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SEARCHING FOR NEW “PARTICLES” IN THE LAW OF LAWYERING: RECENT DEVELOPMENTS IN THE ATTRIBUTION OF “CLIENTHOOD”

Theodore J. Schneyer

An awful lot of law is being made these days under the heading, “who is the lawyer’s client.” I am not sure if this is a good or bad thing. I am just here to report on the phenomenon and think a little bit about what it says about the present state of the law of lawyering.

I. PARTIAL CLIENTS

Atomic physics used to be easy. Atoms contained electrons and protons and neutrons, and it was not hard for the physicist to tell which particles were which. The law of lawyering used to be easy, too. It distinguished sharply between lawyers’ duties to clients and to non-clients, and it relied on relatively straightforward tests to identify the clients. True, lawyers owed somewhat different duties to different sorts of clients. For example, prosecutors could choose for themselves the ends to be sought in representing the people, while private lawyers were expected to defer to their clients’ wishes. And a few sorts of nonclients, such as beneficiaries under a negligently drafted will, were given a right to sue lawyers for malpractice, which other non-clients lacked. Still, even without a score card, it was easy enough for lawyers and judges to tell the clients from the nonclients, and having done so, to know just what duties a lawyer owed to the parties at hand. That was then.

Nowadays, just as physics has discovered neutrinos and gluons, so the law is recognizing various types of partial clients, that is, parties who enjoy some of the traditional rights of clienthood, but not others. These new legal particles include prospective clients, derivative or quasi-clients, nonclients who nonetheless stand in special confidential relationships with a lawyer, and secondary as opposed to primary clients. These new particles are turning what once seemed like a sharp dichotomy between clients and nonclients into something that looks much more like a continuum, a gradual scale.
Let me take a minute to define these concepts. A prospective client is somebody who consults a lawyer about a matter so that the two can decide whether to create a lawyer-client relationship. To promote these useful consultations, the law, rather than any contract, protects the prospective clients' confidences.

A derivative client is someone with whom a lawyer has no contract, but to whom the lawyer still owes distinctive duties because the lawyer's true client owes that party such duties as a fiduciary. The best-known example, and Geoffrey Hazard has written beautifully about it, is the ward whose guardian hires a lawyer for advice in carrying out his fiduciary duties. The lawyer's duty to the ward is derived from the guardian's duty. If the lawyer realizes or should realize that the guardian has been stealing from the ward, then in at least some states the lawyer must take steps to protect the ward, even at the cost of disclosing the guardian's confidences. Now, here is the interesting part. As I read the cases, this could be true even in states where the lawyer's duty of confidentiality would bar the lawyer's disclosure for the protection of any third party who was not a derivative client. In this sense, the lawyer's duty to the ward turns on the ward's status as a partial client, not on any general exception to the duties of confidentiality that lawyers owe to their clients as against nonclients. Notice also that because the lawyer has this derivative duty to the ward, the lawyer's duties of confidentiality and loyalty to the guardian are somewhat reduced, even though the guardian did not knowingly agree to waive any of his rights of full clienthood. By operation of law, one might say, the guardian himself is demoted to the rank of partial client.

The best-known example of a nonclient who stands in a special confidential relationship with a lawyer comes from the 7th Circuit's decision in the Westinghouse case. In that case, in preparing a report to Congress, lawyers at Kirkland & Ellis, Washington gained sensitive business information from the member companies of their entity client, a trade association. The association had asked the member companies to give the lawyers this information and had assured the members that the information would be kept confidential. The information, it turned out, could have been helpful to Kirkland & Ellis lawyers in the Chicago office who were pursuing an antitrust claim on behalf of their client, Westinghouse, against several energy companies that belonged to the trade association. Those members had no contract for legal services with Kirkland & Ellis and were therefore not clients for most purposes. For example, only the association, not the members of the association, had any right to instruct the law firm in preparing the report to Congress. Nonetheless, these
members were clients enough to disqualify Kirkland & Ellis from continuing to represent Westinghouse on the ground that their confidences were entitled to protection.

A secondary client is a client by contract, a real client, whose rights against the lawyer are cut back by operation of law in order to accommodate the lawyer’s duties to another, primary client. If all conflicts of interest between clients could be avoided ex ante, before they happened, then there would not be any need to develop any primary, secondary, distinction. But, as a recent California case, Flatt v. Superior Court, shows, they cannot all be avoided and the problem becomes one of encouraging the lawyer to make the best of a bad situation. In that case, the plaintiff had retained the defendant lawyer to represent him in bringing a claim against an unidentified third party. The plaintiff was not merely a prospective client. But the lawyer soon learned that the party to be sued was, in unrelated matters, his own client of longer standing. So, the lawyer told the plaintiff that he could not bring the suit, and he withdrew. After the statute of limitations ran on the plaintiff’s underlying claim, the plaintiff sued the lawyer for negligently failing, at the time of withdrawal, to advise him to seek other counsel so that his claim would not become time barred. Even though a lawyer who withdraws, before filing a client’s claim would normally be expected to warn the client about the statute of limitations, the court said, this is not the case when the warning would prejudice another client of longer standing. Preserving the latter’s full client rights necessitates limiting the rights of the newer and therefore secondary client.

