PART VII — CONFIDENTIALITY

1 ETHICAL FOUNDATIONS

1.1 Ethical Rationales for Confidentiality

Issue: why, in general, ought a confident to maintain confidentiality?

- Individual autonomy mandates control over personal or other sensitive information
- Individuals should respect the secrets of their intimates
- A pledge of silence should be honoured

Issue: why, in particular, ought lawyers to maintain the confidentiality of information communicated to them by clients?

- The public has a special interest in the confidentiality of their legal communications
- Lawyers’ role as adversarial advocate dictates that they comply with their clients’ wishes and act in their best interests
- The proper administration of justice depends on clients fully confiding in their lawyers without fear of unwanted disclosure

The law of confidentiality implements the role morality of an adversarial advocate. Because the lawyer is viewed as a part of the client, they are obliged to maintain their confidences. Deane J identifies an overriding public interest in protecting confidentiality, observing that it is

of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law and to the administration of justice and law in that it advances and safeguards the availability of full and unreserved communication between the citizen and his or her lawyer and in that it is a precondition of the informed and competent representation of the interests of the ordinary person before the courts and tribunals of the land… a bulwark against tyranny and oppression… it is not to be sacrificed even to promote the search for justice or truth in the individual case … extends to protect the citizen from compulsory disclosure of protected communications or materials to any court or person with authority to require the giving of information or the production of documents or materials.¹

Several justifications are implicit in this analysis:

- Confidentiality protects the rights and freedoms of individuals by guaranteeing them private communication with their legal representative;
- Confidentiality upholds the administration of justice by allowing for informed and competent representation of clients’ true interests;
- Confidentiality protects against tyranny and oppression by preventing compelled disclosure to the government or other regulatory body; and
- The importance of confidentiality is so great that it should always triumph over justice in any given case.

In other words, public confidence in the system is more important than truth or justice in individual cases.

¹ Attorney-General (NT) v Maurice (1986) 161 CLR 475, 490.
1.2 Limits of Confidentiality

**Issue:** should lawyer–client confidentiality be absolute, or are there circumstances in which the public interest is better served by disclosure?

- The requirement of confidentiality is said to be necessary to achieve the public interest
- However, the public interest is actually in the proper administration of justice, and there are several ways to ensure this (of which confidentiality is an insufficient and unnecessary condition)
- There is no need that confidentiality be an end in itself — confidentiality should only ever serve the public interest
- In this way, confidentiality is just one consideration when weighing up the public interest against other ethical ideals
- One problem with the adversarial advocate’s conception of confidentiality is that it is viewed as an absolute requirement, when in fact it may arguably damage the administration of justice more than it upholds it, in some circumstances

Tur argues that confidentiality is far from an absolute principle of modern law, and that it is really only one of many factors relevant to the public interest:

*legal education and theory should resist the lawyer’s ideological and self-serving account of confidentiality as some kind of absolute and demonstrate that the doctrines of confidence and privilege in a society at any one time represent a compromise between conflicting principles and values… A recognition that confidentiality and disclosure are of equal status leads to serious questions about limiting confidentiality in the interests of disclosure. Both confidentiality and disclosure can reasonably lay claim to being essential to the interests and administration of justice… Confidentiality does not necessarily mandate non-disclosure: it merely provides a reason for non-disclosure which may or may not be outweighed by other considerations.*

Some commentators have also, somewhat cynically, suggested that confidentiality serves an ulterior, pragmatic end in that it encourages the overuse of lawyers:

*Lawyers are excessively prone to advise confidentiality for the same reason that surgeons are excessively prone to advise surgery. Confidentiality puts a premium on services and protections that lawyers are distinctively qualified to provide.*

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2 PROFESSIONAL OBLIGATIONS

2.1 Legal Requirements

In general, lawyers are obliged to keep private the communications of their clients. Three sources of law support and enforce this obligation:

1 Common law causes of action in equity and contract
   A breach of confidence action is available to the wrongfully-exposed client, which may
   award an injunction preventing the disclosure or damages as compensation;

2 Professional conduct rules
   The Legal Practice Act 1996 (Vic) s 64 and Professional Conduct and Practice Rules 1, 3
   provide for disciplinary action if a complaint about breach of confidentiality is made;

3 Legal professional privilege
   A client is be entitled to protection against a third party able to compel mandatory
   disclosure of certain ‘privileged’ lawyer–client communications.

