

# Client confidentiality and ethical issues in law



“ Many of the most difficult ethical issues for lawyers arise when there is a clash between their duties to clients and their broader duties to the justice system, and to society more generally. Discuss.”

Lawyers face many ethical issues when it comes to their duty to their clients, the justice system, and society in general. This essay will analyse these issues lawyers face when, focussing on confidentiality to the client, conflicts of interests that may arise, and fees charged to clients.

Legal ethics can be defined as the “...essential connection between lawyers’ humanity and their engagement in passionate and reasoned lawyering...”[1].

In order to allow lawyers to do their duty, there are rules and principles set out for both barristers and solicitors called ‘ code of conduct’. Both the Bar Standards Board (BSB) and Solicitor’s Regulation Authority (SRA) handbooks outline similar principles which are key ethical requirements for firms and individuals, and can generally be summed up as to

*“...uphold the rule of law and proper administration of justice; act with integrity; not allow your independence to be compromised; act in the best interests of each client; provide a proper standard of service to your clients; behave in a way that maintains the trust the public places in you and in the provision of legal services; protect client money and assets...”* [2]

Ethics involves making a commitment to acting with integrity and honesty (in accordance with widely recognised principles depending on the branch of legal profession a lawyer works in), be it as a solicitor or barrister. Both solicitors and barristers have their own individual code of conduct and set of principles to work by, though there is overlap between them.

The lawyer-client relationship concerns issues such as confidentiality and conflicts of interest, not necessarily what the lawyer is legally required to do.

A client comes to a lawyer mainly for representation by a person with knowledge of the law and one who has the ability to argue the case.

A fundamental ethical issue lawyers face is determining who is to decide the client's best interests. Historically, a paternalistic approach was adopted, where the client provides information (their case) to the lawyer and leaves the lawyer to make the decision on the best way to respond. This was superseded by a client-led decision: autonomy of the client. Autonomy is the act allowing the individual to make their own decisions and action them freely so long as no harm to others comes about. Autonomous clients may have influenced Boon and Levin's view that lawyers should "...treat them [the client] as individuals and allow them to reach their own decision..."[3].

Elements of paternalism can be used to assist an autonomous decision.

Lawyers should provide all relevant legal arguments and potential outcomes relating to the clients' decisions in order to act in the client's best interest.

This still allows the client the ability to reject a proposal in favour of a predetermined ambition.

The ethical conundrum arises where a lawyer could present biased advice or arguments in order to bring about a beneficial result for the lawyer. In the lawyer-client relationship, a lawyer should act in their client's best interests and aim for the best possible outcome based on the information they have available. The lawyer should not use the case to pursue their own, or third parties, agendas.

Therefore, professional ethics should be employed to ensure lawyers avoid getting into a situation of 'conflicts of interest'. These could include financial or personal interests, for example, receiving a gift or commission for recommending services. A client should expect a lawyer to give impartial advice and recommend the best course of action. The 'conflicts of interest' principle ensures that a lawyer is not having to make an impossible decision between two clients, benefitting one and harming another.[4]The conflicts principle is based upon honesty - the honesty of a lawyer to disclose any information(s) to their client that could affect their ability to provide the best possible outcome. A key case for this is SRA v Dennison[5], where a partner of a firm owned a third of shares of a company that provided medical reports for clients and had not disclosed this. He benefitted financially from this partnership, unbeknown to clients and other partners, and was subsequently sanctioned when this came to light.

With regards to this principle, it is not only the client that benefits from a lawyer obeying the conflict principle. The justice system is able to continue to run fairly, with lawyers presenting cases and arguments based solely on their client's best interests (and not their own or others). Also, the public are able to put their trust in lawyers to continue providing service to defendants appropriately and without ulterior motives (i. e. financial or personal gain through another invested party). This is a key principle the public needs to have of lawyers if they want the best outcome for their case.

