice? *McGill Law Journal*. 2000, Vol. 45, No. 3, pp. 648–649.

15 SKUCZYŃSKI, P. *The Status of Legal Ethics*. Frankfurt am Main: Peter Lang GmbH, 2013, pp. 100–101.

16 JOHNSON, *c. d.*, pp. 45–46.

language is more likely to capture the complexity of life situations, while too much specificity threatens to create an unsystematic casebook full of loopholes.[17] Yet, more detailed norm offers the actor deeper certainty that s/he is acting in accordance with the norm. General language does give the actor more freedom to act, nevertheless such freedom could by easily interpreted as undesirable ambiguity. A useful code of ethics must thus strike an appropriate balance between the two positions.

A bad code of ethics may also be created due to a reason other than the effort of various stakeholders to reach a compromise or clumsily chosen language. When the profession tries to regulate itself, it is in a clear conflict of interest – should the profession protect itself (its members) or should it impose high standards on itself? Additionally, the lack of willingness for ethical self-restraint may lead to a more subtle result. It is possible to adopt an apparently good quality code which is not reflected in reality, i.e., it is not effectively enforced. We could take the criticism even one step further. Empirical research shows that codes not only fail to promote moral decision making, but they even deteriorate it, because they prevent the moral development of an individual. Instead of deliberation and acceptance of personal responsibility, the actor mechanically applies the text of the code.[18]

For the sake of completeness let us briefly evaluate the above-stated arguments and counter-arguments. It is clear that the benefit of codes of ethics can be disputed meaningfully. I believe that the arguments in favour of the existence of the codes prevail as more convincing – but with one important, though somewhat banal, postscript. To be able to claim that a code of ethics is beneficial to the moral thinking and conduct of professionals, we must first examine its form more vigorously. Then it is possible to proceed with the next step, that is the examination of the practical application of the code. A code of ethics may certainly inhibit the way an individual thinks of her/his acts, if the individual's attitude to the text is buck-passing, or if the text of the code is enforced by unreasonable penalties or not enforced at all, or enforced only to a limited extent. The code may, however, (and it certainly should) be a useful source for assessment of a potentially morally significant situation. Free decision made by the individual may confirm the text of the code and therefore increase its importance. It may also rebut it, and thus lead the actor to deeper thoughts on the findings. Acceptance of the plurality of moral opinions is a common component of moral thinking. Meeting a different finding represents an opportunity to hold a clarifying discourse.

It is also possible to agree with the criticism that professional explorations of morals cannot be reduced to a professional code. However, if we consider the individual's conscience as the primary source of moral decision-making, a code of ethics represents only one of the resources taken into account. The code thus creates the information basis for moral decision-making together with tradition, professional customs, consultations with colleagues, or other resources.[19]

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[17] BARON, *c. d.*, pp. 160–161; cf. HERRING, J. *Legal Ethics*. Oxford: Oxford University Press, 2017, p. 41.
[18] WILKINSON – WALKER – MERCES, *c. d.*, pp. 649–651.
[19] This is in some cases confirmed in the codes themselves. Japanese, Canadian, and American codes of ethics remind the lawyers that in their work they should also take into account the wider context in the form of

The concern that codes may be misused is also appropriate. However, I am of the opinion that the simple possibility of misuse should not automatically disqualify a tool. Conversely, a warning against possible misuse should induce increased vigilance and attention in using such tool and monitoring its benefits. The tool should be abandoned only if it turns out that misuse prevails over the intended effects.

It seems that to assess the role of a specific code of ethics it is necessary to examine more closely the code and its functioning. We have indicated a number of criteria which can be used in the assessment of codes of ethics: the content (wording) of the code, how it originated, the extent and manner of regeneration of the code in practice (professional bodies and the public), and so forth.

It is beyond the scope of this text to cover all the listed criteria, therefore in the first step we will focus only on the analysis of the content of the code of ethics of the Czech Bar Association. Before we do so, let us briefly describe the status of the Czech Bar Association and its code of ethics for the sake of completeness.

