

## **Is it ever ethically justifiable for a lawyer to breach client confidentiality? Examine the limits of professional ethics in extreme cases.**

### **Introduction**

In recent years, the #MeToo movement and the Post Office Inquiry have highlighted how lawyers can facilitate wrongdoing by maintaining client confidentiality using non-disclosure agreements ('NDAs'). International organisations have also criticised lawyers for relying on the guise of confidentiality to conceal complex corporate structures and financial transactions,<sup>1</sup> facilitating the commission of financial crimes. While the principle of client confidentiality provides that the affairs of clients should be kept confidential, these examples reveal how the principle can be misused to conceal injustices. This raises the question of whether it can ever be ethically justifiable for a lawyer to breach client confidentiality, and if so, where the limits of professional ethics lie in extreme cases.

To answer the questions, the essay will proceed in two parts. The first part will examine the justifications for client confidentiality, which will answer whether breaches of confidentiality can ever be supported. The second part will examine three cases of (1) preventing serious crime; (2) protecting vulnerable individuals; and (3) misuse of confidentiality to argue that while client confidentiality is essential, it can be outweighed by the need to uphold public interest in the administration of justice and the rule of law. In such extreme cases, breaches of client confidentiality can, and indeed must, be ethically justified.

### **Part I: The Case for Client Confidentiality**

To understand when breaching confidentiality may be justified, it is important to first consider the justifications for this duty. Client confidentiality is not just a matter of protecting a client's privacy; it is integral to the functioning of the legal system and the pursuit of justice, as emphasised by the International Bar Association.<sup>2</sup> A key distinction between the lawyer's duty of confidentiality against other professional confidentiality duties is that lawyers are performing the public function of administering justice and not merely serving clients' private interests; resultingly, the duty of confidentiality is the bedrock of the rule of law.<sup>3</sup>

A powerful justification for client confidentiality is that it enables clients to obtain independent and confidential legal advice without fear that their statements could be used against them. This is especially important in situations where individuals may be vulnerable or unsure of their legal position. For example, lesser-resourced parties may not disclose their position, fearing it will expose their weaker bargaining power and leave them vulnerable to unfair settlement offers. However, they may be pushed

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<sup>1</sup> OECD, 'Ending the Shell Game: Cracking down on the Professionals Who Enable Tax and White Collar Crimes' (2021) <[https://www.oecd.org/en/publications/ending-the-shell-game\\_79e22c41-en.html](https://www.oecd.org/en/publications/ending-the-shell-game_79e22c41-en.html)> accessed 6 November 2024; UN FACTI Panel, 'Report of the High Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda' (2021) <<https://factipanel.org/>> accessed 6 November 2024.

<sup>2</sup> IBA Presidential Task Force on Lawyer-Client Confidentiality, 'IBA Statement in Defence of the Principle of Lawyer-Client Confidentiality' (International Bar Association 2022) 23.

<sup>3</sup> Richard Moorhead, Steven Vaughan and Kenta Tsuda, 'What Does It Mean for Lawyers to Uphold the Rule of Law?' (2023) Faculty of Laws University College London Law Research Paper No. 23/2023 23 <<https://papers.ssrn.com/abstract=4660750>> accessed 6 November 2024; IBA Presidential Task Force on Lawyer-Client Confidentiality (n 2) 12.

towards litigation if a lawyer does not have the full picture, which may be more detrimental in practice if it is economically unviable.

Moreover, the independence of lawyers would be compromised without client confidentiality. This point was made by Lord Justice Bingham in *Ventouris v Mountain*, when he noted that lawyers should be “free to give honest and candid advice on a sound factual basis, without fear that these communications may be relied on by an opposing party if the dispute comes before the Court for decision.”<sup>4</sup> The point can be taken further; breaches of confidentiality could be exploited by more powerful parties to undermine the lawyer’s independence. Taking the same example as above, if a lawyer breached confidentiality on the client’s economic situation, the stronger party may offer to ‘buy out’ the lawyer and deprive the other side of legal advantages. Such commercialisation of legal services creates a tiered system of justice, which operates to the detriment of the public.

A related but distinct justification is that client confidentiality protects lawyers from personal harms or external pressures, enabling them to serve clients impartially. For example, an immigration lawyer acting for a refugee may be at risk of attack from extremists if no client confidentiality existed. One can look at the June 2024 UK riots, where up to 60 immigration centres were circulated as targets online, to infer that lawyers and clients could be personally attacked if confidentiality was breached. Indeed, a London immigration law firm was subject to an armed attack by a knifeman motivated by racism in 2020;<sup>5</sup> the initial non-disclosure of the firm name only highlights the importance of preserving confidentiality to prevent further danger. When a lawyer’s safety is at risk, their ability to represent clients impartially and effectively is impaired. Confidentiality therefore safeguards the integrity of the legal process itself, which is integral to clients accessing justice.

