Lawyers' Ethics and Professional Responsibility

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The Lawyers

Lawyers and the Rule of Law

Arguably, the adversarial system is the system that best supports the rule of law based on formal legality. It embodies the institutional separation of powers[27] and the rule of law.[28] Most importantly, within the framework of an adversarial trial, lawyers have the platform to hold the liberal state to its promises of liberty and equality. From this position, the judiciary and legal profession are strongly placed to control government powers and restrict government immunities.[29]

Values of Lawyers in an Adversarial System

The adversarial system dictates the values of lawyers working within it. The adversarial trial of the common law system demands that advocates do their utmost for their clients. This emphasises the value of loyalty. However, while lawyers are advocates for their clients they owe balancing duties to the court. This emphasises the value of independence.

Weber thought that the rational values of lawyers dominated the intellectual system of the law. Once the law is formulated, lawyers develop and pass on the skills and ways of thinking necessary to maintain it. Weber perceived that the independence of lawyers from political and other influence were essential to the autonomy, generality and universality of law as a system. Hazard and Dondi, US legal academics, argue that the effectiveness of the rule of law depends on 'a legal profession sufficiently autonomous to invoke the authority of an independent judiciary'.[30]

Lawyers working in different kinds of legal systems have different degrees of independence. Civil law systems allow lawyers less scope to control proceedings than common law systems do. Communist regimes are often characterised as allowing lawyers very little independence. Adversarial systems place a premium on the lawyer's separation from all influences outside the framework of professional values.

[27] See generally TC Halliday and L Karpik, *Lawyers and the Rise of Western Political Liberalism* (Oxford, Clarendon Press, 1997).
[28] TC Halliday and L Karpik 'Politics Matter: A Comparative Theory of Lawyers in the Making of Political Liberalism', in Halliday and Karpik, ibid, 15, 21 and 30.
[29] N MacCormick, 'The Ethics of Legalism' (1989) 2(2) *Ratio Juris* 184.
[30] Hazard and Dondi (n 3) 1.

The lawyer's social role tends to reflect the social system in which it evolved. Consider the following example:

> As expressed by law professors at the University of Havana, 'the first job of a revolutionary lawyer is not to argue that his client is innocent, but rather to determine if his client is guilty and, if so, to seek the sanctions that will best rehabilitate him.' Similarly, a Bulgarian attorney began his defence in a treason trial by noting that: 'in a Socialist state there is no division of duty between the judge, prosecutor, and defence counsel. ... The defence must assist the prosecution to find the objective truth in a case.' In that case, the defence attorney ridiculed his client's defence, and the client was convicted and executed. Sometime later the verdict was found to be erroneous, and the defendant was 'rehabilitated'.[31]

Q1.16 Which formal version of the rule of law does the example illustrate?

Q1.17 What point about the lawyers' role is the author seeking to make?

The Ideology of Advocacy

The dominant belief system of legal professionals in an adversarial setting has been called the ideology of advocacy.[32] It is traceable to foundations laid by Thomas Hobbes in positivist legal theory. In a society of egoistic individuals pursuing their own ends the state provides order. It commands loyalty and provides each individual with the prescribed space to pursue their own ends. This space is governed by rules that, according to William Simon, are 'artificial, impersonal, objective and rational'.[33]

The role of the judge is to interpret the sovereign's intention. The role of the lawyer is to explain to the citizen how this will affect him and to pursue his rights. A number of writers suggest that the ideology of advocacy is based on the twin principles of neutrality and partisanship. The idea behind these two principles is that every individual is entitled to a champion who will take their side against the whole world.

Simon suggests that two other principles sustain the ideology of advocacy. Simon's third principle is procedural justice. This is the idea that the legitimacy of a situation lies in the way it is produced, for example, by a judicial proceeding. According to this idea it is possible to act justly by conforming to procedure. The second principle is professionalism. In this context, it is the

[31] M Freedman, 'Are there Public Interest Limits on Lawyers' Advocacy?' (1977) 2 *Journal of the Legal Profession* 47.

[32] WH Simon, 'The Ideology of Advocacy: Procedural Justice and Professional Ethics' (1978) *Wisconsin Law Review* 29.

[33] Ibid, 40

idea that the development of key disciplines should be left to the practitioners of relevant disciplines. This act of delegation rests on the belief that experts are best placed to identify and resolve the ethical dilemmas produced by a complex role.

Most writers on the ideology of advocacy are critical of its implications. They are particularly critical of the fact that the legal mind-set is fundamentally affected by the ideology of advocacy. Therefore, lawyers are adversarial even when the context does not demand it, and potentially against the interests of their clients.

Some critics have sought refinements or adjustments of the ideology of advocacy in codes of conduct and the training of lawyers. Simon argues that these cannot change the underlying basis of the ideology of advocacy. Only deprofessionalisation of advocacy can fundamentally alter the ideology. Today, this seems like less of a fantasy than when Simon first proposed it. In order to explore the implications of the rise and fall of the ideology of advocacy it is necessary to trace its evolution through the legal profession and in the courts.

The Art of Advocacy

There are numerous books about what constitutes good advocacy. Early versions approached advocacy as an art.[34] This suggests that advocacy is often viewed as the expression or application of human creative skill and imagination to the task of presentation in court. The books generally cover the whole process, from pleading cases, presenting evidence, introducing and cross-examining witnesses and making speeches. As this shows, good advocacy is determined by context. It is shaped by the legal system, the culture and the rules of court. The performance of English barristers has always been assessed on their ability to persuade while assisting the judge to reach a just decision.

There are many iconic advocates. This section takes examples from the lives of two: Thomas Erskine and Henry Brougham. These two are often cited as proponents of neutrality and partisanship, respectively. In many respects they also demonstrate some of the qualities required to be an advocate and, indeed, a good lawyer of any kind.

i. Efficiency and Diligence

Being helpful to the court involves assessment of what the circumstances and the case requires. The thorough, honest and skilful presentation of cases saves court time and reduces expense. Roscoe Pound related having seen a record in which 'a boy, asleep in the well of the court, fell and broke his neck. The bar-

[34] The Hon Sir Malcolm Hilberry, *Duty and Art in Advocacy* (London, Stevens and Sons, 1946); LP Stryker *The Art of Advocacy: A Plea for the Renaissance of the Trial Lawyer* (London, Simon & Schuster, 1954); R Du Cann, *The Art of the Advocate* (London, Penguin, 1964).

rister speaking at the time was, in the spirit of 'comradely humour', indicted by the Circuit 'for murder with a certain dull instrument, to wit, a long speech of no value'.[35]

Pound's anecdote illustrates the fact that the Bar has its own standards of rhetoric. It also shows how poor advocacy was discouraged by peer pressure. The pressure to be efficient did not mean that the court process was perfunctory. As a visitor from the US noted:

> Patience and thoroughness is the rule of the Bar and the Court; time is never more than a passing consideration and counsel are permitted to exhaust the argument ... no warning light and cutting short as in the US Supreme Court—'Justice is seen to be done.'[36]

In fearlessly representing their client, barristers were required to be politely persistent if the judge did not follow their point. They sometimes had to be politely insistent if the judge was, in their view, wrong in directing the evidence.

ii. Persuasion

Good advocacy is persuasive, potentially to a judge or to a jury. For the judge, the advocate must marshal the legal arguments and present them convincingly, respectfully and without arrogance. The jury may need emotional or psychological anchors as well as rational argument. To do both these things with economy and confidence, while marshalling the evidence and the law, is a complex and demanding set of operations.

The first task of the advocate is to decide the organising theme of the case, to which all the individual points lead. Arnold suggests that Erskine's approach was that:

> In every case he proposed a great leading principle to which all his efforts were referable and subsidiary. ... As the principle thus proposed was founded in truth and justice, whatever might be its application to the particular case, it necessarily gave the whole of his speech and air of honesty and sincerity which a jury could with difficulty resist.[37]

The second is to find a form of presentation that is natural and appealing. With juries it is important to communicate effectively. Thomas Erskine was said to have been particularly successful at this, whereas Brougham was awkward with juries and seldom successful in persuading them. They must make their theme accessible and convey a sense of importance of the issue to be decided. Arnold remarked on Erskine's

[35] R Pound, *The Lawyer from Antiquity to Modern Times: With Particular Reference to the Development of Bar Associations in the United States* (St Paul, MN, West Publishing, 1953) 127.
[36] B Hollander, *The English Bar: The Tribute of an American Lawyer* (London, Bowes, 1964).
[37] H Roscoe, *Lives of Eminent British Lawyers* (London, 1830) 381.

