



Robert Schuman

*Confidentiality:
The Primary and Fundamental
Right and Duty of the Lawyer*

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Confidentiality: The Primary and Fundamental Right and Duty of the Lawyer

Introduction

Current Challenges to Core Values

The legal profession today and in particular its core values – independence, confidentiality, loyalty and avoidance of conflicts of interests - face several challenges.

The plethora of scandals involving Enron and other major corporations have shown amongst executives, auditors, analysts, investment bankers and lawyers serious conflicts of interest. The international alliances and networking, productivity pressure, complex financial matters, and most significantly globalisation have created an explosion of badly resolved conflicts of interest. Some theories are being used to circumvent the evangelical prohibition to serve two masters, like Chinese walls, less stringent ethical rules for sophisticated clients, etc. But the reality is an ever-growing trend to soften the prohibition of conflicts of interest.

The principle of independence, the epitome of the legal profession, is also facing various challenges. MDPs, particularly between lawyers and accountants (although, banned by the CCBE and by the ABA and subsequently repudiated by the ECJ in the NOVA case in February 2002), are still here and supported in certain jurisdictions. There is also the proposal to allow banks, insurance companies and even supermarkets (“Tesco lawyers”) to offer legal services to the public.¹

Institutionally, the independent self-regulatory powers of lawyers are in question with claims that society has overvalued professional independence, delegated too much of their own oversight responsibility to the organized bar and that the system fails to address legitimate public concerns, particularly those involving cost and accessibility of legal services, the protection of social interests and the sanctions for lawyer misconduct.

Confidentiality, the "primary and fundamental right and duty of the lawyer" (CCBE Code 2.3.1), is also under siege. The revised ABA Model Rules has broadened the confidentiality exception in order to prevent the commission of certain crimes². In addition, the US Patriot Act 2001 allows the monitoring of conversations between terrorist suspects and their lawyers. Both United States and EU regulations have made the lawyer a "gatekeeper", requiring him to report any suspicion of money laundering. The SEC

¹ Rhodes, Deborah, *In the interest of justice*, 2002, p.19.

² ABA, Model Rules of Professional Conduct, amended 2002, Rule 1.6 (b) (1)

regulations stemming from the Sarbanes-Oxley Act, oblige lawyers to report suspected violations of the securities laws etc. I will analyse the last two in greater detail.

The Quest for Reform of the Legal Profession

The new obligations for lawyers to report and whistle blow on suspected money laundering imposed by the money laundering legislations and the Sarbanes-Oxley Act have not come out of the blue.

One must bear in mind that a lawyers' active assistance and/or passive acquiescence regarding client misconduct is seen by many as having contributed to public health and financial disasters. In the US for example, some lawyers knew far more about the dangers of asbestos and tobacco than either regulatory agencies or end consumers. Tobacco companies deliberately channelled compromising scientific research through law firms in order to claim privilege, obtaining disclosure exemption. Misconduct with savings and loans associations have contributed to catastrophic projected losses costing taxpayers \$200 billion³.

There are some complaints about the organised bar. In the US, for instance, they include dismissing 90% of complaints against lawyers; acts of litigation misconduct going unreported; and that the current system offers overly zealous representation for those who can afford it and inadequate representation for everyone else. Several surveys have shown that only one-fifth of those surveyed felt that lawyers could be described as "honest and ethical" and lawyers' ethics rank substantially below those of other occupations. The belief is that the root of these problems lies in a lack of public accountability and the bar has failed to produce the necessary reforms to address it.

Proposals for Confidentiality Reform

Reformation promoters claim it is necessary to examine whether the current duty of confidentiality adequately balances the needs of clients and the legal system more generally with those of third parties and the general public interest. They argue that:

- a. The legal profession itself, rather than clients or society as a whole, which primarily benefits from the rules of confidentiality⁴.
- b. Except in relatively rare circumstances, lawyers cannot reveal confidential information even in order to prevent physical or mental harm, imprisonment of the innocent, third parties' financial ruin, etc.
- c. Clients can use confidentiality as a "device for cover-ups"⁵ by giving incriminating documents to lawyers.

³ Rhodes, Deborah, *op. cit.*, p.109.

⁴ Fischel, Daniel R. "Lawyers and confidentiality", *University of Chicago Law Review*, 1998, p. 3.

