

TO: Legal Theory Workshop Participants

FROM: David Wilkins

RE: My Very “drafty” Draft!

Bruce, Heather, and Dan have generously allowed me to bend the usual norms of your workshop by sending you the outline of a lecture that I delivered in March at University College London as part of the Current Legal Problem Series. I am currently in the process (but unfortunately not far enough to have a real draft!) of turning the lecture into a chapter for the volume that Oxford University Press will publish next year collecting the lectures so receiving your feedback now will be especially valuable. (My guess is that I will also publish an expanded version in the US as well.) Although I hope that the outline will give you a pretty good idea about the general thrust of the argument, I thought it might be helpful to raise a few additional points that I am considering as a result of comments I received at UCL and when I subsequently presented the idea at a workshop at Hastings and in an informal Legal Profession lunch with my colleagues at Harvard. So in addition to the text, please consider the following:

1. Is “agency” the right way to describe the current understanding of the attorney/client relationship?

Your former colleague Geoff Hazard (now at Hastings) noted that Model Rules never expressly say that the attorney/client relationship is one of agency. Moreover, the Rules also impose many limitations on what lawyers can contractually promise their clients (for example, restrictions on the lawyer’s right to practice to which I return below) that constrain what principals would otherwise be allowed to demand. Nevertheless, it seems to me that the predominate understanding of the relationship is one of agency but I’d like to know if others disagree.

2. If “agency” is a proper understanding of the current model, do the changes that I outline undermine the validity of that model?

I don’t think that there is any doubt that the relationship between sophisticated corporate clients and their outside firms does not conform to the assumptions about information asymmetry and vulnerability that are often used to justify the current one-sided fiduciary duties on lawyers. Even so, some have argued that the fact that these clients are sophisticated does not mean that we shouldn’t still see this as fundamentally an agency relationship. As I concede, even if one moves to something like the model I propose clients would still have to be given many of the rights to define and control the relationship that we associate with principals. The question is whether the kind of mutual interdependence, risk sharing, and danger of client opportunism that increasingly characterize these relationships have changed their

basic character so much that we should alter the way in which we understand them. It seems to me that the answer is yes, but I'd be interested in hearing whether others see it differently.

3. Is a "joint venture" a helpful metaphor for the relationship I am describing?

Even if one agrees that the relationship is different from the traditional "agency" understanding, several people have questioned whether a "joint venture" is the proper way to characterize this difference since companies and their law firms will not be sharing "profits" and "loses." I take this point, although as the Elawforum.com example underscores one of the features of these new relationships is "risk-sharing" on both the up and down side. Although not technically "profit" sharing (since from the company's perspective any savings are simply a reduction in costs), the goal is for both sides to share in the risks and benefits of producing legal services for the company. In any event, I am less concerned about whether one calls it a "joint venture," "strategic alliance," or something else (although I'd like to know what), and more with understanding the boundaries of a relationship in which both parties owe fiduciary duties to each other and have a stake in the other's long-term viability (and, in this instance, legitimacy). So if there is a better metaphor to capture this idea I'd be very interested in hearing it.

4. Should all of this be left to contract or other forms of private ordering or is their a role for regulation, and if so of what kind and at what level?

At present, most of the new arrangements I am talking about are being worked out privately between lawyers and clients. My guess is that whatever the regulatory environment, this will continue to be the case. So as a first order, my project is to understand what these bargains should look like and how the parties can best establish an ongoing cooperative regime that allows them to exploit joint gains while reducing the hostility and mistrust that currently characterize these relationships. But the terms of the attorney/client relationship have never been left completely to private bargaining, in large measure because the consequences of these bargains have important spillover effects for third parties and for the public purposes of the legal framework generally. In many ways, the current regulatory regime imposes various limitations (i.e., restrictions on non-lawyer ownership, preventing covenants not to compete, severely limiting actions for wrongful discharge by lawyers against clients, etc.) that distort what kinds of contracts are possible or likely to arise. More generally, the regulatory regime is shaped by normative assumptions of what the "ethics" of these relationships are supposed to look like. At a minimum, one would have to examine these default rules and background normative assumptions if one wanted to move in the direction I propose. Other aspects of the "law of lawyering," including rules governing malpractice and third party liability, Sarbanes Oxley and the growing number of other federal and state laws governing lawyer conduct, would have to be put on the table as well. At this point my primary purpose is to figure out what the terms of the new relationship should be (taking into account the full range of relevant private and public considerations) and then to think about how contract and

regulation can best be used to accomplish this objective, but I'd be very interested to hear any and all thoughts on this latter question.

