

BAD LAWYERS

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Doing what's right & legal

Conduct unbecoming? **John Gould** weighs up the evidence surrounding legal but anti-social lawyering

IN BRIEF

- ▶ One person's moral conviction is not another's legal obligation.
- ▶ Lawyers must have integrity and comply with professional codes.

Law is the great ethical common denominator. We can disagree with it but we must obey it or take the consequences. It tells us, in a way which matters, what is right and what is wrong. It tells us what is permitted and what is not. It tells us that with compliance comes the freedom to speak or to do as we please.

Individually I may think that failing to stand for the national anthem should be punished by public stoning but, until my lobbying produces a referendum and legislation, you can continue to sit there gesturing disrespectfully in my general direction. A Beefeater will not appear and haul you off to the Bloody Tower.

Fortunately for lawyers, we are not experiencing a shortage of law. Law, like nature, abhors a vacuum and a vast cloud of law has occupied more or less every nook and cranny of our complicated modern society. It is a comfort to know that anarchy is not imminent because of a lack of laws.

It is, of course, also true that most people

aspire to meet their own ethical standards and would usually like to be considered ethical by their communities and friends. Unsurprisingly these standards are inconsistent and changing. To be ethical in that context, a person may be expected to maintain the Sabbath or minimize their carbon footprint or exhibit their patriotism, and if they fail they may feel shame or be shunned or abused.

There may be times when these ethical expectations become so strong that even expressing disagreement can produce a passionate reaction. The rule of law, however, means that the ways in which ethical expectations can be legally enforced are limited. One person's moral conviction is not another's legal obligation.

For lawyers it is a little more complicated. Lawyers have their own special ethical standard intended to give the public confidence that they can trust their lawyer to work in their best interests. Lawyers must have integrity and comply with professional codes. Lawyers are subject to professional 'laws' but have less opportunity to operate their own ethical philosophy because their personal beliefs don't matter that much. My clients may engage in perfectly legal activities of which I personally disapprove but I am not entitled to act as the gatekeeper of their conscience. Lawyers are not priests; they are the rude mechanicals of the law.

In recent times this comfortable philosophy is beginning to be challenged. Strong and pervasive beliefs form quickly and the law is slow to follow. Governments are always tempted by an opportunity to appear to achieve something without having to take the responsibility of making law or spending money and a rising tide of popular sentiment provides political waves to be ridden.

A scholarly article by Michael Blackwell 'Conduct Unbecoming: Solicitors, the SRA and Tax Avoidance' [2019] (1) British Tax Review 31-54, has recently dissected the relationship between law and a lawyer's ethical duties in the context of tax avoidance.

The article is a critique of the SRA's warning notice to solicitors not to be involved in tax avoidance schemes. Tax avoidance is an example of lawyer activity which does not assist illegality but which many people would consider objectionable. The warning notice also raises the question of the extent to which regulators should promote political objectives which go beyond what the law requires by the use of their regulatory powers.

In 2015 the government asked regulatory bodies to take a greater lead in setting and enforcing clear professional standards around the facilitation and promotion of avoidance to protect their reputation and the public good.

In September 2017 the SRA issued a warning notice 'Tax avoidance—your duties'. Solicitors were warned: 'The promotion or implementation of artificial arrangements will lead both client and

adviser into difficulties with HMRC and leave the adviser open to disciplinary action.'

The SRA warns solicitors not to create, encourage or promote potentially illicit tax planning arrangements. The warning might be thought to be so broad as to provide little guidance but be directed more to general deterrence. Michael Blackwell raises a number of questions. Are any 'schemes' objectionable or only if they are 'artificial' or highly contrived? Is the crucial point that what is proposed is contrary to the intention of parliament as discerned in some way outside of the relevant legislation itself? Does it matter if the scheme turns out to be successful? Is advising a client considering an arrangement or acting in litigation defending a scheme a problem? How far does facilitating promoting or implementing extend?

These issues are likely to be typical of a situation in which ethical pressure, in this case from the government, produces requirements which do not derive from the law but from a particular ethical or policy objective. The warning is neither an expert tribunal's assessment of professional conduct on particular facts nor a codification into rules of conduct. It is not clear how far the warning goes beyond the existing and obvious principle that lawyers should not facilitate identifiably unlawful actions on the part of their clients.

Without law, the risk is that professional obligations are expressed in a way which owes more to politics and social media and a vague sense that something called 'avoidance' is bad, than it does to a balanced view of a lawyer's function.