2.2 Breach of Confidence

Requirements:

- Secrecy
  The information of whose disclosure is complained must have the necessary quality of
  confidence or secrecy about it;

- Obligation of confidence
  The information must have been disclosed in circumstances which implied an obligation
  to keep the secret (such is implied in a lawyer–client retainer); and

- Unauthorised use
  There must have been, or be a possibility of, unauthorised use of the information to the
  confider’s detriment.

Where these requirements are met, an injunction may be granted to prevent disclosure. If
disclosure has already occurred, damages can be awarded and the relevant documents may be
shredded before the Court.

Question: what should a practitioner do if they receive the other party’s documents mistakenly?

The (conventionally) ‘ethical’ answer is to inform the other side and not to read the documents.
However, such a course of action has several disadvantages:

- If the other side finds out, they might nevertheless assume they had been read and
  request the practitioner’s removal from the case
- This would disadvantage the client, both because the lawyer failed to take the opportunity
  to act in their interests (by reading the documents) and was subsequently unable to act

However, failing to report or actually reading the documents may have equally dire
consequences. To what extent is it permissible for a lawyer to immediately return the documents
to the other party without first consulting their client?
2.3 Professional Conduct Rules

Disciplinary standards protect the confidentiality of clients’ disclosures by imposing a duty of confidentiality upon practitioners:

1. Duty to Client

1.1 Honesty and Confidentiality. A practitioner must, in the course of engaging in legal practice, act honestly and fairly in clients' best interests and maintain clients’ confidences.

3. Confidentiality

3.1 A practitioner must never disclose to any person, who is not a partner, proprietor, director or employee of the practitioner’s firm, any information which is confidential to a client and acquired by the practitioner's firm during the client's engagement, unless —

3.1.1 The client authorises disclosure;

3.1.2 The practitioner is compelled by law to disclose;

3.1.3 The practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a serious criminal offence;

3.1.4 The information has lost its confidentiality; or

3.1.5 The practitioner obtains the information from another person who is not bound by the confidentiality owed by the practitioner to the client and who does not give the information confidentially to the practitioner.

The exceptions to confidentiality recognised by the PCPR are fivefold:

- Consent or authorisation (3.1.1)
- Compelled waiver of privilege by legislation (3.1.2)
  - Eg, legal aid, money laundering, child abuse, etc
- Loss of confidential status (3.1.4)
  - Exceptions (public interest in truth/justice): ‘rumours’ are not ‘public knowledge’
- Obtaining from a person not bound by confidentiality (3.1.5)

Exception 3.1.3 is dealt with below (‘public interest exception’).

Two further, implied exceptions exist:

1 Incidental communications

The obligation of confidentiality does not restrict communication incidental to the normal conduct of the matter (McKaskell v Benseman [1989] 3 NZLR 75)

- Eg, asking colleagues and mentors for advice
2 Protecting the lawyer in a dispute with the client
Confidentiality is impliedly waived to the extent necessary to reply to or defend against a charge of criminal or unprofessional conduct, or professional misconduct made by the client.

• Eg, costs disputes: substantiating a lawyer’s entitlement to remuneration by disclosing the work that was done
• Eg, defending against complaints: implied waiver of privilege by a client who instigates any proceedings against his lawyer

In all of the above circumstances, principles of confidentiality do not apply.