OK! Thanks for your indulgence about this somewhat unusual style of presentation. I look forward to discussing these issues with you on May 1.

TOWARD A JOINT VENTURE MODEL
(University College London March 18, 2008)

I Introduction

- A. Thank Dean and Faculty of UCL. Particularly thank Professor Colm O’Cinneide for his incredible hospitality and generosity in working out the arrangements for this trip

- B. It is a particular pleasure to give this talk at UCL. Not only is it one of this country’s oldest and most distinguished Universities, but I feel I have a particular affinity for this place. In doing a bit of quick research I discovered that the architect of UCL was William Wilkins, who designed the school between 1825-1832. Now I’m not sure whether Mr. Wilkins is a distant relative – and even if he was, I’m not sure he would claim me! – but it does give me a certain comfort in standing in this great room

- C. I also quickly discovered in the course of my research that two other giants associated with this great university also had a connection to me – and more importantly to my talk.
 - 1. The first of course, is the great philosopher and social critic Jeremy Bentham, whose auto-icon I visited this afternoon. Bentham wrote many brilliant commentaries on law and legal ethics, delivering an especially devastating critic of the social utility of the attorney client privilege, famously arguing that it was unnecessary to protect the innocent (since any good lawyer should be able to persuade an innocent person that giving the lawyer all the fact will increase their chance of being acquitted) and socially pernicious with respect to the guilty, since they won’t disclose everything which will mean that they are more likely to be convicted – which is exactly what society should want!

 - 2. I don’t intend to take on the merits of this particular critique today but I do want to call on Bentham’s willingness to take on some of the sacred cows of our profession to address one of the most common claims made about the nature of the attorney client relationship – a claim arguably made most forcefully by another great son of this University. For although Bentham often gets credit for founding UCL, as I understand it the person who really deserves the lion’s share of the credit is Lord Henry Brougham,

 - 3. Lord Brougham had many distinctions during his remarkable 90 year life, including a tenure as Lord Chancellor where he was responsible for passing the Slavery Abolition Act of 1833. But his most famous moment may have come when he was appointed to represent Queen

Caroline in defending against the divorce petition filed by her husband King Charles IV on the ground of adultery. In a stirring speech delivered in the House of Lords in 1820, Brougham delivered these memorable words:

"[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion."

- D. For more than 150 years, these words have stood as the embodiment of the ideal of zealous advocacy that lawyers owe to their clients. Needless to say, there have been many detractors, particularly in recent years, who question whether such a standard of extreme partisanship – being willing to throw the country into confusion – is the proper standard for lawyers to take in all circumstances. Although I share some of these concerns, particularly outside of the context of criminal representation where Brougham was essentially operating, I want to focus on a different – and I would argue even deeper – assumption in Brougham’s statement: that the reason why the advocate “knows but one person in all the world” and is required to promote the client’s interest “by all means and expedients and at all hazards and costs to other persons,” particularly “to himself” is that the fundamental conception underlying the relationship between attorney and client is one of “agency.”
- E. This idea – that the lawyer/client relationship is essentially one of agency in which the client as the “principal” has rights – the right to define the goals of the representation, and to demand that her advocate serve her zealously and faithfully – and the lawyer as “agent” essentially has nothing but duties – confidentiality, loyalty, zealous advocacy even if it means throwing the kingdom – and himself – into confusion – is the standard way of thinking about the attorney/client relationship. It is this conventional wisdom that I would like to subject to Bentham’s skeptical gaze
- F. I do so through the prism of a particular kind of attorney client relationship – one that is becoming increasingly prevalent and important. That is the relationship between large corporations and their outside counsel.
 - 1. In the US, corporations now consume almost 2/3rds of all legal effort (up from 50% in 1975)

2. Next year, the nation's largest 250 law firms will hire almost one quarter of all of the graduates of US law schools
3. More to the point, one doesn't have to look any further than the recent wave of corporate scandals from Enron to Northern Rock to see that corporate clients can have an enormous impact on our economic and political life – and that the advice corporate lawyers give their clients can have important consequences about how these powerful clients behave.

G. In this talk, I want to argue that the agency model is no longer a helpful way of understanding the relationship between corporations and their outside firms. Instead, I will argue that the relationship between these sophisticated consumers and their equally sophisticated counsel is more like a partnership – or to be even more precise – like a “joint venture” in which both clients and lawyers owe reciprocal obligations of trust and fair dealing and in which both parties acknowledge that they each have a stake in the other's long term financial viability and – equally important – political and moral legitimacy.