Is the concept of a “secondary client” really necessary in today’s law of lawyering? Well, you could argue that any lawyer who foolishly takes on a new client without determining that the adverse party in the new matter is also a client ought to be damned if he does warn the new client about the statute, and damned if he does not. Why give the lawyer a liability escape hatch if he chooses to favor one client over the other? The court apparently felt that warning the departing client would be the greater of two evils, and wanted to structure the lawyers’ incentives in order to discourage that evil. The only way to do this was to acknowledge the existence of a hierarchy among clients.

A much more important application of the secondary client concept involves insurance defense work. A debate has been raging during the ALI Restatement Project about how to model the three-party relationship that arises when a lawyer is retained by an insurer to defend a liability claim against an insured. Recognizing the potential conflicts that can arise between insurer and insured, the ALI first tried to model the situa-
tion as one in which the insured is the sole client and the insurer is merely a third party payor. Traditionally, a third-party payor is not supposed to interfere with the lawyer’s independent judgment in representing the client. But, claiming that this characterization would have dire consequences for the insurer’s rights to sue the lawyer for malpractice if something goes wrong, to control the defense, and to use in-house lawyers as liability counsel, insurance companies have balked at the ALI’s initial modeling of the situation. The latest drafts of the Restatement, as I understand it, relent a bit. They recognizes that the one-client model is only a default rule, that the insurance company can contract to be a co-client if it wishes. But when this happens, the Restatement will apparently not treat the co-clients as equals. In other co-client situations, a principle of client equality has been understood to bar a lawyer from continuing the representation, if one client tells the lawyer something in secret that would be relevant to the other’s decisions in the matter, unless the lawyer is permitted to disclose the information to the other client. Under that analysis, a defense lawyer who learned something from the insured that threw policy coverage into doubt but bore on liability as well, would be expected to share that information with the insurer, the co-client, or to resign. The Restatement appears instead to treat the insurer as a secondary client in this respect, one who is not entitled to the information. The premise here seems to be that the lawyer’s financial incentives are always skewed in favor of the insurer and that as a kind of correction the law should give the insured certain protections that are normally unavailable to a co-client.

II. ATTRIBUTIONS OF CLIENTHOOD

Putting aside these new statuses that are somewhere between client and nonclient, we find that the client-nonclient distinction is getting more complicated in other ways as well. There is a growing uncertainly over the tests for distinguishing clients from nonclients, and controversy about the proper application of those tests. Moreover, when the client is an artificial entity, such as a class or a corporation, there is often controversy over which of the entity’s constituents should count as the client for such purposes as the anti-contact rule or the attorney-client privilege. Accordingly, the courts are increasingly called upon to make two types of “attributions of clienthood.” “Type One” attributions determine whether some party X is or is not, was or was not, the legal client of lawyer Y. “Type Two” attributions determine which constituents of an entity client count as that client for some legal purpose. In both fields, legal decisionmakers display a growing interest in using their attributions
to achieve policy goals, and in particular to structure lawyers’ incentives properly.

I don’t have time to focus on Type Two attributions today, but they do raise fascinating policy problems. Just to give you a feel for the subject, I will mention one such problem. Class actions pose the risk that lawyers will manage the case for their own benefit, entering into settlements that are not in a class’s interest and collecting fees that are higher than necessary to ensure adequate representation. This risk of undue agency costs is very acute because the class representative is usually a figure head chosen by the lawyer and usually has too small a stake in the case (and too little sophistication) to monitor the lawyer effectively on behalf of the class. As a response to this risk of undue agency costs, rules of civil procedure require trial judges to determine that a class representative is adequate, to review any settlement the class counsel proposes, and to approve class counsel’s fees. Many critics contend, though, that these devices insufficiently protect class members. Judges have a strong interest in clearing class actions from their dockets, and once the parties negotiate a settlement, nobody has any incentive to point out the shortcomings of that settlement or of the proposed attorney’s fees.

Focusing on investors’ class actions for securities fraud, Elliott Weiss, and John Beckerman recently proposed some innovative reforms to deal with these agency cost problems. These class actions usually begin when a lawyer becomes aware of a substantial drop in the price of a company’s stock after the company announces worse than expected earnings or some other bad news. The attorney briefly investigates, prepares a complaint on behalf of the relevant class of investors, alleging that the company’s previous disclosures were fraudulent, and recruits a small stakes investor to represent the plaintiff class. If several complaints are filed, then the cases are usually consolidated. The court typically appoints as lead counsel the lawyer who filed first, and also appoints that lawyer’s chosen class representative.

