

The Confidentiality Obligation of the Defense of Lawyer's Vocational Ethics

-- Taking "The Happy Lake Case" as an Example

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Abstract

Based on the important value of criminal defense in criminal litigation, the defense function carried by defense lawyers has always been concerned and valued by the society, and the defense relationship has become the basic relationship of criminal litigation. As an important part of the legal professional group, the legal benefits protected by the defense lawyer include the legitimate interests of their clients and the value pursuit of social fairness and justice. However, the professional ethics of lawyers and the general public's emotional perceptions are inevitably in conflict. The first case of American lawyer's professional ethics, "The Happy Lake Case", has produced a fierce opposition between lawyer's professional ethics and public moral cognition, this paper takes this case as the starting point to analyze the reasons for the conflict of professional ethics and put forward suggestions for improving the practice of defense lawyers, in order to promote the overall positive development of China's lawyer industry and contribute to the promotion of the socialist rule of law process.

Keywords

Defense lawyer; Professional ethics; Confidentiality obligations; The Happy Lake Case.

1. The History of "The Happy Lake Case"

In the summer of 1973, Robert Garrow was accused by the prosecution of murdering Philip Dombrewski while camping and burying his body under a tree, and two American lawyers, Frank Armani and Francis Belge, jointly defended him. During a subsequent meeting, Robert Grew admitted to the lawyers that he had killed two other women and dumped their bodies in addition to Philip Dombrewski. The two lawyers then found evidence at the location identified by Robert Grew that confirmed both murders, but Armani and Berger said nothing about it to anyone, not even the father of the women, who was desperate to know about it. It was only after Robert Grew finally confessed to the two uncharged murders in court that the two lawyers publicly admitted that they already knew the circumstances and the location of the dumping site. This is known as "The Happy Lake Case" (Zou, 2011).

"The Happy Lake Case" was widely discussed in the community when it was reported. The attitudes of all sectors of society towards the two lawyers in "concealing" the facts of the crime on behalf of the parties were vastly different. The media and the general public criticized them, and they even received "death threat letters". In contrast, the legal profession has been very supportive of them and has praised them, as demonstrated by Armani's award for excellence in 2006.

2. The Value of the Duty of Confidentiality of Defense Lawyers

At present, in China, there is still a controversy in the academic circle about the nature of confidentiality of defense lawyers in the process of specific cases. On the one hand, some

scholars believe that respecting professional ethics and keeping professional secrets is a legal obligation of lawyers. Of course, on the other hand, some scholars believe that lawyers need to follow the real obligation to restore the truth of the case, to maintain judicial justice and social justice. From this lawyer confidentiality behavior can be specifically subdivided into the following two points.

2.1. Confidentiality Obligation

The lawyer's duty of confidentiality, refers to the lawyer must be strictly conservative in the process of practice or understanding of the client's personal privacy, commercial secrets or other little-known and personal information, without the consent of the client, shall not disclose to a third person or even disclose the obligation. The lawyer confidentiality obligation "is the lifeline of criminal defense, supporting the existence of the defense system", its importance is self-evident. In terms of the scope of lawyer confidentiality, Article 38 of the Lawyers Law of the People's Republic of China (hereinafter referred to as "Lawyers Law") (Lawyer Law of the People's Republic of China, Article 38 A lawyer shall keep the national secrets and trade secrets known in practicing law, and shall not divulge any privacy of a client. A lawyer shall keep confidential the relevant condition and information that is known by the lawyer in practicing law and the client and other persons are reluctant to disclose, however, except facts and information on a crime compromising the national security or public security or seriously endangering the safety of the body of a person, which a client or other person prepares to commit or is committing)stipulates four kinds of situations: state secrets, commercial secrets, the privacy of the client, the client or other people do not want to disclose the situation and information, and the above four situations need to be known in the practice activities as a prerequisite. In terms of the exceptions to the confidentiality of lawyers, Article 38 of the Lawyers Law stipulates that "the facts and information of crimes that endanger national security, public security and other serious crimes to safeguard the personal and property safety of others that are prepared or being committed by the client or other persons" are not within the scope of confidentiality of lawyers, which means that there are exceptions to the lawyer's obligation of the confidentiality, national security and social welfare to a certain extent priority over personal private interests.

