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Title: Should lawyers acknowledge whom they represent in public discourse?

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Abstract

Political rule depends upon public discourse as it requires negotiation and compromise of conflicting interests. Public discourse includes activities that can be described as cause lawyering, lobbying, and rule entrepreneurship. The rule of law supports public discourse through, inter alia, the right to petition. The right to petition requires identification of those engaged in public discourse through petition. This requirement reflects a principle of general application. Solicitors owe an ethical duty to support the rule of law, including the right to petition. Lawyers without a specific duty to uphold the rule of law have ethical duties to maintain the reputation of the legal system and their legal profession. Lawyers, including solicitors, are frequent contributors to public discourse. Lawyers sometimes resist identifying the clients or client groups they represent in public discourse on the ground of the need to protect client confidentiality. This resistance is not ethically well reasoned, and lawyers should recognise a duty to disclose the identity of a client or client group for whom the lawyer is making representations in any public arena, understanding public arena to include both are representations to public office holders (lobbying) and contributions to reform campaigns or consultations (cause lawyering or rule entrepreneurship).

Keywords

Rule of law; legal ethics; rule entrepreneurship; cause lawyers; lobby; right to petition; client confidentiality; politics; public discourse; law and politics; lawyers as lawmakers; public sphere; deliberative democracy; communicative rationality; public education

Should lawyers acknowledge whom they represent in public discourse?

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Introduction

Ethical obligations often conflict, which is why ethical discourse can be frustratingly indecisive. That we have no reason to suppose our ethical values can be harmonised was recognised by Berlin when he formulated his account of pluralism.¹ In this article we argue that traditional understanding of the duty of confidentiality owed by a lawyer to a client can be in conflict with the duty of a lawyer to support the integrity of public discourse.² Public discourse in turn is a foundational element of the rule of law, and lawyers have a duty to uphold and support the rule of law. Therefore, we argue there is a need to consider the relationship between these two ethical duties, and identify when confidentiality, and when support for the integrity of public discourse should govern. We are not going to argue that one should supersede the other, but that disclosure of client identity, or client group interest, is required from lawyers when they make interventions on behalf of clients, or client groups, in public discourse.

It is important not to overstep the bounds of professional ethical obligation, and demand unrealistic knowledge, purity of intention, or responsibility from lawyers. Thus, we start by exploring the nature of public discourse, and rejecting any duty based upon a demand for moral communicative action from participants in the public sphere.³ We then set out our argument that participation in public discourse, specifically the right to petition, is a somewhat neglected but historically and conceptually foundational aspect of the rule of law. A focus on the right to petition enables us to identify the importance of openness and honesty about the identity of petitioners, and by analogy others engaged in public discourse. We thereby establish the links between strategic communications in the public sphere, the rule of law, and the need for identification of participants for the integrity of strategic communications. If these arguments are correct, then anyone who enters into public discourse can undermine the discourse through deceptive or misleading manipulations of identity.

Lawyers are usually associated with representation of clients in litigation or private negotiation, situations in which the existence of a representational relationship between client and lawyer will be apparent. Therefore, no claim to confidentiality obstructs identification of this representational relationship. However, lawyers also represent clients in public fora. This professional activity is less well recognised. Therefore, to confirm the practical importance of our argument we present evidence for the assertion that lawyers do take part in public discourse on behalf of clients and client groups. Indeed, we argue that such activity can be both partisan and a valuable aspect of legal professional action. The communications are strategic, and lawyerly partiality is neither odd nor reprehensible. When entered into without obfuscation of whom the lawyer is representing the activity is active support for the rule of law via public discourse.

¹ Isaiah Berlin, 'The Pursuit of the Ideal' in Henry Hardy and Roger Hausheer (eds), *The Proper Study of Mankind: an anthology of essays* (Pimlico 1998), 5-7.

² For solicitors in England and Wales see: Principle One at: <http://www.sra.org.uk/solicitors/handbook/code/content.page> accessed 14 November 2016.

³ Jurgen Habermas, 'Some Further Clarifications of the Concept of Communicative Rationality' in Maeve Cooke (ed), *On the Pragmatics of Communication* (Maeve Cooke tr, Polity 2002).

Thus, we have set out an argument that lawyers owe duties to support the rule of law, and that public discourse is foundational of the rule of law, and that lawyers are quite properly and commonly participants in public discourse in the course of their professional practice. We then make a digression, as it might be thought that regulation of lobby activity would suffice to govern the conduct of lawyers in public discourse. We reject this possibility on two grounds, firstly, that the professional ethical duty to uphold the rule of law should survive any such regulation. Secondly, that existing regulation is not fit for this purpose in any event. With this distraction dealt with we are able to bring the tension between confidentiality and the duty to support the rule of law into clear focus.

Up to this point we have assumed confidentiality of all communications between a lawyer and a client, including specifically confirmation that any such relationship exists. Clearly, this is a matter of confidentiality and not privilege, as the existence of the relationship would not even reveal the topic of any legal or other advice given, no matter the instructions that form the basis of any advice, or content of such advice.⁴ In order to try and resolve this conflict between two ethical obligations we analyse the underlying justifications. Our argument to this point has already explored the justifications for the duty for disclosure of representational relations in support of the rule of law, therefore, the focus is now upon the justifications for the duty of confidentiality. We conclude that lawyers should accept and recognise an ethical obligation to be open about the client or client group they speak for in public discourse.

Political governance and public discourse in a liberal democratic state

Modern liberal democracy rests upon foundations that include the rule of law.⁵ It is an intensely political system, by which we mean that it is concerned with compromises between groups who believe they share common interests. To function effectively such a system requires a public discourse that both permits all significant voices to be heard, and enables strategic communications to take place. Lawyers as a professional group, and specifically solicitors, should be concerned about the foundations of public discourse for two reasons. First, it is based upon principles of the rule of law that the solicitors' profession is ethically committed to support.⁶ Second, and generally, because lawyers are significant participants in this public discourse, and its conduct affects the reputation of lawyers and the legal system.

Political discourse cannot and does not require that participants ignore their self-interest in public debate. It is through representation of the interests of groups that politics operates constructing a public interest from the various overlapping interests of constituent groups, an agreement that

⁴ *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1AC 610 [86].

⁵ On the meanings of the rule of law see: Joseph Raz, 'The Rule of Law and Its Virtue', in *The Authority of Law: Essays on Law and Morality* (Oxford University Press 2009); Tom Bingham, *The Rule of Law* (Penguin Books 2011); Francis G Jacobs, *The Sovereignty of Law: The European Way* (Cambridge University Press 2007); Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge University Press 2012).

⁶ <<http://www.sra.org.uk/solicitors/handbook/handbookprinciples/content.page>> last accessed 16 December 2016: "1. SRA Principles These are mandatory principles which apply to all. You must: 1. Uphold the rule of law and the proper administration of justice".

secures the advantages of collective action through compromise and bargaining. In the words of Bernard Crick:⁷

“Politics, then, can be simply defined as the activity by which different interests within a given unit of rule are conciliated by giving them a share in power in proportion to their importance to the welfare and the survival of the community.”

Thus, seeking to influence public decision making, whether in favour of one’s economic interest, or some other interest - ethical, religious, patriotic, aesthetic or expressive - is a vital aspect of political governance. This entails the legitimacy of lobbying activity in liberal democracy. In the words of political lobbyist and author Lionel Zetter:⁸

“Why do companies, charities, trade associations, trade unions, pressure groups and professional bodies lobby government? The answer is very simple: governments represent either a threat or an opportunity to those organisations. It is all about acquiring advantage – or maintaining – a competitive advantage.”

Public discourse is not predicated on altruistic or uninterested communication. It is as much about negotiation and bargaining as it is about principles and the public interest. Indeed, too much principled commitment can set up barriers to mutually beneficial conflict resolution.⁹

Thus, the Western political tradition recognises that there is a tension at the heart of public discourse between the public interest and private interests,¹⁰ and this raises the question of what if any ethical constraints need to be imposed on public discourse. Ruth Grant frames this tension as that between two unacceptable poles: the hypocrite and the antihypocrite or moralist.¹¹

“Hypocrisy and antihypocrisy, cynicism and sanctimonious righteousness are not the only possibilities. The alternative we seek is *integrity* ... The person of integrity is one who can be trusted to do the right thing even at some cost to himself ... What we need to know is which kinds of deception, hypocrisy, and compromise are defensible and which are not ... This book aims to identify the ethical alternatives and to discriminate among them, in particular with a view to the place of hypocrisy in politics.”

In terms used by Habermas we are concerned with weak communicative discourse when we consider public discourse.¹² It is strategic discourse the rule of law supports. This explains why the right to petition is central to the history of legal support for public discourse.

⁷ Bernard Crick, *In Defence of Politics* (5th ed, Bloomsbury Academic 2013) loc. 259-268.

⁸ Lionel Zetter, *Lobbying: The Art of Political Persuasion* (2nd ed, Harriman House Ltd 2011) loc. 797.

⁹ Jon Elster, ‘Strategic Uses of Argument’ in Kenneth Arrow, Robert H Mnookin, Lee Ross, Amos Tversky, and Robert Wilson (eds), *Barriers to Conflict Resolution* (WM Norton & Co 1995). We use a wider sense of “interest” than Elster, who distinguishes interests and passions.

¹⁰ The issue can and has been framed in different ways in the past: Plato in *Republic* (Christopher Rowe tr, Penguin 2012) justified the “noble lie” condemned in Karl Popper, *The Open Society and Its Enemies Volume 1: the Spell of Plato* (Routledge Classics 2003). Nagel posed the problem as one of role morality and action in general, rather than one of ethical standards on discourse in Thomas Nagel ‘Ruthlessness in Public Life’ in Thomas Nagel, *Mortal Questions* (Cambridge University Press 1979). However, the key tension is the same, that unless one believes in a necessary congruence between public and private interests then public discourse is always going to be a mixture of both principled debate and compromise.

¹¹ Ruth W Grant, *Hypocrisy and Integrity: Machiavelli, Rousseau, and the Ethics of Politics* (University of Chicago Press 1997), 2.

¹² Jurgen Habermas, ‘Some Further Clarifications of the Concept of Communicative Rationality’ in Maeve Cooke (ed), *On the Pragmatics of Communication* (Maeve Cooke tr, Polity 2002).

