Reflections on Professional Responsibility in a Regulatory State

Jonathan R. Macey*
Geoffrey P. Miller**

Introduction

In this Article we examine the special, often unique, ethical problems faced by lawyers who practice in the regulatory sector. We argue that such problems exist both for lawyers who represent clients before administrative agencies and for the lawyers who actually work within such agencies themselves.

As a general matter, the relationship between lawyers and their clients is like any other agency relationship. Thus, any problem between lawyers and clients in the private sector is simply a particular manifestation of the general agency problem that exists between shareholders and corporate managers, or doctors and patients. Many of the rules of professional responsibility are directed at reducing this agency-cost problem by providing a set of default rules that fill in the gaps in the contractual relationship that exists between lawyers and their clients, thereby reducing agency costs. Rules governing client confidentiality, lawyer competence, conflicts of interest, and the use of a client's funds are examples of gap-filling rules that further the interests of the legal profession by reducing the agency costs associated with the relationship between a lawyer and her client.

It is important to realize that, at least in the private sector, these rules are not the only source of constraint upon the behavior of lawyers. Rather, the rules of ethics and professional responsibility supplement a variety of market mechanisms that exist in the private sector and work to control the behavior of lawyers.

This combination of constraints upon lawyer behavior is effective at controlling many of the ethical problems that arise within the private sector. We argue, however, that a variety of factors prevent this combination of constraints from working effectively within the regulatory sector.


1 See infra part I.
2 As with contractual relationships generally, the contractual relationship between the attorney and the client may be express or implied. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 501 (Prac. ed. 1986). There is no requirement in the Model Code of Professional Responsibility or Model Rules of Professional Conduct that a fee contract be in writing, although Model Rule 1.5(b) "states that the basis or rate of the fee should 'preferably' be communicated to the client in writing." Id. at 502 (quoting MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(b) (1983)). Professor Wolfram continues by stating that "[m]ost lawyers prefer to have a written agreement signed very near the beginning of the representation as a matter of sound client relationships." Id. at 503.

August 1995 Vol. 63 No. 6

1105
With respect to lawyers who represent clients before government agencies, the importance to clients of hiring lawyers with expertise and a proven track record in representing clients before particular regulatory agencies creates a situation in which lawyers representing clients before agencies easily are "captured" by the agencies before whom they practice. In particular, because private-sector lawyers often are "repeat-players" in their actions before government regulators, they have strong incentives not to alienate the bureaucrats. We will show that this repeat-player representation by law firms can lead to less than zealous representation because lawyers balance the immediate interests of their present client against the long-term interests of their firms in maintaining a cordial relationship with a particular bureaucrat or bureaucracy.

Private-sector lawyers who represent clients before government agencies also face special ethical problems where those agencies have the power to bring sanctions against private-sector lawyers for ethical violations. As recent developments in banking and securities law demonstrate, public agencies are obtaining expanded powers that allow them to impose massive sanctions on firms for "ethical" violations. Thus, even those firms that are not concerned with long-term relationships with a particular agency are likely to be less than zealous representatives of their clients due to fear of sanctions.

The special ethical problems that exist for lawyers who work within the government exist for three reasons. First, the market forces that characterize the relationship between lawyers and clients in the private sector are conspicuously absent in the public sector. The lack of market constraints, coupled with concerns about agenda control and career building by government lawyers, makes the problem of ethical conduct by government attorneys far more difficult to solve.

A second reason why lawyers in administrative agencies face special ethical problems is because of the unique difficulties associated with monitoring the behavior of government lawyers. This is largely due to the fact that, unlike lawyers in the private sector who have clearly defined clients with clearly defined interests, lawyers in the public sector do not have clearly defined clients with clear interests. Rather, those interests change dramatically with changing political winds.

Finally, public-choice theory predicts that, even where the client of a government lawyer can be clearly identified (perhaps in the case of an ad-


4 See infra part II.B.

5 See infra notes 19-50 and accompanying text.

6 Public-choice theory models the political process from an economic perspective. It demonstrates that political outcomes generally reflect the preferences of narrowly focused, self-aggrandizing interest groups. Thus, under the public-choice model, regulation does not serve the interests of the public, but rather the interests of the entities being regulated. For a general
ministrative agency), the objectives of the agency may drift from the original purposes of the agency, as the agency struggles for influence and prominence within the political arena.