2.4 Legal Professional Privilege

Professional privilege protects certain lawyer–client communications from mandatory disclosure, such as would occur when a third party subpoenas documents for litigation. To be privileged, communications between a solicitor and client must be made for the dominant purpose of:

(a) Advice (‘advice privilege’); or
(b) Preparation for litigation that is in reasonable contemplation (‘litigation privilege’).

Client legal privilege is thus an exception to general civil and investigative processes. Information that is protected by privilege is largely exempt from all attempts to compel disclosure, such as subpoena or discovery (where each side is forced to disclose all relevant — even damaging — information when preparing for a civil trial). However, in order to attract protection, the communication must be of a certain quality:

• It must be confidential (in the general law sense, not the wider sense under the professional conduct rules); and

• It must be communicated in the context of a professional lawyer–client relationship (and not in some unrelated context, such as an engineering or design specification)
  o For the dominant purpose of advice, between lawyer and client; or
  o For the dominant purpose of preparation for litigation, including preparatory communications with third parties.

Professional privilege is a fundamental principle of the common law. As such, it can only be overridden by explicit words or a necessary construction of a statute. Courts are increasingly protective of privilege. However, it may be waived by the client expressly or impliedly. Lawyers may also be taken to have impliedly waived privilege on behalf of their clients.

In the context of in-house counsel, it is arguable that, as just another employee of the company, a lawyer will not be an independent provider of legal advice and hence no privilege will arise. However, the High Court of Australia appears to have taken a more conservative approach to privilege, protecting it in changing circumstances by expanding the scope of confidentiality to be inferred from service contracts.

Differences between legal professional privilege and common law confidentiality obligations:

• General confidentiality is much broader than professional privilege
  o The privilege only extends to certain communications made for certain purposes
Namely, privilege only covers communications satisfying the above requirements

- Professional privilege is used for and arises in different circumstances
  - Confidentiality is an obligation owed by a lawyer to his or her client not to deliberately or inadvertently disclose information to third parties
    - It is enforceable via the disciplinary system or the common law of equity and contract
    - It is enforced by the client (or a professional association) on the lawyer to restrain disclosure by the lawyer
  - Privilege is a protection available to the client (but not to the lawyer) against ordinary legal processes in order to prevent them from having to disclose information they would otherwise have been under a legal obligation to disclose
    - Privilege is a shield used to protect the client from the requests of third parties for disclosure

2.5 Exceptions to Confidentiality

2.5.1 Public Interest Exceptions

Broadly speaking, there are five public interest exceptions to confidentiality:

1. **PCPR 3.1.2**
   Where disclosure is compelled by legislation;

2. **PCPR 3.1.3**
   Where privilege does not apply and the disclosure is for the sole purpose of avoiding probable commission or concealment of a serious criminal offence;

3. **PCPR 15.3.3(b)**
   Where a client’s intention to disobey a court order poses a threat to the safety of another;

4. **Public interest defence**
   Where the defence would apply to a common law breach of confidence action; and

5. **Illegality**
   Where the illegality exception applies to prevent professional privilege.

The recognised exceptions to confidentiality are mostly permissive. That is, they give lawyers discretion (rather than compulsion) to disclose information in particular circumstances. The issue of which circumstances, if any, should positively compel lawyers to disclose information revealed by a client remains largely unexamined.

2.5.2 **PCPR 3.1.3**

PCPR 3.1 sets out five exceptions to the general requirement of confidentiality, one of which reads as follows:
3.1 A practitioner must never disclose to any person ... any information which is confidential to a client ... unless —

3.1.3 The practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a serious criminal offence;

PCPR 3.1.3 has three sub-components in order to be enlivened. The practitioner may disclose information in circumstances in which:

- **Compulsion by law**
  ...the law would probably compel its disclosure...

- **Inapplicability of privilege**
  ...despite a client’s claim of legal professional privilege...

- **To avoid a criminal act**
  ...and for the sole purpose of avoiding probable commission or concealment of a serious criminal offence.