The right to petition and public discourse

Participation in public discourse occupies an important place in our conception of the rule of law. What the rule of law protects is strategic communication directed towards political institutions entrusted with making decisions. We argue that petitions played a central role in developing the concept and role of the rule of law in modern society. The petition of Parliament on public matters is the central trunk, from which the later branches of the rights legitimating individual and group involvement in public discourse grew.¹³ The right to petition Parliament was a central right for the development of the rule of law and the constitutional monarchy of the UK. One of the precipitating causes of the “Glorious Revolution” was the prosecution of the Bishops of the Church of England for their petitioning of Parliament. Hence, the subsequent Bill of Rights 1688 provided that:

“Right to petition.

That it is the Right of the Subjects to petition the King and all Commitments and Prosecutions for such Petitioning are Illegal.”

This marks the positive assertion of a right of any individual or group to a voice in public discourse.

The petition was the process for formal intervention in public discourse about the governance of the Nation, addressed to the representatives of the Nation; and its protection in the Bill of Rights marked the recognition of a right to be heard without fear of legal reprisal for speaking out. However, the right protected was to take part in public discourse without fear of prosecution, not to take part anonymously. The punitive reaction of the Crown to the Petition of the Bishops led to the establishment of the right to petition as a legal right. However, the practice of petitioning in public causes came to full flower in the nineteenth century as part of the democratisation of political life.

To keep our consideration within bounds we will restrict our examples to the Chartist petitions of the 1830s and 1840s.¹⁴ Four linked perceptions can be identified in their historical practice and the historical sources: that through petition people could take part and influence the politics of the Nation; that the practice was Constitutional; that one was protected in organising for a petition to Parliament; and that the signatures should represent the identities of those who signed. To quote Pickering:¹⁵

“‘The Commons are intended to represent the whole people’, argued the Rev. Benjamin Parsons, a Chartist of Ebley near Stroud, ‘but how can they do this unless you hold

¹³ Later branches such as freedoms of expression and association, and voting rights. The right to petition itself can still play a role in the modern law, e.g. in 2011 the Supreme Court of the United States of America was concerned with the relationship between the right to petition and the right of free speech, each contained in the first amendment of the Constitution: *Borough of Duryea, Pa. v. Guarnieri* 131 S.Ct. 2488. In the UK Human Rights Conventions tend to be the focus of analysis. Petition is foundational, but freedoms of expression and association are no longer restricted to activities associated with petition, and consideration of petition tends to be subsumed within these broader freedoms. So fertile has the right of petition been that it is almost supplanted by its progeny.

¹⁴ Thereby ignoring the eighteenth century practice of public Parliamentary petitioning generally, and the role of petitions in such seminal movements as: the Anti-Corn Law League; the anti-slave trade and anti-slavery movement; and the struggle for women’s suffrage. See: Paul A Pickering, ‘And Your Petitioners & c’: Chartist Petitioning in Popular Politics 1838-48’ (2001) 116 *The English Historical Review* 368

¹⁵ Pickering (n 14) 374 (footnotes omitted).

public meetings and use other legitimate means to make them acquainted with your grievances and wishes'. Further answering his own question Parsons continued: 'The right of Petition has this object especially in mind'. Speaking for many Chartists the editor of the *Ten Hours' Advocate* put the case more succinctly: 'How are we to be heard? Our answer is By PETITION'. This notion of popular representation was deeply rooted in an understanding of the past. Petitioning was an integral part of what historians have dubbed 'popular constitutionalism', a widely supported interpretation of British history that posited Chartism as a quest for lost rights."

This illustrates well the first three perceptions: that petitioning Parliament was a way even the disenfranchised could use to speak in political discourse, and it was a safe way to take part in public discourse, because it was a constitutionally protected practice. The fourth perception is best illustrated by both historical, and contemporary reactions to allegations of "fraud" in petitioning. What is meant here by "fraud" is simply apparent signatures that do not represent the people whose names they are, or anybody at all. The mischief is pretending to represent the opinion of people who have not signed or otherwise endorsed the petition:¹⁶

"Linked inexorably to the practice of petitioning in the Chartist decade were allegations of fraud and forgery. In particular, many historians have coupled the decline of Chartism to the accusations of fraud that surrounded the last monster Chartist petition in 1848. ... the report of the Committee on Public Petitions which concluded that the Petition contained just under 2,000,000 bona fide signatures, and not the 5,700,000 that the Chartists claimed ... Similarly, for the doyen of Chartist historians, Mark Hovell, the fact that the document featured so many names of unlikely Chartists such as Queen Victoria and the Duke of Wellington as well a host of fictitious names such as Pugnose, Flatnose, Longnose and 'numerous obscene names that the Committee declined to repeat to the House' earned the Chartists 'ridicule'; it was a 'tragic fiasco' from which the movement 'never recovered'."

The force of a petition is connected to the identities of the petitioners. The fundamental idea is that the petition expresses the view of the named petitioners, it is not an anonymous argument but an assertion by a group who is willing to be identified. In this lies the petition's vital role in establishing the rule of law: as people who on the record object, or complain, or argue for a position unpopular with those in power, are protected from legal repercussions. The voicing of the view allows for complaint against the over-mighty, and hence a possibility of constraining them within the rule of law. However, the petitioners are required to stand behind their opinions, and the membership of the group holding the opinion is a relevant factor in establishing its political force. Thus, the emphasis on the integrity of the signatures, it is not only the view expressed, it is the collective view expressed by a significant group, that the petition embodies.

To put this into the language of modern lobby practice:¹⁷

¹⁶ Pickering (n 14) 383 (footnotes omitted).

¹⁷ Nick Williams quoted in Zetter (n 8) loc 808. The idea that there is a significant link between a speaker and their words was articulated by Ben Jonson in the seventeenth century: "Language most shows a man; speak that I may see thee; it springs out of the most retired and inmost parts of us, and is the image of the parent of it, the mind. No glass renders a man's form or likeness so true as his speech." The problematic relationship between speaker and words is the problem of sincerity and authenticity in modern culture, explored by Lionel Trilling, *Sincerity and Authenticity* (Harvard University Press 1974).

“A good lobbyist understands both the commercial and political drivers underpinning the argument and seeks to align them. The lobbyist also takes care to marshal as wide a coalition of support for their client’s argument as possible, noting that in politics the messenger is just as important, if not more so, than the message.”

In the modern sphere as in the traditional sphere the misrepresentation of identity of the messenger or petitioner is corrosive of political discourse. The identity of those who are petitioning or taking part in political discourse is an important aspect of their contribution.¹⁸ The contemporary exercise of the right to petition specifically, and to contribute to public discourse generally, has evolved.¹⁹ However, the role of public engagement in public discourse in establishing and maintaining the rule of law remains, and the importance for public discourse of honest identification of the contributors to public discourse also remains.

Analysis of the right to petition illustrates self-interested political communications are held to account ethically. Specifically, public communications should be made by the people purporting to make them. Identity is important because the weight to be given to a communication is informed by both its inherent force and the size and importance of the group that is represented by the communication.

Our argument does not rely upon any universalistic claim for transparency as a political or legal virtue. Indeed, it has been argued that in some circumstances transparency can lead to polarisation and objectively inappropriate decision making in the political realm.²⁰ However, in public discourse there are good reasons to suppose that transparency of representation is important.

The importance of the identification of participants in public discourse

The right to petition was valued, and still represents an important aspect of the rule of law, because it enabled and enables individuals and groups to engage in public discourse. The Chartists recognised this.²¹

¹⁸ Hence the acknowledged illegitimacy of some “astro-turf” activities: “One of the leading US proponents of astroturfing is Jack Bonne. At one stage his Washington office contained 300 phone lines, which his young, articulate workforce would hammer to build phoney grassroots support. The firm has been accused of underhand tactics, such as forging letterheads and making up signatories of supposed grassroots supporters on letters sent to Congress.” Tamasin Cave and Andy Rowell, *A Quiet Word: Lobbying, Crony Capitalism, and Broken Politics in Britain* (The Bodley Head 2014) loc 2576.

¹⁹ One recent development is the electronic petition that can lead to a debate of an issue in Parliament, see <https://petition.parliament.uk/petitions?state=open> accessed 14 November 2016. This process requires identification proof from those who electronically sign the petition. The “Stop cuts to pharmacy funding and support pharmacy services that save NHS money” petition was influential in causing the debate of the issue in the House of Commons on 2 November 2016. It is a typically political mix of public interest (of customers of local pharmacies – the general population) and private interest (of pharmacists).

²⁰ Elster (n 9) 244: “Closed debates permit the open expression of interest; open discussions force it to go underground. In closed proceedings among a small number of delegates, expressions of passion will be derided as cant. In a public forum, with large numbers of delegates, passionate argument serves both as a sword and as shield ... my concern ... is with the way in which the setting of the debates channelled, amplified, or muted the expression of these motives.”

²¹ Pickering (n 14) 378

“A petition, he argued, 'is a means of keeping the agitation before the public mind'. Even though the petition was dealt with in the House of Commons, Samuel Kidd, another leading Chartist, suggested that this would invariably produce a report 'which will find its way into the columns of the newspaper press, and cause a general discussion throughout the country'.”

This right and capacity is valuable for both economic and non-economic reasons. The basis of the claim to participation is moral or political, but there is no *a priori* restriction on how the claim to legitimate participation in public discourse must be used.²² Thus, we are arguing for the rules necessary for a self-interested discourse, which assumes conflict rather than consensus, and which seeks to avoid descent into assertions of dominance and violence through use of procedures for discourse:²³

“Machiavelli and Hobbes famously insisted that political conflicts are not finally and reliably resolved on a rational level by adversary argument, because they normally also bring with them a struggle for power in the state or in the society, which often overwhelms the rational procedures. Even those whose conception of the good requires that rational procedures of conflict resolution be stretched as far as they can be must acknowledge that in fact they will often underdetermine the outcome: not only for Hobbesian reasons, because of concomitant struggle for sovereignty and power, but also because of the nature of reasoning itself.”

Given the legitimacy of self-interested engagement in public discourse we naturally assume that economic interest might colour the actions and words of people in public discourse, as for private discourses, and such communicative activities as advertising.