Part I of this Article summarizes the principal-agent nature of the relationship between lawyers and clients and explains how the rules of ethics and professional responsibility work together with market mechanisms to control lawyer behavior within the private sector. Part II turns to private-sector lawyers who represent clients before government agencies and demonstrates how the client's interests can be subjugated to the long-term interest of the lawyer or law firm in maintaining a cordial relationship with the particular agency or to the interest of the lawyer or law firm in avoiding sanctions. In Part III, we conclude by examining the ethical problems facing government lawyers that are created by the lack of market controls, monitoring difficulties, and bureaucratic drift.

I. Lawyers and Clients as Agents and Principals

In a wide variety of contexts, principals hire agents to perform specialized tasks for them. When a shareholder purchases stock in a publicly traded corporation, she is entering an agency relationship with the managers and directors of that company. When a patient visits a doctor, she is entering a principal-agent relationship. When someone hires a plumber to fix a leaky faucet she enters into a principal-agent relationship. Likewise, the retention of a lawyer by a client establishes a principal-agent relationship. One of the central points of this Article is to establish that the core problems that exist between lawyers and their clients are no different than the problems that exist between shareholders and management, doctors and patients, or homeowners and plumbers.

First, it is often extremely difficult to determine the quality of work being performed by the agent. And, when the work being done is complex and therefore must be performed by teams, the problem of measuring performance quality becomes more difficult. Indeed, with lawyers, doctors, and plumbers it is even difficult to determine whether the work being performed was necessary, or alternatively, whether projects that ought to be pursued are in fact being pursued.

A second problem that is endemic to agency relationships is the problem that arises when agents divert assets or business opportunities to themselves at the expense of the principal. A doctor might perform an operation not only to increase the cost of services unnecessarily, but also in order to experiment with a new procedure, or to develop a reputation for expertise in a new area of specialty. Similarly, problems that arise in the lawyer-client relationship involve not only the delivery of unneeded services in order to pad the client's bill, but also the delivery of unneeded services in order to try out a new legal theory or to develop a reputation in a new area of legal specialty. Thus, the situation in which a lawyer might take a case to trial when the client would be better off if the case were settled is a good illustration of the way

that issues of legal ethics are best seen as what economists describe as agency-cost problems.

Our point here is that the attorney-client relationship is an economic relationship that is best categorized in the principal-agent context. The purpose of the rules regarding professional responsibility and legal ethics that govern lawyers is to lower the cost of the principal-agent relationship.

Market-Based Rules Governing Lawyers’ Conduct: The Economics of Reputation-Building

Lawyers and clients share a common problem. This problem arises from the inability of clients to monitor lawyers effectively. Because of clients’ inability to monitor their lawyer-agents at the relevant margins, clients will be less willing to hire lawyers than they would be in the absence of such monitoring problems. In other words, to the extent that people are concerned about their lawyers stealing from them, or failing to represent them effectively, or putting their own interests ahead of their clients’ interests in more subtle ways, lawyers, as individuals and as a group, have a strong incentive to devise contractual devices that cause clients to trust them.

Apart from contractual devices, the primary market mechanism by which lawyers seek to increase demand for their services is by causing clients to trust them through “reputation-building.” A lawyer’s reputation is a valuable asset precisely because it will decline in value if the lawyer acts in ways that are contrary to the interests of her client. A lawyer will not cheat a client if the profit from cheating the client will be less than the loss in business that comes as a result of the reputation damage that occurs when the lawyer’s cheating is discovered.

Thus, lawyers’ reputations serve as a bonding mechanism because the diminution in reputation that a lawyer suffers from poor performance is a type of penalty that is forfeited in the same way that a traditional bond is forfeited for nonperformance. In other words, basic economic theory implies that lawyers will invest considerable resources in reputation-building in order to increase the demand for their services.

Lawyers make investments in reputation capital by attending prestigious law schools and by joining prestigious law firms. The costs of cheating to a lawyer trained at Harvard or Yale will be higher than to a lawyer trained at an unaccredited night law school simply because the lawyer trained in the Ivy League has more to lose by cheating than the other lawyer.