In addition, China's "Code of Professional Ethics and Discipline for Lawyers (revised by China Lawyers Association on November 26, 2001)" also provides for the duty of confidentiality of lawyers in Articles 4 to 8 (Lawyer Professional Ethics and Discipline (November 26, 2001 the All China Lawyers Association revised). Article 4 lawyers should be loyal to the constitution and the law, adhere to the facts as the basis, the law as the criterion, strictly in accordance with the practice. Lawyers should be faithful to their duties, adhere to the principles, to uphold national laws and social justice. Article 5 lawyers shall be honest and trustworthy, diligent and conscientious, due diligence to protect the legitimate interests of the client. Article 6 lawyers shall be dedicated and diligent, and strive to study the business, master the legal knowledge and service skills should be practiced, and constantly improve the level of practice. Article 7 lawyers shall value and maintain the professional reputation of lawyers, exemplary compliance with social morality, focus on moral and ethical cultivation. Article 8 lawyer shall strictly abide by state secrets, conserve the client's commercial secrets and the client's privacy). Thus, the client's interests must be legal to be confidential, illegal interests are not in the scope of the lawyer's duty of confidentiality. At the same time, keeping the client's secrets presupposed on not violating the "national law and social justice", when the client's legitimate interests conflict with the social public interest, lawyers generally do not assume the duty of confidentiality. In addition, the relevant provisions of the lawyer's duty of confidentiality can be found in the Criminal Law, Criminal Procedure Law, Secrecy Law, the Lawyer Business File Management

Measures and other laws and regulations, such as "Beijing Lawyer Practice Secret Rules" and other local regulations.

2.2. Duty to Be Truthful

The facts that are unfavorable to the defendant are not disclosed by the defense lawyer in principle, there is no obligation of truthfulness, which is determined by the professional characteristics of the lawyer, needless to say. The lawyer will do his best to "show" the facts that are favorable to the defendant, so the lawyer has a duty of truth in this regard. Based on the understanding of the defense relationship, the lawyer has "negative truthfulness obligation", as the defendant's legitimate rights and interests, the lawyer cannot actively distort the facts, false defense, should comply with the relevant industry regulations and behavior norms as well as using their statutory non-testimony privileges to lawfully carry out defense activities. In addition, as a legal service worker, a lawyer aims to achieve social justice and fairness, and bears certain social responsibility, which requires a strong sense of mission and social responsibility, and may assume a certain limit of truthfulness. When the lawyer's true obligation and the maintenance of the interests of the parties to complement each other is naturally the most ideal, but more often than not, defense lawyers are faced with the conflict between the two, the lawyer certainly should be responsible for the maintenance of social justice, but never to the detriment or sacrifice the interests of the client as the price. Likewise, the lawyer must also not carry out some activities that damage social welfare or even violate the law and commit crimes in order to safeguard the interests of their clients. While resolutely safeguarding the interests of the client, the bottom line of the lawyer's real obligation is to comply with the law, the "negative real obligation" is seen in this (Guo, 2019).

3. The Overall Status of the Duty of Confidentiality of Defense Lawyers in China

3.1. Legal Regulation Level, the Legislative Status is Relatively Single

At present, there is no special provisions for lawyers' professional privilege, there are only some fragmented legislative regulations on defense lawyers' confidentiality system, and no systematic legal documents, but only scattered in the middle level laws, regulations and industry norms, such as article 48 of the Criminal Procedure Law, article 38 of the Lawyer Law and article 43 of the Lawyer Practice Management Law. Secondly, although China's Criminal Procedure Law clearly stipulates the right to confidentiality, there is no perfect legal provisions of the procedural safeguards, nor the remedy or modality for illegal infringement of this right, which cannot be described as a big regret.

In addition, article 38 of the Lawyer Law only provides that the lawyer has the duty of confidentiality and the secrets he should keep, but there are no specific and detailed provisions on the nature and scope of the lawyer's confidentiality, the way the lawyer keeps the secret, and the legal consequences of leaking the secrets of clients and so on. The legislation is too general, too abstract, lack of operability and enforceability, in judicial practice will also let our lawyers and lawyers association and other relevant personnel at a loss, cannot really implement.

3.2. Industry Standard Level, the Role of the Bar Association is Relatively Limited, Lawyers Cannot Effectively Participate in the Industry Autonomy.

In China's judicial administration of the environment, the association is never and can never be reduced to the judicial subordinate, it is the overall lawyer interests of the representative, is also the lawyer industry organizers and managers, but the role of China's lawyers association has relatively large limitations. Judging from the current management model of the lawyer

industry management construction in China, the combination of lawyers associations and judicial administrative departments makes it impossible for lawyers to manage independently on the one hand, and on the other hand, the state's management of lawyers is not standardized and comprehensive. Therefore, this model under the management system is almost "paper", the effect is very little. In addition, the law association lacks the corresponding regulatory authority and cannot really effectively play its regulatory function. With large limitations, the possibility of lawyers to participate in the industry autonomy is very small.

3.3. Social Cognition, the General Public's Understanding of the Duty of Confidentiality of Defense Lawyers Is Relatively Shallow, or even Don't Understand.