If a person engaged in public discourse is paid by someone whose interests may be specific, and not aligned with the public interest, then the representative will tend to make arguments, and develop positions that serve the perceived economic interests of the client. As this is an economic argument we might cite an economist in support:²⁴

“Disclosure of potential conflicts of interest, ownership, or remuneration may help market participants interpret the action of others. For instance, knowing that a salesman gets a higher commission from selling one product than another may shed some light on his praise of the product generating higher commissions; knowing that analysts’ pay is not related to the accuracy of their prediction of stock performance but to the investment deals they bring in sheds some light on the reliability of their forecasts; knowing that CEOs are remunerated on the basis of *reported* earnings may

²² Stuart Hampshire and Amartya Sen share a pessimism about the *possibility* of value consensus or principled agreement in modern states that entails recognition of the claim to take part in the discussion, or negotiation, or argument, the essential necessary foundation for political justice: Stuart Hampshire, *Justice is Conflict* (Princeton University Press 2000) x, 7-9; Amartya Sen, *The Idea of Justice* (Allen Lane 2009) 87-113. Jürgen Habermas views “strong” communicative or moral discourse as requiring “sincerity” and aiming at “agreement”, but also recognises “weak” communicative discourse or “strategic” communication which aims at reaching a mutual “understanding”. It is this second weak or strategic form of discourse that we, Hampshire, Sen, and Crick rely upon: and that is reflected in the understanding of lobbyists and their critics to be at the heart of modern political discourse.

²³ Hampshire (n 22) 66.

²⁴ Joseph E Stiglitz, ‘Government Failures vs Market Failure: Principles of Regulation’ in Edward J Balleisen and David A Moss (eds), *Governments and Markets: Towards a New Theory of Regulation* (Cambridge University Press 2012) 26-27.

affect judgments about the reliability of those reports; and knowing the structure of remuneration of hedge fund managers should lead to an expectation that they will engage in excessive risk taking.”

Thus, putting the argument into the mouth of another and generating the appearance of multiple voices. To give an impression of representing the views of a broader group, distorts political discourse. It prevents people from taking into account factors they consider relevant for assessing the value of arguments. The remedy for this potentially disruptive ploy is to demand that the economic links between participants be publicly known. Then others can interpret the contributions to the public debate in the usual manner, taking into account remuneration as a likely influence upon contribution.

Another problem generated by non-disclosure of relationships between represented and representative in public discourse is that any negative consequences from making the argument are avoided. People form their views about other people, people they might co-operate with, on the basis of their actions and words. Taking part in a public discourse has reputational effects. Information relevant to the assessment of reputation can improve collective outcomes. If a participant to a discourse can act without their identity being known, then other participants cannot make the inferences from action to reputation that improve outcomes. Anonymity is equivalent to reputational irresponsibility.

Economic studies of strategic behaviour confirm that information relevant to reputation can improve collective benefits. There are two possible causes: those subject to reputational damage behave better; and vulnerability to reputational damage leads to greater trust across participants.²⁵

A different type of problem is posed by the risk that misattribution of arguments might actually impact negatively upon those with whom the argument originated. The two objections assume actors know their own interest, in line with standard economic assumptions.²⁶ Therefore, they each assume the self-interested party loses nothing from hiding their participation, through use of an undeclared agent. However, it is quite possible that the originator of the argument might not correctly identify its interest. If their true identity is hidden then no other participant is likely to draw their attention to their error. The assumption that actors know what is in their own best interests has not held true empirically, and public discourse can, by facilitating collective consideration of the issues, lead to identification of benefits unrecognised by the parties to the discourse at the outset.²⁷ This potential for a win all around is of course forfeited if the identities of some participants are undisclosed.

Finally, if we consider public discourse as a type of strategic discourse then it requires the identity of the participants to be apparent. If public discourse were a wholly moral discourse aimed at reaching

²⁵ Elinor Ostrom, James Walker, and Roy Gardner, ‘Covenants With and Without a Sword: Self-Governance is Possible’ (1992) 86 *American Political Science Review* 404; Ernst Fehr and Simon Gächter, ‘Cooperation and Punishment in Public Goods Experiments’ (2000) 90 *The American Economic Review* 980; Samuel Bowles and Herbert Gintis, *A Cooperative Species: Human Reciprocity and its Evolution* (Princeton University Press 2013).

²⁶ Standard economic assumptions make self-deception impossible, self-deception and denial of unwelcome facts are considered in Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (Vintage Books 1989) 59-72; and Stanley Cohen, *States of Denial: Knowing About Atrocities and Suffering* (Polity Press 2001). Self-deception need not be based upon denial, positive thinking is based upon belief that belief itself produces beneficial results, on which see Barbara Ehrenreich, *Smile or Die: How Positive Thinking Fooled America and the World* (Granta Books 2009).

²⁷ Dani Rodrik, ‘When Ideas Trump Interests: Preferences, World Views and Policy innovations’ (2014) 28 *Journal of Economic Perspectives* 189. See text at nn 21-22.

principled agreement then every argument made would need to be sincere, and represent the views of the participants.²⁸ This requirement for fully communicative action, or moral discourse, we view as unrealistic. Politics is about power as well as about truth. Habermas argues that if one is engaged in strong communicative discourse then the identity of the other party is not relevant to the consideration of their argument. Habermas terms communicative action “strong” when it is aimed at agreement (*Einverständnis*), and arguments in such discourse as “actor-independent”. However, he also recognises the possibility of strategic communicative action, which he terms “weak” communicative action. In strategic communication the identity of the actor (the person making the argument) is relevant to a consideration of the argument.²⁹

“while *mutual understanding* (*Verständigung*) can also come about when one participant sees that the other, in light of her preferences, has good reasons in the given circumstances for her declared intention – that is, reasons that are good *for her* – without having to make these reasons his own in light of his preferences.”

Clearly, public discourse will normally be strategic in practice. Therefore, to maintain this level of communicative action we must insist upon knowing the identity of the participants, as arguments may make sense when considered from their point of view, but without this information they may simply seem in bad faith.

This final point is significant. In effect it undermines any easy assumption that demands for identification rest upon a desire to engage in *ad hominem* attacks. In strategic communication the aim of the participants is to advance their interest rather than seek the truth. Therefore, their interests are relevant to understanding their arguments, and judging the reasonableness of their arguments. Refusal to reveal the identity of the participants suggests resort to manipulation, which is damaging to public discourse. This raises a novel type of reputational risk, a risk to the reputation of public discourse, and those who take part in it, including legal professionals.

If lawyers are involved in public discourse, whether that be communications directed at the public at large, decision makers in Parliament, or in Government Departments, or Local Authorities, or Health Trusts, or any public body or quasi-public body, then their actions should be subject to the same ethical constraint as any other petitioner or participant in public discourse. Obviously, lawyers in litigation represent an identified client and petition the court on its behalf. The argument is that if lawyers engage in public discourse then a similar duty of disclosing whom is represented and petitioned for arises. In litigation it is the due process of the courts that is in issue. In public discourse it is the upholding of the rule of law that is in issue.

Lawyers and law firms DO take part in public debate

As lawyers, whether academic or professional, in our professional lives we act politically. We may do this in various ways, perhaps we work to influence public debate, or we engage in lobby activity, or we influence the enactment of legislation or administrative rules. Sometimes these activities are motivated by our personal beliefs, and sometimes by client or employer instructions, and sometimes by a mixture of the two. This activity is not novel, or transgressive, or necessarily associated with

²⁸ Jürgen Habermas, ‘What is universal Pragmatics’ in Maeve Cooke (ed), *On the Pragmatics of Communication* (Thomas McCarthy tr, Polity 2002).

²⁹ Habermas (n 3) 321.

“progressive” or “conservative” views. However, awareness of this lawyerly activity, and discussion of it in academic and professional fora is underdeveloped.³⁰ The academic discourse tends to assume lawyer engagement in public discourse is unusual; borders on, or oversteps, the bounds of professional behaviour; and is associated with radical causes. Such assumptions are at best misleading.³¹ Our account will focus on the activity of professional lawyers, but the principles involved apply equally to academic lawyers.

Lawyers may take part in public discourse for individual clients, or in the interests of client groups. Most of the lawyer engagement in political debate is not party political.

The campaign activity of Thompsons Solicitors in the UK around legislative proposals to increase the small claims limit to £5,000 and to curb general damages is an example of a firm that specialises in representing people who have contact with relevant legal processes (a personal injury claim) once or infrequently taking part in public discourse on behalf of the client group and the business.³² The Citizens Advice charity plays a similar role for disparate client groups more systematically.³³

Government and large scale commercial enterprises have frequent interactions with legal processes and make most use of the plasticity inherent in legal systems, for such clients:³⁴

“ ... it pays ... to expend resources in influencing the making of the relevant rules by such methods as lobbying.”

It would be odd if clients did not seek the aid of their legal advisors when negotiating their way around the law.³⁵

The use of lawyers to represent clients in political or legislative processes has deep historical roots. Wilfred Prest reminds us of this tradition of involvement by lawyers in political processes in his account of William Blackstone’s professional life:³⁶

“Both these latter projects required the passage of acts of parliament; the Botley improvement also involved lobbying Oxford’s vice-chancellor, arranging for subscriptions to be solicited from college bursars, and inserting a paragraph to promote the subscription in the news columns of the local newspaper, a public relations initiative worthy of any modern spin-doctor.”

Aware of modern assumptions about the nature of “legal” work, Prest continues:

³⁰ It has been noticed judicially on occasion: *Three Rivers (No 6)* (n4) [40], [41], [83].

³¹ We have touched on these issues before, see: Graham Ferris and Nick Johnson, ‘Practical Nous as the Aim of Legal Education?’ (2013) 19 *International Journal of Clinical Legal Education* 271, 289-291.

³² <http://www.thompsons.law.co.uk/personal-injury/thompsons-responds-to-moj-consultation-reforms-to-small-claims-limit.htm/> accessed 13 December 2016.

³³ “2004: After a ten year campaign using evidence from Citizens Advice service clients, the Government added an amendment to the Housing Bill to include a tenancy deposit protection scheme” <https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/who-we-are-and-what-we-do/history-of-the-citizens-advice-service/> accessed 16 December 2016.

³⁴ Marc Galanter, ‘Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law & Society Review* 95, 100.

³⁵ It is difficult to judge the scale of the activity, but Mathew Drake found all nine of Australia’s largest law firms were involved: Matthew Drake, ‘Lobbying by Law Firms: A Study of Lobbying by National Law Firms’ (1997) 56 *Australian Journal of Public Administration* 32.