> ability in a single speech, to direct effective persuasion towards the predisposition of judges and jurors even when these two classes of auditors were differently inclined; the entire harmony of language, thought and purpose which marks all his pleas; and, above all else, his ability to make inescapable the *public* significance of each case for which he accepted a brief.[38]

Erskine's approach is illustrated in an extract the trial of Tom Paine. Erskine concluded a long speech with a parable: Jupiter and the countryman. The tale deals with the importance of tempering power with reason. It is an allegory of the relationship between the state and its citizens:

> You all remember, Gentlemen, the pleasant story in that fable of his respecting the Countryman and Jupiter they were conversing with great freedom and familiarity on the subjects of heaven and earth; the countryman listened with great attention, and acquiesced in the conversation so long as Jupiter tried only to convince him by reason and argument; but the Countryman happening to hint a doubt as to the truth and propriety of something which Jupiter had advanced, he instantly turned round and threatened him with his thunder: No, says the Countryman, if you up with your thunder, I believe you are in the wrong; you are always wrong when you appeal to your thunder; as long as you have reason on your side, I believe you may be right, but I cannot fight against thunder.[39]

In this extract, Erskine gently suggests that the heavy handedness of the state indicates that it has lost the argument, and hence the claim to act legitimately in prosecuting Paine.

Effective advocates use the rules that circumscribe their behaviour to their advantage. For example, the prohibition on venturing an opinion on the innocence of their client is overcome by conveying confidence in their client by their manner.[40] This is arguably much more effective than a hollow and inauthentic verbal expression of faith in a client's innocence.

Evolution of the Ideology of Advocacy in England and Wales

Lawyers have a claim to be agents in the formation of the modern, democratic state. Leading advocates were engaged in social movements in the eighteenth and nineteenth centuries. Indeed, they won some of the important victories in the struggle for civic equality and human rights. Barristers were often campaigners, politicians and lawyers. As the public face of a battle for democracy they could become popular heroes.

[38] CC Arnold, 'Lord Thomas Erskine: Modern Advocate' in TW Benson (ed), *Landmark Essays on Rhetorical Criticism* (Davis, CA, Hermagoras Press, 1993) 89, 92.

[39] *The Genuine Trial of Thomas Paine, for a Libel Contained in the Second Part of Rights of Man* (London, Guildhall, 1792), www.constitution.org/tp/trial_of_thomas_paine.html, accessed 23 January 2014.

[40] D Pannick, *Advocates* (Oxford, Oxford University Press 1992) 154.

Lawyers agitated for a legal system that both reflected and could facilitate the social and political changes that they promoted through the causes they supported. Their views on the proper disposition of lawyers towards society, their clients and the courts, influenced the legal professions, the law and lawyers' self-perception. Their stirring phrases continue to be quoted in arguments about the proper role of lawyers. The voices of Thomas Erskine and Henry Brougham were not the only ones heard in this evolution. They did, however, in some memorable instances articulate the core ethic of lawyers. They illustrate how lawyers forced the pace of political progress and helped forge the ideology of advocacy.

Thomas Erskine and the Obligations of Fearless Advocacy

Thomas Erskine (1750–1823) was a barrister from Edinburgh. He was from an aristocratic family that had fallen on hard times. He rose through the Bar to serve briefly as Lord Chancellor (1806–07).[41] Lovat-Fraser says:

> Erskine brought to his profession the dignified qualities and lofty ambition of a great spirit. He did not, with sordid greed, think only of amassing money, and regulate his attendance and exertions according to the fee marked upon his brief. To Erskine, the Bar was a field for noble effort, where he sought the renown that is secured by eloquence and courage, and zeal for justice.[42]

When Erskine first arrived in London he was poor. In his very first case he appeared on the defence team of the Lieutenant Governor of Greenwich Hospital, Thomas Baillie.[43] The hospital had been built for seamen, but the First Lord of the Admiralty, Lord Sandwich, had introduced corrupt officials who were diverting funds. When Baillie objected to this practice, these officials brought a case of criminal libel against him. Baillie instructed a team of lawyers of which Erskine was the most junior.

Three of Erskine's senior counsel urged compromise of the action, but Baillie preferred Erskine's advice to resist the charges. In the trial the Solicitor-General concluded his closing speech against Baillie, and Erskine's three senior counsel all responded. The Solicitor-General was about to close, assuming that Erskine would not speak. Erskine rose and launched a verbal assault on Sandwich. The judge, Lord Mansfield, said that the Lord was not a party before the court, to which Erskine responded:

> [F]or that very reason I will bring him before the court. He has placed these men in the front of the battle, in hopes to escape under their shelter; but I will not join in battle with them; their vices, though screwed up to the highest pitch of human

[41] See generally J Hostettler, *Thomas Erskine and Trial by Jury* (Hook, Waterside Press, 2010); Rt Hon Lord Widgery, 'The Compleat Advocate' (1975) 43(6) *Fordham Law Review* 909.
[42] JA Lovat-Fraser, *Erskine* (Cambridge, Cambridge University Press, 1932) x.
[43] Ibid.

> depravity, are not of dignity enough to vindicate the combat with me. I will drag him to light who is the dark mover behind the scene of iniquity … if he keeps this injured man suspended, or dares to turn that suspension into a removal, I shall not scruple to declare him an accomplice in their guilt, a shameless oppressor, a disgrace to his rank and a traitor to his trust.[44]

Whether or not Erskine's rhetoric appeals to modern tastes, no one could criticise his commitment and courage. Remember, this was an advocate on his first outing.

Later, Erskine's most notable cases involved defence of radicals and reformers against charges of seditious libel. Sedition was an offence defined in the early 1600s in the Star Chamber. It involved any act that the authorities deemed to be provoking insurrection, but was often used to stifle criticism of the establishment. Seditious libel was constituted by the act of committing the offending words to print.

In 1785 Erskine represented William Shipley, an Anglican priest, who had published *Principles of Government, in a Dialogue between a Gentleman and a Farmer*. This tract advanced radical views on the relationship between the state and citizens. *Principles of Government* was based on a pamphlet Shipley had found at a public meeting, although it turned out to have been written by his brother-in-law.

The Sherriff of Flintshire, a political opponent of Shipley, funded a private prosecution for seditious libel. The Society for Constitutional Information retained Erskine to defend Shipley. The trial judge attempted to bully the jury into a quick conviction on all the charges, but it resisted. Shipley was convicted only of publication and appealed the decision. The appeal court held that the publication was not criminal and Shipley was discharged. The case was instrumental in the passing of the Libel Act 1792, which provided that the decision that a publication is libellous must be left to a jury.

In 1792 Erskine appeared on behalf of Thomas Paine, who was charged with seditious libel following publication of the second part of *Rights of Man*, which the government saw as incitement to revolution. Erskine based his defence of Paine on the argument that a free press leads to stronger and more secure government. Paine was convicted in his absence by a special jury, selected from wealthier property owners. They did not even bother to retire to consider their verdict.

Erskine's friends had advised him not to take the case, and doing so cost him his position as Attorney General to the Prince of Wales, which he had held since 1786. Erskine is frequently quoted on the obligation of barristers to take on causes involving challenges to the state. In 1794, for example, there was great anxiety in government that the campaign for parliamentary reform might spiral into revolution. The government of William Pitt put troops on the

[44] Ibid, 9–10.

street, suspended habeas corpus and arrested 12 leading radicals for treason. Erskine was assigned to seven of the cases pro bono, as was the custom in treason trials.