2. CZECH BAR ASSOCIATION AND ITS CODE OF ETHICS

The Czech Bar Association (the CBA) is a public corporation associating Czech attorneys-at-law and trainee attorneys. It was established by the Act on the Legal Profession of 1996 and became a joint successor of the Chamber of Commercial Lawyers and the Czech Bar Chamber (both of which were established by an act in 1990, i.e., in the year following the collapse of the communist regime).[20] The CBA exercises public administration in the Bar and is vested with numerous powers over its members (e.g., it decides on the admission to the Bar, holds disciplinary proceedings). With respect to the self-governing character of the organisation, the activities of the CBA are funded by membership fees and not by the state.

Unlike voluntary professional organisations, the membership of attorneys and trainee attorneys in the Czech Bar Association is required by law, and registration in the register of attorneys maintained by the CBA is required to practise as an attorney. The number of practising attorneys is around 12,000, the number of active trainee attorneys is approximately 3,000.

The creation of the CBA's code is assumed by the law which authorises the CBA to adopt the code.[21] It was adopted on 31 October 1996 by a resolution of the Board of Directors of CBA No. 1/1997 of the Journal under the title *The Rules of Professional Ethics and Rules of Competition among Attorneys-at-Law of the Czech Republic (Code of Ethics)*. The father of the wording of the code was Karel Čermák, who also wrote an extensive commentary on it.[22] The purpose of the code is presented as fourfold:

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general (rather than role-based) morality or social justice. Cf. EVANS, A. *The Good Lawyer*. Australia: Cambridge University Press, 2014, p. 203.

[20] Act No. 85/1996 Sb., on the Legal Profession.

[21] S. 17 of Act No. 85/1996 Sb., on the Legal Profession.

[22] ČERMÁK, K. *Pravidla profesionální etiky a pravidla soutěže advokátů České republiky: text s komentářem JUDr. Karla Čermáka* [The Rules of Professional Ethics and Rules of Competition among Attorneys-at-Law of the Czech Republic: text with commentary by JUDr. Karel Čermák]. Praha: Česká

protection of the consumer, the Bar as a profession, protection of attorneys-at-law as competitors on the market of legal services, and protection of third parties in contact with attorneys-at-law.[23] (If these are the declared goals of the code of ethics, an attentive reader begins at this point to wonder about all the groups that are supposed to be protected by the code and how is it related to ethics?) The CBA's Code of Ethics consists of four parts (applicability of the rules of professional ethics and competition rules of Czech attorneys-at-law; rules of professional ethics; competition rules of attorneys-at-law; and final provisions).[24]

3. THE CBA'S CODE OF ETHICS – ETHICS OR MERE REGULATION?

The following section of the paper is of key importance. It briefly focuses on the method used and follows with detailed evaluation of the results of the analysis of CBA's Code of Ethics.

3.1 A FEW WORDS ON THE METHOD

In the introduction we stated that this text uses the substantive concept of the code of ethics. The substantive approach focuses on *texts actually dealing with the topics related to morals* (irrespective of their title). On the other hand, the formal approach deals with *documents whose title relates to ethics*. In other words, substantive codes of ethics are (true) codes of ethics whereas formal codes of ethics are "codes of ethics". The below lines are looking for an answer to the question whether the CBA's code is a code of ethics or a "code of ethics".

We will apply the method used by Donald Nicolson to evaluate the *Code of Conduct of the Bar of England and Wales* and the *Guide to the Professional Conduct of Solicitors*. Nicolson distinguishes between *ethical norms* and *conduct norms*. The latter include norms of etiquette or organisational and administrative norms which he refers to as *mere regulation*. He compares the *mere regulation* norms to traffic rules, it is necessary to know them and to implement them, but they do not require any deep thinking or understanding. In the professional environment these are generally the rules regulating

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advokátní komora [Czech Bar Association], 1996. The text is available also online at: http://www.cak.cz/assets/files/180/BA_00_Z1.pdf.