³⁶ Wilfred Prest, *Blackstone as a Barrister*, Seldon Society Lecture (Seldon Society 2010) 28.

“It would be an artificial distinction to confine the category ‘lawyer’s work’ to the exercise of specifically legal knowledge and credentials, as distinct from activities building upon or benefiting from such expertise and qualifications.”

Blackstone was not being transgressive in his professional combination of legal interpretation and creation of law for his clients.

Thus, it should come as no surprise that Tamasin Cave and Andy Rowell found that:³⁷

“Law firms also provide lobbying advice to their clients. The practice is commonplace in the US. While there are fewer players in the UK, those law firms that do give such advice, have influence.”

Nor that the European Union’s transparency register of lobbyists has the category: “Professional consultancies/law firms/self-employed lobbyists”.³⁸ Most of the engagement by lawyers in political debate is motivated by the self-perceived interests of clients, or lawyer perceived interests of client groups. Lawyers represent their clients in public discourse.

This is not to deny the activity of personally committed lawyers, sometimes known as “cause lawyers”, in public discourse.³⁹ Groups such as the National Association for the Advancement of Coloured People in the USA have through their litigation, public education campaigns, and political action changed the very context and language of political debate, public discourse more widely, and the law governing race relations.⁴⁰ However, we argue that such lawyers are not deviant in their engagement with public discourse; various activities, whether defined as lobbying, or consultation, or offering expert evidence, are normal parts of legal practice. These activities entail professional engagement with contentious matters.

Legal practice cannot be “neutral” when it affects politically contested subjects. In 2014 the Law Society of Ireland became embroiled in a dispute over its presentation to the Oireachtas Joint Commission on Health and Children regarding proposed legislation imposing plain packaging regulations on Tobacco products. The similarities between two sets of arguments: those put forward by representatives of the tobacco industry, and those advanced by the Law Society, revealed as chimerical claims of neutral or objective legal advice in an area of public controversy. Unusually the activity of lawyers acting “non-politically” but in the interests of client groups whose perspective informed the lawyers’ communications was briefly newsworthy.⁴¹

³⁷ Cave and Rowell (n 18) loc 1194.

³⁸ <<http://ec.europa.eu/transparencyregister/public/homePage.do>> accessed 24 August 2015.

³⁹ We take the term “cause lawyer” from Austin Sarat and Stuart Scheingold, *Something to Believe In: Politics, Professionalism, and Cause Lawyering* (Stanford Law and Politics 2004).

⁴⁰ Richard Kluger, *Simple Justice: The History of Brown v Board of Education and Black Americas’ Struggle for Equality* (Vintage 2004).

⁴¹ See:

<http://www.irishtimes.com/news/politics/tobacco-firms-to-argue-against-plain-packaging-for-cigarettes-1.1690036>

http://www.lawsociety.ie/News/News/Stories/Law-Society-and-plain-packaging/#.Vds7l_Rr2et

<https://www.lawsociety.ie/Documents/news/2014/Opening%20Statement%20Plain%20Packaging%20%20Law%20Soc.pdf>

<http://aclatterofthelaw.com/2014/04/01/objections-to-the-proposed-irish-tobacco-plain-packaging-law-an-overview/>

<http://www.mcgarrsolicitors.ie/2014/02/18/request-clarification-law-society-plain-packaging/>

<https://www.lawsociety.ie/Documents/Gazette/Gazette%202014/March2014.pdf>

all accessed 24 August 2015. Thanks to David Fennelly for these references.

To lobby, or to be a rule entrepreneur, or to pursue a cause, is OK

Probably, the most contentious aspect of lawyers' activity in public discourse is their activity as lobbyists. Therefore, we will start out from the position that we need to defend lawyers' activity in lobbying. If we take a wide definition of "lobby"⁴² so that it includes private representations made to decision makers, but also representations made to wider groups, including that abstract imagined community "the public"⁴³ then the participation of lawyers in lobby activity is legitimate, and even desirable. There is no truly neutral language in this area, and we should beware of linguistically implied evaluative assumptions. Although we are all familiar with: "I am firm, you are obstinate, he is pig headed";⁴⁴ we may not all be on guard against: "I pursue a cause, you are a rule entrepreneur, he is a lobbyist".⁴⁵

It is important to emphasise that our argument is not directed *against* lobby activity, or involvement in public discourse by lawyers. Rule entrepreneurship is a legitimate role for lawyers, who are experts on governance through rules. In the words of Lon Fuller legal culture should embrace:⁴⁶

“... a nation where both law and good law are regarded as collaborative human achievements in need of constant renewal, and where lawyers are still at least as interested in asking ‘What is good law?’ as they are in asking ‘What is law?’”

Thus, the cause lawyer, and the lawyer actively seeking reform that is in the interests of client and society, are clearly legitimate practitioners of law from this perspective.

⁴² For such a definition Zetter (n 8) 361: “Lobbying is the process of seeking to shape the public policy agenda in order to influence government (and its institutions) and the legislative programme. It is also of course, the art of political persuasion”.

⁴³ For the public as an “imagined community” see: Benedict Anderson, *Imagined Communities: reflections of the origin and spread of nationalism* (revsd ed, Verso 2006).

⁴⁴ Attributed to Bertrand Russell in a 1950s radio interview.

⁴⁵ The term “rule entrepreneur” seems apposite for an innovative agent who seeks legal change, and invests time and effort in seeking the same, whether for primarily selfish or altruistic reasons. A similar meaning, but a little broader, is given the term “political entrepreneur” by Rodrik (n 27) 202: “But ultimately, political entrepreneurs are the ones who arbitrage between academic ideas and political inefficiencies. It would be nice to know the circumstances under which such arbitrage actually takes place and political entrepreneurs are actually able to implement their policy innovations; for now, there seems to be little research addressing this question”. Galanter (n 29) 118 used a similar expression “moral entrepreneur” for a similar purpose: “Specialized lawyers may, by virtue of their identification with parties, become lobbyists, moral entrepreneurs, proponents of reforms on the parties' behalf. Our usage reflects the important role played by “organisations” and entrepreneurs as agents of organisations in effecting “institutional” change as those terms have been used by Douglass C North, *Institutions, Institutional Change and economic Performance*, (Cambridge University Press 1990) 4-5; and Elinor Ostrom, *Understanding Institutional Diversity* (Princeton University Press 2005) loc. 3764. We supply it as an intermediate term, as it neither implies ethical superiority as “cause lawyer” may, nor does it carry a taint of opprobrium as “lobbyist” may.

⁴⁶ Lon L Fuller, ‘Positivism and Fidelity to Law – A Reply to Professor Hart’ (1958) 71 Harvard Law Review 630, 648.

Furthermore, it is legitimate for a lawyer to assume *prima facie* that her client's interests, and autonomous actions in pursuit of those interests, are in the public interest. We uphold in practice the rule of law and the public interest by facilitating our client's realisation of their interests.

Our presumptions are of liberty of action in the absence of legal constraint,⁴⁷ and of a natural alignment of economic interests through market mechanisms.⁴⁸ Where private interests and the public interest diverge we, as citizens and lawyers, look to the law to forbid, constrain, or regulate the conflict.⁴⁹ However, such conflicts are not always apparent on their face, and public debate on whether they exist in a specific case is the stuff of political discourse.⁵⁰ The rule of law allows people to argue that their interests are compatible with and serve the public interest, but not to impose their interests by force, or corrupt means.⁵¹ Lawyers are legitimate participants in such discourse on behalf of their clients. We will argue below that this legitimacy is forfeited if lawyers do not reveal the client, or client group, whose interests inform their participation in public discourse.

Representation, whether in litigation or in public discourse, requires disclosure of the representative nature of the communication for integrity of the discourse. However, the starting point must be that lawyers can legitimately act in the public discourse and advance arguments informed by the interests of their clients.

Well documented examples of law firms or individual lawyers acting as rule entrepreneurs are not easy to find. This reflects the lack of academic attention given to the lobbying activity of lawyers outside of public interest or cause lawyer activity. We present one well documented account below from the USA.⁵²

Same sex marriage in the USA: an example of lawyers engaged in public discourse

⁴⁷ John Locke, *Two Treatises of Government* (Peter Laslett (ed), Cambridge University Press 1988).

⁴⁸ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) 313.

⁴⁹ Hence, what is good for General motors might not be good for America, see: Adam Smith 90; the quotation (or mis-quotation) is of a remark made by Charles Wilson, former CEO of General Motors whilst acting as Secretary of Defence of the USA, see: Thomas J Usher, 'Restoring Broadly Shared Prosperity: A Business Perspective' in Ray Marshall (ed), *Back to Shared Prosperity: The Growing Inequality of Wealth and Income in America: The Growing Inequality of Wealth and Income in America* (Routledge 2015) 352.

⁵⁰ Political discourse as noted above may legitimately be motivated by self-interest, but it will usually take place under the guise of the public interest, Rodrik (n 27) 194: "After all, powerful interests rarely get their way in a democracy by nakedly arguing for their own self-interest. Instead, they seek legitimacy for their arguments by saying these policies are in the public interest.". Elster argues that such resort to the cloak of public interest may have a beneficial effect, producing more equitable political settlements than assertion of naked self-interest produces, Elster (n 9) 250: "I believe we can assert that argument – even when purely strategic and based on self-interest – tends to yield more equitable outcomes than bargaining." He terms this tendency: "the civilizing force of hypocrisy".

⁵¹ Bribery Act 2010.

⁵² Ostrom gives an account of a process that almost certainly involved lawyer rule entrepreneurs in her description of the Los Angeles metropolitan area water basin common resource in Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press 1990) Chapter 4. Unfortunately, it is not possible to identify with any precision the activity of lawyers specifically, as opposed to other professionals or business entities, in her description of events. Nevertheless, the account is recommended for readers interested in successful non-political (non-cause lawyer) lawyer rule entrepreneurship.