In the first of the trials the jury acquitted the defendant following a seven-hour speech from Erskine on the final day. Joyous crowds outside the court unharnessed Erskine's horses and dragged his carriage through the streets. Erskine appeared in the next two cases, which also failed. The prosecutions, and a large number of other warrants of arrest, were abandoned. Stopping the escalation of the situation into a 'reign of terror' is attributed to Erskine's 'singular skills and resolution'.[45]

Erskine's eminence lent credibility to two key elements of the ideology of advocacy in England. The first was neutrality. At a time when the establishment and the middle classes were anxious that the spirit of revolution would spread to England, it was vital that those agitating for reform could not be cast as radicals.

In the trial of Paine, Erskine went to great lengths to explain to the jury how a loyal Englishman could still support reform. His second cause was jury trial. He had ample reason to trust the good sense and democratic inclinations of ordinary people when the state machinery threatened justice.

The Fearless Advocacy of Henry Brougham

The ethic of advocacy is often predicated on the need for advocates to stand in defiance of the state on behalf of clients. Today it is manifest in the demand for freedom from the influence by the state. This commitment is deep in the culture of the English Bar. An early exponent was Henry Brougham, a Scottish lawyer, Whig politician and social reformer, who joined Lincoln's Inn in 1803.

From 1812, Brougham was a legal adviser to Caroline of Brunswick, the estranged wife of the Prince of Wales and Prince Regent. In 1820, she appointed him her Attorney-General. Caroline was married to George, Prince of Wales, in 1795 although she had not met him previously. They separated and Caroline lived abroad. An investigation was launched into her alleged adultery in 1806 but no evidence was found. In 1820 the Prince of Wales acceded to the throne as George IV and Caroline returned to England, ostensibly as queen.

Caroline became associated with opposition to George, who was an unpopular king. He began divorce proceedings against her and presented evidence of Caroline's adultery to the House of Lords. A bill was introduced to remove Caroline's title. The proceedings lasted 11 weeks, but were tightly controlled to deny Brougham any chance to discredit the king or to mention his mistress, Maria Fitzherbert, whom George had secretly married before he married Caroline. Caroline was cheered by crowds as she went to the House each day.

[45] Ibid, xvii.

The bill passed by the narrow margin, but public opinion, and the risk that the bill might fail in the House of Commons, led to its withdrawal. Brougham defended his willingness to expose the king to embarrassment and ridicule. This speech is often quoted in discussions of the ethics of advocacy. It is cited in support of the duty of 'zealous advocacy', originally adopted by the American Bar Association in its model rules. Brougham's explanation of his duty to defend Queen Caroline is a defence of the lawyer's partisan obligation to defy power, at whatever personal or political cost.

The Association of Advocacy and Rights

Advocates such as Brougham and Erskine tied the obligations of advocacy to the discourse of freedom and rights. By the early nineteenth century the foundations of the ideology of advocacy had been laid and cemented, with the Bar as its custodian. Refinements occurred between 1820 and 1850.

Changes to the rules of advocacy were needed. Some barristers took Brougham's oft-quoted expression of counsel's obligation to defend clients by 'all expedient means' too far. There were infamous cases of counsel asserting their client's innocence while being aware of their guilt.[46] This led to restrictions on counsel, outlined below.[47] Nevertheless, the infrastructure, the basic orientation of the advocate to the state, to clients and to courts, remained.

The Standard Conception of the Lawyer's Role

The standard conception of the lawyer's role is derived from an interpretation of the American Bar Association model code by US academics.[48] Their analysis cites the rhetoric of advocates such as Erskine and Brougham as inspirations behind the code (see further chapter four: The Relationship). The 'standard conception' which they propose is based on two overarching principles: neutrality and partisanship.

The principle of neutrality demands that lawyers present cases on behalf of unpopular causes or those they disagree with morally. The principle of partisanship demands that they follow their client's instructions so far as the law allows, even if this produces unjust outcomes. The first two principles of the standard conception are supported by a third, the principle of non-accountability.

The principle of non-accountability suggests that, provided lawyers observe

[46] A Watson, 'Changing Advocacy: Part One' (2001) 165 *Justice of the Peace* 743.

[47] Ibid, attributed to the arguments of William Forsyth in *Hortensius or the Advocate, an Historical Essay* (1849).

[48] See eg ML Schwartz, 'The Professionalism and Accountability of Lawyers' (1978) *California Law Review*, 66; Simon (n 32); D Luban, *Lawyers and Justice: An Ethical Study* (Princeton, NJ, Princeton University Press, 1988).

to encourage clients to adopt a 'realistic' view of their matter and promote a positive attitude towards compromise and settlement.

The Limits of Loyalty

One of the most serious issues in the professional ethics of lawyers is the limit of loyalty to clients. Lawyers cannot pursue client instructions that require illegal conduct by the lawyer or conduct specifically forbidden by professional rules. A good example is where the conduct requires action involving a breach of the duty not to mislead the court.

Despite the fact that lawyers cannot be involved in illegality there may be circumstances where, if they follow a particular course of action, justice may not be done. This raises a fundamental issue in relation to the ethical principle of client autonomy. Crudely expressed: who is in charge—the lawyer or the client? Or, if the relationship is more complex than such a question implies: who bears the moral responsibility for lawyers' actions on behalf of their clients?

Who's in Charge?

Under the standard conception of the lawyer's role the principle of non-accountability means that lawyers are not legally, professionally or morally accountable for the ends achieved. In theory, a lawyer should assist a client to achieve a purpose about which said lawyer would otherwise have moral qualms. Critics of the standard conception argue that it commits lawyers to pursuing their client's whims, and possibly their immoral ends. Such a conclusion is sometimes said to place a lawyer in the position of a 'hired gun' rather than that of an independent moral agent.

The representation of the client's case is usually a more complex interaction. It results from a kind of negotiation with the lawyer in which the client's interpretation of their facts and circumstances are filtered through the lawyer's technical lens. In this process, the lawyer is as dependent on the client's picture of their circumstances as the client is reliant on the lawyer's legal interpretation of them.

Even though, in reality, clients' immoral ends may be deflected by lawyers, there remains an issue about what happens when this does not occur. Once all the negotiation is done, who is ultimately in charge of decision-making? This is where the four main models of lawyer–client relationship, ie paternalism. participation, autonomy and empowerment, interact with ethical principles to

define the limits of professional responsibility for client goals. There are a number of situations that may be thought to pose ethical problems for lawyers. The limits of legitimate action can be explored by looking at these situations.

Four Situations at the Ethical Margins

Representing the Guilty

One of the key challenges for professional ethics is explaining how lawyers can be allowed to represent parties they know are guilty or suspect of being guilty. The starting point is the rule of law. The rule of law decrees that parties are innocent until found guilty; in the meantime they are entitled to proper representation. The consequence of lawyers' ethical duties is that they must not deliberately mislead the court in presenting the case. Therefore, how can a lawyer represent a client they know or suspect to be guilty on a not-guilty plea? This question needs to be broken down before it can be answered.

i. Knowledge of Guilt

Representation of a client known to be guilty was dealt with explicitly in the Bar Written Standards for Professional Work, which, though superseded by the 2014 Code, are still relevant on most points. Barristers who have received an admission of guilt are entitled to advise a client to enter a plea of not guilty and to present the defence. They are told to:

> bear the following points clearly in mind:
>
> (a) that every punishable crime is a breach of common or statute law committed by a person of sound mind and understanding;
> (b) that the issue in a criminal trial is always whether the defendant is guilty of the offence charged, never whether he is innocent;
> (c) that the burden of proof rests on the prosecution.[38]

A confession of guilt from a client does not 'release the barrister from his imperative duty to do all that he honourably can for his client'.[39] It does, however, impose very strict limitations on the conduct of the defence. Having heard a confession, a barrister must not allow the court to gain the wrong impression of the grounds of the defence. This means that no alternative perpetrator can be implicated, or false evidence, such as an alibi, called. The barrister cannot,

[38] Bar Standards Board, *Written Standards for the Conduct of Professional Work*, para.12.1, https://www.barstandardsboard.org.uk/regulatory-requirements/the-old-code-of-conduct/written-standards-for-the-conduct-of-professional-work/.
[39] Ibid, para.12.2.

whether or not the defendant gives evidence, set up an affirmative case of innocence that is inconsistent with the confession made to him.[40]

Acting consistently with the obligation to do all that he honourably can do for the client, a barrister can object to the competence of the court, to the form of the indictment, to the admissibility of any evidence or to the evidence admitted. The defence barrister is also entitled to test the evidence given by individual witnesses and to argue that the evidence taken as a whole is insufficient to amount to proof that the defendant is guilty of the offence charged. The Written Standards pronounce that '[f]urther than this he ought not to go'.[41]

ii. Suspicion of Guilt

In circumstances where a lawyer suspects that a client is guilty the situation is more ambiguous. On the face of it, the lawyer is entitled to take the client at face value and not pre-judge the situation. In any such circumstances, however, a lawyer should point out inconsistencies in a client's proposed evidence. If a client insists that they are telling the truth, the lawyer arguably has an obligation to present that case and to explain or challenge any evidence that is inconsistent with the client's version.