[23] ČERMÁK, K. – VYCHOPEŇ, M. Komentář etického kodexu [Commentary on the Code of Ethics]. In: SVEJKOVSKÝ, J. – VYCHOPEŇ, M. – KRYM, L. et al. *Zákon o advokacii: komentář* [The Act on the Legal Profession: Commentary]. Praha: C. H. Beck, 2012, pp. 439–440. The quoted text seems to be identical to the text contained in ČERMÁK, *c. d.*, pp. 18–19. Cf. KOVÁŘOVÁ, D. – SOKOL, T. *Etický kodex advokáta: komentář* [Code of Ethics of an Attorney-at-Law: Commentary]. Praha: Wolters Kluwer ČR, 2019, p. XXII states, that the code certainly does not deal only with ethics and that it is a multifunctional code. (However, the statement is followed by a criticism of excessiveness, verbatim, and the case-based approach of the code.)

[24] On the importance of code of ethics in civil proceedings see the recently published SEDLÁČEK, M. Lawyers' Ethics before a Civil Court. *Acta Universitatis Carolinae Iuridica*. 2021, Vol. LXVII, No. 3, pp. 57–69.

the internal organisation of the profession and they may also regulate the *self-interest* or *self-image* of the profession. This is why they are sometimes referred to as *guild rules* or *trade association rules*. Conversely, ethical norms are such norms which transcend to contemplation on what is morally sound. We must add that Nicolson is aware that the definition is unsatisfactory at first glance because it is circular. He deals with this in an addendum referring to the general consensus on what is and what is not an ethical topic. Ethical are such norms which generally concern our conduct and its influence on other persons, animals, or the environment, however they could be concerned also with the moral soundness of our acts irrespective of the consequences (e.g., the issue of moral acceptability of a lie).[25] Admittedly, the definition could be more convincing. At the same time, it should be added that applying the definition to the CBA's Code of Ethics will clearly show that it does not present any serious issues, which is why we can consider it appropriate for our purposes.

Another criterion used by Nicolson is whether the norms focus on the internal interests of the profession (*private face norms*) or the interests of persons more distant from the profession (*public face norms*). *Private face norms* concern the interests of attorneys-at-law in the broad sense (i.e., the attorney, their clients, their colleague attorneys, and the profession as a whole). *Public face norms* focus primarily on the public, third parties, the environment, future generations, or abstract "fairness".[26]

A combination of both criteria yields four analytical categories: *private face conduct norms*, *public face conduct norms*, *private face ethical norms*, and *public face ethical norms*. We will use these categories to analyse the text of the CBA's Code of Ethics. For greater precision, the analysis categorises individual paragraphs rather than entire articles of CBA's Code of Ethics. Although it is true that the paragraphs within one article usually fall within the same category, it is not always the case.[27]

We will analyse only the two main parts of the CBA's Code of Ethics, i.e., part two (the rules of professional ethics) and part three (the competition rules of attorneys-at-law), and not the whole text. Part one (the applicability of the rules of professional ethics and the competition rules of attorneys-at-law of the Czech Republic) and part four (final provisions) contain purely technical norms concerning applicability of the regulation. Therefore, they are norms which are typically found in all legal regulations, and they do not add anything to the unique character of the CBA's Code of Ethics. Additionally, Article 15a(4) was excluded from the analysis,[28] because it refers to a provision which was repealed, or rather transferred to another part of the code.[29] Article 15a(4) therefore does not have any meaning, unless we interpret it creatively. Article 12(4) was also excluded. Article 16(2)[30] suffers from a similar defect because its last sentence refers to a passage in the Code of Ethics which no longer exists. However,

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25 NICOLSON, *c. d.*, p. 54.

26 Ibid.

27 Taking Article 4, the first article analysed, as an example, the first three paragraphs fall within private face ethical norms and the remaining paragraphs fall within private face conduct norms.

28 *"The provision of Art. 15(8) applies to an employed attorney-at-law by analogy."*

29 Art. 15(6) of the CBA's Code of Ethics.

30 *"Attorney-at-law manages the office in a manner which does not adversely affect the dignity of the profession. The attorney assigns office work only to persons having the required qualification, responsibility, and*

in case of this paragraph it is possible to understand the meaning from the preceding sentences which remain valid normative text. This is why Article 16(2) was analysed. Overall, 105 paragraphs of the CBA's Code of Ethics were analysed.

