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Accountability and the Adjudication of the Public Interest

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In these remarks, I will speak briefly about the question of a lawyer's accountability to clients in public interest law. This is the fundamental theoretical problem confronting the public interest law movement, at least from the point of view of traditional models of adjudication.

Our legal system has developed certain traditional notions of lawyer-client relations: that the attorney should be accountable to his client, that he has a duty of fidelity to his client, and that any lawsuit should be client-centered, that is, based on the needs, concerns, and articulated desires of the client. All of these traditional notions place external constraints on an attorney's behavior. Although the attorney need not consult his clients on tactical or strategic issues, he must discover their desired ends and goals.

This traditional notion of a lawyer's relationship with his client may well be inconsistent with current public interest law practices in at least two situations. First, as Professor Rabkin suggested earlier, in many instances in public interest law cases, the client is more fictional than real. The client becomes important only for the determination of jurisdiction and standing. In reality, it is the attorney's understanding of an ideological cause or his position that becomes the client. In those instances, there are no constraints on an attorney's behavior except those which he chooses to impose upon himself. I will refer to this problem later in greater detail.

The other problem occurs when a client's organizational base is diffuse or shifting. For example, the Environmental Defense Fund and the Sierra Club have diffuse memberships, thus one cannot state with specificity what exactly their entire membership wants on any specific issue. In most instances, the attorney and a small leadership cadre will articulate their

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organization's desires and interests. If you are talking about a class action situation, several fundamental questions must be addressed. Who is the client? Is it the person who hired the attorney? Is it the elite of the class? The elites of the group? Is it the attorney himself? This theoretical problem becomes real when you have conflicts within the group. Such conflicts arise over whether a lawsuit ought to be brought, which tactics are to be used, and which remedies ought to be sought.

The Boston busing case is a classic example of the latter problem. As you may know, the Boston schools have long been involved in an integration lawsuit.[1] Some years back, the plaintiffs sought an order mandating busing as their remedy.[2] However, the question arose whether many of the black plaintiffs would prefer quality education in neigborhood schools to busing. Some commentators have suggested that the plaintiffs' attorney, the NAACP Legal Defense Fund, failed adequately to consider the interests of those plaintiffs who favored the nonbusing alternative, thereby arguably creating a conflict of interest within this class and a lack of representation for the "quality education" faction. This kind of conflict arises because of the assumption of homogeneity of class in class action suits under the Federal Rules and elsewhere.[3] The fact is that in large groups and classes, there is often latent if not actual heterogeneity. Since client groups are diverse in many of these public interest lawsuits, by imputing homogeneity to them, you ignore the texture, the variety, the differences and the concerns that really make up their individual needs and desires. In this way, accountability to clients is lost. This home truth is ignored almost everywhere in the legal system, including, I am sorry to say, by many judges.

There are a number of ways in which we theoretically deal with the realization that public interest law often pays insufficient attention to the issue of client accountability. Some have sought to escape the dilemma by manipulating the conflicts of interest rules. There are two primary devices used in this gambit. The first is to make use of the "limited retainer." I have

1. *See, e.g.*, Greve, *Terminating Desegregation Lawsuits*, 7 HARV. J.L. & PUB. POL'Y 304-5 (1984); Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974), *aff'd sub. nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

2. *See* Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470, 482 (1976).

3. *See, e.g.*, FED. R. CIV. P. 23(a).

seen some retainers used by the ACLU which say it will represent a client unless and until that client's interests conflict with the civil liberties concerns of the ACLU, at which point they will drop the client like the proverbial "hot potato." Those of us, I suppose, who are less subtle and less sophisticated might see certain problems with this arrangement, at least on traditional attorney-client fidelity principles. Nonetheless, the limited retainer approach is really a method for acknowledging explicitly what often happens furtively. In other words, the client is put on notice that when a conflict arises between his concerns and the broader ideological concerns propagated in many "public interest" lawsuits, the attorney will drop the client rather than try to resolve the conflict. Another kind of doctrinal manipulating device is the prospective waiver. In this device, the client's retainer agreement states that, "I will agree to be represented by you, Mr. Public Interest Attorney, and if in the future there is a conflict of interest, just ignore it. You do what you think is best." By signing such a retainer, the client is agreeing to rely on the attorney's discretion not only over tactical issues, where the need for the attorney's control may be persuasively debated, but over the determination of a client's goals and ends as well.

The second broad method of resolving the accountability problem is to reject this dilemma completely. Some of our academic colleagues at Harvard Law School, Professor Chayes for example, take the position that there is no dilemma because there is no need for accountability to actual clients in public interest law cases. In his view, a client is only necessary as a nominal plaintiff, a warm body to meet antiquated standing requirements.[4] This view, however, appears either to ignore Article Three of the United States Constitution[5] or to reinterpret the judiciary as a vehicle to elicit pronouncements on the public policies and values rather than as a forum to provide redress in what we conventionally understand to be "cases and controversies." After all, a client serves no purpose in a philosophy or political science debate. Indeed, a flesh and blood client just

4. *See* Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 24-26 (1982).