The general public may think that although the defense lawyer represents the interests of the client, but also need to consider the public interest of society, in the event of conflict between the two, the lawyer should choose the latter. This kind of simple legal feelings of the public inferred from the behavior is certainly understandable, but in the long run is to the detriment of the interests of society as a whole, hindering the development of the lawyer industry and the progress of the rule of law society. Specific reasons are two: First, everyone cannot guarantee that they will not be involved in criminal litigation disputes in their lifetime, and once we become the person being prosecuted in criminal proceedings and become the defendants in the dock, we who enjoy the right to consult lawyers for legal resources and legal services will take the initiative to seek lawyers to provide defense for ourselves. If the defense attorney will be for the public interest and social justice to disclose the person's secrets, that is, the loss of lawyers to keep professional secrets of the layer of protection, then the person may no longer trust the lawyer, cannot produce effective trust, and even will not seek the help of lawyers. At the same time, if the person does not explain the process of the crime in detail, the lawyer will not be able to provide more high-quality and efficient legal services because they cannot understand all the information of the parties in a timely and effective manner, that is, it will prevent the lawyer from making a full and reasonable defense, then the lawyer confidentiality obligation is in name only. In this case, the defendant's legitimate rights and interests are difficult to protect, may cause the case of injustice. Secondly, if the public shows distrust of defense lawyers, no one will hire lawyers to represent them in criminal litigation cases, which may cause a short term reduction of lawyers' business or some lawyers lose their jobs, which is not conducive to the development of the lawyer industry. In the long run, it will make the criminal prosecution side and the defense side of the power is not balanced, it is difficult to protect the legitimate rights and interests of the defendant, and ultimately will stall the overall progress of the rule of law society.

4. Relevant Suggestions for Improving the Regulations of China's Lawyers' Confidentiality Obligations.

4.1. Improve the Relevant Legislation and Add the Right of Lawyers to Refuse to Testify

First of all, the duty of confidentiality of defense lawyers in China is not only a moral obligation but also a legal obligation. The U.S. Model Rules of Professional Conduct have specific provisions on the duty of confidentiality of lawyers, and lawyers have the right to refuse to testify to their clients' special exemption. The Japanese Criminal Procedure Law provides that "a defense lawyer has the right to refuse to testify when questioned by the court as a witness, except in special circumstances", i.e., the right to refuse to testify is given to lawyers from the legal level. The above achievements in foreign legislation are worthy of our country's reference and study (Li & Liu, 2017).

Secondly, China can learn from the legislative experience of other countries and add the right of lawyers to refuse to testify in the Criminal Procedure Law and the Lawyers Law, that is, "lawyers may refuse to testify to information related to the secrets of others that they know or obtain in the course of their profession (Pi, 2009)." I believe that only in the legal provisions of the lawyer's confidentiality privilege is clearly stipulated in order to effectively protect the specific implementation of the duty of confidentiality. The so-called "stones from other hills, can learn", based on China's specific national conditions, in the background of the socialist construction of the rule of law with Chinese characteristics continue to promote, study the progress of other countries in the professional ethics of lawyers, with a view to constantly improve the confidentiality of our lawyers system (Li, 2018).

4.2. Give Full Play to the Active Guidance of the Lawyers' Association

First of all, we should clarify the role and authority of foreign lawyers association is more detailed, the United States Bar Association defines the disclosure of a party's secret as an illegal act and according to the specific circumstances may be given to cancel the lawyer qualification, suspension of practice and other different degrees of discipline. French lawyers must comply with the discipline in the bar association, which naturally includes the obligation to keep professional secrets (Zhang, 2008).

Secondly, back to the reality of China, China's bar association should effectively perform its duties, give full play to its positive guiding role, truly achieve industry self-discipline. In the construction of professional ethics of lawyers, it is possible to carry out management system reform to stimulate vitality. The bar association should fully protect the legitimate rights of lawyers, enhance the professional ethics education of lawyers, and regulate the professional behavior of lawyers. When the legitimate rights and interests of lawyers are illegally infringed, the bar association should actively regulate and protect them. At the same time, for lawyers who violate the duty of confidentiality or professional ethics, the bar association should give significant criticism and give appropriate consideration to the punishment. Finally, the lawyers' association, as the "pilot" of the lawyers' industry, should increase the publicity of the relevant industry and lawyers' work, strengthen the affirmation of lawyers' confidentiality obligations, and create a good environment for the normal practice of lawyers (Hao, 2020).