A good example of such action, inspired by the interests of a client group, and involving legitimate engagement in public discourse, was the work of Susan Murray and Beth Robinson, two of the partners in the Vermont law firm of Langrock, Sperry and Wool.⁵³ They were two of the three attorneys that filed the claim in *State v Baker*.⁵⁴ They argued that the Constitution of Vermont prohibited discrimination against gay and lesbian people by denying them access to the benefits of marriage. Success in *State v Baker* was followed by passage of Vermont Civil Union Law Act 1991; and that in turn was followed by passage of an Act to Protect Religious Freedom and Recognise Equality in Civil Marriage in 2009. Finally, the question of the legality of excluding gay and lesbian people from marriage across the States of the USA was resolved by the Supreme Court decision *Obergefell v Hodges* in 2015.⁵⁵

Murray and Robinson began not as campaigners but as litigators acting for gay and lesbian clients. In 1989 the firm was involved with *In re Hamilton* (1989). A lesbian couple had been parenting a child, who was the biological child of one of them. When the biological mother died the surviving parent went to court, to claim guardianship of the child. The firm represented the non-biological mother. The case received a lot of press coverage, and Langrock, Sperry and Wool became known as a firm supportive of gay and lesbian couples.

This led to significant transactional legal work for Murray and Robinson. Lesbian and gay couples came to the firm with problems that arose from the refusal of Vermont law to recognise their relationships, both *inter vivos* and *post mortum*. The firm crafted private law arrangements to try and resolve some of the problems created by the absence of any marriage law available to the couples.

This work led to Murray and Robinson becoming aware of the need for legal change,⁵⁶ and they became “cause lawyers” for their client group. They decided to try and litigate a test case, in an attempt to change the law at the structural level. At this point they also self-consciously moved from legal arenas into the political arena of public discourse. They became founder members of Vermont Freedom to Marry Task Force. This group was set up to take part in the public discourse in Vermont, in the words of Robinson:⁵⁷

“All the great case citations in the world won’t get you to your goal if the political and educational context is wrong.”

⁵³ Beth Robinson, ‘The Road to Inclusion for Same Sex Couples: The Lessons From Vermont’ (2001) 11 Seton Hall Constitutional Law Journal 237; Scott Barclay and Anna-Maria Marshall, ‘Supporting a Cause, Developing a Movement, and Consolidating a Practice: Cause Lawyers and Sexual Orientation Litigation in Vermont’ in Austin Sarat and Stuart Scheingold (eds), *The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice* () Stanford University Press 2005). See also: William N. Eskridge Jnr, *Equality Practice: Civil Unions and the Future of Gay Rights*, (Routledge 2002) 43-82. We related this story at greater length in Ferris and Johnson (n 31).

⁵⁴ 10 Vt. L. Wk. 363 (Vt. December 20, 1999). The third was Mary Bonauto of Gay & Lesbian Advocates & Defenders. The text of the brief is available in (1999) 5 Michigan Journal of Gender and Law 409.

⁵⁵ 135 S.Ct. 2584.

⁵⁶ Through a process essentially the same as the process by which Citizen’s Advice Bureaus generate evidence of systemic problems – the legal advisors become a nexus where individuals unknown to each other bring the same or similar problems. It is the interest of a group that is not self-aware of its group interest, which may be perceived to be a unique individual problem by the people who make up the group, but the lawyer is aware of the communality of the problems.

⁵⁷ Robinson (n 53) 241.

The group held public meetings, and visited other civil society organisations to speak about the problems caused by the refusal of Vermont to allow gay people to marry, and from this activity identified people willing to act as litigants in test litigation. The test case, *State v Baker*, was commenced in 1997 and the petitioner argued that the “common benefits clause” of the Constitution of Vermont made discrimination against gay people unconstitutional, and that preventing them from marrying was such discrimination. The Vermont Supreme Court essentially accepted the validity of this argument. However, it threw the issue back into the political realm, and deferred any grant of remedy until the legislature had had an opportunity to consider the issue.

At this juncture the partners in the law firm were involved in classic political lobbying activity, and there was no professional ethical guidance to refer to:⁵⁸

“It’s certainly different from litigation. As a lawyer, I’m used to crossing the street to avoid the judge if I’m in the middle of a trial lest I inadvertently walk into an ex parte contact. In the legislative process, on the other hand, I found myself prowling around the coatroom just hoping to catch a legislator for a quick, private conversation. The rules of the game are quite different, and sometimes a little messy.”

In this quotation, we can take “messy” to mean unclear, and not familiar from discourse about professional ethical conduct. It is clearly not intended as an admission of impropriety, in litigation the boundaries of professional conduct are clearly demarcated, but in lobbying there is no developed ethical discourse to help lawyers to behave properly.

Throughout the involvement with the issues Murray and Robinson acted for individual clients affected, and for a client group. The activity was principled, but it was also informed by the interest of clients, and professional self-interest, as the client group brought work to the firm. They acted as rule entrepreneurs in bringing test cases and then in entering public discourse; they did so in pursuit of a cause; and they become involved in lobbying as part of the endeavour.

Two aspects of the legal and political case created by Murray and Robinson probably influenced subsequent arguments at the Federal level in the USA. They laid emphasis on the discriminatory nature of the exclusion of gay people from marriage, and they emphasised the human costs associated with this discrimination. Both of these legal and rhetorical positions are apparent in the judgment of the majority in *Obergefell v Hodges*.⁵⁹ The legitimacy of taking the issue into the political and legislative domain was recognised by both the majority and the minority in *Obergefell v Hodges* although, obviously, they differed on the appropriate judicial role in the instant case.

The effects of the Vermont campaign went fed into a burgeoning public discourse, often contentious and even bitter, but also leading to re-appraisal of discriminatory actions that had been assumed to

⁵⁸ Robinson (n 53) 253.

⁵⁹ 135 S. Ct. 2584, 2599: “This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.” At 2604: “It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.” At 2594-2595 (harms suffered).

be natural and essential by many people.⁶⁰ The activity grew from awareness of client need, and the unjust way Murray and Robinson felt the law impacted upon gay and lesbian couples. That is an example of public discourse in action, and of the legitimate role of the lawyers engaged in public discourse, who act for clients or a client group.

The normality of identification with client groups

Although we chose a politically high profile example, partly due to materials relating to the issue being available in the public realm, Murray and Robinson were not exceptional in their motivational starting points. Some altruistic impulse, however diffuse and unfocused, is common in those who select law as a field. It is very common for law students to give as a reason for their choice of law a desire to do some good in the world.

Some lawyers start their legal careers with a commitment to a political or social cause that they seek to further in their professional life.⁶¹ Corey Shdaimah interviewed twenty seven legal professionals who perceived their work as part of “something larger” that they viewed as central to their life.⁶² For these individuals working as a legal professional was both an enactment of commitment, and inevitably a renegotiation of that commitment within a changing legal and political context. Perhaps members of this group most naturally see their contributions to public discourse as representative of the interests of the group whose welfare they identify with:⁶³

“I’m going to be participating in [a state legislative advisory committee]. There I’m not representing individual clients; it’s a committee to discuss possible changes in the state’s child welfare legislation. And there I see my role as representing the interest of the class of people who are parents who have or might have some involvement in the system.”

⁶⁰ 135 S. Ct 2584 at 2605: “There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts ... Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades ... This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.”

⁶¹ Alternative expressions would be “social justice lawyers” (e.g. Carrie Menkel-Meadow, ‘The Causes of Cause Lawyering: Toward and Understanding of the Motivation and Commitment of Social Justice Lawyers’ in Austin Sarat and Stuart S Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press 1998) 31), or “political lawyers” as the term was used by Minow in Martha Minow, ‘Political Lawyering: An Introduction’ (1996) 31 *Harvard Civil Rights – Civil Liberties Law Review* 287, 289: “Political lawyers use litigation, legislation, mass media, and social science research, assessing the consequences of each particular approach by reference to long-term visions of freedom, equality, and solidarity. Political lawyers are partners, for the long haul, with clients and client communities in struggles for social justice”.

⁶² Corey S Shadaimah, ‘Intersecting Identities: Cause Lawyers as Legal Professionals and Social Movement Actors’ in Austin Sarat and Stuart A Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford Law and Politics 2006) 220.

⁶³ *Ibid*, 231.

By contrast, the primary commitment of Lieutenant Colonel Yvonne Bradley seems to have been to the rule of law.⁶⁴ There is little in her personal history to suggest she would have been inclined to put her career at risk to defend her client from an oppressive system, her primary commitment was, not to those suspected of Islamic extremism. In similar ways it seems some lawyers serving Palestinian communities:⁶⁵

“ ... who may have entered, for example, military court practice out of initially pragmatic interest, may in the process have been sensitized to the political movement – that is to say, to have been themselves politicized – by their interactions with clients and their experiences with Israeli military authorities.”

Occasionally a moment of revelation in legal practice is made visible through clinical teaching, which requires the keeping of reflective journals:⁶⁶

“I couldn’t believe what I saw in court yesterday. While we were waiting for our trial to start, dozens of people were getting evicted by the judge without even having a real chance to defend themselves. A lot of these tenants seemed to have good cases, but just because they were poor and didn’t know the system the landlords’ lawyers were getting anything they wanted from the judge. I just never realized how poor people get railroaded in what I thought was a fair system.”

What these examples suggest is that the “cause lawyer” is less of an existential category and more of a negotiated identity, which may in fact be rejected by some who are engaged in practice that serves a group interest.⁶⁷

Some professional groups in the UK clearly do combine identification with the interests of a client group, and professional networking, and communication of legally salient information. The Legal Action Group is a charity that links many professionals who are committed to access to justice as a political aim and essential aspect of the rule of law. The Immigration Law Practitioners Association is an example of a group of practitioners who exchange information and enter public discourse on behalf of client groups. The City of London Law Society operates in similar ways in representing the interests of the City clients of its member firms.⁶⁸

⁶⁴ She was initially apprehensive of her client: <<http://witnessstoguantanamo.com/interviews/lt-col-yvonne-bradley-jag-attorney/>> accessed 24 August 2015. For an account of her role in the “trials” of prisoners held at Guantanamo Bay see: Clive Stafford Smith, *Bad Men: Guantanamo Bay and the Secret Prisons* (Phoenix 2008); David Luban, ‘Lawfare and Legal Ethics in Guantanamo’ (2008) 60 *Stanford Law Review* 1981.

⁶⁵ George Bisharat, ‘Attorneys for the People, Attorneys for the Land’ in Austin Sarat and Stuart Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press 1998) 453, 478.

⁶⁶ F. Quigley, ‘Seizing the Disorientating Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics’ (1995) 2 *Clinical Law Review* 37, 52-56.

