

The Internal and External Contradictions of Defense Lawyer's Duty of Loyalty

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ABSTRACT

In the past four decades, many Chinese scholars have been paying attention to the future development of the lawyer industry and committed to promoting the improvement of the Chinese lawyer system. Among them, loyalty is an external requirement of lawyers' professional ethics, and at the same time, the lawyer's "dual identity" forms internal professional constraints. In order to protect the rights and interests of lawyers, this article uses literature analysis and comparative analysis to clarify the core elements of lawyers' loyalty obligations, and explore the reasons for conflicts in lawyers' loyalty obligations under different identity attributes. This article believes that only when the rights of lawyers are fully protected and the professional environment is optimized can this problem be solved fundamentally, and it puts forward some suggestions to promote the harmonious development of the lawyer industry.

Keywords: duty of loyalty, duty of confidentiality, lawyer's right

I. INTRODUCTION

In social practice, some related cases are highlighted everywhere, which make the parties and lawyers full of suspicion and collapse of trust. Worse still, some lawyers are prosecuted for the crime of shielding and perjury. This undoubtedly has a huge impact on the profession of lawyers, and many lawyers have a negative attitude of defense, which is contrary to the construction of the rule of law society in China.

The author thinks that the main reason for the above phenomenon is that it's hard to accurately grasp the boundary of lawyer's right of defense, especially there are many unclear contradictions on the issue of duty of loyalty. If a lawyer may face punishment when exercising his right of defense, it is very unfavorable to the defense system. If the above contradictions are not reconciled, the result is that the professional value of lawyers is damaged, the trust of lawyers in society is reduced, the main force to protect human rights is reduced, and the strategy of governing the country according to law cannot be well carried out. Therefore, the author believes that it is of great practical significance to clarify the boundary of lawyer's loyalty obligation to the parties. The author intends to divide it into "external contradiction" and "internal contradiction" in lawyer's duty of loyalty from the two perspectives of "loyalty to the client" and "lawyer's special identity", and take this as the starting point to give some reasonable suggestions.

II. EXTERNAL CONTRADICTION: FULL LOYALTY TO THE CLIENT MAY NOT MEET THE REQUIREMENTS OF LAWYERS FOR JUSTICE

The duty of loyalty of lawyers, also known as the privilege of confidentiality, is originated from the litigation confrontation system of the common law system at first. Later, with the development of the theories of honor, privacy and utility, it becomes more and more scientific.¹ In my opinion, being completely loyal to the client can reflect the professional value of lawyers, but it is not necessarily just. The reasons are as follows:

Article 2 of the Lawyer's Law of China stipulates three basic tasks of lawyers, one is to safeguard the legitimate rights and interests of the parties, the other is to safeguard the correct implementation of the law, and the third is to safeguard social fairness and justice. As mentioned above, most of the three interests are the same, but there will be conflicts. For example, in the first task, the lawyer should have concealed all the facts for the parties in order to build trust. Only in this way, the legitimate rights and interests of the citizens can be protected to the greatest extent, but it is also likely to infringe the interests of the society if lawyers completely depend on the will of the parties.

¹ Refer to Tongshan's doctoral dissertation, Study on the System of Defense Lawyer's Privilege of Confidentiality, Shanghai Jiaotong University, classification No.: d926.5

Furthermore, as a defense lawyer, he must know and master a lot of core privacy information. But based on the lawyer's duty of loyalty, despite the discovery of criminal acts that have not been discovered by the judicial authorities, the lawyer can not expose them. As Lord Denning said: "as far as I know, there is only one profession that has the privilege of not providing information to the court. This is the lawyer profession, but it is not the lawyer's privilege, but his client's." Shen Jiaben, a legal reformer at the end of the Qing Dynasty, also believed that "criminal defense lawyers are not for the state, nor for officials, not for trial and conviction, but only for the interests of clients."² Of course, the author thinks that "the interests of the parties" can not break the bottom line of social interests. For example, the willingness of the parties is a serious criminal act, which will seriously harm the society if it is not stopped. Such willingness should not be maintained by lawyers, instead, lawyers have the right and obligation to stop it.

