

Lawyers and moral activism: confidentiality versus candor

“ Standards of professional responsibility are affected first, by concepts of moral ethics; second, by the need to keep the adversary system of litigation operational; and third, by a hope that sound political values will motivate lawyers when they find themselves clothed with coercive, governmental power. When a question about a lawyer’s professional duty arises, an analyst must consider not only which of the three approaches should control the outcome, but in addition the outcome that the chosen approach demands. So understood, the task of deciding professional responsibility questions becomes as complex as that of deciding any other legal question, and it is no wonder that confusion abounds when the complexity is not ever appreciated. “

William Nelson

Setting the scene

The concept of legal ethics has been already very much discussed and the literature written in connection to it exceeds by far people’s expectation. Nevertheless, apart the fact that the subject is highly debated, it has not been enlightened completely and a great majority of those whom, with or without their will, become clients or involved in judicial matters still find the legal apparatus similar to what Charles Dickens described in Bleak House.

We will draw our attention to the adversary legal system where the lawyers have a very important role and the extent to which a judge or a jury might decide on the verdict depends on the convincing power of the prosecutor, respectively the advocate. There are many times when especially the lawyers of the defendant find themselves in difficult position involving moral precepts or ignoring their own beliefs in assisting and defending a certain client. This is why the rules of professional responsibility, widely known under the name of legal ethics, have been created. Their attempt is to solve the conflicting situations; nonetheless reality shows that most of the time the lawyer has to decide by himself/herself whether and how he/she will carry out the client’s request when conflicting ethical principles arise. We will focus on the duty of confidentiality versus the duties to the administration of justice or of candor, two of the most debated rules ever. Discussion upon existing specific formulations of the confidentiality rules will be brought forward and a conclusion of the role of this extreme partisanship lawyer-client will try to be issued.

There are many codes of rules that embody principles of legal ethics, some of them going much more in detail than others. To give an account of the diversity, in the United States of America practically every state has its own code of professional responsibility. There are also models, used as example when new bodies of ethical rules are generated; such examples are **The ABA Model Rules of Professional Conduct** or **The Rules of the NSW Bar Association**, to refer only to the American extremely mediated side. Very often the form of very specific rules such as the Rule of Confidentiality differs slightly from case to case, which leads to quite significant differences in the actual pleading sustained in the courts. In the United States, for

instance, a document of Professional Conduct Rules may differ in Idaho in specific matters from the corresponding document in California and so on. The ethical rules have not been homogenized at all and this represents one of the most important factors assessing the lack of their enforcement and the difficulty of implementing them.

As William Nelson stipulated in one of the best ever written books in the field of legal ethics, Moral Ethics, Adversary Justice and Political Theory: Three Foundations for the Law of Professional Responsibility (see the introductory quote), moral ethics constitutes a major factor affecting the standards of professional responsibility. What is strange enough, but also very true, is that the moral ethics factor is underlined and opposed at the same time by the second major term: keeping the adversary system of litigation operational. The scope of the hereby paper completely acknowledges and accepts the mutual interaction between these two factors. After all, without having to ensure the survival and good functioning of the adversary legal system, all legal ethics would not be justified and the lawyer would be free to choose between two completely opposite sides: either decide to help the client and do everything to prove him innocent or refuse to take the case no matter how he got engaged in it, either assigned or contacted.

Duty of confidentiality versus rules of candor

When talking about the duty of confidentiality, we have to see its function against the background of rule of law ideals, to paraphrase one of the ideas expressed by Bottomley and Parker in Law in Context, Second Edition. On the one hand the duties of candor impose a set of positive obligations to bring particular information to the court; for instance, almost all bodies of ethical rules have included the obligations to inform the court of legal authorities directly on the point, whether or not they help the client, and there are also duties to correct previous evidence which is discovered later to be untrue. Most of the time there is also an obligation of “disclosure” of the documents, but this can vary substantially from jurisdiction to jurisdiction and it is applied more likely in civil cases and not so often in criminal cases. On the other hand, the duties to the client restrict disclosure of any other kinds of information that might seem relevant otherwise. Lawyers cannot (without the client’s consent) volunteer information that harms the client because that would certainly breach the principle of partisanship.¹ Moreover, they cannot divulge directly to the court or to prospective witnesses the client’s communications, except the case when the client gives his consent. Below, we will analyze some concrete formulations of the Rules of Candor toward the Tribunal in opposition to the Rules of Confidentiality toward the Client.

We take as main example, the Rules of Professional Conduct Governing Lawyers applied by the state of Idaho from 1993. Concerning the rules of candor, the form is given below:

¹ Bottomley and Parker describe the principle of partisanship as follows: “The principle of partisanship generates a duty that lawyers must act only in the client’s interest and not have a conflicting obligation to anyone else. It also generates a duty that their own undeclared interests must not intrude. The duty of confidentiality, which prevents a lawyer from disclosing a client’s communications without the client’s consent, can also be regarded as stemming from the principle of partisanship.” (Law in Context, Second Edition, page 152)

Rule 3.3. Candor toward Tribunal

(a) A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to tribunal;
- (2) fail to disclose a material fact to tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
- (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer, which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

In contrast with the rules of candor and for the purpose of the discussion we shall naturally state the Rules of Confidentiality from the same document:

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in (b)

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime, including disclosure of the intention to commit a crime; or

[The ABA Model Rules of Professional Conduct differs from Rule 1.6(b)(1) and states:

"to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm;"]

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of a client.