Lawyers who associate themselves with prestigious law firms increase the market demand for their services for a variety of reasons. One of the most important of these reasons is that the lawyers who associate with law firms of high reputation are in effect “renting” the reputation of those firms. A particular lawyer may be unknown to a client, but the name of Davis Polk & Wardwell or Sullivan & Cromwell speaks volumes. Associating with a prestigious law firm is a particularly effective bonding mechanism for three reasons.

First, because the value of a law firm's reputation is great, the firm has a very strong incentive to use great care and selectivity in its hiring practices. The costs to a law firm of having a partner or associate cheat a client might be as great if not greater to the firm than to the client.

Second, and more importantly, the prestigious law firm is able to monitor its young associates more effectively than smaller firms. Consequently, clients will value greatly the willingness of law firms to monitor their partners and associates. It is commonplace for small firm lawyers to complain about larger rivals chronically overstaffing cases by routinely assigning what appear to be a surfeit of partners and associates to handle cases. It is difficult to explain this practice as a simple matter of lawyer overbilling, because the practice is so easy for clients to detect, and because if large law firms truly had sufficient market power to overbill they could just do it. A better explanation may be that such “overstaffing” actually serves as an effective mechanism by which large firms can protect their clients and their own reputations by enabling their lawyers to monitor the work of their colleagues.

Third, unlike smaller law firms, many large law firms tend to receive a disproportionate amount of business from a small number of large, institutional clients, particularly banks or other financial institutions. The dependency of these firms on a particular client results in a situation in which such firms will suffer greatly if the client decides to take its business elsewhere. The high proportion of large firms’ total revenue that derives from a small number of clients serves to constrain the behavior of such firms because of the high cost of acting in ways that deviate from the interests of such clients.

Of course, all of this monitoring and bonding is not costless. And for some clients, the costs will not be worth the benefits. Much of this activity, however, represents efficient market mechanisms for solving the monitoring problem that exists between clients and lawyers.

II. Repeat Players and Liability Avoidance: Lawyers and Bureaucrats Versus Clients

The above description of the roles that the market and the rules of professional responsibility play in controlling attorney behavior applies to lawyers within the private sector. This Part examines two acute conflicts of interest that arise with respect to private-sector lawyers who engage in the practice of law before government agencies. We label the first conflict the “repeat-player” problem and the second the “liability avoidance” problem.


9 Cf. Roberta Romano, The State Competition Debate in Corporate Law, in Foundations of Corporate Law 87, 90 (Roberta Romano ed., 1993). Professor Romano makes this point in the context of the jurisdictional competition for corporate charters. She argues that Delaware has credibly committed itself to being responsive to the needs of corporations because such a high proportion of the state’s revenues come from its incorporation business. Id.

10 For a general discussion of monitoring and bonding in the context of agency relationships, see Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305 (1976).
A. The Repeat-Player Problem

The interests of lawyers and clients can diverge where the lawyer/repeat player wants to ingratiate and appease the agency bureaucrats. Whereas the client may want the lawyer to vigorously assert its interests, even to the point of claiming illegal activity by the agency, a law firm may be unwilling to zealously assert the client's interests if doing so would alienate the bureaucrats and give the firm the reputation of being held in low esteem by the agency—a result that would cause other clients who need representation before the agency to turn to other law firms that are held in higher esteem by the agency. Not only might this pattern of events cause other clients to refrain from using the law firm's services in the future for fear of actual retaliation, it might also cause clients simply to believe that another law firm might receive a more sympathetic audience within the agency. This problem is particularly acute where a law firm, or an individual lawyer, has devoted years to developing particularized expertise in the legal sub-specialty that constitutes the administrative agency's jurisdiction, because alienating the agency could well result in a substantial diminution in the value of that human capital investment.