In practice, lawyers tend to be too loyal to the parties and violate the law. The common accusations are 306³ and 310⁴ of criminal law. In addition, in judicial practice, because of the betrayal of the parties or the high pressure of the state public power, "confession" also makes lawyers bear the "crime of shielding and perjury". So it's possible that a little bit of carelessness will lead us to become the accomplice of perjury. Since then, contradictions have arisen.

III. INTERNAL CONTRADICTION: NORMATIVE BARRIER CAUSED BY LAWYER'S DUAL STATUS

A. Dual status of lawyer

The defense lawyer has dual status. On the one hand, as the legal defender, he has a certain degree of "judicial function". On the other hand, he is the assistant of the defendant.⁵ However, the author believes that the two identities are primary and secondary. The former should be put in the first place

² Refer to Chen Weidong's *The Study of Chinese Lawyers* (Fourth Edition), China Renmin University Press, page 25.

³ Article 306 of the criminal law stipulates that: in criminal proceedings, defenders and agents ad litem who destroy or forge evidence, help the parties to destroy or forge evidence, threaten or induce witnesses to change their testimony against the facts or commit perjury shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; if the circumstances are serious, they shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years.

⁴ Article 310 of the Criminal Law of People's Republic of China, if a person knowingly provides a hiding place, money or property for a criminal to help him escape or cover up with false certificates, he shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years.

⁵ Refer to Lin Shantian: *Criminal Procedure Law*, 1999 edition of Taiwan Wunan book publishing company, page 196

between "auxiliary defendant" and "judicial function". The reasons are: first of all, in criminal proceedings, lawyers are naturally partisan and should maximize the interests of the parties. But the function of judicial organs requires them to fight crime on behalf of the state, while the state does not require lawyers to fight crime, which is the most basic role orientation. Secondly, finding the truth is the basic task of the judiciary, not the lawyer. Because in the criminal procedure, the main responsibility of proving the facts of the case lies in the judicial organ. According to the principle of evidence law, the defendant cannot be allowed to prove his innocence, but the judicial organ can prove his guilt. The burden of proof mainly lies in the prosecution. "Finally, for defense lawyers, if he deviates from the trust relationship established with the parties, then there is no need for the existence of the profession of lawyers, and no way to talk about judicial fairness, let alone expect other public attributes of the profession in society.

In addition, the dual identity of defense lawyer is the concept of unity of opposites. According to Lord Bruham of England, "the sacred duty of a lawyer is to save and protect the client, even if at the cost of going through hell".^[1] This view holds that the defense lawyer should be transformed into a gunner who is hired only by the will of the parties. Lord Coburn, on the other hand, said: "lawyers have a greater responsibility for eternal truth and justice than their clients."^[2] However, in the author's opinion, these two absolutized views are too extreme to correctly understand the status of lawyers and the resulting confidentiality obligations and real obligations of lawyers.

B. Two obligations derived from lawyer's dual status

1) *Lawyer's confidentiality obligation*: Lawyer's Law in China only stipulates that lawyers keep professional secrets as an obligation, and does not establish related right protection of lawyers, which may be a major omission. As for the legal liability of lawyer's breach of confidentiality obligation, only the disclosure of state secrets is subject to criminal liability. If a lawyer only divulges State secrets or party secrets, he will be punished and compensated. In western countries, almost all divulgers of party's secrets are subject to criminal liability. Therefore, this is not strict enough in the standardization of lawyers' confidentiality in China.

2) *True obligations of lawyers*: Compared with the objective and real obligations of the judiciary, the real obligations of defense lawyers are quite different.

First of all, a lawyer should protect the correct facts of the law in his practice. But the first task of a lawyer is to protect the legitimate rights and interests of the

parties, so the real obligation of a lawyer must be different from that of a judicial organ. For facts that are not conducive to the parties, a lawyer can be silent and have the right not to testify, which is a one-sided limited real obligation derived from his natural partisanship.