It is fair to state that some paragraphs can be meaningfully classified under several categories because of their mixed nature. In such cases the paragraphs were classified depending on the prevailing meaning. For example, Article 17(3) provides that: *"An attorney is obliged to act in proceedings honestly, respect the legal rights of other parties, and behave towards them as well as to other persons participating in the proceedings in such a manner that does not reduce their dignity nor the dignity of the profession of attorneys. Unless procedural legislation so allows, in such matters the attorney must not deal with persons performing the tasks of the courts or other bodies, nor hand over to them written documents unless the attorney-at-law of the other party is present or aware of it, or the unrepresented party is present or aware of it."* The paragraph contains elements falling under private face ethical norms (honesty of the attorney already pointed out in Article 4(1)). However, the prevailing meaning of the paragraph clearly focusses on the protection of third parties. This is also confirmed by a systematic interpretation of the paragraph text because it forms part of a passage dealing with contacts between attorneys-at-law and authorities and courts or the attorney's *pro bono* activities. This is why the paragraph is classified under public face ethical norms. A similar ambiguity occurs relatively rarely (approximately in 5% of paragraphs), and a possible change in classification of an ambiguous paragraph would not significantly affect the overall result of the analysis.

3.2 ANALYSIS RESULTS – PRIVATE FACE CONDUCT NORMS

The analysis performed shows that the CBA's Code of Ethics can be considered – *to some extent* – a substantive code of ethics (i.e., a code containing *ethical norms*), which is no surprise. A genuine formal code of ethics (i.e., a code containing exclusively *conduct norms*) can hardly be expected in reality. A more precise question is, *to what extent* is the CBA's Code of Ethics a formal code and to what extent is it a substantive code?

The results show that the CBA's Code of Ethics predominantly (approximately 70%) deals with topics other than ethics. Approximately 67% (71 occurrences) of the 70% of the topics other than ethics are *private face conduct norms*.

The largest group of provisions of such type comes from part three entitled The Competition Rules of Attorneys-at-law. For example, the provisions state that *"*[t]*he designation of 'attorney-at-law' can also be used by the attorney outside of the Bar profession"*,[31] that the attorney may also use her/his academic degrees and degrees of

integrity and consistently supervises their activities. Provision of Art. 15(4) and (7) on trainee attorneys applies to such persons by analogy."

[31] Art. 19(2) of the CBA's Code of Ethics.

associate or full professor as part of the designation,[32] and state a number of other rights and obligations dealing with designation and other similar issues.[33]

The regulation of an attorney's fee represents a major area of regulation in this group.[34] It is a relatively broadly covered area despite the basis being quite simple in principle – the fee is determined as either non-contractual or contractual. A contractual attorney's fee is to be reasonable,[35] the costs of legal services are to be borne by the client rather than the attorney.[36] This is a statement of a common standard, it is unlikely that a regulation of this type would advocate for an unreasonable fee. The remaining paragraphs of Article 10 are primarily of a technical nature, they define what is meant by a reasonable fee[37] and reasonable advance,[38] they provide for the duty of the attorney to keep records of her/his acts,[39] the impossibility of concluding a contract that would be disadvantageous for the client,[40] the duty to resolve a dispute effectively,[41] and to inform of the possibilities of obtaining free legal aid.[42] From the perspective of classification, the only slightly more complex provision is Article 10(5), which allows the parties to agree on a contractual fee in the form of a success fee. The possibility of a success fee as such represents an interesting ethical issue because such a fee interferes with the attorney's independence vis-a-vis the client or the client's case. Potential interference with independence is usually balanced by an increase in the client's *access to justice*.[43] With respect to the technical language of this paragraph, which deals primarily with the determination of the amount of the fee (which should be reasonable and usually not exceeding 25%), rather than ethics, this paragraph was classified as a *private face conduct norm*.

Another significant group of *private face conduct norms* includes the provisions the code generally refers to as duties toward the Bar profession. For example, they concern a polite prohibition on slandering another attorney,[44] determining a fee in the case of

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32 Art. 21(3) of the CBA's Code of Ethics.