Monroe Freedman has previously analyzed this issue with his characteristic brilliance and wisdom, in the particular context of the Securities and Exchange Commission ("SEC" or the "Commission"). Freedman notes that lawyers who represent clients in the securities industry, along with lawyers who represent "the poor, minorities, and the politically unpopular, should be added to the roster of those who are in legal and professional jeopardy." Freedman blames this jeopardy on "serious abuses by the Securities and Exchange Commission of the rights of those subject to its jurisdiction" as well as on "the fact that the SEC has succeeded in intimidating the attorneys who appear before it, with the result that zealous advocacy has been sharply curtailed in securities matters."

Professor Freedman agrees with prominent securities lawyers who observe that "[t]he professional training of the New York securities bar is to cave in" and also that "[t]he securities bar has abdicated its responsibilities to its clients in deference to the Commission." We believe that Professor Freedman is wrong, however, to blame the lack of forceful representation by the securities bar solely on the misconduct of the SEC, although we have no reason to doubt his analysis in this regard. Rather, even in the absence of overt misconduct and intimidation, the problem of repeat dealing would still exist.

12 FREEDMAN, LAWYERS' ETHICS, supra note 11, at 20-21.
13 Id. at 21.
14 Id. (quoting two unnamed securities lawyers).
Of course it might be said that the clients who are represented by securities lawyers before the SEC are highly sophisticated and able to fend for themselves by selecting aggressive lawyers who will vigorously assert their interests. Specifically, it might be argued that if there were a problem of inadequate representation due to the problem of repeat dealings, then the problem could easily be solved by having clients select law firms that were not repeat players before agencies. The problem with this solution, of course, is that it often results in higher costs for the clients, because the lawyers in the new firm would have to familiarize themselves with the substantive law falling under the agency's jurisdiction. And, of course, there could be no guarantee that the neophyte law firm selected would not use the opportunity presented by the client to attempt to become a repeat player before the agency.

A second problem with this analysis is that it is difficult for clients to anticipate when hardball tactics will be necessary in dealing with an agency. Consequently, it is difficult for clients to tell when conflicts will arise before it is too late. A third and far more serious problem is that the law firms that are repeat players before regulatory agencies are truly favored in the sense that they are given preferential treatment by the bureaucrats in the agencies.\textsuperscript{15} Clients, of course, are attracted to law firms whose lawyers qualify for such preferential treatment and may be willing to risk the danger that subsequent events may develop that make it necessary to employ hardball tactics with the agency. Thus, at one stage of a proceeding before an agency, a client may benefit because his attorney receives "the opportunity, denied to others, to appear before [an agency] at a critical stage" in the proceedings.\textsuperscript{16} At a later stage in the proceedings, however, the lawyers may "trade off the rights of some clients in order to curry favor with the [agency] and thereby advance the rights of other clients."\textsuperscript{17} Although we fully agree with Professor Freedman that it is unethical for the government to intimidate attorneys into foregoing zealous advocacy on behalf of their clients,\textsuperscript{18} we believe that the lawyers share at least some of the blame with the bureaucrats.

\textbf{B. The Liability-Avoidance Problem}

The preceding Section argued that the repeat-player phenomenon creates a conflict that can cause private-sector lawyers who represent clients before government lawyers and bureaucracies to subordinate the interests of their clients to their own long-term interests in maintaining a close and cordial relationship with the government lawyer or bureaucracy. Clients' interests in allying themselves with lawyers held in high esteem by administrative agencies, coupled with lawyers' interests in maintaining their cozy relationships with such agencies, result in a situation in which lawyers will be unwilling to represent their clients' interests with zeal in certain situations.

\textsuperscript{15} See id. at 21-22.  
\textsuperscript{16} Id. at 22.  
\textsuperscript{17} Id.  
\textsuperscript{18} See id. at 21-22.
In this Section, we argue that the increasing sanctions faced by private-sector lawyers when dealing with administrative agencies create a further conflict that seriously threatens to exacerbate the problem of less-than-zealous representation of clients' interests by their lawyers. In recent years, government agencies in heavily regulated industries such as banking and securities have moved to impose sanctions for ethical violations against lawyers and law firms. Clearly, the possibility of such sanctions intensifies the problem of less-than-zealous representation of clients before administrative agencies.