Secondly, in the process of criminal procedure, the public prosecutor bears the burden of proof. In other word, the proof of case facts is mainly the obligation of the public prosecutor. The defense lawyer has the right to "conceal" the facts of the case against the parties. But this kind of concealment is not to prevent the investigation and prosecution from discovering the truth, but to "not expose" it passively. This is the bottom line of the real obligation, because lawyers can not actively forge and destroy evidence, abet others to commit perjury, and actively cheat the court.

Finally, compared with the lawyer's confidentiality obligation, which embodies the defense lawyer's "private" attribute, the real obligation embodies the nature that the defense lawyer is "for the public" for the society and the national interests. The core difference is that the position of the station and the object of loyalty are different.

IV. SUGGESTIONS: RESOLVING CONFLICTS

Although the construction of the rule of law society is constantly improving, the high risk of criminal defense and the low rate of lawyer's defense are still a chronic disease in China's criminal litigation. As mentioned before, the professional risks of defense lawyers are mainly manifested in the crime of perjury, the crime of shielding, forgery of evidence, etc. Therefore, on the basis of this standard, it is necessary to further refine the connotation of lawyer's practice environment and loyalty obligation. The author has the following suggestions:

A. Increasing the system of defense lawyer's privilege of confidentiality

In the countries of adversary system, the privilege of lawyer's confidentiality is regarded as the cornerstone of adversary system.[3] Considering the reality of China, it is the key to resolve the defense risk to give the defense lawyer the privilege of confidentiality, which is also the need of the reform of the criminal procedure mode. Therefore, it is suggested that lawyers should have this privilege in legislation.

B. Improving the social status of lawyers

Defense runs through the whole criminal procedure, and the right of defense is the core right in criminal procedure. China is a country ruled by officials with strong public power. Up to now, there are still many biases against lawyers in many places. Therefore, it is

suggested that all parties in the society should increase the publicity of lawyers' profession, improve their status, attract outstanding talents, and make the work of rule of law in China in a virtuous circle.

C. Optimizing the professional environment of lawyer industry

It is necessary to form a general understanding in the judicial industry, deeply understand the professional value of lawyers, protect the rights of lawyers, and do not bully people in violation of rules and regulations, or deliberately make difficulties for lawyers in various ways of action or inaction. It is advisable able to establish a corresponding punishment and complaint mechanism, give full play to lawyers' subjective initiative, let lawyers make all-out efforts in each case, and ensure the effectiveness of the lawyer's defense system.

D. Improving lawyers' social responsibility

Lawyer is a special profession, and it is precisely because lawyer profession has the sacred attribute different from general work that it has always been respected in different social systems. Therefore, lawyers should continue to maintain the positive image, otherwise it will shake the public belief in the law. Among them, the first problem is to resolve the contradictions arising from the duty of loyalty and the problems existing in the contradictions. The duty of loyalty is the foundation of lawyer. This duty is not only the foundation of establishing trust relationship between lawyer and client to carry out effective agent, but also the minimum requirement of lawyer's loyalty to client's interests.⁶ Therefore, the protection of lawyer's rights is an inevitable requirement of building a socialist society ruled by law with Chinese characteristics, and an important guarantee of promoting judicial justice and preventing judicial corruption.⁷

V. CONCLUSION

To sum up, increasing the system of defense lawyer's privilege of confidentiality, enhancing lawyer's antagonism and protecting lawyer's professional environment are all, in the final analysis, increasing the "base" of lawyer's legal activities and protecting lawyer's rights, which contribute to improve lawyer's social responsibility, and to better develop the rule of law society.

⁶ Refer to Chen Ruihua: *The Concept of Criminal Defense*, Peking University Press, 2017 edition, page 120.

⁷ Refer to Zhou Xiaoxia. *Analysis of Institutional Change and Practical Construction of Lawyer Professional Ethics in China*. Legal research, 2012, issue 12

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