⁶⁷ The professional culture of the UK seems less comfortable with the idea of the cause lawyer and the implicit distinction it raises between lawyers: see Andrew Boon, ‘Cause Lawyers in a Cold Climate: The Impact(s) of Globalization on the United Kingdom’ in Austin Sarat and Stuart Scheingold (eds), *Cause Lawyering and the State in a Global Era* (Oxford University Press 2001) 143.

⁶⁸ For an example see: the City of London Law Society, Revenue Law Committee response to Office of tax Simplification competitiveness review 9 May 2014 at: <<http://www.citysolicitors.org.uk/attachments/article/105/20140605%20Response%20to%20Office%20of%20Tax%20Simplification%E2%80%99s%20Competitiveness%20review%20-%20initial%20thoughts%20and%20call%20for%20evidence'.pdf>> accessed 24 August 2015.

Which brings us to our potentially least self-conscious representative of group interests on our spectrum: the private client non-contentious firm, providing advice for clients, and the in house lawyers. Both these groups are likely to adopt the world view of their clients, or employers.⁶⁹

Thus, we argue that Murray and Robinson were not engaged in practices alien to the legal profession, that their practice was not “transgressive” as it developed into representation of a group in the public sphere. Rather their practice was unobjectionable on the basis of ether legal ethics or ethical conduct in public discourse, and that it was typical of one aspect of legal practice. However, the activity was not well supported by ethical norms promulgated by the profession.

A short digression on legislative regulation of lobbying

Given our argument that lawyers commonly engage in lobby activity, it might be thought that the regulation of lobby activity by legislation, enacted to protect public discourse and its reputation, would suffice to meet any mischief. The recent Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 in the UK requires lobbyist to “go on the record”, therefore, it might be thought if a law firm is engaged in lobbying it would be unable to avoid disclosure of the identity of those clients being represented. This is because, those engaged in lobbying, may be required, in addition to registering, to provide “client information”, which can include the identity of the person on whose behalf lobbying was undertaken, as well as “other information” which can be prescribed by regulation.⁷⁰

However, the legislation defines lobbying very narrowly. This was identified as a key inadequacy of the reform, together with the failure to prescribe a code of conduct, by the Political and Constitutional Reform Committee of the House of Commons in their written evidence in response to the consultation that preceded the introduction of the Bill that became the Act:⁷¹

“Our Report concluded that the Government’s proposals would do nothing to improve transparency and accountability about lobbying. Imposing a statutory register on a small part of the lobbying industry without requiring registrants to sign up to a code of conduct could paradoxically lead to less regulation of the lobbying industry.”

Complaints about inadequacy were not limited to politicians, academic activists presented highly critical analysis of the statutory definition:⁷²

“The definition of lobbying must be wide enough to capture significant lobbying activity – whether undertaken by consultant lobbyists, corporations, charities, NGOs, lawyers or management consultants. All these groups lobby, and therefore they should be

⁶⁹ Andrew M Perlman, ‘A Behavioral Theory of Legal Ethics’ (2015) 90 Indiana Law Journal 1639.

⁷⁰ Section 5

⁷¹ E25: PCRC in

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/407527/Lobbying_P-Z.pdf accessed 2 November 2015.

⁷² E36: William Dinan and David Miller, founders and directors of Spinwatch, also at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/407527/Lobbying_P-Z.pdf accessed 2 November 2015.

captured in both the definition of lobbying, and the provisions of any register of lobbyists.”

Criticism that was echoed by lobbyists themselves in their written evidence:⁷³

“The Government’s proposals do not go far enough to regulate lobbying. A simple, statutory register must cover anyone practicing the act of lobbying, including in-house practitioners, law firms that lobby, management consultancies, not just ‘third-party’ lobbyists which make up a minority of all activity.”

Finally, commentators who were politically sympathetic to the Government and engaged in lobbying thought the legislative definition was inadequate:⁷⁴

“... the overwhelming majority of lobbying activity is not targeted directly in the form of communications to or meetings with this select bunch.

Indeed, my own estimate would be that as a commercial lobbyist with a wide range of clients only about two per cent of our activity would be meeting Ministers, and, to be honest, in 30 years of lobbying I’ve never once asked to meet a Permanent Secretary or written to one that I can recall. To limit the scope of regulated activity so narrowly is to leave out communications with members of either House of Parliament, with civil servants who are actually dealing with policy development and formulation, local Government, statutory agencies, the media, think tanks, and, of course, the institutions of the European Union which have such a major influence on our laws and regulatory environment.”

In summary, the Act fails to even identify lobbying in a convincing manner, and therefore its regulatory effects are unlikely to be effective. Certainly, it will not have a major impact upon law firms engaged in lobbying. To date only six law firms have registered, and the large number of unregistered firms engaged in lobbying activity can justify not joining the register because of the extremely restrictive terms of the Act.⁷⁵

EU institutions at first sight seem to have taken a more robust approach to lobbying. The “Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation”,⁷⁶ which took effect on 1 January 2015, extends the scope of registration to include most lobbying activities.⁷⁷

However, while the scope of the Agreement is laudable, its effectiveness is doubtful. First, as an agreement between the Parliament and the Commission, it has no effect on the Council of the

⁷³ E26: PLMR(Political Lobbying and Media Relations Ltd) Ibid.

⁷⁴ <<http://www.conservativehome.com/platform/2015/02/new-guidance-on-compliance-with-the-lobbying-act-is-as-clear-as-mud.html>> accessed 2 November 2015. The source “Conservative Home” and author, Chris Whitehouse of The Whitehouse Consultancy, suggest a lack of party political (the Act was a Conservative piece of legislation) or economic (Whitehouse is a commercial lobbyist) animus against the Act.

⁷⁵ John Hyde, ‘Law Firms Given All Clear on Lobbying’ *The Law Society Gazette* (London, 4 July 2016) 1.

⁷⁶ Official Journal of the European Union, L 277/11, 19 September 2014 available at: http://eur-lex.europa.eu/legal-content/en/TXT/?uri=uriserv:OJ.L_.2014.277.01.0011.01.ENG accessed 2 November 2015.

⁷⁷ Paragraph 7. The Agreement also prescribes a code of conduct, set out in Annex 3. It thus meets the demands of the Political and Constitutional Reform Committee as set out in their written evidence and quoted above.

European Union excluding one of the Union's most significant institutions.⁷⁸ Second, it is voluntary, and beyond the withdrawal of access privileges to certain buildings, there are no sanctions for those who do not register.⁷⁹ In August 2015, only four law firms with significant UK bases were registered. However, it is unlikely that this represents the only law firms who are conducting lobbying activity as defined by the Agreement. The Corporate Europe Observatory notes several law firms who are both definitely engaged in lobby activity of European Union institutions and not registered.⁸⁰

Therefore, legislative responses have proven inadequate. However, we submit that participants to public discourse have an ethical responsibility independent of legislative action. In particular, that solicitors have a duty to uphold the rule of law,⁸¹ and generally that many, if not all, lawyers have a duty originating in the obligation to uphold the reputation of the profession or legal system. Also, public participation in public discourse is a vital right enjoyed by civil society. It is fitting and reasonable to expect civil society bodies, such as legal professional bodies, to protect and regulate that right in the interests of civil society.

Lawyers in public discourse and professional ethics

When a lawyer represents a party to litigation then the identity of the lawyer acting will almost always be clear on the public record. It seems obvious beyond the need for argument that this is necessarily and properly the situation. However, when representing a client or client group in public discourse it is often claimed that client confidentiality prevents such openness.

Client confidentiality is an important ethical principle, of particular relevance in litigation and private client advice. In the context of litigation, we have already noted that it is subject to public acknowledgement of the lawyer and client relationship if formal litigation is commenced. In private client work it is vital to the freedom of the client to give instructions and receive advice that can be used to structure legal relations in confidence. In the words of HLA Hart:⁸²

“The principal functions of the law as a means of social control are not to be seen in private litigation or prosecutions, which represent vital but still ancillary provisions for the failures of the system. It is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court.”

⁷⁸ Thus, rather less effective than Juncker had hoped to achieve: Jean-Claude Juncker, Candidate for President of the European Commission, ‘A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change’, 22 October 2014, available at: http://ec.europa.eu/priorities/docs/pg_en.pdf accessed 2 November 2015.

⁷⁹ “As long as law firms publicly advertising their effective lobbying strategies and do not have to sign up to the EU Transparency Register, the Commission's efforts at furthering lobby transparency remain a farce. If the current approach – a register which is not legally binding but aims to encourage organizations to sign up by providing incentives – is not able to increase transparency regarding the lobby activities by law firms, it is a failure.” Corporate Europe Observatory, Law Firms: the most underrated lobbyists, 15 July 2015, <<http://corporateeurope.org/international-trade/2015/07/law-firms-most-underrated-lobbyists>> first published in German by LobbyControl, 23 June 2015, accessed 2 November 2015.

⁸⁰ Ibid.

⁸¹ <<http://www.sra.org.uk/solicitors/handbook/handbookprinciples/content.page>> accessed 16 December 2016.

⁸² HLA Hart, *The Concept of Law* (Peter Cane, Tony Honore and Jane Stapleton eds, 2nd ed, OUP 1994) 40.

This facilitative role of transactional law is supported by client confidentiality. Clients must be free to consider legal actions that would be potentially embarrassing, or likely to cause conflict if publicised.⁸³ Client confidentiality acts to shield considerations of legal possibilities, in a similar manner as the without prejudice laws protect negotiations. We support the use of client confidentiality principles to this effect, and obviously, such legal work will not generally lead to any participation in public discourse.

Obviously, client confidentiality overlaps with privilege, and particularly legal advice privilege which shares common justifications with the protection of client confidentiality. However, the two are not co-extensive,⁸⁴ and client confidentiality is the broader of the two. Legal advice privilege is justified by the support it gives to the rule of law,⁸⁵ enabling people and corporations to seek advice and arrange their affairs in reliance upon legal advice based upon full information.⁸⁶ Legal privilege is at tension with one aspect of the rule of law, the availability of all relevant evidence to a trial court, whilst it supports another aspect of the rule of law, in making legal instruments and adjudicative processes available through its support of legal advice and representation. This tension was recognised by Lord Nicholls in a dissenting judgment:⁸⁷ “The public interest in a party being able to obtain informed legal advice in confidence prevails over the public interest in all relevant material being available to courts when deciding cases.” In arguing here for a restriction of confidentiality we are in similar fashion arguing for a balance between the important public interest in confidentiality and the important public interest in the integrity of public discourse.