4.3. Enhance the Education of Lawyers' Professional Ethics Norms

First of all, the lawyer profession has distinct independence, its professional content and practice value is to protect the legitimate rights and interests of the parties and use legal weapons to promote the realization of social justice. Pay attention to the construction of professional ethics of defense lawyers in our country, and give full play to and carry forward the professional spirit of lawyers. Truly carry out reasonable and legal defenses for the legitimate rights and interests of the parties. At the same time, it is necessary to strictly guard the secrets of the parties and effectively implement the lawyer's duty of confidentiality.

Secondly, the good trust relationship between the advocate and the client is the basic premise of the development of professional ethics of lawyers. Based on professional ethics and the interests of the client's trust, the defense lawyer should take the initiative to undertake the obligation to preserve the confidentiality of the parties' information, and always be loyal to the parties and make professional defenses for their legitimate interests. This is an important way to protect human rights, and is also a reflection of the balanced structure of criminal proceedings.

4.4. Actively Update the Mindset of the Public and Enhance the Understanding of the Duty of Confidentiality of Defense Lawyers

First of all, the media and the general public still have not eliminated the professional misunderstanding of defense lawyers and have not yet accepted the role of defense lawyers for

the protection of human rights (Pan, 2010). Therefore, it is urgent and important to update the public's ideology.

From a macro point of view, the duty of confidentiality of lawyers is beneficial to everyone in society, no one can guarantee that they will not face litigation problems in their life, of course, everyone hopes that they can get the help of professional lawyers when they are involved in litigation, and naturally, they do not want lawyers to disclose their secrets. Therefore, the relevant departments need to continue to strengthen the publicity and education, popularize the lawyer confidentiality obligation of the relevant provisions, improve the public acceptance of the lawyer confidentiality obligation and promote people's deep understanding of the important value of lawyers' confidentiality obligations in safeguarding the lawful rights and interests of parties, protecting the human rights of defendants, balancing the structure of prosecution and defense, and promoting the development of judicial litigation procedures in China

5. Conclusion

The author agrees with the behavior of the two defense lawyers in "The Happy Lake Case" in keeping the criminal secrets of the defendant, but the author will not represent this case. The general social moral psychology of the public and the legal professional ethics of lawyers are not the same, this matter has caused a great shock in the media, the public and the lawyer community, people have condemned the behavior of lawyers, demanded to disqualify their practice, and even filed a lawsuit against them. The general public believes that the two defense lawyers did not act in accordance with basic human standards and did not consider the fairness and justice of the legal system and the well-being of others and society. As far as the legal profession is concerned, the behavior of the two lawyers is consistent with the provisions of the lawyer's professional code of conduct related to the restraint of the lawyer's practice process, which stipulates that lawyers are obligated to keep client information confidential and that lawyers must always protect the interests of their clients. Based on the significance of the professional secrets that lawyers need to keep in different fields to national security, social stability, and personal interests, as well as the wide range of contacts and the large amount of information obtained by lawyers in professional activities, many countries have made quite strict provisions on lawyers' confidentiality obligations and responsibilities for leaking secrets, this is especially true in case law countries such as the United Kingdom and the United States. Take the United States as an example, the United States law on lawyer confidentiality norms up to the professional code, that is, lawyers must comply with the principle of absolute confidentiality, shall not be leaked for any reason and adjusted by the industry discipline and civil compensation. From the consideration of the perpetrators themselves, the privacy they enjoy is also the law should protect, no one is free to violate. Modern law stipulates that a criminal who has committed a serious crime can only be deprived of his dignity and rights in accordance with the legal procedures legally and properly, but never by his defense attorney at will. In summary, it can be seen that the U.S. legal profession places very high demands on the duty of confidentiality and fidelity of lawyers, a lawyer should have a human nature, should have the values and moral philosophy of the community, but also more need to have a lawyer's professional ethics, in the two cannot be reconciled, choose the latter is the loyalty of their own lawyers to practice, but also the social status of the lawyer's profession is firmly maintained.

At the same time, the author believes that it should also be judged according to the specific national conditions of different countries and different historical and legal traditions, in our country, China's "Lawyer Law" does not have a lawyer's duty of confidentiality and fidelity to clear detailed provisions, article 49 of the "Lawyer Law" regards the disclosure of state secrets as one of the criminal liability of lawyers, and does not involve lawyers for the general public's

secret disclosure. Therefore, the author believes that the law has provided a certain direction for lawyers to solve such a reasonable and effective solution to this situation in the provisions of the articles and regulations. In addition, the traditional culture of the Chinese nation has a deep foundation and a long history, and the feeling of putting the country first and fairness and justice has long become the mainstream value of society, and all sectors of society generally advocate the subordination of individual interests to national interests and collective interests. Therefore, the author believes that the final outcome of the "The Happy Lake Case" may change in China.

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