Tax avoidance is a good example of ethical and political pressure actually being in opposition to the rule of law. The requirement for legislation to support taxation was actually a key part of the development of the rule of law and it remains the case that people's property (including money) may only be taken on the basis of primary legislation. Pressure to pay 'Ship Money' without a legislative basis was, as I recall, what got Charles I and the country into a certain amount of difficulty.

If a client wants to make arrangements to reduce his or her tax bill, they are entitled to advice. If they are advised that certain arrangements may save tax but that there is a risk they do not, they are entitled to take that risk and instruct a lawyer to go ahead. It is not for the lawyer to deny them the opportunity on the basis of his or her disapproval of the client's objectives. It matters still less that the Government or the regulator may disapprove of the client's lawful choices.

A lawyer may be criticised for

manipulating a system or process in a way which a tribunal would consider to lack integrity. A lawyer who brings a judicial review which is totally without merit to delay a deportation is acting improperly. There have been similar opportunities for persons promoting tax schemes. An elaborate artificial scheme may have little chance of success but still have been worth doing to delay payment, justify a non-declaration or create enough complexity to lead the revenue to settle the liability at a discount. Many of those opportunities no longer exist, but a lawyer should not assist taxpayers to attempt to avoid tax by supporting arrangements which they ought to know have little or no chance of success. It is a fair criticism that too often in the past, professional advice supporting Byzantine transactions with no true commercial purpose were a licence to print money for specialist tax lawyers who gave schemes commercial sales value by providing to promoters very expensive opinions endorsing the schemes.

The taxpayer could not be criticised by HMRC for relying on the advice. HMRC historically might not even identify what had happened, multiple cases might take years to resolve and HMRC were usually ready to offer a deal for part payment. A well-known tax lawyer sending out essentially the same opinion over and over again at the behest of commission-earning scheme salesmen would be well remunerated indeed. Opinions would always point out the risk that the scheme might be challenged and defeated, but that hardly mattered.

It may be that it was this form of historic abuse that members of the Public Accounts Committee were referring to when they said that lawyers who gave opinions on tax schemes which allowed taxpayers to avoid penalties for failing to take reasonable care in their tax return were 'prostituting' themselves.

The question raised by Mr Blackwell is whether warning against legal but 'anti-social' lawyering is really anchored in professional conduct rules at all.

The warning refers to a number of principles which it says are relevant:

- ▶ principle 1 (the rule of law);
- ▶ principle 2 (integrity);
- ▶ principle 4 (client best interests);
- ▶ and principle 6 (public trust).

But does the warning derive from those or are they just the off-the-peg garments used to clothe it?

General anti-abuse rule

Fairly elaborate provisions now exist to combat abusive tax avoidance generally under the heading of the General Anti-

Abuse Rule. The nub of the SRA's concern leading to the warning notice was that: 'We have concerns about firms facilitating tax avoidance schemes that are aggressive in ways that go beyond the intentions of Parliament.'

It is hard to see how exactly assisting a client to 'go beyond the intentions of Parliament' except to the extent expressed in legislation should be a disciplinary offence. Upholding the rule of law would suggest that the duty is to provide clients with access to advice on what the law is. The notice almost suggests that a lawyer who does not seek to maximize the public tax revenue is acting unethically or without integrity. A client's best interests are usually served by complying with the law not by paying tax on a voluntary basis. The relevant public trust in solicitors is not a trust that solicitors will ensure that they do not avoid tax. There is a problem of circularity—advising on tax avoidance is unethical and therefore public trust is damaged, and public trust is damaged therefore it is unethical.

How do professionals identify what they shouldn't do?

General views of the social value or ethical nature of the client's activity are not very relevant but illegality is. Lawyers should not advise or assist clients to 'game' the system whether it be in hopeless litigation or doomed tax avoidance schemes. Lawyers must be able to advise clients and litigate with HMRC after the event. Lawyers must preserve their independence from promoters of any scheme and disclose any conflicts or benefits which they derive from the relationship. The whole of a client's interests should be considered.

Misconduct is only likely to arise where the solicitor has an interest in the scheme being used or fails to provide proper balanced advice. Acting in disputes in relation to schemes would rarely be improper. Allegations are very likely to arise from specific circumstances rather than overarching disapproval.

An objectionable scheme is probably one which: is sold and promoted without the required notification to HMRC; involves steps which are artificial, uncommercial and contrived; may be sold for a share of the proceeds; is likely to be ineffective; the lawyer has a relationship with the promoters or the benefit from it may simply derive from non-declaration on the basis of advice. Even then, if it probably works ...

NLJ