

## Summaries

*Justitiële verkenningen* (Judicial explorations) is published nine times a year by the Research and Documentation Centre of the Dutch Ministry of Justice in cooperation with Boom Juridische uitgevers. Each issue focuses on a central theme related to judicial policy. The section *Summaries* contains abstracts of the internationally most relevant articles of each issue. The central theme of this issue (vol. 31, nr. 3, 2005) is *Professional ethics*.

### **Confidence challenged; legal professionals between profession and commerce**

*E. Niemeijer and M. ter Voert*

This article describes the changes that took place in the professions of lawyers, notaries and bailiffs and the ethical dilemmas these changes give rise to. Legal professions produce confidential goods. Because clients have less information than providers (information asymmetry) they cannot judge the quality of the service themselves. Regulation by a legal monopoly and disciplinary systems should protect clients from opportunistic behaviour. However, changes like commercialisation, interdisciplinary practices, increasing office sizes, specialization, internationalisation and the growing heterogeneity within the professions evoke ethical strains. Traditional mechanisms of regulation do not seem to be effective enough to prevent and detect misconduct.

### **Problems of integrity for lawyers and notaries in relation to organised crime**

*F. Lankhorst and J.M. Nelen*

This article sheds some light on the nature and extent of unacceptable links between lawyers and notaries on the one hand, and criminals on the other. Although the number of cases of culpable involvement of lawyers and notaries in organised crime is rather small (coming from occasional cases, rather than from any clear empirical end or statistical basis), the case studies and interviews the article is based upon, contain several indications that: the specific features of the professions make it attractive to some criminals to involve professionals in their activities, notably the financial and reputable credibility a lawyer's or notary's involvement can provide; the legal

professional privilege and confidentiality provide a first-line protection against investigation; and, the legitimate private interactions between professional service providers and clients generate a cloak under which dishonest relationships can hide. With regard to lawyers, the most striking evidence of culpable involvement in the Netherlands refers to the assistance in various forms of money laundering schemes, and to passing through confidential information to unauthorised persons, and the intimidation of witnesses. Cases of culpable involvement of notaries mainly involve transactions on the property market, the establishment of legal entities to shield criminal activities, and drafting fraudulent deeds to enable money laundering. In general, rather than being considered as perpetrators or accomplices, the notaries involved in this sort of activity, take an insufficiently critical stance with regard to the facts as presented to them.

#### **The ethics of Dutch civil law notaries**

*Z.D. Laclé*

The Dutch notary is a public officer that has the exclusive authority to execute authentic deeds in order to safeguard the legal security and legal protection of citizens. The civil law notary practises his office as an entrepreneur. With the coming into force of the new notarial code the structure of fixed tariffs and the access obstructing rules have been abandoned. In five years changes have become visible within the tariffs (increased differentiation) and the supply and demand of notarial services. Are there any trends noticeable within the notarial professional ethics? In the perception of notaries the compliance of conduct rules by the profession is diminishing. Notaries feel that the balance between the public tasks and the entrepreneurial demands is distorted and that the scale is inclining towards the merchant values. Public notions of duty of care and quality of the deeds recede to the background while entrepreneurial benefits enter the stage. While it is clear that developments within a profession cannot be solely accounted to shifts in the notarial market, within the profession no incentives for compliance other than the disciplinary measures exist. In order to secure the public tasks and the traditional ethics, notaries should take more efforts in securing self-regulation. That is to say by reviewing peers and introducing control mechanisms on the firm level.

**The bailiff; businessman or functionary?**

*A.W. Jongbloed*

In 2001 the Judicial Officers Act (laws of 26 January 2001, Bulletin of Acts, Orders and Decrees 2001, 70 and 71) came into force. Until that moment bailiffs could only operate in the district where they had set up their office, but from that moment they could operate in other parts of the Netherlands as well (art. 3 JOA; they are only obliged to act in the district where they had set up their office, art. 11 JOA). More competition most of the times is good for consumers, because prices will be lower. But in this case it probably is less preferable: more bailiffs from different towns will seize more goods to recover the claim of their principal. Consequently, creditors are less willing to give the debtor some delay in paying the debt. If they do give some delay without seizing the debtors goods, other creditors will seize those goods, will sell them and will strip the debtor of his assets. And if creditors are seizing the debtors assets, it is easy to sell those assets to collect the money. So bailiffs sometimes find themselves in an ethical dilemma if they know from their own experience that the debtor will pay the debt within a short period: seizing the assets means more costs, not seizing the assets can mean that the debtor is stripped of these assets. Another dilemma is that selling the debtor assets sometimes will bring in only a very small amount of money and that the costs of selling the debtors assets will be much higher. Another question is: can the bailiff charge the debtor the statutory costs and give the creditor (his principal) a discount, because this creditor gives him a lot of assignments which means that the bailiff can work more cost-effectively? The main topic at the moment is: is it bad that bailiffs have changed their working-method? And if that question is answered affirmatively, how could that procedure be changed? Only the legislator can change the law. But as the 2001 law will be evaluated, it is not to be expected that this will be done within a short period of time.

**The auditor; independence in a multiple force field**

*A. Schilder and W.H.J.M. Nuijts*

An essential part of the auditor's work is to certify corporate financial statements. Through these auditor's activities, the credibility of such statements is enhanced. Financial reporting schandals like Enron, Ahold and others have created public doubts as to whether the auditor still performs his duties with the impartiality and independence required for the job. This public discontent is based on the assumption that in performing his tasks the auditor needs to act in accordance with the public interest, irrespective of other interests that may be involved (interests of the enterprise, interests of the (non) executive directors or his own interests (an auditor generates income with certification activities)). This article describes the ethical dilemmas an auditor may encounter when performing his job. It also focusses on core principles like expertise, impartiality and independence (as elaborated in professional ethics as well as pre- and post-Enron regulation) which are being considered as crucial standards for a trustworthy audit performance.

**Tax advisors caught between two loyalties**

*A.L.J. Grotenhuis*

Should tax-advisors take other interests into consideration then just the ones of their clients? The tax-administration tends to expect that the advisors refrain from advising tax-evasion schemes. In return the tax inspectors are prepared to manifest a greater willingness for preliminary consultation on the fiscal consequences of upcoming transactions and be more willing to compromise on pending tax matters. This idea was presented to the leading associations of tax-advisors as a draft of a code of conduct. Though this approach was rejected by the organizations, the administration has not abandoned it. Within the next years a number of larger enterprises will be presented a similar offer, as a part of a new strategy of cooperation between tax authorities and trustworthy businesses. This is expected to promote foreign investment in the Netherlands.