Weiss and Beckerman marshall considerable evidence that these cases produce less than optimal settlements for the class, that class representatives are ill-informed about the merits of the settlements, that judges routinely approve these settlements, and that judges do not or cannot adequately review proposals for attorney’s fees. They also show that in virtually all cases the class includes one or more large institutional investors, like a pension plan or a mutual fund. These institutions, unlike the investors who usually serve as class representatives, would have the sophistication to monitor lawyers effectively and a large enough stake in
the outcome to justify their doing so. Their active participation would thus help to align the behavior of class counsel as agent with the interest of the class as principal. Accordingly, Weiss and Beckerman would encourage institutional investors to serve as class representatives and they would encourage the courts to appoint them. They would require courts to appoint as lead counsel the lawyer for the most adequate lead plaintiff. And it would be the most adequate lead plaintiff who, as the class representative, and would be riding herd on the lawyers. The Weiss-Beckerman proposals were in large part incorporated in the Federal Securities Litigation Reform Act of 1995.

In the area of Type One attributions, the courts are treating the question of who is a client less and less as one of contract, and more and more as a question to be answered on policy grounds. This is happening for several reasons. First of all, there are all kinds of models of clienthood around. In the insurer-insured situation, for example, it is possible to model the insured and the company as co-clients or as one client with a third-party payor. The lawyer hired to assist in the administration of an estate could be viewed as representing the fiduciary, the estate itself, or even the beneficiaries. Likewise, close corporations and partnerships can plausibly be viewed as entity clients or as aggregations of individual clients.

One vehicle the courts are using to make Type I attributions on policy grounds is the "reasonable expectations" test. If a lawyer does something that makes somebody reasonably expect that he is a client, then he is, regardless of what the lawyer's intentions might have been. But reasonable expectations are in the eyes of the beholder, and that means that judges have tremendous latitude to see reasonable expectations when they think it would be a good idea to see them, and not to see them when they think it would be a bad idea. And that is a wedge in for policy.

Can there ever be a general body of law to govern all Type One attributions of clienthood? I doubt it. When questions of clienthood arise, courts often think about them in the context of the substantive law area that is involved. They "contextualize" the law of clienthood. If you compare the insurance situation with labor union cases, I think you can see that. In the insurance cases, the tendency is to want to think of the insured as the client, or at least as a co-client, because you are worried that the lawyer's loyalties to the insurance company may be unduly strong. The lawyer is hired by the insurance company, the lawyer wants their business in the future, etc., etc.

In the labor context, lawyers are hired by unions to pursue grievances in arbitration. Those grievances may relate to the plight of a par-
particular worker who was fired or disciplined. The cases have generally held that if the lawyer does a bad job and as a result the worker is not reinstated or given back pay, that lawyer is not to be treated as a lawyer for the worker. That lawyer is instead to be treated as a lawyer for the union alone, with the implication that the union member has no right to sue that lawyer for malpractice. This issue has to do with whether grievances really belong to labor unions and are to be viewed from the union's collective standpoint, or whether they belong to the individual grievants. Generally, the federal courts have come down on the side of saying that grievances really belong to the union. And that, I believe, is what explains why courts refuse to regard the union member whose grievance triggers all this as a client, even though the situation is factually very much like the insurance situation. The lawyer is hired by the union, and wants to be hired by the union again. All the tugs of loyalty naturally run in that direction. Why not protect the individual grievant by allowing him to be a client and to sue the lawyer for malpractice? I think the answer lies in labor law, not in any general principles of professional responsibility.

These are my musings about some of the things that are going on right now in the law of clienthood. I might say that John Leubsdorf recently published an article in which he expressed a concern about the development of the new policy-oriented or functional approach to clienthood. I am not as concerned as he is that this leaves lawyers in a lurch because lawyers will never be able to know in advance who, after the dust clears, a court will say they owe their various duties to. By designing rules on these subjects, the courts can put lawyers on notice of the direction in which their various duties run. We do not necessarily leave lawyers at sea by making policy-based inquiries into who counts as a client.

One other thing. I believe that the growing importance of issues of clienthood in the law of lawyering implies a shift in political authority to make that law. The ABA ethics codes, state that they are not designed to answer the legal question of who is a client. And indeed questions of clienthood mostly get resolved not in disciplinary cases, where ethics rules are central, but in disqualification cases, malpractice cases, and cases involving the application of the attorney-client privilege. That means that the big new players in making the law of lawyering are likely to be common-law judges rather than the ABA and the state supreme courts that adopt ABA rules. And if that is the case, of course, it means that the power will have shifted from the ABA to the American Law
Institute, which in preparing its new Restatement of the Law Governing Lawyers, will be influencing those judges more than the ABA ever has.