33 Art. 20, Art. 21(1) and (2), Art. 22(1–5), Art. 23(1–4), Art. 24, Art. 24a, Art. 24b(1) and (2), Art. 24c(1) and (2), Art. 27, Art. 29(1–4) of the CBA's Code of Ethics.

34 All 9 paragraphs of Art. 10 of the CBA's Code of Ethics.

35 Art. 10(1) and (2) of the CBA's Code of Ethics.

36 Art. 8(6) of the CBA's Code of Ethics.

37 Art. 10(3) of the CBA's Code of Ethics. It is hard to resist the impression arising from this paragraph that it is possible to take into consideration virtually any imaginable circumstances – from the attorney's capabilities to the client's information on the legal services market.

38 Art. 10(7) of the CBA's Code of Ethics.

39 Art. 10(4) of the CBA's Code of Ethics.

40 Art. 10(6) of the CBA's Code of Ethics. Of course, the impossibility is relative. The Article makes it possible for a client to conclude a disadvantageous contract if concluded in writing and the client has a reasonable possibility (i.e., an option which s/he do not have to use) to consult the contract with another attorney. The related text simultaneously excludes the possibility of the attorney "underselling", meaning to provide services below the cost determined by the amount of reimbursement for the costs of proceedings.

41 Art. 10(8) of the CBA's Code of Ethics.

42 Art. 10(9) of the CBA's Code of Ethics.

43 Put simply, a success fee makes the services of an attorney-at-law affordable even for a client who would otherwise have to do without legal representation.

44 Art. 11(1) of the CBA's Code of Ethics.

substitution,[45] various informational duties towards the CBA,[46] or the duty of an attorney to carry out the profession primarily in the attorney's registered office.[47, 48]

The remaining *private face conduct norms* do not constitute any larger groups and relate to various areas such as the regulation of entrepreneurial activities other than the business of acting as attorney-at-law,[49] the scope of the liability insurance of the attorney,[50] or advertising.[51, 52]

3.3 ANALYSIS RESULTS – PUBLIC FACE CONDUCT NORMS

Another part analysed – approximately 3% (3 occurrences) – out of the 70% of ethically indifferent provisions of the CBA's Code of Ethics are *public face conduct norms*. This is a small group of provisions of Article 17(1), (4), and (5), dealing with the rules of etiquette of the attorney in contact with the courts and similar bodies (addressing for example the mode of address of third parties and the attorney dress code).

3.4 ANALYSIS RESULTS – PRIVATE FACE ETHICAL NORMS

The content of the penultimate group of provisions is concerned with ethical topics. In this group 25% (27 occurrences) are *private face ethical norms*. A substantial part of these provisions focuses on the cornerstone of the Bar, and the relationship between client and attorney-at-law primarily in two respects: the quality of legal services provided and conflict of interests.

In terms of the quality of legal services provided, the attorney has a duty to provide the same standard of service when appointed by the court or the CBA or when providing services to clients under a contract,[53] clients must be informed properly of the course of action,[54] and money and other deposited valuables must be kept in custody applying the standard of due managerial care.[55] Most provisions on the refusal to provide legal services by the attorney are directed at the protection against conflict of interest and will be discussed in the following paragraph. Nevertheless, some refusal provisions aim at

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45 Art. 13(1) of the CBA's Code of Ethics.

46 For example, to inform that one has accepted to represent a client in dispute with another attorney under Art. 14(1) or to inform the CBA that the attorney-at-law has become a supervisor of a trainee attorney under Art. 15(2).

47 Art. 16(1) of the CBA's Code of Ethics.

48 For the sake of providing a complete list, other provisions included in this group are Art. 11(2) and (3), Art. 14(2), Art. 15(1), (3), (4), and (5), Art. 15a(1) and (2), Art. 16(2), (3), and (4) of the CBA's Code of Ethics.

49 Art. 5(1) and (2) of the CBA's Code of Ethics.

50 Art. 9(3) of the CBA's Code of Ethics.

51 Art. 26 of the CBA's Code of Ethics.

52 For the sake of providing a complete list let us also name the remaining provisions: Art. 4(4), Art. 6(5), Art. 9a, Art. 17a, Art. 18a(1) to (3), Art. 19(3), Art. 25, Art. 26a, Art. 28, Art. 31(1) and (2), Art. 32(1) and (2) of the CBA's Code of Ethics.