H. My claim will be both descriptive and normative

1. Descriptively, I will argue that the assumptions underlying the traditional agency model – i.e., that clients are essentially unsophisticated and that they must therefore be protected from their more sophisticated lawyers – do not apply in this context. To the contrary, over the last 30 years corporations have become increasingly sophisticated consumers of legal services – primarily through the acquisition of internal expertise in the form of GCs. The result is that companies now seek to control virtually every facet of their outside counsel
2. Although this might seem to be the perfection of the agency model, it has several adverse normative consequences. Indeed, a wag like Bentham might say that it has turned the normative premise of the agency model on its head
 - a. By withholding information and manipulating incentives, companies now have the power to trick or force their lawyers into taking risky or unethical actions that risk throwing them “into confusion” in the form of legal peril or financial ruin. “Innocent” lawyers who do not want to participate in such actions have no recourse other than to resign – or be fired.
 - b. At the same time “guilty” lawyers who have no interest in standing up to client pressure are given a pass on the

ground that they are not responsible for the ends of the representation and are required to follow the client's direction so long as it is technically within the letter of the law. Paradoxically, this also hurts "bad" companies who do not see legal risk coming, and perhaps even more, "good" ones who want to achieve high performance with high integrity.

3. In the end, clinging to the agency model has led to an era of increasing hostility and mistrust between companies (particularly in house counsel) and their outside lawyers in which both sides have lost sight of their mutual interest in and responsibility for the future of the profession – a future, which despite all of the money that is currently being made is in serious peril.

I. Or at least so I will try to argue in my remaining time! But since I am unlikely to get it all in – or get it all right, I will try to leave sufficient time for questions!

II Limitations of the Agency Model

- A. Since time immemorial, the traditional model of the attorney/client relationship has been one of agency in which clients have rights and lawyers have obligations.
- B. Given the circumstances in which the model was constructed, it makes perfect sense. Clients hire lawyers to further their goals. Because lawyers are sophisticated about the law there is a danger that they will take advantage of their vulnerable clients to substitute their own goals for those of the client.
- C. Several standard dimensions of the attorney client relationship flow from this characterization
 - 1. Clients have the sole right to set the terms of the representation
 - 2. Clients have the right to fire lawyers for any reason – even for refusing to violate the rules of professional conduct or other duties to third parties
 - 3. A Client's only duty to his or her lawyer is to pay them and perhaps to indemnify the lawyer for wrongful actions taken on the client's behalf and without the lawyer's knowledge
- D. Ten years ago, I published an article in the Georgetown Journal of Legal Ethics entitled "Do Clients have Ethical Obligations to Lawyers?" in which I

argued that the agency model failed adequately to describe the relationship between all lawyers and clients. In particular, I argued that while the relationship between individuals and their lawyers might fit this mold, that the evolving relationship between large companies and their clients did not.

- E. Specifically, calling on the work of Ronald Gilson, I argued that Corporate clients now have access to sophisticated advice from in-house lawyers that has allowed them to greatly reduce or eliminate the information asymmetry between themselves and their lawyers
- F. As a result, corporate clients have been able to turn the prevailing assumption about client vulnerability on its head. It is now lawyers who find themselves vulnerable to client manipulation.
- G. Given these realities, I argued that the relationship of corps and their lawyers was much more like joint venture partners than like principle and agent. These relationships have become very common in the corporate arena as the boundaries that used to separate firms have become much more fluid and permeable. In order to accomplish their mutual goals, firms frequently now enter into arrangements in which they agree to cooperate and share information and resources for specific projects – while still remaining competitors in other areas. Sometimes these arrangements are formal, but often they are informal. When GM wants to design components for a new car, it does not just have its engineers come up with the design and then put in an order for windshield wiper blades to its suppliers. It now often works with those suppliers to design the blades and to figure out a production process that maximizes the net benefit to both firms.
- H. Corporations and their outside counsel, I argued, are in a similar position. Like joint venture partners, both corporations and firms depend upon each other to provide crucial information and expertise to accomplish their mutual goals. Clients depend on firms for specialized knowledge and to interface with third parties. Firms depend upon companies to supply accurate information and to provide capital.
- I. As a result, I argued that in addition to investigating the scope of the ethical obligations that corporate lawyers owe to their clients, it was now also important to identify the ethical obligations that clients owe to their lawyers. I did so in the context of an emerging trend in corporate diversity initiatives in which companies were being asked to pressure their law firms to improve diversity. Although such programs were typically justified in terms of corporate self interest, I argued that they were better viewed as part of corporation's responsibility to ensure that law firms do not squander the legitimacy that helps give them their status – a status very important to

corporate clients – by being seen as failing to conform to the legal profession’s core legitimating commitment to equality of opportunity

- J. It is fair to say that my article did not immediately change the world! Indeed, many people were skeptical about the model both descriptively and normatively. Descriptively, people argued that the trend over the last several decades was for companies to move away from viewing their law firms as partners and instead seeing them as fungible providers of services to be purchased in the spot market. Normatively, people worried that viewing clients as “partners” would undermine professional independence.
- K. These are both serious concerns, but in the balance of my talk I want to argue that neither ultimately undermines my basic thesis.