The importance of the public trusting lawyers is simple: it allows the public (and therefore clients) to divulge confidential information to their lawyer. This brings us to our second ethical issue: a client's right to privacy, as it is <https://assignbuster.com/client-confidentiality-and-ethical-issues-in-law/>

now a fundamental human right.[6] This means that any communications between the client and lawyer must be kept confidential to maintain trust in the lawyer-client relationship. There is code of conduct in the Bar Standards Board (BSB)[7] and Solicitor's Regulation Authority (SRA)[8] that states affairs are to be kept confidential unless disclosure is required by law or the client consents. This is one of the largest ethical issues: lawyers must not use this principle of confidentiality to justify their misleading of a court. That is, if a client has confided information to a lawyer and, as a result, knows the information being presented to a court is false, the lawyer must seek client's approval to ensure the court is not misled, withdraw the misleading evidence, or cease to act for the client (a view that is shared by the BSB[9]). A lawyer, who also owes a duty to justice and therefore proper court administration, should not allow their client to mislead the court with information if they know it to be false. Such was the case of *Brett v SRA*[10], where the defendant had the opportunity to disclose information pertaining to illegal activities to gain information but had not disclosed it. As a result, the SRA gave a large fine and suspended him for six months. This shows the SRA's view on the importance of not letting the confidentiality principle overthrow lawyer's broader duties to the justice system. Such a view shared by the House of Lords in *Re L* [11], where a commissioned report should be exempt from the confidentiality principle when the case applies to child protection (under Children Act 1989[12]). These are clear examples that demonstrate the duties of a client to the wider public and justice system that often extend beyond his duty of confidentiality to his client. Although this may impact on the information a client confides in their lawyer, it is beneficial to the justice system in the sense that a fair and reasonable

outcome would be expected, rather than information being withheld/construed and causing injustice.

Both the BSB and SRA warrant the lawyer acting in the best interests of their client. One cannot disagree that the primary goal of any law firm is to generate business and make money. However, charging client's is not in the best interests of the client. The issue is whether a client who is in a desperate position requiring professional help would be exploited by their lawyer's high fees. The Civil Procedure Rules (CPR) states that "...costs are to be proportionate to the nature and value of the case..."[13], which is a sound principle, but begs the question " what is proportionate?".

This dilemma is often sorted by a lawyer being open about how they will charge costs (and any others that may arise), then leaving the consent of said costs to the client. The SRA code of conduct states "...clearly explain[ing] your fees and if and when they are likely to change..."[14] Obviously fees can be highly subjective to the case at hand, so here the lawyer's duty is to reasonably disclose costs associated. This may also involve the lawyer presenting the different ways their client may be able to fund their case – be it through legal aid, insurance or other means. The ethical issue here is whether the client's best interests would be harmed should they be unable or struggle to pay (which in some cases would lead to the client finding new representation/methods to pay); and whether the client is being exploited for their lack of knowledge of the law, and therefore unfairly charged by their lawyer. BSB and SRA conduct both exist to mitigate this issue, with the Legal Ombudsman also acting as a mediator in disputes regarding high fees (in 2015, 8.8 per cent of complaints were about high

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fees, with a further 8.1 per cent relating to lack of clear information about fees).[15]The sheer percentage of complaints regarding fees displays a lack of ethics amongst the profession, with a clear need for some to follow CPR rules around costs. By providing clarity to fees early on in the case(s), it aids lawyers ability to build rapport with clients and shows the general public they are honest and have client interest at the heart of their approach.

There are many other ethical issues lawyers may face when it comes to their duties. Professional codes (such as BSB and SRA) exist to emphasise lawyers' duties to the court, however, this may not always be so clear. According to Andrew Boon and Jennifer Levin, lawyers (advocates) shifts the burden of cost upon clients to advise the courts of its own laws[16]. This again raises the issue of a lawyers' interests - whether their interests are with their client, or whether they aim is to clarify the law at no expense to the state. While these advocates have the specialist knowledge to bring about the best outcome for their clients, they are also bound by their professional codes to disclose information so as to not mislead the court, again, a clear display of their duties to the court coming above that of their clients. This confidentiality principle comes under scrutiny once again when the general public are concerned. For example, if a lawyer comes across information from a client that indicates a major risk to public health or finances, is it the lawyer's duty to act on that information? Even in this situation, the confidentiality principle does not allow you disclose the information without your client's permission (a reason as to why one stays quiet). However, the significant public interest in disclosure provides the

reason as to why you may break this principle, and it of general duty to society that a lawyer must disclose of the information.