53 Art. (2) of the CBA's Code of Ethics.

54 Art. 9(1) of the CBA's Code of Ethics.

55 Art. 9(2) of the CBA's Code of Ethics.

protecting the quality of services provided, or the client's case and due legal processing of the case. Under these provisions the attorney is to refuse to provide the services if s/he do not have sufficient experience or specialised knowledge[56] or if prevented from providing the services by health or mental condition.[57] Even if attorneys refuse to provide the service they must take reasonable measures to prevent serious injury caused to the applicant as a result of refusal.[58] When an attorney ceases to provide legal services to a client, s/he must hand over to the client all important documents related to the provision of legal services.[59]

The fact that the attorney should put the interest of the client above all other interests[60] is clearly stated in numerous provisions of the code on conflict of interests. The attorney must not use information on the client against the interest of the client, nor is s/he allowed to use the information for her/his own interest or in the interest of third parties,[61] the attorney must refuse a potential client who would put the interests of existing clients in danger.[62] Other provisions specify the steps to be taken when multiple persons are involved on the part of the client or the law office[63] or when a trainee attorney is involved.[64]

Similarly, to *private face conduct norms*, in the case of *private face ethical norms* the CBA's Code of Ethics also contains norms which are relatively independent in nature, not elaborated further in the code, and at the same time mutually unrelated. Without any further elaboration an attorney-at-law is directed to act honestly and fairly,[65] to fulfil the obligations,[66] and not to knowingly tell an untruth.[67] The provision prohibiting the attorney from verifying the information provided by the client[68] may be considered as the basis of trust between the attorney and the client. The remaining provisions point out

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56 Art. 8(3) of the CBA's Code of Ethics. The paragraph may also be interpreted as an effort by the CBA to make it possible for the attorney to provide the services in such circumstances. Because the first part of the provision containing the prohibition is followed by a list of grounds on which an attorney may provide the services despite lack of experience or specialist knowledge.

57 Art. 8(4) of the CBA's Code of Ethics.

58 Art. 8(1) of the CBA's Code of Ethics. Similarly in the case of substitution of legal representation under Art. 13(2) of the CBA's Code of Ethics.

59 Art. 9(4) of the CBA's Code of Ethics.

60 Art. 6(1) of the CBA's Code of Ethics.

61 Art. 6(4) of the CBA's Code of Ethics, a similar prohibition applies to cases when an attorney provides legal services in association or in a company together with other attorneys, see Art. 12(3) of the CBA's Code of Ethics.

62 Art. 8(2) of the CBA's Code of Ethics.

63 Art. 7(1–3), Art. 8(5), Art. 12(2) of the CBA's Code of Ethics.

64 Art. 15(6) of the CBA's Code of Ethics.

65 Art. 4(1) of the CBA's Code of Ethics, this is also applicable to competition with other attorneys under Art. 19(1) of the CBA's Code of Ethics.

66 Art. 4(2) of the CBA's Code of Ethics.

67 Art. 4(3) of the CBA's Code of Ethics. In the case of this article, a question could be raised as to whether it should be classified as public face ethical norm, because the obligation not to tell lies is certainly beneficial to the public. Similarly, to the success fee provision with reference to the occurrence of the article within the code system, more weight was given to the importance of self-presentation of the profession.

68 Art. 6(3) of the CBA's Code of Ethics.

the importance of the law and the guild rules in specific situations[69] and set the quality standard for a request for substitution and report on substitution.[70]

3.5 ANALYSIS RESULTS – PUBLIC FACE ETHICAL NORMS

The last component of our analysis with the size of approximately 5% (5 occurrences) covers *public face ethical norms*. The low percentage indicates that there are only few such provisions in the CBA's Code of Ethics. In part they are norms mentioned by the code elsewhere. The distinctive feature of *public face ethical norms* is that the norms refer exclusively to third parties. Hence the direction not to state misleading or false facts[71] in proceedings before courts and other bodies and the direction to act in the proceedings honestly and in a way not harming the dignity of persons involved[72] is modelled on Article 4(1) and (3),[73] and in the context of clients and attorneys in competition with other attorneys both the rules are stated in Article 19(1).[74]

