

Dilemmas facing the legal profession

Hans Nelen

Amsterdam, CIROC, 22 oktober 2003

Structure

- Risk factors
- Features of culpable involvement
- Prevention
- Repression
- Recommendations

Things in common

- Expertise
- Aura of credibility/legitimacy
- Monopoly (notary public)
- Client confidentiality
- Legal professional privilege

Risk factors

- Structural
- Internal to the lawyer
- External to the lawyer-client relationship

Structural

- Notaries (Solicitors in UK) have a monopoly and will be inevitably involved in real estate transactions
- UK: Conveyancing system which allows lawyers to represent both borrowers and lenders

External

- Commercialisation
- Internationalisation (both positive and negative effects)
- Co-operation with other disciplines

May have consequences for:

- Independence
- Transparency

Extent of the problem

- Number of lawyers/notaries prosecuted or convicted low

Explanations:

- The problem is exaggerated
- Reluctance to investigate
- Difficult to prove

Features (lawyers)

- Mailbox or errand boy
- Intimidation/manipulation witnesses
- Human trafficking (legal representation in asylum claims/marriages of convenience)
- Give opportunities to abuse law firm facilities
- Involvement in financial-economic crime (including Money laundering)

Money laundering

- Creation of corporate vehicles or other complex legal arrangements such as trusts;
- Buying or selling of property;
- Performing financial transactions;
- Financial and tax advice;
- Providing introductions to financial institutions.
- Receipt of cash;
- Provision of cash to the client or the client's associates;
- Payment of monies to third parties in “transactions” not connected with the lawyer's

Features (Notaries)

- Insufficient questioning regarding setting up of legal entities;
- Lack of due care in executing deeds regarding property;
- Misleading by maintaining a false appearance;
- Using the third-party account as a safe haven;

Supervision

- Micro (firm)
- Meso (professional group)
- Macro (law enforcement)

Macro

9/11 and the amended EU-directive 2001/97/EC
report any unusual or suspect financial transactions

- buying and selling of real property of business entities;
- managing of client money, securities or other assets;
- opening or management of bank, savings or securities accounts;
- organisation of contributions necessary for the creation, operation or management of companies;
- creation, operation or management of trusts

Will mandatory reporting work?

- Merely speculative, but effects are questionable because.....
- Use of financial information by the police is very poor;
- Distinction between ‘traditional’ role of the legal profession – which still is highly protected – and ‘modern’ forms of legal and financial support may be too academic

Meso; a regulatory approach

Likely to be more effective than a law enforcement approach, because regulators can:

- routinely inspect confidential and privileged material and thus both monitor compliance and uncover serious wrongdoing;
- better assess the behaviour of lawyers and notaries;
- take preventative steps such as intervention;
- undertake regulatory incapacitation by suspension or by expulsion;
- conclude all of the above well before any criminal case comes to trial

Self-regulation & compliance

- Compliance depend on:
 - Morality
 - Financial circumstances
 - Risk perceptions
 - Clear professional rules
 - Detection
-
- Levels of visible enforcement of provisions low

Disciplinary boards

- Insufficient access of outsiders to the procedure
- Insufficient investigation facilities
- Regulators not equipped – legally physically or culturally – to investigate dishonesty
- Insufficient awareness?

Recommendations

- Professional rules
- Professional back-up
- Dissemination of knowledge
- Extension of investigation capacity of regulators
- Professional, criminal or administrative sanctions on lawyers/notaries who improperly claim the protection of lpp

Professional rules and back-up

- Need for a professional standard according to which a lawyer can decide whether or not to accept a case.
- Senior lawyers as confidants or trusted representatives
- Encourage debate on professional ethics