The requirements imposed by rule 3.1.3 are somewhat unclear. How certain need the practitioner be that the law would ‘probably’ compel disclosure? How is the ‘sole purpose’ of the disclosure to be determined? When can the ‘probable commission or concealment’ of a crime be ascertained? What is a ‘serious’ criminal offence?

Issues of application:

- Would disclosure ordinarily be mandatory?
  - Ie, would professional privilege apply?
- Is it the ‘sole’ purpose of disclosure to avoid the relevant conduct?
- Is commission or concealment of an offence ‘probable’?
- Is that offence ‘serious’?

Essentially, if privilege is probably inapplicable, then disclosure is permitted where it occurs solely to avoid the probable commission or concealment of a serious criminal offence. Privilege may be inapplicable either because its requirements are not met or because an exception such as illegality or the public interest defence applies.

Thus, the PCPR exception appears to permit disclosure if:

- Privilege does not apply; and
  - Requirements are not met; or
  - Illegality defence is made out
- The disclosure is solely for the authorised purpose.
  - Avoiding the probably commission or concealment of a criminal offence that is serious
It also seems clear that a third party need not actually demands disclosure. The law need only be willing to compel disclosure were such to occur. Whether disclosure would be compelled depends on whether privilege applies. If it does not (for whatever reason), then disclosure would be compelled in the event that a third party legitimately requests access to the information. Therefore, the exception applies where privilege does not.

Even if PCPR 3.1.3 does operate to permit a practitioner to disclose confidential information, the permission appears to be solely discretionary. The lawyer is obliged not to disclose unless one of the exceptions applies, but no mention of a positive obligation to disclose is made. The lawyer must take the initiative independently; it is an optional undertaking. The Law Institute of Victoria suggests that a more liberal interpretation is possible, reminding practitioners not to be too literal when interpreting the rules.

2.5.3 **PCPR 15.3.3(b)**

The general rule is that practitioners are not allowed to disclose their client’s intentions to break the law. However, where the client’s conduct may threaten a person’s safety, PCPR 15.3.3(b) authorises disclosure:

<table>
<thead>
<tr>
<th>15.3</th>
<th>A practitioner whose client informs the practitioner that the client intends to disobey a court's order must:</th>
</tr>
</thead>
<tbody>
<tr>
<td>15.3.3</td>
<td>Not inform the court or the opponent of the client's intention unless:</td>
</tr>
<tr>
<td>(b)</td>
<td>The practitioner believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.</td>
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Thus, another exception to professional privilege arises where the lawyer reasonably believes that the client poses a threat to the physical safety of another.

This exception is most likely to arise in the context of violations of a restraining order following domestic violence.

2.5.4 **Public Interest Defence**

The public interest defence is a defence to an action for breach of confidence at common law. It says that in certain circumstances, the public interest demands disclosure of confidential information to the proper authorities.

- Finn’s formulation:⁴
  - If the information relates to serious wrongdoing which it is in the public interest to disclose; or
  - If the disclosure will probably avert apprehended and serious harm to the public or to members thereof; then
  - Disclosure will not be restrained

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• Koomen’s formulation:
  o If the information is iniquitous (concerns crimes, frauds, misdeeds of some gravity and possibly ‘improprieties’); then
  o A court should consider whether, on balance, the public interest would best be served by disclosure (e.g., where the information is not trivial);
  o A court should also consider to whom the information should be disclosed.

2.5.5 Illegality

Illegality is an exception to legal professional privilege. Where a communication is made for any purpose that ‘might be described as a fraud on justice’, it will not be privileged and disclosure can be compelled (Attorney–General (NT) v Kearney).

The exception appears to have been acknowledged in PCPR 3.1.3 (‘law would probably compel disclosure despite privilege’ in relation to a ‘serious criminal offence’). However, as a result of Kearney, the illegality exception is considerably broader than what is contemplated in Rule 3.1.3.