If, under questioning, the client changes his/her account, the lawyer's suspicion may harden into a belief that the client is guilty. There may come a point where this is a certainty. It is arguable that a lawyer could not present the case in such circumstances without knowingly misleading the court. In most circumstances, this situation is unlikely to be reached. For the proper functioning of the justice system, in the absence of a confession, it is best if a lawyer is entitled to assume innocence, whatever the evidence stacked against his/her client.

iii. Summary

In summary, barristers can represent on a not-guilty plea by requiring that the prosecution proves that the defendant is guilty of the offence as charged. This neatly reconciles the duty of loyalty to clients with the obligation to the court. It illustrates how the Legal Services Act and the professional codes can claim a role for lawyers in the administration of justice. It is a relatively clear and well-established position that distinguishes lawyers, as professionals, from technicians who merely deliver the service clients pay for. Other situations may be less clear cut.

[40] Ibid, para.12.3.
[41] Ibid, para.12.5.

Advising on Illegality

A relatively common problem for lawyers arises where a client seeks advice on a situation where a proposed action may involve breaking the law. The client's purpose in seeking advice may be to better understand the risks and consequences of their proposed action, or to identify other ways of achieving the same thing. Can the lawyer give advice on the basis that nothing has happened yet? Should they refuse to advise, warn parties likely to be affected or counsel against any action?

Pepper gives, by way of illustration, two situations where clients may seek advice about breaking the law.[42] In one, a lawyer is asked about the legal consequences for someone who participates in consensual euthanasia where their parent is known to be terminally ill and in immense pain. Because assisting suicide is illegal, Pepper suggests, the lawyer should be cautious in advising. Two principles are uppermost. The first is that the proposed criminal conduct has consequences for third parties. The second is that lawyers should not provide advice which may assist in the commission of an offence.

The example of assisted suicide teases out several issues in counselling illegality. For example, the issue may not be presented in a way that suggests the client intends unilateral action. The client may, for example, appear to be seeking advice about the possibility of a court-sanctioned suicide. A further problem arises if the third-party element is taken away. If, say, the client is contemplating his own suicide, in circumstances where this would be illegal, the issue becomes one of the client's autonomy versus their intention to break the law. This tends to illustrate Pepper's conclusion. The variety of situations that can arise, and the different contexts in which they arise, make it difficult to formulate clear rules or guidelines.

Pepper's second example relates to a lawyer advising on drafting a contract. The client asks what the consequences would be if he breaks the contract in three years' time. In the scenario, the lawyer knows that the client will break the contract if the financial consequences are favourable. Pepper argues that in civil cases, such as contract or tort, breaches of the law are not prohibited, but merely invite financial sanctions. This view would be contested by many contract lawyers, but it is promoted by economic theories of law.[43] Pepper concludes that advice on the financial consequences of this kind of 'unlawful' conduct is ethical.

Pepper speculates that full legal advice on the financial consequences of breach of contract might include reference to matters that invite debate. He argues that the advice could refer to factors not constituting *legal* knowledge, for example the existence of court backlogs. These might encourage another

[42] SL Pepper, 'Counselling at the Limit of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering' (1995) 104 *Yale Law Journal* 1545.

[43] Symposium (2005) 8 *Legal Ethics* 87.

contracting party to accept a lesser sum in damages than the claim is worth. It might be argued that it is bad public policy that lawyers encourage breach of contract on non-legal grounds. On the other hand, full advice would presumably include countervailing arguments, such as the damage to trust and reputation involved in an 'efficient' breach of contract.

Pepper suggests a number of principles that can be applied to situations where lawyers are asked to advise whether proposed actions are legal. The first consideration that lawyers should bear in mind, he argues, is that clients have a right to know the law. The second is that lawyers have a moral obligation to counsel clients, even when they suspect that the clients might try to circumvent the law. The third is that lawyers' legal assistance is bounded by law; lawyers should not help clients to break the law. They should consider a number of factors regarding the impact of the conduct to which the advice may give rise.

Pepper acknowledges that the kinds of distinctions involved in counselling clients who propose breaking the law potentially involve complex decision-making. The factors Pepper indicates might be relevant include:

- the distinction between criminal and civil law;
- conduct wrong in itself and conduct 'merely' prohibited;
- the extent to which the particular law is enforced;
- whether the query relates to procedural rules, substantive law or the enforcement of law (eg where a criminal client seeks information relating to police procedures which might be known to a lawyer);
- whether the information is in the public or private sphere;
- whether the lawyer or client initiated the discussion of the particular issue;
- the likelihood that the information will assist unlawful conduct.

Finally, Pepper argues, in addition to using technical aids to decision-making, lawyers must self-consciously balance the good of providing access to law with their obligations as a lawyer. The principles for counselling illegality fall well short of a definitive guide to ethical decision-making. Client confidentiality means that, except in a few exceptional cases, such as suspected money-laundering or imminent threats to a third party's safety, advice is confidential. It is doubtful that many clients divulge determination to carry out an illegal act when seeking general advice.

To some extent, counselling on the consequences of breaking the law is part of a lawyer's role, even though there is a suspicion that the advice may lead a client to cause harm. Clients should be warned that lawyers cannot promise to maintain confidentiality if the court demands to know what advice was given (see further chapter eight: Social Responsibility). Performing the task ethically demands considerable skill and sensitivity. When a lawyer advises a client what the consequences of particular action are, it is the client's choice whether or not to follow that advice. If the client breaks the law, it is their own conscious act, not that of the lawyer.

Facilitating Illegality

Facilitating illegality occurs in situations where an action is not illegal in itself, but the law could not be broken without an action by a lawyer. This situation is distinguishable from counselling on illegality, where the illegal conduct could happen anyway. A simple example was given in the old *Guide to the Professional Conduct of Solicitors*. The situation described was one where a client asked a solicitor only to instruct a barrister from a particular racial group. The act of instructing a barrister was not illegal, but the instruction to exclude a racial group was a breach of the Race Relations Act 1976. The rule, since 1995, is that a solicitor must try to persuade a client to modify discriminatory instructions, but must otherwise cease to act.[44]

In other circumstances, the action itself may be perfectly innocent in ordinary circumstances, but there may be factors that could or should alert a lawyer to a risk of wrongdoing. Lawyers tend not to be held responsible, legally or morally, for legal actions that might enable client wrongs. It has been argued that they should be. This argument is particularly well illustrated by the case of Lehman Brothers Holdings Inc (see further chapter eight).

Participating in Client's Perceived Immorality

A distinction must be made between counselling illegality and participating in a client's perceived immorality. The idea of participating in immorality envisages a lawyer asked to do something for a client which is perfectly legal but which the lawyer personally disagrees with on moral grounds. Wasserstrom proposed a number of examples that exposed the issues.[45] These were hot topics at the time but now seem somewhat dated. Wasserstrom's first example was: should a lawyer draft a will for a client to disinherit a child because he opposed the war in Vietnam? The second was: should a lawyer represent a corporation which manufactures harmful substances such as tobacco?

Wasserstrom assumes that acting for a vindictive testator or a tobacco company would be immoral. While both propositions can be disputed, the point is that many people would consider the clients to be immoral or have an immoral purpose. Is a lawyer taking that view entitled to decline instructions?

Disappointingly, Wasserstrom comes to no conclusion on the questions he poses. He believes that the 'role differentiated way of approaching matters' would incline many lawyers to act for the clients, against their convictions. His argument is that they should confront the moral dilemmas such action involves, rather than simply taking refuge in the requirements of the role.

