

On the Principles and Exceptions of Lawyers' Professional Ethics

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Abstract: The profession of lawyers should follow the ethics of loyalty, rules, public interest and so on. In some cases, these ethics will conflict. Generally speaking, defense lawyers should take loyalty as the first ethics and try their best to maximize the interests of their clients through legal performance. However, under special circumstances such as preventing serious crimes on the horizon, lawyers are obliged to give priority to maintaining fairness and justice and protecting public interests.

1. Introduction--Three Questions of Professor Friedman

In his book "Lawyers' Ethics in an Adversary System", Professor Friedman points out those lawyers face some ethical dilemmas under this adversary system. He raises the conflict between public morality and lawyer's obligation of confidentiality with the question of "where the body was buried" in the murder of Happy Lake in the United States. In the face of the dilemma of perjury, he elicits the conflict between the lawyer's obligation to keep secret and to defend honestly. In a speech on the ethics of lawyers, he presented three of the most difficult issues facing criminal defense lawyers: (1) when you know that a witness is going to make a perjury, should you support the witness's position? (2) If you know that a prosecution witness is accurate and honest, should you cross-examine the witness carefully in order to make the witness appear to have made a mistake or to be lying? (3) If you know that a legal advice may induce your client to make a perjury, should you provide this advice to your client? He believed that the adversary system and its inevitable result were the affirmative answers to the above three questions. Once his views have been published, it caused a great disturbance. Some people thought that he has violated the lawyer's code of ethics, and some even wanted to deprive his qualifications and professorship [1]. In the end, Professor Friedman was not deprived of his qualifications as a lawyer and continued to serve as a professor of law. However, this shocking experience prompted him to conduct a more in-depth study of the ethical dilemma of lawyers, which is why he created this book.

The author can't help but admire Professor Friedman's extraordinary courage. He dares to be against the world and give the affirmative answers to the three questions mentioned above. In fact, the core content of the above three questions is whether the defense lawyer should assume the positive obligation of honesty in a given situation. Professor Friedman thinks that it is precisely because of the obligation of confidentiality that defendants can say everything to lawyers. Then, a lawyer can give the most effective legal advice only when the client has explained all the facts. Under the conflict between the obligations of confidentiality and honesty, if honesty is chosen first, the trust between the defense lawyer and the client will be seriously damaged. In this way, the foundation of adversarial system will be shaken. Although Professor Friedman's arguments seem to be rigorous, he has neglected some important issues and his views are debatable.

2. Loyalty is the Primary Ethics of Lawyers

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It is generally believed that lawyers should follow various professional ethics. At present, the theoretical circle pays more attention to the professional ethics of lawyers, such as obligations of confidentiality, loyalty, truth and rules. However, scholars are controversial about which professional ethics is at a higher level. For example, the above-mentioned Professor Friedman believes that the conflict between the lawyers' confidentiality to clients and the honesty to pursue objectivity and truth, the former has a priority, which can be called the "priority of confidentiality". Professor Chen Ruihua believes that "the obligation of loyalty is the primary professional ethics of defense lawyers". "Defense lawyers should regard protecting the interests of suspects and defendants as the goal of defense, and try their best to choose the means and methods of defense that are helpful to achieve this goal", which can be call "priority of loyalty"[2]. Some scholars believe that loyalty to law is the primary professional ethics of lawyers[3], which can be called "priority of rules". Other scholars believe that criminal justice professionals (including lawyers) should insist on both substantive justice and procedural justice, try to pursue the ideal state of realizing both at the same time, and to avoid the situation of causing both injustices. In the event of a conflict between the two, a scientific balance must be made according to the principle of maximizing profit, which can be called "balance theory"[4]. Among the above views, there is no substantial difference between the "priority of loyalty" and "priority of confidentiality", because confidentiality obligation can be regarded as the specific requirements of loyalty obligation. It is in order to be loyal to his obligations and to live up to clients' trust that lawyers are morally responsible for keeping secrets that the clients wish to keep secret. "Priority of rules" first requires defense lawyers to obey the law and obey the reason of law, instead of being the slaves of money or clients. This view holds that criminal defense is not only a tool to serve clients, and it should not violate the rational values of the law itself. And the "obligation of honesty" that professor Friedman discusses in conflict with the "obligation of confidentiality" requires lawyers to pursue the rational values of the law apart from their loyalty to their clients, such as seeking truth from facts, not abetting or even tolerating perjury by witnesses. The "balance theory" points out that all kinds of lawyers' professional ethics are significant and cannot be neglected. It seems to cover all aspects, but has little effect on clarifying the professional ethics of lawyers. After all, the conflict between lawyers' professional ethics is unavoidable, and once a conflict occurs, it is inevitable to face the priority of choice. In the author's view, the loyalty in lawyers' professional ethics should be the first. The specific reasons are as follows:

Firstly, the Partisanship of criminal proceedings requires lawyers to be loyal to their clients. Criminal litigation has a distinct characteristic of "Partisanship". Defense lawyers, suspects and defenders are part of the defense, and the defense unanimously opposes the state organs that make criminal charges, including public security organs, supervisory organs and procuratorial organs. Thus, within the scope of professional conduct, lawyers must maximize the interests and goals of clients, which is the "Policy of Partisanship". To ensure the maximization of the clients' interests, as long as the clients' goals and interests are not against the law, lawyers must use their professional skills to strive, even if this violates their own or the public's moral judgment, which is the "Principle of Neutrality". If the lawyers' behavior suits the requirements of Partisanship and neutrality principles, other people or the public should not require them to assume moral and legal responsibility, which is the "Principle of Nonaccountability"[5]. Among the above three principles, both the Partisanship and neutrality emphasize the lawyers' loyalty. The difference is that the former only requires lawyers to actively pursue the maximization of clients' interests, and the latter requires lawyers to "exclude their own morality" and only pursues clients' interests. In judicial practice, the lawyers' defense for the "bad" is the vivid reflection of the principle of neutrality. In the criminal procedure, the client and the defense lawyer sign the Client and Agent Agreement, which is the relationship between the client and the agent. According to the general principles of agency activities, the agent takes the realization of matters entrusted by the client as his own responsibility to prevent acts that infringe upon the interests

of the client. This means that the professional orientation of lawyers should first be the shield of clients' rights, so as to stop all kinds of foreign aggression against them.

Secondly, loyalty is the basic requirement of procedural justice. Unlike civil and administrative judicial activities, criminal justice can bring civil and administrative justice. In addition, it can also bring damage to economic interests (compensation or fines), short-term restrictions on personal freedom (such as administrative detention) and other relatively minor consequences, as well as some severe and unique consequences, like, the label of "criminal", the restriction of personal freedom for a long time or even the deprivation of the right to life. These unfavorable consequences are often unbearable for the parties, making it impossible for them to ignore the results of the criminal proceedings and finding ways to pursue the most favorable outcomes, which is the direct reason of the criminal defense. At the same time, compared with the prosecution, the parties lack the ability to protect their legitimate rights and interests. The professionalism of criminal substantive law and judicial procedures makes it difficult for non-professionals to participate effectively. As the opponent of defendants, court prosecutors who assume the legal work and the obligation of prosecution usually have better legal literacy, which accelerates the imbalance of the prosecution and defense. In the modern legal countries, the right of giving criminal suspects and defendants the help of lawyers has become an important systematic design to balance the power of prosecution and defense. In criminal proceedings, the expected purpose of setting up the lawyer defense system is to enhance the defense's adversary ability through their participation. In this way, the protection of the right to defense is free from mere formality to achieve the equal adversary between prosecution and defense. It can be said that giving and protecting the right of defense of criminal suspects and defendants reflects the basic requirements of procedural justice. In recent years, the international community has put forward new and higher requirements for the right to defense; namely, the concept of effective defense is gradually popular. The core meaning of effective defense is that defenders should provide effective defense for defendants, which is inseparable from the loyalty of defenders to defendants.

In a word, the obligation of loyalty is very important to enhance the ability of defendants to fight against criminal charges. It is not only the intention of the principle of honesty between commercial subjects required by the Client and Agent Agreement, but also the necessary requirement of the characteristics of "Partisanship" in criminal proceedings. In addition, it is the basic requirement of the procedural justice principle of balance between prosecution and defense in criminal proceedings, and is the first value of lawyers' professional ethics.

3.Protecting Public Interests is the Exception Principle of Lawyers' Professional Ethics

In the process of lawyers' practice, they may face the conflict of different legal values. Generally, lawyers should put the interests of clients first, because after all, the obligation of loyalty is the first duty of lawyers' professional ethics. However, in special circumstances, lawyers also need to assume the obligation to protect the public interests. So, when should lawyers protect the public interests?