The Kaye, Scholer matter presents a vivid example of this point. In 1992, the law firm of Kaye, Scholer, Fierman, Hays & Handler settled for $41 million a $275 million suit brought against it by the Office of Thrift Supervision ("OTS") arising out of the firm's representation of Charles Keating's Lincoln Savings & Loan Association ("Lincoln").\(^{19}\) In 1986, Lincoln had retained Jones, Day, Reavis & Pogue to represent it in its semiannual examination ("1986 Examination") before the Federal Home Loan Bank Board ("FHLBB").\(^{20}\) Lincoln, upset with Jones, Day's nonconfrontational approach, replaced that firm with Kaye, Scholer.\(^{21}\) Kaye, Scholer had represented Charles Keating's American Continental Corporation ("ACC") since 1977, and had also represented Lincoln on other matters since the thrift's acquisition by ACC in early 1984.\(^{22}\)

Kaye, Scholer took a confrontational approach to FHLBB requests during the 1986 Examination. As one examiner described the relationship, "This was not a dialogue. This was a stiff-arm day in and day out."\(^{23}\) The 1986 Examination resulted in a negative report of examination ("1986 ROE"), and a confidential recommendation by the examiners to appoint a receiver for Lincoln. Kaye, Scholer answered with a strong rebuttal describing Lincoln's sound management and financial stability and threatened litigation if the FHLBB pursued receivership. These threats, coupled with pressure from a group of U.S. senators, worked: the FHLBB decided not to pursue the matter.\(^{24}\)

Lincoln continued to retain Kaye, Scholer for the thrift's next FHLBB examination in July of 1988. Once again, Lincoln received a very negative report of examination, and once again, Kaye, Scholer answered with a strong rebuttal. Three months after Kaye, Scholer's response, in March of 1989, the Federal Deposit Insurance Company ("FDIC") (the predecessor to the OTS) seized Lincoln, which was insolvent by more than $2.6 billion.\(^{25}\)


\(^{20}\) Id. at 979.

\(^{21}\) Id.

\(^{22}\) Id.


\(^{24}\) Symposium, supra note 19, at 980.

\(^{25}\) Id.
The seizure of Lincoln meant that the OTS could reach internal documents and waive the attorney-client privilege to use those documents against Kaye, Scholer.\textsuperscript{26} After an investigation that lasted over a year and a half, the OTS filed ten charges for $275 million in damages against the firm in March of 1992.\textsuperscript{27} Asserting that the charges established a prima facie showing that Kaye, Scholer had a "proclivity to violate laws and regulations, break their fiduciary duties of loyalty and care and engage in unsafe and unsound practices," the OTS issued a temporary cease-and-desist order, freezing the firm's assets.\textsuperscript{28}

Claiming that it had acted in accordance with its duties as litigation counsel for Lincoln, Kaye, Scholer protested its innocence in a memorandum released that same day.\textsuperscript{29} In addition, Kaye, Scholer released a summary of the opinion of legal ethics expert Professor Geoffrey C. Hazard, Jr.\textsuperscript{30} The opinion, which had been drafted by the firm's attorneys, but was signed by Professor Hazard,\textsuperscript{31} concluded that:

Kaye, Scholer did not violate existing standards of ethical conduct and professional responsibility, and Kaye, Scholer acted in accord with its duties under the law. The disclosures and representations that the OTS alleges should have been made to the [FHLBB] by Kaye, Scholer in fact would have violated the standards of ethical conduct and professional responsibility generally recognized as applicable to Kaye, Scholer in its role as litigation counsel.\textsuperscript{32}

Nevertheless, Kaye, Scholer settled with the OTS for $41 million less than a week later.\textsuperscript{33}

As Professor Dennis Curtis has noted, "warring views of the lawyer's role" were at the core of the dispute between the OTS and Kaye, Scholer, "with the regulators and the lawyers espousing radically different models."\textsuperscript{34} The OTS offered a vision based on the notion that lawyers practicing before regulatory agencies should practice the "whole law."\textsuperscript{35} By contrast, Kaye,
Scholer took the view that the ethical duties of lawyers are grounded in their duty to be a zealous advocate of their client's interests. Although Kaye, Scholer's exact reasons for such a quick and costly capitulation can only be speculated upon, it is clear that the case will dramatically effect the way lawyers practice before government agencies.