Wasserstrom's examples suggest a clear distinction between two different

[44] *The Guide to the Professional Conduct of Solicitors*, 8th edn (1999) rule 7.02, para 4(c).
[45] R Wasserstrom, 'Lawyers as Professionals; Some Moral Issues' (1975–76) 5 *Human Rights* 1.

kinds of situation. The first situation arises when the moral issue is obvious from the outset, because of the identity of the client or the task initially identified. Knowing that the client is a tobacco company, for example, is an issue of client selection and not of client loyalty or partisanship. The answer to this kind of problem depends on the profession's position on neutrality. The Bar's position is that the client should be represented. Solicitors can, in principle, reject clients on what might appear to be moral grounds. So, for example, a firm identified with representing clients in the health industry might refuse to represent a tobacco company.

The vindictive testator is a more difficult example because it is not clear at what stage the issue about the disinherited son becomes clear. The lawyer refusing the instructions before agreeing is one case. It is a different issue when the problem is discovered several months into the matter. The issue then is whether lawyers should have a disposition of neutrality towards moral issues, or whether they can cease representing a client if a moral issue arises once representation commences.

The problem of the emerging moral issue is clearly illustrated by the Solicitors' Code. While solicitors are not obliged to represent clients, the rules make it more difficult to get rid of them once representation begins. Therefore, IB.1.26 is a presumption against 'ceasing to act for a client without good reason and without providing reasonable notice'. The moot point is what constitutes a 'good reason'. It seems arguable that the issue would need to be fairly serious before falling out over a moral dimension of a client's case would be deemed sufficient.

Building on Wasserstrom's analysis, Simon proposes a 'professional duty of reflective judgement' requiring evaluation of client goals to see if they will promote justice.[46] Even in an adversary context, Simon argues, the interests of justice should take priority for the lawyer. It is clear that Simon is thinking primarily of the powerful corporate client in putting forward this view. It may be, for example, that a lawyer acting on behalf of a large corporation should not plead limitation rules if, by so doing, a poor person is unable to enforce a debt which undoubtedly is owing to them.

Simon's proposition is that the lawyer should not lend assistance to the client who wants to use procedural rules or technical devices to defeat, rather than promote, the interests of justice. This example demonstrates an approach seeking to achieve substantive rather than procedural justice. Simon is not alone in promoting a responsibility for this kind of 'morally engaged activism' by lawyers.[47] Such a position is arguably beyond the current scope of a professional ethics for lawyers. It is antithetical to the formal legality version of the rule of law. In particular it requires lawyers to balance social justice claims.

[46] WH Simon, 'Ethical Discretion in Lawyering' (1988) 101 *Harvard Law Review* 1083.
[47] D Nicolson, 'Afterword: In Defence of Contextually Sensitive Moral Activism' (2004) 7 *Legal Ethics* 269, 270.

The potential scope of an ethic of substantive justice is unclear. The issue is not whether lawyers can reject clients because they disagree with them, but whether they can, or should be able to, terminate representation on that ground. Lawyers can try and dissuade a client from tactics that they consider underhand, but if the action is legal, should they withdraw because consequences may be unjust?

Moral sensibilities are obviously relative, but lawyers probably need a fairly robust and pragmatic approach to moral issues. This is reflected in the practice of a Manchester solicitor who, as part of his practice, regularly gets drivers charged with driving over the legal alcohol limit acquitted on technicalities. Morally, he cannot square this with his conscience but, he writes, 'ethically I can. I am a lawyer and my job is to give my clients the best defence I can.' However he claims he also takes his clients to one side to 'give them a polite ticking off ... and advise them not [to] transgress again'.[48] Whether this improves the lawyer's moral position is moot.

If lawyers were to morally censor their clients' actions they could be accused of adopting an unacceptably paternalistic attitude towards them. This is not to deny that there may be a moral issue on which all lawyers might refuse to continue, terminating representation. To require excessive deliberation over every issue on which a lawyer might have a moral qualm would arguably encourage over-sensitivity. There are various practical reasons why this would not be a good policy for the profession to pursue, particularly against a standard such as promotion of the rule of law or administration of justice.

If lawyers were to terminate representation when they decided that a client or their goals were immoral, appointing new lawyers and acquainting them with the case would cost time and money. Meanwhile the possibly legitimate action that the client seeks may cease to be relevant through delay. This would raise the issue of who should be responsible for the additional costs and open up the morally sensitive lawyer to the risk of being sued for negligence. It would hardly be in the interests of the administration of justice if withdrawal of representation were a frequent occurrence.

A Theory of Client Loyalty

Dinnerstein suggests that it is unclear why any client, corporate or otherwise, would engage the services of lawyers seeking to limit their autonomy, impose their values upon them and deny 'them the opportunity ... to seek vindication of hypothetically legal interests'.[49] The essential truth of this statement hints

[48] *Guardian*, 27 January 2006.

[49] RD Dinerstein, 'Client-Centered Counselling: Reappraisal and Refinement' (1990) 32 *Arizona Law Review* 501, 558.

at the very real difficulty in limiting the loyalty of lawyers to clients beyond that which is necessary.

Academics are right to explore the possibility of defining those limits, and the possibility of finding rules that would make the legal role more morally defensible. The reality, however, is that such quests are likely to fail because they impose an impractical burden on legal business.

It is necessary that lawyers do not actively participate in a client's criminality. This hardly needs stating, since both lawyer and client would face criminal charges and the lawyer would probably be struck off. There is probably no conduct limitation on advising clients in such a way that they can avoid legal charges. This is so even if the client achieves their desired result and the outcome remains morally wrong.

There is no ethical responsibility not to perform a task that may, but may not, facilitate illegality. Some models of the lawyer and client relationship envisage responsibility to counsel a client against any action that may result in illegality. Ultimately, the main constraint on what lawyers do for clients is the character of the lawyer and the model of the lawyer and client relationship in use.

Considering the various situations outlined above, the most defensible is the participatory model. This engages lawyers in considering the moral defensibility of client goals and provides them with an opportunity to dissuade clients from taking actions they disagree with. This throws into sharp relief the difficulty with other options. For example, the paternalistic model means that the client's interests are probably not explored and may be ignored. The client autonomy model involves the lawyer acting purely as a hired gun without any opportunity to restrain a client's wilder impulses. The client empowerment model potentially absolves the lawyer of any responsibility for outcomes.

Evaluation

Critique of the Standard Conception

The standard conception of the lawyers' role attracted much criticism in the US, Canada and UK. Critics argue that lawyers should not have to act against their moral conscience. Such critics suggest that neutrality is unnecessary because even the most reprehensible client will usually find someone to act for them. If not, professions should establish panels of lawyers willing to act for these pariahs.[50]

[50] Nicolson (n 47).

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(b) **Non-parties and the CPR (1998)**

19.265 The court can now order disclosure of documents by a non-party in any type of case.[464] Normally, the relevant non-party is entitled to costs in respect of complying with such an order.[465] The *Norwich Pharamacal* doctrine appears now to be otiose except in respect of non-documentary sources of information, whether against a prospective party or non-party.

(7) Legal Professional Privilege[466]

(a) **Classification**

19.266 This doctrine is now split into two segments, of which the first is the more secure.[467] The first category, known as 'legal advice' privilege, covers communications between client and lawyer for the purpose of eliciting or giving legal advice, or for the incidental purpose of facilitating such advice.[468] It has been categorized as a matter of 'substantive law' because it involves a duty of confidentiality, and its operation is not confined to matters of evidence.[469]

19.267 Secondly, there is 'litigation' privilege, which concerns communications between a lawyer and a non-party, or a client and a non-party, if made predominantly for the purpose of use in pending or contemplated criminal or civil litigation, whether in England or elsewhere.[470]

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[464] CPR 31.17; this rule concerns only documents (CPR 31.17(3), (4) and the terms of s 34, Supreme Court Act 1981 and s 53, County Courts Act 1984). The Civil Procedure (Modification of Enactments) Order 1998, SI 1998/2940 enables orders for disclosure to be made against a non-party in any type of case. CPR 31.18(a) preserves 'any other power which the court may have' in this regard.