III Recent Empirical Support

- A. Over the last decade a number of trends underscore that companies and their counsel are moving more in the direction of the JV model. At PLP we have been investigating these trends through a project on how corporations purchase legal services. That project has identified several developments that underscore the degree to which clients and firms are moving closer together:
 - 4. Downsizing of the number of firms. After years of breaking down old relationships, companies now realize that it is very costly to have so many firms working for them. They have therefore dramatically reduced the number of firms they use, particularly for premium work. [cite statistic about over half of work going to top 5 firms, and much of it going to the top two]
 - 5. Law Firms are doing the same thing. There has been a tremendous consolidation among top law firms. The most successful firms are attempting to leverage their work for existing clients: premium work for premium clients. [cite big growth in the Am Law 50]
 - 6. Both these trends are being driven by a strong desire on the part of clients for lawyers to “understand their business.” In a recent survey, a plurality of clients 37% listed this as the number one thing that they were looking for.
 - 7. This trend is coupled by an increased permeability between the boundary between clients and firms, including:
 - i. DuPont Model and other forms of networking firms together and monitoring and controlling internal firm practices. This is

even more true in the diversity area than when I wrote ten years ago. Just had dinner with the GC of Tyco who tells me his model is even more radical

- ii. Secundment and joint hiring between clients and firms
 - iii. Lateral movement – including movement of GCs back to firms. Some GCs are even arranging moves (E*TRADE)
8. Indeed, the significant movement in the GC's office is reinforcing the dependence of companies on their major law firms.
- i. GC turnover now exceeds CEO turnover
 - ii. As a result, it is hard for clients to dismiss firms with which they have significant relationships. (like turning the Titanic).
9. All of this underscores the desire on both sides for risk sharing. Clients want lawyers to share the down side risk. Lawyers want to find a way to share the upside gain beyond the hourly fee.

B. JV not Marriage

1. It is important to recognize that this is not the same as the old relationship between corporations and their outside counsel. That relationship was more like a marriage with the senior partner's daughter marrying the CEO's son!
2. Firms and their outside lawyers in this new world remain competitors – sometimes fiercely so. Companies compete by taking their work in house or switching to other firms. Firms compete by selling the knowledge they gain through the representation to others and by “firing” clients in favor of others with more lucrative work. And they both compete fiercely for talent, as we see in the diversity area.
3. The model is what the B school people call “cooptition” – cooperation and competition at the same time.
4. Nor are companies and firms equal partners. Clients still pay the bills. But even if we imagine the clients as the “senior” partners, they are JV partners nonetheless.

C. An example: Elawforum.com

1. An on line service between corporations and outside counsel to try to control legal fees
2. Evolved from just a “meeting” site to true “matchmaking.” Elawfourm works with companies to package and price potential work and then works with firms to bid and share risks.
3. In the end the parties sign a “joint venture agreement” in which they agree how the work will be conducted, the parameters for success, and how the risks and rewards will be divided.

D. From Economics to Ethics

1. Not surprisingly, the founders of Elawforum.com don’t think of themselves as creating a new kind of ethical regime for lawyers. Indeed, when I told the founder that I was interested in his new idea as a new model of the attorney client relationship he was quite surprised!
2. Nevertheless, there are important ethical implications of these arrangements.

IV The Ethics of Joint Ventures

A. Ethical limitations of the Agency Model

1. Encourages “externality defects” in which clients enlist lawyers to inflict harm on third parties.
 - a. Charles Keating and the S&L scandal are a sad example. Keating fired Jones Day when they wouldn’t go along. Brought in Kaye Scholer who proceeded to do Keating’s bidding without question
 - b. When the conduct came to light, the firm defended itself on the ground that it was ethically obligated to put forward even the most dubious of Keating’s claims
2. More importantly it encourages clients to take advantage of their law firms.
 1. Consider Enron’s request of Vincent & Elkins to conduct an “investigation” – but only on the basis of the limited knowledge that the firm was given, knowledge the client knew was insufficient.