Attorney–General (NT) v Kearney (1985) 158 CLR 500:

Facts
• The Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) has the potential to affect the distribution of land in the Northern Territory
• The Attorney–General wants to minimise losses of land, so the Administrator of the Northern Territory makes regulations zoning large tracts of land near Darwin and Katherine to be treated as parts of those towns, thereby defeating any claim under s 50(1) of the Act
• This was an improper use of the power to make regulations, so a prima facie case to defeat the regulations is established by the Northern Land Council
• However, the indigenous claimants cannot prove that this was the purpose of the rezoning was for itself improper unless they have access to the legal advice that preceded it

Issue
• Is the communication between the Northern Territory Government and its legal officers subject to professional privilege?
• If so, does the illegality exception operate to allow access by the claimants?

Reasoning (per Gibbs CJ)
• Prima facie, communications between a public authority and legal advisers of that authority fall within legal professional privilege unless an exception to that rule applies
• One exception to professional privilege is that communications for the purpose of being guided or helped in the commission of a crime or fraud are not privileged (Varawa v Howard Smith & Co Ltd per Griffith CJ)
• The illegality exception is not confined to cases of crime and fraud: it includes ‘anything that might be described as a fraud on justice’
• Privilege cannot be claimed when its confidentiality was sought, as here, in order to

frustrate the processes of law

- Here, the communication should be denied privileged status because it was made to further an illegal purpose
  - ‘It would be contrary to the public interest which the privilege is designed to secure — the better administration of justice — to allow it to be used to protect communications made to further a deliberate abuse of statutory power’
  - ‘It would shake public confidence in the law if there was reasonable ground for believing that a regulation had been enacted for an unauthorised purpose and with the intent of frustrating legitimate claims’
  - ‘The law strikes a balance between securing proper representation by encouraging full disclosure [by privileging legal communications], and requiring the production of all relevant evidence [during discovery]’
  - ‘[T]he balance more readily inclines in favour of disclosure where privilege from disclosure might conceal an abuse of delegated powers to enact legislation, and thus obstruct a proper challenge to the validity of part of the law itself’
- Therefore, privilege does not protect communications made by a public authority for the purpose of obtaining advice or assistance to exceed its statutory powers

**Decision**

- The illegality exception encompasses anything that might be a fraud on justice
  - This includes improper use of the administrative power
- That the power was used for ‘an ulterior purpose’ is clear, and this ‘has sufficient colour to displace the privilege’
  - Therefore, the communication is not protected and disclosure is possible
- Mason, Wilson and Brennan JJ agree
- Dawson J dissents on the basis that making regulations for an ulterior purpose isn’t fraudulent or illegal conduct

Applying the illegality exception:

- **Is disclosure being mandated?**
  - Eg, by police, a regulator, the Court, during discovery
- **Does professional privilege apply?**
  - Is it a confidential communication?
  - Is it for the purpose of advice or litigation preparation?
  - Was it made in the course of a professional lawyer–client relationship
- **Was the communication for the purpose of furthering or guiding an illegal purpose?**
  - Broadly defined * (Kearney)*
  - Was it a ‘fraud on justice’ with ‘sufficient colour to displace the privilege’?
- **If so, privilege does not apply and the information must be disclosed.**

Possible responses to client illegality:

- **Adversarial advocate:**
  - Continue to advocate the client’s interests
  - Attempt to ensure they do not get caught
• Advise them within the limits of the law how best to conceal (and continue?) their wrongdoing
• Use professional privilege to prevent discovery of sensitive documents by another party