Moreover, the OTS's vision of the lawyer's role in representing financial institutions before regulatory agencies is insupportable in many respects. The essence of the OTS's view is that "thrift lawyers should practice the 'whole law' by counseling their clients not to exploit technical 'loopholes' that 'disregard the significance of principles of general applicability.'"36 Such a standard goes beyond what the Model Code of Professional Responsibility and the Model Rules of Professional Conduct require of lawyers.37 The OTS's view has two critical weaknesses. First, as Lawrence Fox notes, by requiring the lawyer to enforce the whole law, the OTS would transform the lawyer into an enforcer for the government. In effect then, the client pays for the lawyer to represent the regulatory agency. This effects a situation whereby the client was denied its right to counsel, for if the lawyer owes a duty to the regulator, a crucial question must be asked: "Who fulfills the role of the lawyer for the client?"38

Second, as Professor David Wilkins notes, the OTS's vision does not "explain how firms like Kaye, Scholer should divine the content of these general principles in the midst of the kind of pervasive political conflict over regulatory policy that existed during the period that Kaye, Scholer represented Lincoln."39 Thus, in situations where the policies and objectives of the agency are at best ambiguous and at worst in conflict, Wilkins concludes that the OTS's view "actually boils down to a requirement that S&L lawyers counsel their clients to comply with the regulators' (or perhaps even the primary regulators') current articulated interpretation of the governing rules and regulations."40

Like the OTS, the Securities and Exchange Commission is also seeking to police ethical violations by private-sector lawyers who practice before the


37 See Model Rules of Professional Conduct Rule 2.1 (1994) (stating that lawyers "shall exercise independent professional judgment and render candid advice"); Model Code of Professional Responsibility EC 7-3 (1980) ("While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving . . . as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.").


39 Wilkins, supra note 36, at 1168.

40 Id. at 1169.
Commission. On December 3, 1992, the SEC released an order arising out of Salomon Brothers's violations of United States Treasury auctions.\footnote{See In re Gutfreund, Exchange Act Release No. 34-31554, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,067 (Dec. 3, 1992).} Salomon's government securities traders had submitted false and/or fraudulent bids in numerous auctions of government securities.\footnote{C. Evan Stewart, Corporate Counsel as Whistleblower, N.Y. L.J., July 1, 1993, at 5.} Within the period of this activity, knowledge of such an occurrence came to senior management's attention.\footnote{Id.} Donald Feuerstein, Salomon's general counsel, advised management that the bid was likely a criminal act and of the need to report the occurrence to the appropriate regulatory officials.\footnote{Id. at 5-6; Gutfreund, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 83,599.} Despite telling Mr. Feuerstein that they would follow his advice, the senior management at the firm failed to report the bid.\footnote{Stewart, supra note 42, at 6.} Months later, after additional bidding violations had occurred, disclosure was finally made.\footnote{Id.}

Although the SEC took no formal action against Salomon's former chief legal officer, Donald Feuerstein, the SEC's order did set forth the Commission's "views on the supervisory responsibilities of legal and compliance officers."\footnote{Gutfreund, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 83,608.} The SEC listed three alternatives for future lawyers placed in Mr. Feuerstein's position, that is where counsel is aware, or should be aware, that the client is not implementing their advice: (1) go to the board of directors; (2) resign; or, (3) disclose the wrongdoing to the appropriate regulatory authority.\footnote{Stewart, supra note 42, at 6.}

Actions like those taken by the OTS and the SEC demonstrate that administrative agencies, at least in heavily regulated industries such as banking and securities, have begun to take over enforcement of the ethical rules from the bar. Government agencies embrace this because it gives them access to the "deep pockets" of big law firms.\footnote{See Curtis, supra note 29, at 987.} Faced with a new source of liability exposure that has a potential to inflict massive damage upon the firm, law firms are likely to refrain from zealously advocating the interests of their clients. Indeed, corporate lawyers who practice before such regulatory authorities as the OTS and SEC are witnessing a redefinition of their professional responsibilities.\footnote{See generally, James R. Doty, Regulatory Expectations Regarding the Conduct of Attorneys in the Enforcement of the Federal Securities Laws: Recent Development and Lessons for the Future, 48 Bus. Law. 1543 (1993); Fox, supra note 38.}

### III. Government Lawyers

The problem of regulating lawyers’ ethical conduct in the public sector is much more difficult than the problem of regulating lawyers’ ethical conduct in the private sector for three reasons. First, public-sector lawyers are not constrained by the same market forces that work to control the actions of private-sector lawyers. This lack of market control, coupled with government...
attorneys' proclivity to litigate and engage in career-building, creates the risk that government lawyers will pursue their own interests, interests that are often adverse to the agency that they represent.