2. Although many people argued that V&E should have refused the assignment, why should Enron have been able to put the firm in a position from which it almost didn't recover

B. Ironically, the regulation in this area is moving toward a JV model

1. In Kaye Scholer, the charge by the OTS said to the firm that if you act like you are the client, we will treat you accordingly by holding you responsible for all of the client's duties. The regulators could, however, have gone further by making it a breach of Lincoln's obligation to fire a law firm for refusing to take a position that violates the firm's ethical obligations to regulators
2. In the wake of Enron, Sarbanes Oxley has gone even further. Outside and inside lawyers now have a joint responsibility for ensuring that matters are raised inside the corporation and if necessary get to the board. Lawyers are, in turn, partly protected against unfair client retribution by having an obligation to report if they are dismissed for trying to report something up the ladder. And in extreme cases, they can now report out.
3. Indeed, the ethics rules now give lawyers the ability to protect themselves against clients using their services to commit financial frauds by being able to breach confidentiality to either prevent or rectify this kind of conduct if "their services" have been used.
4. Although many fear that these powers will deepen the mistrust between lawyers and clients, a joint venture model underscores that both sides ought to have incentives to avoid this situation

C. The ethics of Joint ventures

1. At the core of joint venture ethics are trust, reciprocity, and fair dealing. Partners have to trust each other enough to share information and open up their internal practices and believe that they will each work for to maximize their joint gain in this venture even as they compete in other arenas
2. In order to accomplish this goal there must be both specified rights and obligations but also procedures to work out the inevitable gaps in the formally articulated structure

D. I close by looking at three areas where these reciprocal duties would have force:

10. Diversity. As indicated, corporations have increased their pressure on firms to improve diversity. But at the same time, they are also making it more difficult to accomplish this objective – in part by hiring away all of the most promising women and minorities that the firms develop. Given that they have an interest in firms being more diverse, they have an obligation not only to put pressure on firms but to help them achieve this goal. One important way that they can do so is by supporting minorities in their effort to receive the training and experience that they need to become partners.
11. Training. Ben Heineman and I have written a piece in AA and Corp Counsel worrying that we are in danger of producing a “lost generation” of young lawyers. Associate training is increasingly a victim of pressure by firms to increase profits and pressure by clients to decrease costs. Under a JV model, both sides would be required to share the cost of training equitably in order to ensure that this public good is not lost or they will both suffer.
12. Conflicts. Right now, clients have the unfettered right to try to manipulate the conflict rules to their advantage. Thus one of the GCs said that they hired firms specifically to conflict them out of opposing them at some future date. They are also under no obligation to inform lawyers of things that might create present or future conflicts. A Joint Venture model would change this to place obligations on clients not to manipulate the conflicts rules and to make clear that at least with respect to pro bono matters positional conflicts are not prohibited. It would also provide a productive way to think about advance conflict waivers.

V Conclusion: Preserving Professional Independence

- A. One can agree in principle with everything I’ve said but still legitimately worry that this is a bad idea for the legal profession. Specifically, how will lawyers who see themselves as “partners” with their clients still be able to be independent? As I suggested at the outset, this is a legitimate concern. But I also want to argue that framing the problem in this way ignores the current threats to professional independence in the agency model and ignores the potential virtues of the joint venture conception
- B. With respect to the first point, one of the justifications for the JV model is the increasing power of corporate clients under the agency conception to push lawyers into compromising situations.

- C. With respect to the second, by expressly acknowledging that lawyers are joint participants with a right to look out for their own interests – including their ethical interests – the JV model offers a place for lawyers to resist this pressure.
- D. Indeed, this is exactly the model that expect from in-house lawyers. General Counsel, in Ben Heineman’s words, are expected to be both “partners” working to ensure the company’s economic goals and “guardians” of the company’s long-term reputation and integrity. To be sure, there are many examples where this has not worked. But in many cases it has. And outside counsel have greater opportunities for independence than inside lawyers – and a partnership between them could arguably be even stronger.
- E. In the end, it is clear that if this model is going to work it must be clear that it encompasses ethical as well as economic issues.
- F. In this respect, however, it is no different from the core issue facing our profession: How to maintain the values of independence and public service that animate our profession in an increasingly competitive world.
- G. The joint venture model highlights that both clients and firms have a vital stake in how this question is resolved – as does the academy. Which is why I am thrilled to give this talk at a school that has such a deep tradition of thinking about the core challenges facing our profession.
- H. And it is why I have tried to save tied to hear your comments. Thank you!