The moral obligation to serve the public is also reflected in two provisions dealing with activities for the benefit of the public. It is an obligation upon a reasonable request to assist, for a fee or gratuitously, projects aimed at asserting and defending human rights[75] and an obligation upon request from the CBA to assist projects supporting the principles of a democratic state respecting the rule of law and improving the legal order of the Czech Republic.[76] The last provision which has not been mentioned is the direction to act towards the public in a way that persons requiring legal services choose an attorney-at-law freely and not under pressure.[77]

4. CONCLUSION: A "CODE OF ETHICS" RATHER THAN A CODE OF ETHICS

Let us briefly summarise the results of the analysis before evaluating them. Using a combination of two criteria (I. *ethical norms and conduct norms* and II. *private face norms and public face norms*) we have classified 105 paragraphs of the CBA's Code of Ethics into four categories. The most widely represented category is *private face conduct norms*, which represent approximately 67% of the CBA's Code of Ethics. Approximately one quarter of the analysed provisions are *private face ethical norms*.

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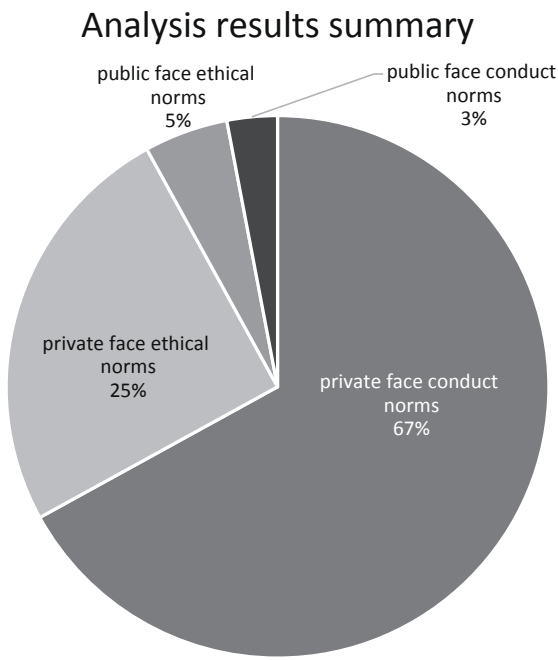
69 Art. 12(1) and Art. 15a(3) of the CBA's Code of Ethics.
70 Art. 13(3) of the CBA's Code of Ethics.
71 Art. 17(2) of the CBA's Code of Ethics.
72 Art. 17(3) of the CBA's Code of Ethics.
73 *"An attorney's statements in connection with the practice of law are factual, sober, and not knowingly false."*
74 *"In the interest of clients and other competitors, the attorney proceeds fairly in the competition with other attorneys. In particular the attorney does not use data which are knowingly false, misleading, and degrading another attorney…"*
75 Art. 18(1) of the CBA's Code of Ethics.
76 Art. 18(2) of the CBA's Code of Ethics.
77 Art. 30 of the CBA's Code of Ethics.

Public face ethical norms are considerably less represented, they are found in a mere 5% of the provisions analysed. The least represented are *public face conduct norms*, representing approximately 3% of the provisions analysed.[78]



How should the results be evaluated? It is evident that the text of the CBA's Code of Ethics does not contain many provisions aimed at areas that were classified as *public face norms*. *Public face conduct norms* and *public face ethical norms* combined represent less than 10% of all the provisions. In the case of a code of ethics focusing on attorneys-at-law it is not surprising that priority is given to issues concerning the attorneys, their clients, and the profession of attorneys. However, the intensity with which the emphasis is placed can be considered surprising. It becomes even more prominent once we realise that only 5% of these norms deal with ethics. It is hard to imagine that such a code of ethics can serve to build the trust of the public, if only every tenth rule

[78] Our results are consistent – although not entirely – with Nicolson's findings. He concluded that the *Code of Conduct of the Bar of England and Wales* largely contained private face conduct norms; the rest of the code was fairly evenly spread between public and private ethical norms. As regards the *Guide to the Professional Conduct of Solicitors* private face ethical norms were covered approximately to similar extent as private face conduct norm, while public face ethical norms were represented substantially fewer.

concerns the public.[79] In contrast to Nicolson we could perhaps forgive the Czech code that it fails to explicitly protect the interest of the environment or whistle-blowing, because these areas are gradually gaining in importance. However, it is much more difficult to forgive the scarcity of references to general justice and public interest. And this is not the only incompleteness. For example, the CBA's Code of Ethics does not cover politeness or honesty towards persons outside the proceedings before the court or a public body, and in particular there are no rules protecting an opposing party which is not represented by an attorney.