Responsible lawyer
• Duty to the integrity of law is greater than that owed to the client
• Advance any available defences to the illegal conduct, but do not exploit loopholes to conceal it or act inconsistently with the ‘spirit of the law’
• Privilege should not be used as a purely technical strategy (eg, where the ‘magic’ documents aren’t really lawyer–client communications)
• Confidentiality does not enhance a client’s ability to or likelihood of respecting both the letter and the spirit of the law: someone who is committed to obeying the law does not need an assurance of confidentiality to disclose his plans (the overall impact of privilege is probably to reduce compliance with the spirit of the law)
• Exit without disclosure: withdraw and maintain confidentiality
• Exit and disclose: where an exception to confidentiality is available, and if the client refuses to change their practices, and the administration of justice demands it, blow the whistle on the client’s illegality

Moral activist
• Consider the social consequences of the client’s illegal conduct
• If the client’s illegal conduct is morally justifiable, no problem arises
• However, if their conduct leads to injustice or is contrary to the public interest, consider blowing the whistle even if no legal exception to confidentiality is available

Ethics of care
• Voice and loyalty: counselling to do the ‘right thing’
• Threaten exit as part of counselling
• Consider whether disclosure would cause harm and how it would affect relationships with third parties, the company, your colleagues
• Act in the client’s best interests, but consider them holistically (true costs of non-disclosure, continuing illegality, etc)
• Don’t protect against disclosure at the cost of degrading relationships; like the responsible lawyer, only pursue good faith legal measures
• If their conduct is causing harm, engage in dialogue with the client to alter their current practices

Exam note: illegality is likely to appear. As a result of Kearney, it is a very broad exception.

2.6 Corporate Whistle Blowing

Can a corporation, although not an individual, possess a right to rely upon lawyer–client privilege to prevent disclosure of sensitive information?

Whistle-Blowing:

6 This section extracts, summarises and critiques portions of Richard Zitrin and Carol Langford, ‘Chapter 5: Blowing the Whistle in Corporate America’ in The Moral Compass of the American Lawyer (1999) 94–117. Pinpoint citations are omitted for brevity.
• Courts have not yet resolved whether lawyers ever have positive duty to disclose.
• There are some examples where court has ordered lawyer to disclose as result of an application.
• Where privilege doesn’t apply, may be duty of disclosure to police, regulator, court, or via discovery at general law.
• Regulation may require corporate client to disclose certain matters - lawyer may be held responsible for non-disclosure eg prospectuses.
• Whistle-blowing obligations eg Sarbanes-Oxley (US).

Originally, privileged communications protected the autonomy and dignity of the individual speaking in confidence. It was part of the lawyer’s role as fiduciary — protector of the individual client’s secrets. Throughout history, privilege has remained a highly personal right, concerning individual people and specific confidences. This doesn’t mesh with a corporation — an abstract, intangible conglomeration of power — which would hold the privilege not as an individual but as an invisible entity.

The broad availability of privilege to corporations has caused significant harm to the community. Examples of corporate abuses of lawyer–client privilege include:

• Tobacco companies
  o Risk awareness surveys and other potentially incriminating documents were recorded in the guise of memoranda to company lawyers
  o A ‘special projects’ unit, which conducted scientific research into the health effects of nicotine and cigarettes, was supervised by lawyers; this was described as ‘an industry “shield” … a front’; the aim was to protect damaging information from public scrutiny under the guise of privileged communications
  o Regularly made improper claims that research involved a lawyer–client communication
  o Often used a claim of privilege as a litigation tactic, causing a claimant party to exhaust their funds or give up fighting: privilege is ‘[a] weapon in discovery wars of attrition’

• Ford ‘Pinto’
  o Pinto engineers were aware of a potentially fatal petrol tank design flaw since 1968, but Ford did not disclose the danger
  o The cost of recalling and repairing cars in the market was estimated at $137 million, but compensation payouts were estimated at $50 million, so no action was taken
  o By 1977, details about the design flaw had begun to surface
  o In 1978, a jury in Grimshaw v Ford Motor Company awarded $125 million in punitive damages (most of which was subsequently set aside by the judge) to a victim of burns caused by the flaw
  o At no stage during the 9 years prior to information about the flaw being revealed did Ford’s lawyers disclose what they must have known
  o Luban argues that, once the lawyers had failed to convince Ford to change its course, they ‘should have alerted the public to the menace of the Pinto’
  o Instead, Ford’s lawyers displaced responsibility onto other company employees
  o The only way to avoid an agency paradox is if someone takes responsibility; as Luban implores: ‘Ask not with whom the buck stops, it stops with thee’