We see that the rules refer back to each other and they are interdependent in a way. It has to be stated that Idaho is considered from the perspective of the rules of professional conduct as a "typical state"; thus it does not contain very original and unique perspectives, as it happens for instance with the state of California; for example the Californian Professional Conduct Governing Lawyers has within the section concerning the client-lawyer relation a special paragraph regarding conflicting

interests due to sexual relations between client and lawyer. An extract from this document is the following:

A member shall not:

- (1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or
- (2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or
- (3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.

Even if this document is rather inconclusive for the declared research topic of this paper, it points out that specific clauses referring to the relation lawyer-client are in some cases formulated in high detail and very particular context. Thus, the regionalism and cultural relativity are applied also in the case of legal ethics; we see the variation even from state to state (it is true, nonetheless, that California in general has very particular laws and clauses and it always distinguished itself among other states).

Discussing the Idaho body of ethical rules in particular, nevertheless without reducing the generality more than necessary, we can find obvious implications and links to practically the most important part, the relation between the rules of candor and the rules of confidentiality, which is the disclosure of information adverse to the client (reference is in provision (b) of the Rules of Confidentiality) What we notice is that the confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person (even if that is again under the auspices of he “reasonably believes” so). However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. This rule seems to be generally valid, no matter in what measure the legal ethics is complied with. The consultation part is decisive most of the time. As a matter a fact they could constitute a separate process, apart the traditional naming, blaming, claiming, with maybe the same significance.

We could distinguish several situations, which are linked to the partisanship principle, in particular to the rule of confidentiality (treated versus the rules of candor). First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. Similarly, a lawyer has a duty under the Rule 3.3 above not to use false evidence. This duty is essentially a special instance of the duty to avoid assisting a client in criminal or fraudulent conduct. Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated the existing conduct, because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. Now, a difficulty arises; it is always subjective to “know” that the conduct is of that character. In legal terms, pairs like “reasonably believing” are used to justify a major rate of subjectivity and arbitrariness. There is also another implication, and that is treated in the ABA Professional code, namely the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or

substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer, again, reasonably believes is intended by a client.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. The complexity predicted by Nelson, which leads to obscurity from outside the legal system, is revealed here perfectly. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes it is necessary, where "reasonably believes" remains after all at the latitude of the lawyer.

Although the moral dilemmas for the lawyers are not at all eliminated, the principles of professional conduct attempt to diminish them. It is definitely different to do something because you are compelled to and your moral guilt does not matter any longer; on the one hand and it is far easier for lawyers to decide on something themselves when they have an official guide, in this case the rules of professional conduct governing lawyers' activity.

Applying theory to practice

How would a lawyer react in cases where he is faced with the moral dilemma? Studies show that there are not few the cases when lawyers are confronted with cases of this type. Let us take for the sake of the discussion a very clear and concise example offered by Bottomley and Parker. We are dealing with a serious criminal case. Darius is accused of murder. He admits to his lawyer, Liz, that he did it in cold blood and in full control. The question is how would Liz react having this information? The authors of Law in Context come to the conclusion that under the principles of legal ethics, "Liz can do everything except become a mouthpiece for Darius to assert positively ". Thus, Liz may continue to act for Darius by probing the prosecution's case and argue for an acquittal on the grounds that the case has not come up to the required standard of proof beyond reasonable doubt. In this respect Bottomley and Parker include one of the rules of the NSW Bar Association, which is not found in the Idaho principles of professional conduct, for instance: "the barrister shall not falsely suggest that some other committed the offence charged and shall not set up an affirmative case inconsistent with such confession but may argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged or that for some reason of law the accused is not guilty".

Practically Liz can, under the present legal ethics rules, discredit truthful witnesses of the prosecution on the ground of inconsistencies in their declarations. It has to be said that most of the legal ethicists disagree about the permissibility of this rule. There have been initiated more projects of legal rules so that the lawyer should not be able to discredit truthful witnesses, but at the same time most of the lawyers (we talk about the US dimension mainly) regard such proposal as turning against the good functioning of the adversarial system as a whole. And we turn back to Nelson's argument, that both the concepts of the moral ethics and the operability of the

adversary system are factors for the standards of professional responsibility. As long as they will operate together — and reality shows an increase in the lawyers' emporium in US and in their importance --- there will always be the need of a compromise at a certain point.

Liz might also choose to resign, but there are also rules concerning withdrawal. It is very unlikely that, nowadays, in a serious process, the advocate will be permitted to withdraw on grounds of being drawn in too far. There are ethical restrictions on refusing to act; nevertheless they do not make the object of the present paper.

Liz finds herself in a moral dilemma. The legal ethics rules have for her two contradictory functions: on the one hand, she cannot reveal anything of the horrible murder Darius confessed to her; that is indeed very difficult, even if she withdraw from the case she still knows this, she practically finds herself in the same position as a priest. That is the price of the confidentiality. On the other hand legal ethics, by the duties to the administration of justice (candor), requires her to disclose facts that might be of real danger, that she reasonably believes should be disclosed; moreover she can still act for her client on the grounds granted to her by the same legal ethics precepts.

It is not for anything that Dickens saw all the legal system as a bleak house, taking into consideration the almost paradoxical situations above. Nevertheless this is what happens in the adversary system very often and nevertheless the adversary system survives as it survived for so much time. US, the most litigious society in the world employs the adversary system and it seems to work. There are problems but there are fixed during the process.

Instead of conclusion

No specific conclusion can be formulated concerning the conflicts within the legal ethics itself. The hereby paper pleads that we are not in measure to draw unique conclusions about the role or function of the apparatus of legal ethics. It exists, it is used, sometimes it fails, and sometimes it is adjusted. It is an entity and a process in the same time. We do not go too far by saying that in a way legal ethics survives by itself. It is at least a recurrent process; a new rule will be a function of the old ones taking into account the experience accumulated by the servants of law.

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