[465] CPR 48.1(2), (3).

[466] Besides *Cross & Tapper on Evidence* (9th edn, 1999), IH Dennis, *The Law of Evidence* (1999) ch 10; P Matthews & H Malek, *Discovery* (1992) 159ff; C Style and C Hollander, *Documentary Evidence* (6th edn, 1997) chs 8–10; PCP 12-001 to 12-051; for history and theory, HL Ho, 'History & Judicial Theories of Legal Professional Privilege' (1995) Singapore J of Legal Studies 558.

[467] Police and Criminal Evidence Act 1984, s 10(1); Sixteenth Report of Law Reform Committee, *Privilege in Civil Proceedings* (Cmnd 3472, 1967) para 17.

[468] *Ventouris v Mountain* [1991] 1 WLR 607, 618, CA; the last category to be added: *Greenough v Gaskell* (1833) 1 My & K 98 (Lord Brougham LC).

[469] *General Mediterranean Holdings SA v Patel* [1999] 3 All ER 673 (considering *R v Derby Magistrates' Court, ex p B* [1996] AC 487, 507, HL *per* Lord Taylor CJ; *Carter v Northmore Hale Davy & Leake* (1995) 183 Commonwealth LR 121, 132 *per* Deane J and 159–62, *per* McHugh J, H Ct Aust; —the Supreme Court of Canada in *Descoteaux v Mierzwinski* (1982) 141 DLR (3d) 590, 601, citing Dickson J in *Solosky v The Queen* (1979) 105 DLR (3d) 745, 760); and for a notable illustration, *Bolkiah (Prince Jefri) v KPMG* [1999] 2 WLR 215, HL).

[470] See the *Ventouris* case (n 468 above).

(b) Legal advice privilege

19.268 When a client seeks or receives legal advice from his solicitor, their dealings are privileged even if the relevant advice does not concern litigation, whether pending or contemplating.[471]

19.269 This head of privilege is to be applied generously:

> Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that the advice may be sought and given as required, privilege will attach . . . [472]

19.270 The courts emphasize the constitutional value in promoting free and candid legal consultation.[473]

(c) Distinction between legal advice and litigation privilege

19.271 Suppose X, who is not a client, makes a communication to L, the lawyer. Or X, might make a communication to the client. If X is a mere messenger or go-between for communication between the client and L, legal advice privilege applies despite the slight interposition of X. But if X has a creative role in drawing up the relevant communication, only litigation privilege can apply (on which see ensuing discussion).[474]

(d) Litigation privilege and its limits

19.272 Litigation privilege is constrained by the 'dominant purpose' test. According to that test, a document or communication is privileged under this head only if made predominantly for use in pending or contemplated litigation.

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[471] Or barristers, foreign lawyers, or in-house lawyers (cf the jurisprudence of EU law; Style and Hollander (n 466 above) 8(2)(b) on *AM & S Europe v Commission of EC* [1987] QB 878). 'Quasi-lawyers' now include: patent agents, trade mark agents (ss 280, 284, Copyright, Designs and Patents Act 1988); licensed conveyancers (s 33, Administration of Justice Act 1985); 'authorized' litigators/advocates, conveyancing and probate practitioners (s 63, Courts and Legal Services Act 1990); and employee's non-legal representative at an Industrial Tribunal, *M Grazebrook Ltd v Wallens* [1973] ICR 256, 259. But not a personnel consultant: *New Victoria Hospital v Ryan* [1993] ICR 201, EAT; for other fringe problems, Style and Hollander (n 466 above) 8(2)(c).

[472] *Balabel v Air India* [1988] Ch 317, 330, CA *per* Taylor LJ; *Minter v Priest* [1930] AC 558, 568, HL *per* Lord Buckmaster; *Balabel* considered in *Nationwide Building Society v Various Solicitors* The Times, 2 February 1998, *per* Blackburne J, 'even on this broad view, [some communications cannot] be said to be made for the purposes of seeking or giving advice, for example, fixing the time and place of the meeting or making arrangements to collect or to deliver a document'. Nor, he added, are client account entries covered by legal advice privilege (*quaere* whether they might sometimes attract litigation privilege?)

[473] *R v Derby Magistrates, ex p B* [1996] 1 AC 487, 507, HL *per* Lord Taylor CJ; *General Mediterranean Holdings SA v Patel* [1999] 3 All ER 673, noted NH Andrews [2000] CLJ 47–50.

[474] *Price Waterhouse v BCCI Holdings (Luxembourg) SA* [1992] Butterworths Company Law Cases 585 (discussing *Wheeler v Le Marchant* (1881) 17 Ch D 675, 682 and 684–5, CA, and *Re Highgrade Traders Ltd* [1984] Butterworths Company Law Cases 151, 164, CA); P Matthews and HM Malek, *Discovery* (1992) 8.14; *Mudgway v NZ Insurance Co Ltd* [1988] NZLR 283.

19.273 This test was introduced by the House of Lords in 1980.[475] The relevant case concerned a third party's safety report made under a statutory duty in respect of a fatal accident which occurred on British Rail.[476] It was held that the report was not privileged because its two purposes were equally significant and so neither could be 'predominant'. Such reports are often the best evidence of an accident's cause. It is no surprise, therefore, that this decision proceeds on the basis that litigation privilege should be narrowly confined.[477]

19.274 Litigation privilege requires that litigation should be 'in reasonable prospect'.[478] 'Litigation' embraces proceedings (original or on appeal and civil or criminal) in the ordinary courts or industrial tribunals.[479] It extends to 'judicial or quasi-judicial proceedings'[480] and to arbitration, or litigation in foreign courts.[481]

19.275 Litigation privilege does not attach where an original and non-privileged document is procured from a non-party for the purpose of litigation.[482]

(e) Justifying the litigation head of privilege

19.276 Severe doubts have been expressed whether, in the age of forensic 'all cards face upwards', there is any longer public policy in according privilege to communications falling solely under the litigation head, and the Court of Appeal has echoed these doubts.[483]

(f) Client and successors

19.277 Legal professional privilege is enjoyed only by the client and his successors.[484]

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[475] *Waugh v British Railways Board* [1980] AC 521, HL.

[476] In fact the third party was an employee of the British Railways Board, so that the case proceeds as though this were a third party situation: explained in the *Price Waterhouse* case (n 474 above).

[477] P Matthews and HM Malek, *Discovery* (1992) 8.38, C Style and C Hollander, *Documentary Evidence* (6th edn, 1997) 8.3 (a)-(c), for further discussion; *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405, HL.

[478] English cases have followed the formulation of Barwick CJ, *Grant v Downs* (1976) 135 Commonwealth LR 674, 677, eg *Guinness Peat Properties v Fitzroy Robinson Partnership* [1987] 1 WLR 1027, 1037, CA.

[479] The statutory definitions of 'civil proceedings', although not directly applicable, might be of interest: Civil Evidence Act 1968, s 18(1), CEA 1972, s 5(1), CEA 1995, s 13.

[480] *Parry-Jones v The Law Society* [1969] Ch 1, 9, CA.

[481] On the last point, *Re Duncan* [1968] P 306; *Minnesota Mining & Manufacturing Co v Rennicks (UK) Ltd* [1991] FSR 97, 98; *Société Française Hoechst v Allied Colloids Ltd* [1992] FSR 66.

[482] *Ventouris v Mountain (The Italia Express)* [1991] 1 WLR 607, CA.

[483] *Secretary of State for Trade & Industry v Baker* [1998] Ch 356, *per* Scott V-C, noted C Passmore (1997) New LJ 1655; *Visx Incorporated v Nidek Co* (CA, 19 May 1998) *per* Rose LJ, noted C Passmore (1998) New LJ 1689, 1690; also A Zuckerman (1996) 112 LQR 535–9 discussing *R v Derby Magistrates, ex p B* [1996] 1 AC 487, 507, HL and *Re L* [1997] AC 16, HL (litigation privilege overridden in context of Children Act 1989 litigation).