In part, these abuses occurred because of the role in-house counsel play in modern corporations. They are heavily enmeshed in their employer’s activities, often losing sight of broader moral issues. As the European Court of Justice noted, it is impossible for them to be both employees and independent, objective lawyers. They are unable to terminate the lawyer–client relationship.
except by quitting their job. Ethical objections or a refusal to implement corporate policy often place their employment in jeopardy. The lawyer’s only real ‘remedy’ is resignation, an act often carrying dire personal consequences and meaningless to the outside world (still unaware of the privileged information). Another lawyer, perhaps less scrupulous, may fill their position anyway.

In-house counsel also have limited room to move within professional practice rules, which (it has been noted) afford less scope to corporate counsel preventing their employers from hurting the public than criminal defence lawyers have when a client is about to commit a crime. Instead, they are often required to act in the best interests of the organisation. However, these interests typically include making profit or increasing stock value, which bear little resemblance to (and often conflict with) the interests of the wider public.

Further, a criminal lawyer who suspects their client is about to or in the course of committing a crime may withdraw immediately and in some circumstances take steps to report the crime, while a corporate lawyer must spend months requesting permission to disclose the information while the ‘fraudulent activity continues unabated.’

Because disclosure would be in breach of professional rules and a potentially criminal act, it is necessary to adopt an ethic critical of law and lawyers in order to justify whistle blowing. A moral activist conception of lawyers, for example, has no problem with the actual legal classification (criminal or otherwise) of the act of disclosure: what is relevant is its inherent moral quality and effect upon justice and the public interest. Such a perspective permits breaking law to uphold justice, something which an in-house counsel must do in order to disclose company secrets.

It might also be argued that lawyers are but one cog in the corporate wheel, and that plenty of other employees without such onerous obligations of confidentiality (designers, engineers, management consultants, etc) ought instead to disclose dangerous defects. Such an argument attempts to shift responsibility for practical, rather than ethical, reasons; however, it fails to explain just when ‘the buck should stop’ — who, if anyone, should disclose confidential information. If anyone attempts to shift responsibility, no disclosure occurs.

An ethics of care approach asks a more difficult question: what does virtue require of a lawyer in such a position? Clearly, they should advise the corporation about the moral costs of their behaviour: virtue is its own reward. An ethics of care lawyer would weigh up the harm caused by allowing the dangerous product to continue to be sold (including any injuries or deaths, resulting strain and anguish, loss of public confidence, subsequent loss of profits, lost jobs) against the harm caused by going public with the information (including the impact on the practitioner, her colleagues and the company, the public, and potential victims), and adopt the course of action which minimises harm.

There may also be financial benefits associated with complying to ethical standards. Social responsibility improves their public image. Counsel might thus argue that the true cost of hiding the truth (especially about dangerous products) is far higher than is traditionally estimated. Just look at the Ford Pinto case for an example. ‘Litigation visibility’ should also be a concern; corporations should adopt strategies that reduce the risk of litigation. These include: helping victims quickly, showing compassion and commitment to safety, remaining sceptical about their own level of compliance, and generally taking responsibility for their actions.

Displacing responsibility in a corporate environment is often easier than in other contexts. The harm caused by a company is abstract: ‘anonymous people being harmed by anonymous, unspecified events’. The conceptual distance between unethical cause and harmful effect creates an emotional distance between employees and morality; this may explain their largely pragmatic approach to ethical issues.
A v B (19xx):

Facts
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Issue
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Reasoning
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Decision
- 