The most difficult ethical issues, therefore, do arise when there is a clash in lawyers' duties to the client, courts, and society. Above all, one can conclude that lawyer's duties to the courts override all other duties to their clients and society. When a lawyer's duty to their client overrides their duty to the court, punishment and sanctions come about (as the case of *Brett v SRA*[17]) for misleading the court and obstructing fair and justified sentencing. When their duty to the client overrides that of public interest, the result is distrust in the profession, with lawyers being regarded as greedy[18]and wanting to "squeeze every last penny they can out of their clients"[19]. Lawyers will continue to face these difficult ethical issues until code of conduct is brought about that specifically defines how a lawyer must act in a certain way. Until then, it is left to the interpretation of the individual lawyer to decide " what is right".

(1952 words)

## Bibliography

### Case Law

- *Brett v SRA* [2015] P. N. L. R 2
- *Re L (Police Investigation: Privilege)*, [1997] A. C. 16
- *PJS v News Group Newspapers Ltd* [2016] UKSC 26
- *Morgan Grenfell v Special Commissioners of the Inland Revenue* [2002] UKHL 21



- R (ex p Daly) v Secretary of State for the Home Department [2001] UKHL 26
- Solicitor's Regulation Authority v Dennison [2012] EWCA Civ 421

#### Secondary Sources

- Herring J, *Legal Ethics* (2nd edition, OUP 2017)
- Boon A and Levin J, *The Ethics and Conduct of Lawyers in England and Wales* (Hart, 2008)
- Parker C and Evans A, *Inside Lawyers' Ethics* (2nd Edition, CUP 2014)
- Solicitor's Regulation Authority (SRA Handbook)
- Bar Standards Board

#### Statutes

- Civil Procedure Rules
- Children Act 1989

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[1]C Parker and A Evans, *Inside Lawyers' Ethics* (2nd Edition, CUP 2014), p 17

[2]Solicitor's Regulation Authority Code of Conduct

[3]Andrew Boon and Jennifer Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Hart, 2008), 183

[4]Jonathan Herring, *Legal Ethics* (2nd Edition, OUP 2017), 181

[5]Solicitor's Regulation Authority v Dennison [2012] EWCA Civ 421

[6]PJS v News Group Newspapers Ltd [2016] UKSC 26; Morgan Grenfell v Special Commissioners of the Inland Revenue [2002] UKHL 21; R (ex p Daly) v Secretary of State for the Home Department [2001] UKHL 26 cited from Jon

[7]Bar Standards Board Handbook, C15. 5

[8]Solicitor's Regulation Authority Code of Conduct O(4. 1)

[9]Bar Standards Board Handbook, gC11

[10]Brett v SRA [2015] P. N. L. R 2

[11]Re L (Police Investigation: Privilege), [1997] A. C. 16

[12]Children Act 1989

[13]Civil Procedure Rules 1. 1

[14]Solicitor's Regulation Authority IB(1. 14)

[15]Jonathan Herring, *Legal Ethics* (2nd Edition, OUP 2017), 206 citing from Legal Ombudsman, *Data and Decisions* (Office for Legal Complaints, 2016).

[16]Andrew Boon and Jennifer Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Hart, 2008), 295

[17]Brett v SRA [2015] P. N. L. R 2

[18]See quote taken from Jonathan Herring, *Legal Ethics* (2nd edition, OUP 2017), 236, regarding one cartoon in which two women are having coffee.

[19]Ibid, 236