[484] *Calcraft v Guest* [1898] 1 QB 759, CA; *The Aegis Blaze* [1986] 1 Lloyd's Rep 203, CA; N Williams in IR Scott (ed), *International Perspectives on Civil Justice* (1990), 239; 'successors' includes trustees in bankruptcy, *Re Konigsberg* [1989] 1 WLR 1257; HL Ho (1999) 115 LQR 27–30 examines the extension of privilege to protect a deceased privilege holder's successors.

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19.278 Privilege cannot be invoked, therefore, by an expert witness who has supplied information for use by that client.[485] Nor does the privilege protect the client's lawyer. He is bound by his duties to the client not to divulge privileged material, unless the client consents.[486] The lawyer lacks title to sue to recover his client's privileged material which the lawyer has mistakenly passed to a third party.[487]

19.279 If a client sues his solicitor, the client is taken impliedly to have waived privilege in that relationship, so that the solicitor can adduce hitherto privileged material.[488]

(g) Duration of privilege

19.280 The courts are unwilling to extinguish the privilege on the basis that the privilege holder no longer has a sufficient interest in maintaining the relevant secret.[489]

(h) Statutory exceptions

19.281 There are a few statutory exceptions to the present privilege, but in general the legislature has been circumspect.[490] The Civil Procedure Act 1997 has been held not to authorize modification or removal of legal advice privilege.[491]

(i) Nefarious purposes[492]

19.282 Privilege is withheld from a communication in which a party seeks legal advice relating to the intended commission of a crime or fraud.

19.283 The scope of 'fraud' is here quite broad. It is not confined to actionable deceit or other claims based upon dishonesty. It extends beyond the tort of deceit to include

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[485] *Schneider v Leigh* [1955] 2 QB 195, CA, distinguished *Lee v SW Thames Regional Health Authority* [1985] 1 WLR 845, CA.

[486] *His Royal Highness Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222, HL.

[487] *Nationwide Building Society v Various Solicitors (No 2)* The Times, 1 May 1998.

[488] *Lillicrap v Nalder & Son* [1993] 1 WLR 94, CA; extended *Kershaw v Whelan* [1996] 1 WLR 358; *Lillicrap* explained and distinguished *Nederlandse Reassurantie Groep Holding v Bacon & Woodrow* [1995] 1 All ER 976, CA; C Style and C Hollander, *Documentary Evidence* (6th edn, 1997) 10.10; *Paragon Finance plc v Freshfields* [1999] 1 WLR 1183, CA (former client suing solicitor D; no implied waiver of privileged materials arising between client and new solicitors conducting present claim).

[489] *Nationwide Building Society v Various Solicitors* The Times, 2 February 1998, not adopting Lord Nicholls' minority *dictum* in *R v Derby Magistrates' Court* [1996] AC 487, 512, HL.

[490] Taxes Management Act 1970, s 20, on which *An Applicant v An Inspector of Taxes* (Special Commissioners Chambers, 16 April 1999); s 39, Banking Act 1979; s 33, Limitation Act 1980; ss 93A and 93B, Criminal Justice Act 1988 and ss 50–2, Drug Trafficking Act 1994 (laundering of proceeds of criminal conduct; these last two statutes noted in *General Meditteranean Holdings SA v Patel* [1999] 3 All ER 673, 681).

[491] CPR 48.7(3), condemned in *General Mediterranean Holdings SA v Patel* [1999] 3 All ER 673, noted NH Andrews [2000] CLJ 47–50.

[492] ALE Newbold, 'The Crime/Fraud Exception to Legal Professional Privilege' (1990) 53 MLR 334; primarily noting *R v Central Criminal Court, ex p Francis & Francis* [1989] AC 346, HL, considering criminal legislation on the present exception.

'fraudulent breach of trust, fraudulent conspiracy, trickery and sham connivances'.[493] But the exception does not embrace every unlawful act.[494]

19.284 The modern trend is to broaden the concept to embrace underhand dealings.[495] Thus deliberate attempts by a client to enlist the help of a lawyer to place assets beyond the reach of creditors are caught by this doctrine.[496] It is likely that the same principle applies to attempts to cover up fraud or criminal conduct, as opposed to defending claims of such wrongdoing.[497]

(j) Proof of innocence in criminal litigation

19.285 A privileged communication between a lawyer and a client cannot be overridden in the interests of justice even where the content of that communication might exculpate a third party accused of a crime.[498]

(k) Waiver of privilege[499]

19.286 A party can agree to waive privilege,[500] or he can voluntarily hand over privileged material and so waive it by transfer, or he can allow it to escape into the public domain. A party's legal representative might effect a waiver at a public hearing. Or a

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493 *Crescent Farm (Sidcup) Sports Ltd v Sterling* [1972] Ch 553, 565.

494 eg breach of contract: the *Crescent Farm* case (n 493 above); *Re Konigsberg* [1989] 1 WLR 1257, 1263–4; or the tort of inducing breach of contract, or conversion or trespass: *Dubai Aluminium Co Ltd v Al Alawi* [1999] 1 All ER 703, 706, 707.

495 Leading surveys: *Nationwide Building Society v Various Solicitors* The Times, 2 February 1998; *Derby & Co v Weldon (No 7)* [1990] 1 WLR 1156, Vinelott J; *Bullivant v Att-Gen for Victoria* [1901] AC 196, 201 HL; *Gamlen v Rochem* (CA, 7 December 1979) *per* Goff LJ (cited *Derby & Co* (above) 1171); *Ventouris v Mountain* [1991] 1 WLR 601, 611, CA.

496 *Barclay's Bank plc v Eustice* [1995] 1 WLR 1238, CA *per* Schiemann LJ in a dictum, the iniquity exception should apply even if the client was acting bona fide, albeit not knowing or misapprehending the law (s 423, Insolvency Act 1985). Cf the insistence upon dishonesty by Goff LJ in the *Gamlem* case (n 495 above); but, for another wide view, note the criminal case, *R v Central Criminal Court, ex p Francis & Francis* [1989] AC 346, HL.

497 Lord Denning, *Buttes Gas and Oil Co v Hammer (No 3)* [1981] QB 223, 246, CA; *R v Central Criminal Court, ex p Francis & Francis* [1989] AC 346, 389–92, HL; on defences to such charges, *O'Rourke v Darbishire* [1920] AC 581, 632, HL *per* Lord Wrenbury and Lord Sumner, ibid, 613: responding to a charge already made 'is a very different thing from consulting [a lawyer] in order to learn how to *plan, execute,* or *stifle* an actual fraud', (emphasis added), cited *Dubai Aluminium Co Ltd v Al Alawi* [1999] 1 All ER 703, 705.

498 *R v Derby Magistrates, ex p B* [1996] 1 AC 487, HL; criticized A Zuckerman (1996) 112 LQR 535 and C Tapper, 'Prosecution and Privilege' (1996) 1 E & P 5; I Dennis, *The Law of Evidence* (1999) 330, n 47, notes that the Australian High Court's decision in *Carter v Northmore Hale Davy & Leake* (1995) 183 Commonwealth LR 121 has been reversed on a similar point by s 123, Australian Evidence Act 1995.

499 C Style and C Hollander, *Documentary Evidence* (6th edn, 1997) ch 10; NH Andrews, 'The Influence of Equity Upon Legal Professional Privilege' (1989) 105 LQR 608; PCP 12-043 to 12-051; IH Dennis, *The Law of Evidence* (1999), 318ff.

500 eg *(Alastair) Brown v Guardian Royal Exchange plc* [1994] 2 Lloyd's Rep 325, CA; considered Style and Hollander (n 499 above) 221; on waiver in the context of 'common interest' privilege, *TSB Bank plc v Robert Irving and Burns (a firm)* [2000] 2 All ER 826, CA.

(26)

party might impliedly waive privilege by suing his solicitor.[501] Waiver can sometimes be restricted to specific proceedings, notably proceedings concerning disputes over costs.[502]

I. Trial

(1) Introduction

(a) Rarity of trial

19.287 Roughly 98% of actions do not go to trial, because they are settled, discontinued, or otherwise founder.

(b) Marginalizing the civil jury

19.288 For centuries civil trials in the common law courts took place before juries.[503] Nowadays, this form of civil trial is a great rarity, perhaps occurring in about 25 civil jury trials a year.[504]

19.289 Civil juries are now confined to actions concerning defamation, malicious prosecution, false imprisonment, and 'fraud' (narrowly construed here).[505] Even within these categories, the court might dispense with a jury where the trial will involve prolonged examination of documents.[506] It is now virtually inconceivable that a personal injuries action will be heard before a jury.[507]

19.290 Although the historical use of jury trial has left deep grooves in the system of civil evidence, most of these evidential technicalities are now regarded as anachronistic impediments to ascertaining the truth (see, notably, the discussion of hearsay evidence below).