Finally, client confidentiality is necessary for the efficiency of administering justice. As Lord Justice Bingham identified in *Ventouris*, the principle of confidentiality is “rooted in the public interest, which requires that hopeless and exaggerated claims and unsound and spurious defences be so far as possible discouraged, and civil disputes so far as possible settled without resort to judicial decision.”<sup>6</sup> This can only be achieved if clients speak candidly and disclose all relevant facts, including their positions and weaknesses, which allows their lawyers to properly evaluate the merits of the case. In turn, lawyers can then “give their clients sound advice, accurate as to the law and sensible as to their conduct”,<sup>7</sup> whether that involves pursuing litigation or redirecting the matter to alternative dispute resolution mechanisms.

However, the strength of the point may be undermined by the possibility that clients do not necessarily have to follow through legal advice. Mere discouragement does not necessarily prevent vexatious litigation – the example of the litigant who brought over 40 discrimination claims in the employment tribunal suggests otherwise.<sup>8</sup> On the contrary, client confidentiality may have an unintended adverse consequence of increasing illegitimate defences when parties become aware of the difficulty in proving

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<sup>4</sup> *Ventouris v Mountain (The Italia Express) (No 1)* [1991] 1 W.L.R. 607 611.

<sup>5</sup> Mark Townsend, ‘Lawyers Claim Knife Attack at Law Firm Was Inspired by Priti Patel’s Rhetoric’ *The Observer* (10 October 2020) <<https://www.theguardian.com/politics/2020/oct/10/lawyers-claim-knife-attack-at-law-firm-was-inspired-by-priti-patels-rhetoric>> accessed 7 November 2024.

<sup>6</sup> *Ventouris v Mountain (The Italia Express) (No. 1)* (n 4) 611.

<sup>7</sup> *Three Rivers District Council v Governor and Company of the Bank of England* [2004] UKHL 48 [61].

<sup>8</sup> Sam Tobin, ‘Vexatious Litigant Banned after Bringing 40 ET Claims’ (*Law Gazette*, 11 March 2022) <<https://www.lawgazette.co.uk/news/vexatious-litigant-banned-after-bringing-40-et-claims/5111829.article>> accessed 7 November 2024.

the case. For example, an unscrupulous defendant facing potential corporate criminal liability may be emboldened to defend their claim after obtaining legal advice, having learnt of the claimant's difficulty in proving the requisite state of mind. In this case, breaching confidentiality to prevent further wrongdoing may be justified. This demonstrates that confidentiality is an "important, but not untrammelled"<sup>9</sup> aspect of the rule of law. Consequently, the question is not *whether*, but *when* it is ethically justifiable for a lawyer to breach client confidentiality.

## **Part II: Ethical Justifications for Breaching Client Confidentiality**

Despite the strong justifications for preserving client confidentiality presented above, it neither requires, nor justifies, rigid adherence to the duty. The duty to maintain client confidentiality must be balanced against the duty to protect and promote the public interest, as reflected in S.1(1)(a) Legal Services Act 2007. This balancing exercise is not straightforward or necessarily intuitive, as demonstrated by the case of Stephen Chittenden, who breached client confidentiality to help convict a man who may otherwise have avoided punishment for murder and agreed to leave the legal profession post-retirement. While consequentialists may argue that any private interests harmed through breaching confidence is outweighed by the injustice of someone going unpunished for murder, the practical reality of financial consequences and reputational risks create disincentives for lawyers to weigh in favour of apparent public interest. To explore when it can be ethically justifiable for a lawyer to breach client confidentiality, three extreme cases will be evaluated to better understand the limits of professional ethics.

### (i) Preventing Serious Crime

Breaching client confidentiality in cases of preventing serious crime or 'iniquity', such as "fraud, dishonesty, bad faith or sharp practice",<sup>10</sup> is one of the most "well-established"<sup>11</sup> exceptions with clear ethical justifications. In principle, a client has no legitimate expectation of confidentiality when they disclose information relating criminal activity. Nor does public policy require "those who misapprehend the law to be privileged in circumstances where no privilege attaches to those who correctly understand the situation."<sup>12</sup> Furthering the criticisms from international organisations, lawyers who facilitate fraud and corruption under the guise of client confidentiality undermine the rule of law as these entities have no legitimate expectations of confidentiality *ab initio* by deliberately misusing legal instruments. Therefore, breaching 'confidentiality' in such cases is not just justifiable, but necessary.

It may be countered that this line is more difficult to draw in practice. Clients may be unable to distinguish between incriminating information, where no legitimate expectation of confidentiality arises, and exculpatory information, where confidentiality may be required to ascertain the true legal position. If an exception is carved out for preventing serious crime, clients could be deterred from being fully honest in their correspondences, with serious consequences for their liberty if they are resultingly imprisoned due to receiving incomplete legal advice. However, strict adherence to client confidentiality will not resolve such fears, and limits can be drawn to mitigate such risks. Taking the same example of lawyers allegedly furthering corrupt and fraudulent practices, financial or administrative advice could be disclosed to establish the true picture and prevent wrongdoing, while core legal advice remains confidential to allow clients to ascertain an accurate view of their legal position without prejudice.