5. Specifically, this view ignores the requirement contained in Article III, Section 2 that there be "cases" or "controversies." To meet this requirement, an attorney must produce a client whose interests are adverse to those of the defendant. *See, e.g., Muskrat v. United States*, 219 U.S. 346 (1911).

causes trouble to one's theoretical abstraction. One cannot deal with pure theory when he has some poor slob who has facts and wants individual redress. So one might reject the notion that any dilemma exists. Some commentators, such as Mark Tushnet, concede that the lawyer must be accountable, but Professor Tushnet's accountability is to the ideological norm the attorney represents rather than to the individual client.[6] If one looks at what is really going on in the public interest litigation process, he will see that this extreme method has become quite popular even if not always explicitly acknowledged.

Many scholars and lawyers have recognized the client accountability dilemma as a serious problem for the public interest law movement. They do not like the "rejecting the dilemma" approach. Professor Chayes' indifference is a little bit too much for them, so they seek to ameliorate the dilemma. However, many of them, like Professor Rhode at Stanford Law School, eventually resign themselves to the existence of the dilemma.[7] It troubles them; they do not like the idea of lawyers not being concerned about their clients' interests, but it is a fact of life. How else will there be public interest litigation? The prime utilitarian value for these commentators is the nurturing of public interest lawsuits. They seek to ameliorate the situation by efforts to sensitize judges and counsel to the fact that there can be conflicts of interest within a lawsuit, within a class or within a group. Some commentators have suggested polling the class or a sample of it to get its views and concerns. They would have counsel report to the court on the potential range of opinion. This would be obtained through notice and counsel would be required to write what almost amounts to a conflicts brief.[8] The judge would then make a factual inquiry into the adequacy of representation at the remedy stage. These efforts seek to approximate the traditional model requiring client con-

6. *See* Tushnet, *The "Case or Controversy" Controversy*, 93 HARV. L. REV. 1698, 1708-1713 (1980).

7. *See* Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1261-62 (1982).

8. This requirement is reminiscent of that imposed in Anders v. California, 386 U.S. 738 (1967). There, the Supreme Court held that the court-appointed attorney for an indigent defendent was constitutionally required to file a brief presenting all evidence and arguments that might support the case on appeal so that the court could make the final decision regarding the merits of the case. (The attorney believed his client's case to be frivolous). Here, too, is an attempt to subject an attorney's determination concerning his professional responsibility to court scrutiny and a mandatory brief.

sent while recognizing that accountability to clients, as we traditionally understand it, is unattainable. Admittedly, many of these efforts are made in good faith. Ultimately, however, we must recognize that they only mitigate the problem.

A third solution to the lack of homogeneity involves adding counsel to represent the divergent interests of class members as they appear. When you add counsel, you ensure the pluralist dialogue through which all the different voices in the lawsuit are heard. For example, in a bilingual education lawsuit, a dispute over remedy may occur. Should Puerto Rican culture be taught in the school? Should English be taught as a second language? What should be done about the Hispanic parents who come and say, "the last thing we want our kids to learn is Puerto Rican culture. We're from Ecuador. We're from Guatemala." What about the Greek students coming in and saying, "Well, if they can have Spanish, we should have Greek." The result is a town meeting held in a courtroom. Indeed, as one presses the ameliorative solution, he moves closer and closer to facing the limits inherent in a town meeting. In doing so, he moves further and further from the traditional understanding of the judicial process as a forum to resolve specific, individual disputes. Therefore, even from a theoretical point of view, this solution offered in good faith may not work.

The final method of dealing with all this is to acknowledge the fact that there is an accountability dilemma, and that it requires a trade-off. Instead of using the myth of homogeneity to legitimate the utilitarian subordination of client accountability to the presumed social reform benefits of public interest litigation one may admit openly that a tradeoff is being made by saying, "look, we can't expect client consent in a large group case, whether it be a Rule 23 case or some other kind of group action. We can't expect to accommodate the needs and concerns of all the individuals we are representing. Some clients don't fit into our particular way of doing things. We claim only to represent those people who are actually taking the position we are putting forward. Although we can't do that exactly, we can approximate it, and approximating it's enough. After all, it's important to have social change through law." Well, this is one way of doing things, but it is not congenial to me, and I suspect it is not congenial to the legal community or the public at large

either. But more importantly, it is at extreme odds with our understanding of traditional modes and norms of adjudication.

The alternative is to limit public interest lawsuits to instances in which there are no conflicts, instances where homogeneity within a group exists. Where there are conflicts, this alternative requires that divergent interests secure their own counsel. If counsel is not available or the conflicting interests cannot afford counsel, the broad reach of a public interest lawsuits may have to be reined in on client accountability grounds. Likewise, where a proper sensitivity to accountability concerns would require so many attorneys that there no longer is a "lawsuit," but a "town meeting," the scope of the public interest lawsuit may have to be reduced.

Finally, where a conflict exists, one may wish to require that the compromised attorney withdraw. Indeed, he may have to withdraw not merely from representing one party but from the entire case, because, after all, his error has compromised whomever his client may be. In many instances, where this cannot or will not be done, the judge will have no choice but to limit or dismiss public interest law litigation on ethical grounds, or perhaps on justiciability or standing grounds.

Fidelity and accountability to the client, therefore, can be seen as a natural limit to the excesses of the public interest lawsuit. Reaffirming our traditional system of dispute resolution—the adversary system—based on client-centered adjudication will limit, if not remove, many of the jurisprudential errors wrought by "judicial activism" in the 1960s. At the very least, I put these arguments forward in the belief that they deserve further consideration.