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[501] *Lillicrap v Nalder & Son (a firm)* [1993] 1 WLR 94, CA (for later cases on this point, see n 488 above).

[502] *Bourns Inc v Raychem Corp* [1999] 3 All ER 154, CA.

[503] On the historical influence of jury trial: S Goldstein, 'The Anglo-American Jury System as Seen by an Outsider (who is a Former Insider)', ch 9, in BS Markesinis (ed), *The Clifford Chance Lectures* vol 1 (1996), citing other literature, esp at n 12; J Getzler, 'Patterns of Fusion', in PBH Birks (ed) *Classification of Obligations* (1997) 157, 187, esp n 136, also cites a rich historical literature.

[504] IH Dennis, The Law of Evidence (1999) 570, n 79, citing M Zander, *Cases and Materials on the English Legal System* (7th edn, 1996), 376.

[505] Supreme Court Act 1981, s 69; County Courts Act 1984, s 66.

[506] *Aitken v Preston* The Times, 21 May 1997, CA, applying s 69(1), Supreme Court Act 1981 (Lord Bingham CJ clearly revealing his preference for reasoned decisions by professional judges).

[507] *Ward v James* [1966] 1 QB 273, CA (a very significant 'stonewalling' against any recrudescence of jury trial outside the four specified actions); applied *H v Ministry of Defence* [1991] 2 QB 103, CA.

the guilt of the practitioner in question in a criminal court or his liability in a civil court. Should either of these proceedings be taken and terminate in the framing of the charges levelled by the complainant against the advocates in question there, then it will be possible for him to approach the Bar Council again under the Advocates Act.[95]

113. IS LAWYER BOUND TO SUPPORT AN UNJUST CAUSE?

One of the questions most frequently asked of any lawyer is how he can defend a client whose case he does not believe. In India, we follow the jurisprudence of '*innocent till proved guilty*'. That being so, is it not advisable to pre-judge a case until it is decided, one way or the other, by a competent forum. Mr Cerflies' observations on this problem are of special value to the members of the profession and are, therefore, reproduced below *in extenso*:

> 'The Layman's question which has most tormented the lawyer over the years is, 'How can you honestly stand up and defend a man you know to be guilty.'
>
> Or, as to civil cases: 'How can you defend a case when you know your client is wrong and really owes the money sought."
>
> At the outset we must remember that in a democratic country even the worst offender is entitled to a legal defender. If a person accused of crime cannot afford a lawyer, the court will assign one to defend him without cost.
>
> Many lawyers, however, believe the right to defend means the duty to employ any means, including the presentation of testimony, the lawyer knows to be false.
>
> In support of this position, advocates enjoy reciting the following colloquy attributed to Samuel Johnson by his famous biogropher, James Boswell:
>
> **Boswell:** But what do you think of supporting a cause which you know to be bad.
>
> **Johnson:** Sir, you do not know it to be good or bad till the judge determines it. You are to state facts clearly; so that your thinking, or what you call knowing, a cause to be bad must be from reasoning, must be from supposing your arguments to be weak and inconclusive. But Sir, that is not enough. An argument which does not convince yourself may convince the judge to whom you urge it; and if it does convince him, why then, Sir, you are wrong and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion.
>
> **Boswell:** But, Sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty: Is there not some danger that a lawyer may put on the same mask in common life in the intercourse with his friends.
>
> **Johnson:** Why, no Sir, everybody knows you are paid for affecting warmth for your client, and is therefore, properly no dissimulation, the moment you come from the Bar you resume your usual behaviour. Sir, a man will no more carry the artifice of the Bar into the common intercourse of society, than a man who is paid for tumbling upon his hands will continue to tumble on his hands when he should walk upon his feet.
>
> It is argued that what a lawyer says is not the expression of his own mind and opinion, but rather that of his client. A lawyer has no right to state his own thoughts. He can only say what his client would have said for himself, had he possessed the proper skill to represent himself. Since a client is deemed innocent until proved guilty, a lawyer's knowledge that his client is guilty does not make him so.
>
> It is asked:
>
> How can a lawyer, or any person for that matter, know whether a person is guilty before his guilt is established : 'To be guilty' under our concepts of due process means to be so adjudged after a trial by a jury or court as due process in the particular case may require. A person charged with crime might be completely deprived of counsel. For all the lawyers in the community might believe him guilty and wash their hands of him.

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[95] In the matter of *H, an Advocate* AIR 1941 All 280, ILR 1941 All 592, 1941 AWR (HC) 217, 1941 ALJ 390, 42 Cr LJ 673.

Again:

How does such prejudgment of guilt differ from the lynch mob, which is equally so convinced of guilt that it considers a trial an idle ceremony : True, to be strung up by the lynch mob without a trial may be somewhat more embarrassing to the victim than to submit to a trial without counsel, but, if defence counsel plays the important role which lawyers like to think he does, a person charged with crime is indeed in an unhappy position if he has to rely on his own knowledge of the law and wits to counter an experienced prosecutor bent on conviction and whose success is measured by his percentage of convictions.

Another lawyer contends:

On undertaking a client's cause, he must wipe out the villainy of the defendant with all the resources at his command. Are not the facts that are unfavourable to his client to be left for the prosecution; if the lawyer may see the better way and approve (not to foster claims that are wrong) the circumstances that compel him, especially in criminal cases to follow the lesser. Thus, the lawyer lives with the maxim—'vidio meliora proboque deteriord sequor'.

The Cannons of Professional Ethics of the American Bar Association are clear, succinct and unambiguous.

The office of attorney does not permit much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

The lawyer must decline to conduct a civil cause or to make a defence when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong.

His appearance in court should be deemed equivalent to an assertion of his honour that in his opinion his client's case is proper for judicial determination.

The American Bar Association recommends this oath of admission:

> I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust nor any defence except such as I believe to be honestly debatable under the law of the land.
>
> I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honour and will never seek to mislead the judge or jury by any artifice or false statement of fact or law.

In civil cases, the area of doubt is undoubtedly considerably greater. At a guess only one-third of the cases presented to a lawyer are pure black or pure white. In only one-third of the cases does the lawyer indubitably know his client is wrong or right. In the other two-thirds grey is the predominant colour. It is the duty of an advocate to appraise the client's cause in his favour after giving due consideration to the facts on the other side. In such a case, it is of course the duty of the advocate to present his client's case to the best of his ability.

Where the lawyer is convinced after studying the law and the facts that his client cannot succeed, his duty is to obtain the best settlement he can, fairly and expeditiously.

Whether he walks upon his hands or feet as Samuel Johnson argues, may not affect the character or soul of the walker. Pleading earnestly a cause which the lawyer knows to be untrue cannot but perniciously affect his character.

Whatever the situation was in Johnson's day there should be no artifice at the Bar. Nor should a man 'resume his usual behaviour' the moment he comes from the Bar. The lawyer's usual behaviour both in his office and at the Bar and in society should be that of a man of probity, integrity and absolute dependability.

114. THE FUNCTIONS OF THE LAWYER

More often than not, a litigant while engaging an advocate will believe that the engagement is for having the case decided in his favour. This is a misconception. The true role of an advocate is only to argue to the best of his ability and preparation and then to leave the decision making to the court. No advocate can make guarantees to his clients that the case *will* be decided in his favour. This practice of giving guarantees is unethical. During consultation with the client and after understanding the dispute involved, it is the duty of an advocate to inform the client about the strong and weak points of the case and accordingly give a fair advice to proceed in the matter. It must not be forgotten that an advice includes both, to file or not to file a case. An advocate has a larger role to play

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Sanjiva Row's

The Advocates Act, 1961

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on
Advocacy: Its Nature, Aims and Background