We can turn our attention back to the Happy Lake case in New York. The public relies on a simple sense of morality that the defendant's lawyer should tell the relatives of the victim where the body was buried, but the defense lawyer refused to do this. From the perspective of the public, the lawyer's behavior is indeed not in accordance with the moral standards, because his confidentiality leads to the dead can not be timely and properly buried. However, from the standpoint of his professional role, the lawyer's behavior is excusable, because professional ethics and personal morality are significantly different. Ethics is the norm of groups that regulate the behavior of members in a particular group, while morality is the constraint and requirement of the individual's inner self-cultivation[6]. When a person appears as a member of a particular group, his behavior is governed by the norms of this group. This means that, in the judicial process, once a lawyer becomes a defender, he is no longer the self who can act according to the will of an independent individual, but a defense lawyer whose behavior is subject to the norms of the lawyer industry. Why can lawyers' defense ignore the public's feelings?

Why should lawyers defend the "bad"? This is because the professional norms of lawyers require them, as agents of clients, to give full play to their role as defenders rather than show their personal moral standards. When questioning the lawyers' behavior, it is necessary to treat them as clients. If the behavior is understandable to clients, suspects and defendants, such as the defendant's unwillingness to disclose the location of the body in the Happy Lake case, the lawyers should not be imposed with a moral obligation.

However, not in all cases, lawyers should keep secrets for clients. Professor Friedman makes a distinction between "past crimes" and "future crimes"[7], which is quite significant. For the crimes that have occurred in the past (the crime already committed), the consequences of social harm have already existed. Usually, the harmful consequences have been exposed and will not or difficult to continue to expand, and these consequences are often irreversible. This means that even severe punishment against the accused is useless. Then, for future crimes (or possible "crimes"), they have been or have not been started, and new harmful consequences have not yet occurred. In order to maintain the value of security, it is acceptable to sacrifice lawyers' "loyalty" to their clients. It is precisely because of the preventability of future crimes that countries around the world generally stipulate exceptions to the confidentiality of lawyers. When the acts of the accused may cause urgent and practical harms to the public interests, defenders should not hesitate to disclose the relevant information to the public authority, so as to stop the occurrence of criminal acts in time. In fact, the relevant legislation of many countries also reflects this principle. Taking the article 38 of the Law of the People's Republic of China as an example, "lawyers should keep state secrets and trade secrets that are known in their practice activities and must not disclose the privacy of the parties... Except for criminal facts and information that are prepared or being implemented by clients or others that endanger national security, public safety, and other serious harm to the personal and property of others."

4. Legal Performance is the Baseline of Lawyers' Professional Ethics

Wilkin once discussed the spirit of legal profession, and what he called "the spirit of legal profession" actually refers to the professional ethics of the law. He believes that the spirit of the legal profession refers to the intention, sacredness and inspiration that have inspired many great people to love, study, teach, practice and establish laws. The reason why "the spirit of profession" is applicable instead of "profession" is that it is a mixed profession. Some second-rate persons who have turned their careers into transactions are also among them, and previously, they were called wall grass, pimps, hawkers, legal pettifoggers and swindlers. These people are familiar with the law and play trading tricks in order to exchange for paid litigation and regard self-interest as the only motivation. In sharp contrast, however, are those who are motivated by the spirit of the profession. They have regulated their behavior with professional requirements and recorded their lives with selfless dedication, moral courage and profound accomplishments. This record, if the world can know, will also be proud[8]. Chen Ruihua believes loyalty is an exclusive obligation, and lawyers need not assume "the obligation to safeguard the implementation of the law". However, in order to avoid damage to other important legal values and interests, the loyalty of lawyers should have its applicable boundaries and scopes[9]. As members of the legal community, lawyers should not resort to any means to win cases, and should not take the way beyond the limit of laws in the name of protecting the interests of the parties. The author believes that in the face of honest witnesses, lawyers can question the authenticity of witnesses' testimony through techniques, although it may suffer from moral doubts. However, lawyers can't take the initiative to induce witnesses to perjury, let alone falsify evidence, or even threaten them to change testimony. In a certain sense, "turning a blind eye" to the witnesses' perjury is the baseline of defense lawyers, and their maintenance to clients cannot exceed

this limit. As we all know, no one has the privilege to go beyond the law. As a lawyer, he should know more about the law and abide by it, rather than become an outsider.

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