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<sup>9</sup> Moorhead, Vaughan and Tsuda (n 3) 24.

<sup>10</sup> *Barrowfen Properties v Patel & Ors* [2020] EWHC 2536 (Ch) [35].

<sup>11</sup> *ibid* [3].

<sup>12</sup> *Barclays Bank Plc v Eustice* [1995] 1 W.L.R. 1238 1252.

Doing so promotes public interest in the administration of justice and the rule of law with greater flexibility, providing a more justifiable solution than rigid adherence.

### (ii) Protecting Vulnerable Individuals

Preventing harm to children and other vulnerable adults may also justify breaches of confidentiality, particularly as they may be unable to fully appreciate the possibility and severity of harm by themselves. While acknowledging that difficult questions of capacity fall outside the scope of this essay, the fact remains that such individuals warrant greater protection under the law because of their vulnerability. At first glance, this may point towards heightened levels of confidentiality to ensure that no harm is caused by inadvertently revealing potential victims to abusers. However, such a fear can be mitigated by clearly defining the exception to exclude the breach of confidential *identification* information, preventing perpetrators from identifying victims.

The disclosure of confidential client information can be required to fully assess the situation and ascertain how harm can best be prevented. Lawyers may be the first to learn of potential abuse, neglect, or threats of harm by virtue of their duty and position. Such cases often require balancing a myriad of complex, non-legal factors such as welfare and public protection. Although lawyers *can* conduct such balancing exercises, it is a distinct question from whether they *should*. Arguably, it would be inappropriate for lawyers to do so because they lack specific expertise, and it falls outside their core function of administering justice given the possible policy implications. For example, if a schizophrenic patient feels compelled to injure other members in a mental health ward and discloses this to a lawyer when obtaining advice or during a capacity assessment, lawyers are less well-placed than trained medical professionals to suggest the best course of harm prevention. As such, breaching client confidentiality may be justified to prevent injury to other vulnerable persons, and to prevent harm (in a broad sense) to the patient who is suffering from false perceptions that compel such action.

Breaches in these cases can be further justified as the other professionals often have their own confidentiality duties, providing an additional safeguard for minimum and proportionate breaches. As such, breaches are more justifiable than maintaining confidentiality when protecting vulnerable individuals, as it allows for deference to expertise and takes account of the specific facts of the case, better serving the client's interest and the ends of justice.

### (iii) Misuse of Confidentiality

Finally, breaches of confidentiality may be justified when lawyers suspect that clients are misusing confidentiality (as through NDAs), as no other party may know of the true situation to hold wrongdoers to account. The justifications for breach in such cases are particularly forceful following the #MeToo movement, where NDAs were systematically and serially abused to enable workplace sexual harassment. Similarly, NDAs allowed much wrongdoing to be hidden in the shadows as revealed in the Post Office Inquiry. Such misuse of confidentiality cannot be said to warrant the protections normally afforded, given that they “frustrate, and might pervert in the criminal sense, the administration of justice”,<sup>13</sup> which undermines the very justifications for having confidentiality in the first place.

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<sup>13</sup> Moorhead, Vaughan and Tsuda (n 3) 35.

It may be objected that this places a stringent requirement on lawyers to act diligently and lead to defensive breaches of client confidentiality out of caution. However, the duty not to behave in a manner that diminishes public trust and confidence (as enshrined for barristers in Core Duty 5) addresses this point precisely. Lawyers *should* be acting diligently to prevent diminished public trust following the uncovering of such misuse, and *should* uphold positive public perception by not acting in a self-interested manner. Further, anecdotal evidence suggests that lawyers would be more inclined to maintain client confidentiality when the boundaries are unclear,<sup>14</sup> further diminishing the force of such criticism. When coupled with the forceful criticisms against lawyers for ‘turning a blind eye’, accepting the paramountcy of client confidentiality without question is no longer possible; breaches are justifiable in extreme cases to support the administration of justice and rule of law.

## Conclusion

While client confidentiality is vital for justice, it cannot be absolute when it facilitates wrongdoing or injustice. In extreme cases, clearly defined exceptions for breach triumph over rigid adherence to duty by accounting for case-specific facts and allowing deference to expertise. This ultimately ensures better adherence with the ends of administering justice and upholding the rule of law. In these circumstances, breaches can, and should, be ethically justifiable.

(2451 words)

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<sup>14</sup> Iain Miller and Charlotte Judd, ‘Client Confidentiality— to Disclose or Not Disclose?’ (*Kingsley Napley*, 3 November 2023) <<https://www.kingsleynapley.co.uk/insights/blogs/regulatory-blog/client-confidentiality-to-disclose-or-not-disclose>> accessed 7 November 2024.