The issue is whether confidentiality should normally be extended to protect the identity of the client when a legal advisor undertakes to make interventions in public discourse on behalf of a client or client group.⁸⁸ Sometimes failure to identify the source of instructions that lead to representations to public bodies can be criminal, due to the requirements of the general law. Thus, the condemnation and prosecution of US attorneys Clarke M. Clifford and Robert A. Altman for allegedly acting on the instructions of BCCI, while expressly or impliedly claiming to act independently of BCCI when making representations to regulatory authorities.⁸⁹ In such situations there is a specific mischief in secrecy, which leads the law effectively to prohibit withholding of client details. However, client preference for secrecy extends beyond situations in which secrecy would be criminally culpable:⁹⁰

⁸³ *Three Rivers (No 6)* (n4) [30]-[34], [55], [106].

⁸⁴ *Three Rivers (No 6)* (n 4) [86].

⁸⁵ *Three Rivers (No 6)* (n4) [34].

⁸⁶ *Three Rivers (No 6)* (n4) [23]-[34], [54], [90]-[95].

⁸⁷ *In re L (A Minor) (Police Investigation: Privilege)* [1997] AC 16, 32.

⁸⁸ Normally, as in the case of vulnerable individual clients an argument can be made for personal anonymity to protect the vulnerable, in a similar manner to the operation of anonymity in court proceedings involving children or victims of sexual predation. However, the nature of the vulnerable group represented should be identified, again as would be apparent in litigation.

⁸⁹ Senator John Kerry and Senator Hank Brown, *The BCCI Affair: A Report to the Committee on Foreign Relations United States Senate* (US Government Printing Office 1993), 369. Subsequent prosecutions of Clifford and Altman were largely unsuccessful: Peter Truell, ‘Clifford and Altman Settle With Fed Over B.C.C.I.’ *New York Times* (New York, 4 February 1998) <http://www.nytimes.com/1998/02/04/business/clifford-and-altman-settle-with-fed-over-bcci.html> accessed 16 December 2016.

⁹⁰ Eric Lipton and Danny Hakim, ‘Lobbying Bonanza as Firms Try to Influence European Union’ *New York Times* (New York, 18 October 2013) http://www.nytimes.com/2013/10/19/world/europe/lobbying-bonanza-as-firms-try-to-influence-european-union.html?_r=0 accessed 16 December 2016

“Many clients view secrecy as an asset. “Even if the matter is public, the client doesn’t want our involvement to be known,” said Lourdes Catrain, a partner at Hogan Lovells. “A law firm provides very strong guarantees of confidentiality.””

Therefore, the issue is whether the application of the present default rule of lawyer client confidentiality applying is justified when a lawyer makes representations in a public forum or to a public body on behalf of a client.

Sissela Bok argues there are four principles that support the ethicality of client confidentiality:⁹¹

“Human autonomy regarding personal information, respect for relationships, respect for the bonds and promises that protect shared information, and the benefits of confidentiality to those in need of advice, sanctuary, and aid, and in turn to society.”

Being shielded from public or private curiosity when deciding how legally to structure your property serves to protect client privacy and autonomy.⁹² Being shielded from revelation of the existence of the client lawyer relationship when the lawyer contributes to public discourse on behalf of the client does not obviously safeguard privacy interests or client autonomy, and whilst it may protect the promise of confidentiality, it seems to threaten the public interest in transparency of public discourse identified above.

Obviously, the duty to keep information acquired from a client confidential is subject to exceptions, such as client consent, revelation of criminal intent, and statutory exceptions related to money-laundering and state security.⁹³ Therefore, it is untenable to argue the protection is absolute. Bok has argued with respect of professional confidentiality generally, that:⁹⁴

“The four premises are not usually separated and evaluated in the context of individual cases or practices. Rather, they blend with the ritualistic nature attributed to confidentiality to support a rigid stand that I shall call the rationale of confidentiality. Not only does this rationale point to links with the most fundamental grounds of autonomy and relationship and trust and help; it also serves as a rationalization that helps deflect ethical inquiry. The very self-evidence that it claims can then expand beyond its legitimate applications.”

In the field of lobbying activity, and other contributions to public discourse there is evidence that just such an expansion of the proper extent of client confidentiality is in evidence. In 2015 the Scottish Government published a Consultation paper on a proposed register of lobbyists in Scotland.⁹⁵ In its response the Law Society of Scotland recognised the importance of transparency in public discourse and debate. However, the Law Society was apparently unaware of the arguments for the identification of the client on whose behalf representations are made that we produced above:⁹⁶

⁹¹ Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (Vintage Books 1989), 120.

⁹² *Ibid*, 10-14 and 116-135.

⁹³ SRA Code of Conduct 2011 IB4.4 <http://www.sra.org.uk/solicitors/handbook/code/content.page> accessed 14 November 2016

⁹⁴ Bok (n 91) 123.

⁹⁵ A Consultation on proposals for a Lobbying Transparency Bill, the Scottish Government, May 2015, available at: <http://www.gov.scot/Resource/0047/00477580.pdf> accessed 14 November 2016.

⁹⁶ The Law Society of Scotland’s Consultation Response to A Consultation on proposals for a Lobbying Transparency Bill, July 2015, p. 7 available at: <https://www.lawscoot.org.uk/media/557927/lobby-a->

“We note that the proposed information includes details of who the lobbyist has recently lobbied on behalf of. We are uncertain as the reason for this or the benefit it is seeking to achieve? We would welcome clarification.”

This seems to misunderstand the lawyers’ role in such work as lobbying. As we argue above, lobbying (and public discourse generally) is a form of petitioning, and, petitioners have always been expected to stand behind their own representations. Indeed, the right to petition is a fundamental aspect of the rule of law, one which supports deliberative democracy. In this light the benefit of knowing on whose behalf lobbying is being carried out seems patent. The response continued:⁹⁷

“The registration of client details will breach the Society’s regulations on confidentiality. Confidentiality is a duty which is owed to the client, and ordinarily can only be waived with the client’s express permission. If the client does not agree to waive confidentiality, then effectively the law firm will not be able to engage with MSPs on their client’s behalf or provide advice on interactions.

Whatever information may have to be registered, it’s important to ensure a fair balance between transparency and openness and the disclosure of business sensitive information.”

It seems to be implicit in this argument that those represented by lawyers can legitimately remain anonymous when they engage in lobby activity through lawyers, and their anonymity should be protected as business sensitive information.

However, this use of client confidentiality would not be justified by the principles that Bok identified that support the ethical obligation of professional confidentiality. The only principle applying is the promise of confidentiality that law firms proffer to clients, and that would of course need to stop if disclosure was made a legal requirement, and is a practice that should be reviewed in the light of the arguments advanced here. Even more obviously, there is no risk of preparations for litigation being undermined. The disclosure is not of the content of legal advice: it is merely acknowledgement that the lawyer is making representations on behalf of a client. In litigation acknowledgement of the relationship would be expected. To argue it would be wrong when representations are made in public discourse seems almost perverse as an ethical argument. If one applied the argument for withholding the identity of the client by analogy to the facts of *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 6)* then the argument would be to the effect that the very existence of a relationship between Freshfields and the Bank of England should have been regarded as privileged.⁹⁸

[consultation-on-proposals-for-a-lobbying-transparency-bill-law-society-of-scotland-response.pdf](#) accessed 14 November 2016.

⁹⁷ The Law Society of Scotland’s Consultation Response to A Consultation on proposals for a Lobbying Transparency Bill, July 2015, p. 7 available at: <https://www.lawscot.org.uk/media/557927/lobby-a-consultation-on-proposals-for-a-lobbying-transparency-bill-law-society-of-scotland-response.pdf> accessed 14 November 2016. A similar argument was made in *The Council of Bars and Law Societies of Europe (CCBE) General Response to the European Commission Consultation on the Transparency Register* http://www.ccbe.eu/NTCdocument/07092012_EN_CCBE_Gen1_1347272377.pdf accessed 16 December 2016. Providing advice on “interactions” (presentation of evidence or argument) is likely to be protected by legal privilege, *Three Rivers (No 6)* (n4) [40], [83]. This is a quite separate issue to protection of “details of who the lobbyist has recently lobbied on behalf of”, and the conflation cannot be permitted.

⁹⁸ *Three Rivers (No 6)* (n4).

There is no strong argument for extending the protections of confidentiality to the extent presently defended by the Law Society of Scotland. However, there is one rather counter-intuitive argument that would support a disclosure rule in the interest of the client, rather than in support of the rule of law.

Perlman has identified a problem for lawyers who work on non-contentious matters for clients.⁹⁹ The problem might be termed a loss of distance or objectivity. It is the risk of an over-identification with the views and interests of a client. This presents two potential problems in the context of lawyers making undisclosed representations on behalf of a client, or client group, in public discourse. First, the lawyer may suffer the same incapacity in identifying the client's best interest as the client, a risk identified by Dani Rodrik and discussed above.¹⁰⁰ Second, a lawyer might in all good faith confuse the interest of the client, or client group, with the public interest. A loss of objectivity due to partisan loyalty may generate the same cognitive or ethical blind spots that the client suffers from.¹⁰¹ In this case there is risk that the lawyer might advance a damaging argument due to a lack of objectivity or distance from the client or client group.¹⁰² The inevitability of revelation of the identity of the client, or client group, encourages legal advisors to consider how other participants in public discourse might react to the arguments, and potentially generates the desired objectivity.

Regardless of how much force is given to this argument it seems clear that the duty to:¹⁰³ "Uphold the rule of law and the proper administration of justice"; would be relevant in this context.¹⁰⁴ The right to petition is a core element of the rule of law, it lies behind such important rights as freedom

⁹⁹ Perlman (n 69).

¹⁰⁰ Rodrik (n 27).

¹⁰¹ Habermas has coined term for such a possibility: "systematically distorted communication" which includes: "at least one of the parties is deceiving herself about the fact she is acting within an attitude orientated towards success and is merely keeping up the appearance of communicative action." Such unconscious deception identifies an area of good faith deception rather than manipulative action. Jurgen Habermas, 'Social Action, Purposive Activity, and Communication' in Maeve Cooke (ed), *On the Pragmatics of Communication* (Thomas McCarthy tr, Polity 2002) 168-169.