The share of *ethical norms* and *conduct norms* is also problematic. It would hardly be surprising if a candidate for admission to the Bar had the impression after reading the CBA's Code of Ethics that the manner in which s/he is designated in various situations is more important for the profession than the provisions concerning honesty. There is approximately one *ethical norm* to two *conduct norms*.[80] This despite the fact that a high moral standard is one of the cornerstones of the profession.

The above conclusions could be relatively simply resolved so that we could move from "code of ethics" to code of ethics.[81] The first solution is the simplest one, i.e., to be more prudent in calling a document a code of ethics. There is enough misunderstanding among legal professions[82] without adding more due to awkward naming. The intensity of the above impressions would be greatly reduced if the existing CBA's Code of Ethics encompassed only part two (Rules of Professional Ethics) and if the contents of part three (Rules of Competition among Attorneys-at-law) were enshrined in a separate set of guild rules.[83]

A review of the CBA's Code of Ethics and its separation into two documents would be slightly more complicated, yet not an unfeasible task. The first document would be dedicated primarily to ethical issues, the second would deal with other matters that the CBA considers important. (This is primarily because from the perspective of legislative technique in some cases it will make sense to add to the ethical norms a reference to the norms of etiquette or *mere regulation*, and conversely to occasionally add a provision with ethical overlap to *mere regulation*).

The research could be extended in the future by focusing on the issues of the practical use of the CBA's Code of Ethics. It would be possible to concentrate on the role of the Code of Ethics in the everyday operation of an office of attorneys-at-law by

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[79] Unless we apply a very narrow interpretation of justice and public interest and consider them satisfied by the possibility to find an independent attorney. While it is a classical concept of *adversarial advocacy*, in the Czech Republic this concept is considerably less common than in Anglo-American legal systems. For other possible concepts of the Bar (*responsible lawyering*, *moral activism*, *ethics of care*) see PARKER, C. – EVANS, A. *Inside Lawyers' Ethics*. Cambridge: Cambridge University Press, 2006, p. 5 et seq.

[80] NICOLSON, *c. d.*, pp. 65–66.

[81] For proposals cf. NICOLSON, *c. d.*, pp. 67–69.

[82] Cf. for example different concepts in NICOLSON – WEBB, *c. d.*; HERRING, *c. d.*; BOON, A. *Lawyers' Ethics and Professional Responsibility*. Oxford: Hart Publishing, 2015; or LERMAN, L. – SCHRAG, P. *Ethical Problems in the Practice of Law*. 4th ed. New York: Wolters Kluwer, 2016.

[83] Such a simple intervention would increase the percentage of *private and public ethical norms* to almost 45%. (This is, of course, a gross figure because the separation could not be purely mechanical. But even with such a reservation it would represent major progress.)

investigating through structured interviews with attorneys-at-law,[84] and on the disciplinary practice which has the potential to stimulate the area of ethics and a further discussion of the issues.[85]

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[84] For example, the researchers of one of the cited papers held structured interviews on the importance of codes of ethics directly with attorneys-at-law. See WILKINSON – WALKER – MERCES, *c. d.*, p. 653 et seq. They concluded that the code of ethics in Ontario is basically not used in practice. And in cases when it is applied, it usually inhibits independent moral deliberation.

[85] In case of the Czech Republic, the access to results of disciplinary practice is limited by the fact that disciplinary proceedings are not public, which means that there is a lack of data to be analysed in detail. An alternative could be analysis of the column dealing with disciplinary practice included in every issue of the monthly Bar Bulletin.