⁵Hazard, Geoffrey, "A historical perspective on the attorney-client privilege", 66 *California Law Review*, 1978, p. 1062.

- d. The need of confidentiality in order to provide an effective defence is undermined by the practise of some lawyers encouraging clients to fabricate facts by outlining the law before asking clients to commit themselves to a version of the facts.

In conclusion, the values of privacy, loyalty, promise keeping and non-malfeasance, which traditionally have been deemed to support the confidentiality principle, are insufficient to justify the width and rigidity of the lawyer's duty of confidentiality, and the benefits of confidentiality do not outweigh the disadvantages.

Conclusions on the New Reporting Obligations

The new reporting obligations raise many theoretical and practical concerns for the legal profession:

- A. Theoretical concerns
 - a. Mandatory reporting obligations enforced by criminal penalties directly impact the bar's independence and lawyers' confidentiality, central institutions of the worldwide legal system.
 - b. Even if it may be difficult to draw the line, lawyers' confidentiality should be maintained at all costs as an essential condition of access to law and justice and any obligation regarding information restricted strictly for lawyers when acting as financial intermediaries.
 - c. Trust and candour, necessary for professional relationships, cannot survive if lawyers assume "Gatekeepers" obligations.
- B. Practical concerns
 - a. Unlike, financial institutions subject to reporting obligations, lawyers do not have the experience nor the means to investigate clients and their activities.
 - b. What is the necessary level of suspicion to create an obligation to report? A relaxed attitude may lead to accusations of breaching the reporting obligation where as a strict attitude may lead to over-reporting to government authorities of innocent conduct. Corporate lawyers will tend to report vast amounts of information, most entirely benign, or may face liability for failing to report what later results in criminal acts.

- c. In a world where lawyers are forced to spy on everything management does, second-guessing business decisions and ratting out to the board, company officers may be reluctant to seek legal advice. However, if they do not know what the law is, there is an even greater chance they will break it.
- d. Whether the reporting requirements will materially advance society's interests in combating money laundering, in light of existing legal and ethical rules and the potential impact on the administration of justice is not clear. Far worse is a rule requiring lawyers to report directly to regulators, policing their clients rather than representing them⁶.

I fully agree that all efforts should be done to prevent illegalities within the profession, and if lawyers are guilty of criminal acts they must be punished like any other citizen. However, the function of the lawyer is to advise and defend clients – not to control, be a whistleblower or gatekeeper. Disclosure and whistle blowing will cause more harm than good and the public interest will be better served with maintaining confidentiality duties and discontinuing reporting obligations. The legal profession has a special function worldwide - legal advice and defence of citizens. Investigation and repression are responsibilities of community institutions. Sociologists⁷ distinguish between three facets of institutions: the dispute resolution (judges), guardianship of law (lawyers) and enforcement (police). The informing obligations imposed on lawyers, which convert them into police informants, are alien to the lawyers' responsibilities.

The imposition of reporting obligations to lawyers may stop a few criminal cases, but undermining trust and confidentiality, which are at the basis of the justice system, may weaken the administration of justice.

The ethical principles of all citizens being obliged to report any criminal offence they are aware of to appropriate authorities and the obligation to keep the information received in confidence so justice can be administered adequately often conflict with one another. In this clash of ethical duties, the latter prevails. In other words, lawyers are exempted from the general obligation of reporting precisely to protect a higher social good-justice. If society invites citizens to communicate to lawyers all the relevant facts of their case because it is needed for the proper administration of justice, and then that same society requires lawyers to report such facts to the authorities, the justice system may become perverted. If confidentiality is relaxed and one of the basic principles of the administration of justice diluted, the legal profession and justice will suffer.

⁶ Fox, Lawrence quoted by Patti Wailmeir, "Lawyers on sentry duty", Financial Times, 6 November 2002.

⁷ Cotterrell, Roger, The sociology of law, 1992, p. 179, who cites Schwartz, Richard and Miller, Lewis, Legal evolution and societal complexity, 1964.

Today, society seems to prefer security over justice. If the lawyers' obligation to report to the authorities is extended, citizens may lose confidence and the judges left alone in administering justice leaving the legal profession tarnished and the fundamental human right of defence impaired.