¹⁰² A risk we think realised with respect to client groups (as opposed to individual clients) by City of London Law Society, Revenue Law Committee response to Office of tax Simplification competitiveness review 9 May 2014 at:

<<http://www.citysolicitors.org.uk/attachments/article/105/20140605%20Response%20to%20Office%20of%20Tax%20Simplification%E2%80%99s%20'Competitiveness%20review%20-%20initial%20thoughts%20and%20call%20for%20evidence'.pdf> > accessed 24 August 2015; and Law Society of

Ireland presentation to the Joint Commission on Health and Children at:

<http://www.irishtimes.com/news/politics/tobacco-firms-to-argue-against-plain-packaging-for-cigarettes-1.1690036>

http://www.lawsociety.ie/News/News/Stories/Law-Society-and-plain-packaging/#.Vds7l_Rr2e

<https://www.lawsociety.ie/Documents/news/2014/Opening%20Statement%20Plain%20Packaging%20%20Law%20Soc.pdf>

<http://aclatterofthelaw.com/2014/04/01/objections-to-the-proposed-irish-tobacco-plain-packaging-law-an-overview/>

<http://www.mcgarrsolicitors.ie/2014/02/18/request-clarification-law-society-plain-packaging/>

<https://www.lawsociety.ie/Documents/Gazette/Gazette%202014/March2014.pdf>

all accessed 24 August 2015.

¹⁰³ <http://www.sra.org.uk/solicitors/handbook/code/content.page> accessed 14 November 2016

¹⁰⁴ The Law Society of Scotland does not have an equivalent provision to Principle One, it does have a version of the duty to act in a way that maintains the reputation of the profession at Rule B1.2 Trust and Personal Integrity, at: <http://www.lawscot.org.uk/rules-and-guidance/section-b/rule-b1-standards-of-conduct/rules/b12-trust-and-personal-integrity/> accessed 17 November 2016: "You must be trustworthy and act honestly at all times so that your personal integrity is beyond question. In particular, you must not behave, whether in a professional capacity or otherwise, in a way which is fraudulent or deceitful".

of expression. However, it has never been unconditional. With the protected right to petition comes the demand that the identity of the petitioner is public. The reason for this condition is that it is necessary to protect the quality of public discourse. As noted above it is relevant when considering an argument in a political arena to ask on whose behalf the representation is being made.

Thus, our primary argument is that the duty to uphold the rule of law is engaged when lawyers lobby, or undertake other interventions in public discourse, on behalf of clients or client groups. However, this central issue is often missed, as it was missed by the Law Society of Scotland. One advantage of the move by the Solicitors' Regulation Authority to principle based regulation is that it facilitates the identification of the ethical foundations underlying professional ethics. Instead of recognising the need to safeguard the reputation and practice of the right to petition the Law Society of Scotland offered an unprincipled defence of the confidentiality of client information. It responded with the rigid stand Bok characterised as the rationale of confidentiality which expanded beyond the legitimate bounds of professional confidentiality. Specifically, confidentiality was extended to the identity of the client when the law firm made representation when lobbying on behalf of that client. Articulation of the duty to uphold the rule of law should make such arguments less common. Inherent is a duty to uphold those legal traditions, principles, rights, and laws that constitute the rule of law. Of especial importance are those that maintain the conditions for a successful deliberative democracy. It is time to distil from the general duty to uphold the rule of law the specific rule that one should uphold the rule of law by practicing in such a manner that: when making interventions in public discourse, on behalf of a client or client group, the representative function of the solicitor is made explicit through disclosure of the identity of the client or client group.

Many Codes of Conduct in many different jurisdictions contain generalised requirements on legal advisers to act with integrity, and to behave in a way that maintains the trust the public places in their legal adviser;¹⁰⁵ as we argued above, secretive participation in public debate undermines trust in and integrity of public discourse. More importantly, though, failure to identify those on whose behalf one is participating in a debate corrodes the rule of law, a cornerstone of the existence of an independent legal profession. Therefore, we contend that declaration of the client or client group's identity when participating in public discourse should be also be viewed as a professional obligation emanating from duties to maintain the reputation of legal professionals and the legal system. This is our secondary argument.

Hopefully we have demonstrated that the public, all those who engage in public discourse, have legitimate reasons to demand to know with whom they are communicating. Traditionally attempts to misrepresent who is involved in a political action: be it a petition, or an artificial "grass-roots" citizen group writing to a Member of the legislature, or representations to the legislature or executive; are viewed as dishonest. This perception is rational and justified because of the nature of public discourse, being strategic rather than purely concerned with questions of truth. Many people legitimately engage in public discourse for self-interested reasons. But whenever they conceal their identity, purport to represent those that they do not represent, or use others to front their arguments without revealing the relationship, then they engage in dishonest practice that undermines public discourse and the rule of law.

¹⁰⁵ <<http://www.sra.org.uk/solicitors/handbook/handbookprinciples/content.page>> accessed 2 November 2015. Bar Standards Board Handbook, Part Two, Core Duties, CD3, CD4, & CD5 at: <http://handbook.barstandardsboard.org.uk/handbook/part-2/> accessed 14 November 2016.

Legal professionals engage in public discourse on behalf of clients and client groups. However, they do not always reveal those relationships. If the relationships are subsequently revealed then one may anticipate reputational damage to the profession because the public perception will be that the lawyers are involved in dishonest practices. Therefore, failure to maintain transparency in this area of practice risks serious reputational damage to the whole profession. Given the role of lawyers in upholding the rule of law such damage to lawyers' reputation may further undermine the rule of law.

Conclusions

We submit that a professional ethical duty to disclose the identity of a client for whom one is making representations in a public arena should be recognised. For solicitors the source of this duty is the duty to uphold the rule of law under the SRA principles, and specifically to uphold the general law principles that underlie the right to petition. Such a duty would instantiate the SRA principle in practice. For the Bar there is no such duty proclaimed, but such a duty should be recognised as an instantiation of the duty to uphold the reputation of the Bar and the legal system as laid down in the new Handbook. The reason non-disclosure is likely to lead to damage to reputation is that people understand that a petitioner should identify themselves, and that camouflage in public discourse is corrosive of the necessary ethical constraint on the conduct of politics. A convenient approach to defining the activities the obligation applies to, is to adapt the EU definition for the Transparency Register, thus the duty would apply whenever a lawyer engaged in any activity.¹⁰⁶

"... carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes ... irrespective of where they are undertaken and of the channel or medium of communication used."

However, it would not capture legal advice to government or on-governmental clients, nor activity in connection with litigation.¹⁰⁷

We submit the disclosure obligation should extend somewhat more widely. For when engaged in more general communications, such as commenting upon matters of public interest, where the connection with a client group is relevant, and not obvious, lawyers should alert their audience to such links. An example, that played a role in the genesis of this research, is a firm that acts mainly for employers in Employment Tribunals commenting upon the impact upon the justice of the system of a government proposal for introducing fees. It would be appropriate to alert the audience to the link with employers, rather than assuming a rhetorical posture of legal neutrality on the issue. Although the exact boundaries of such an obligation may be difficult to draw in every situation: there may be difficult questions of whether the link is obvious, or whether the link is relevant; there is no obvious disadvantage of being overly transparent in this regard, as only a general indication of the link to a type of client group is required. Therefore, this need not generate any conflict with the duty of client confidentiality even as it presently exists.

¹⁰⁶ Excerpt from Interinstitutional Agreement (Chapter III (Scope of the Register), paragraph 7) L 277/11 available at: http://eur-lex.europa.eu/legal-content/en/TXT/?uri=uriserv:OJ.L_.2014.277.01.0011.01.ENG accessed 24 August 2015.

¹⁰⁷ Ibid, Chapter III paragraph 10.

Indeed, one can identify examples of firms that campaign on legislative issues which affect their business who are willing to expressly confirm this alignment of interest between the client group and the lawyers who serve them.¹⁰⁸ Thompsons Solicitors not only campaign through their website, which makes their core business obvious, but uses identifiable former clients to humanise the case they make to protect current provision of legally assistance in litigation, and quantum of general damages.¹⁰⁹ The work of Susan Murray and Beth Robinson was openly aligned with an identifiable client group. Therefore, any argument that openness would be impossible is untenable, given the existence of voluntary identification of client and lawyer relationships. The only arguable issue is whether there should be an obligation to reveal relationships.

If a client seeks a lawyer's representation in a general debate, then the lawyer appears within the public sphere as a representative of that client, and we argue that it should be a professional requirement for the lawyer to identify for whom they act. In effect a broad interpretation of the "indirect influence" category of the European transparency register:¹¹⁰

"'indirectly influencing' means influencing through the use of intermediate vectors such as media, public opinion, conferences or social events"

The effect is to remove any presumption of disinterested neutrality from lawyer interventions in public discourse. Without disclosure of relationships to interested client groups other participants in the debate may be misled. Any perception of an attempt to mislead the public undermines public trust in the legal profession. Lawyers are under a duty to act with integrity and maintain public trust. However, we submit the key obligation at work in this area is to uphold the rule of law, by maintaining public trust in that public discourse that is ultimately derived from the right of petition. In short this area of professional practice has importance beyond the economic interests of the firms involved and the ethical codes of practice should reflect this fact.

¹⁰⁸ Jeremy Vine Show 17 November 2016 <<http://www.bbc.co.uk/programmes/b081nnf7>> accessed 13 December 2016, Tom Jones of Thompsons Solicitors was introduced as a personal injury specialist, and he confirmed expressly that his firm made money by pursuing personal injury claims for claimants.

¹⁰⁹ <<http://www.thompsons.law.co.uk/cutpremiumsnow/index.htm>> accessed 13 December 2016. The City of London Law Society make explicit reference to its members' client base in its response the Office of Tax Simplification competitiveness review:

<<http://www.citysolicitors.org.uk/attachments/article/105/20140605%20Response%20to%20Office%20of%20Tax%20Simplification%E2%80%99s%20'Competitiveness%20review%20-%20initial%20thoughts%20and%20call%20for%20evidence'.pdf>> accessed 16 December 2016.

¹¹⁰ Excerpt from Interinstitutional Agreement (Chapter III (Scope of the Register), paragraph 7) L 277/11 available at: http://eur-lex.europa.eu/legal-content/en/TXT/?uri=uriserv:OJ.L_.2014.277.01.0011.01.ENG accessed 24.08.2015 Chapter III paragraph 7.