A second source of problems arises from the difficulty of monitoring public-sector lawyers. These monitoring problems arise largely because the public-sector lawyers do not have the same clearly defined clients with clear interests. The lack of monitoring results in the potential for the interests of public-sector lawyers to change with the political winds.

Finally, public-choice theory predicts that, even where a government lawyer can identify her client, bureaucratic drift will cause the administrative agency's objectives to shift from the original purposes of the agency. This shift occurs as the agency struggles for influence and prominence within the political arena.

A. Problems Created by a Lack of Market Forces

In the private sector, rules of ethics and professional responsibility work in combination with market controls to ensure that a lawyer does not place her own interests ahead of her client's. The absence of market control in the public sector allows government lawyers to engage in excessive litigation and career-building.

First, we need to identify whose interests it is that the government lawyer should be advocating. We point out that the scope of a government attorney's ethical duties must be understood in the context of the attorney's role in a system of separation of powers. It is not the responsibility of an agency attorney to represent the "public interest" nor the government as a whole. Rather, the constitutional system of checks and balances depends upon the institutional loyalty of its attorneys. Although this argument runs counter to the common intuition that the government attorney should act to further the common good, we argue that this common view is ultimately insupportable, in large part because there is simply no consensus in our pluralistic society as to what constitutes the common good. Thus, the argument that government lawyers have a broad ethical duty to further the public interest that transcends their narrow duties to their agencies would lead to government attorneys being free to operate without any constraints on their behavior.

Congress, the federal courts, and other agencies can and should protect their own interests. To the extent that government attorneys clash with other government attorneys in other branches of government, or in other agencies, this conflict is a normal and healthy manifestation of the operation of the separation of powers. To the extent that government attorneys clash within the agency itself, however, there is a potential for the government attorney to advance his own interests at the expense of the agency as a whole.

For example, suppose that a supervisor approaches a lawyer within an administrative agency with a project that the lawyer knows is in contradiction with the goals and policies of the agency. What advice should the govern-

51 See supra note 6.
52 See infra notes 70-71 and accompanying text.
53 See infra note 70 and accompanying text.
ment attorney provide? Obviously, the government lawyer should advise the supervisor against the project. The problem is that there is no market control on the government attorney in this situation and, therefore, nothing which prevents the government lawyer from supporting a project that contradicts the goals and policies of the agency.

Now consider the analogous situation in the context of a corporation. Suppose a corporate manager approaches corporate counsel for advice on a project that the lawyer knows will benefit management at the expense of the shareholders. What should the lawyer do? Again, the lawyer should advise against the project. Unlike the public sector context, however, a variety of market mechanisms exist in the private sector context that help to produce the correct advice. The market for corporate control, managerial labor markets, capital markets, and products markets all provide incentives for the corporation to engage in projects that benefit shareholders, and reject those that hurt shareholders. Thus, these market mechanisms provide a strong incentive for the lawyer to advise against the project; the result is that, at least in the private sector, good legal advice is often consistent with good ethical advice.

One risk created by the absence of market constraints is excess litigation. Government lawyers may have strong incentives to litigate rather than settle cases. Hughes Aircraft’s recent $114 million patent infringement judgment against NASA provides a telling example. That case has been in litigation for twenty-eight years.

Why so long? Victor Savikas, of Jones, Day, Reavis & Pogue and counsel to Hughes Aircraft since 1979, says that the biggest part of the problem is that “[a]ttorneys for the government feel they have to protect the public treasury, so they never concede anything. Therefore, you have to litigate every issue.” Another disincentive to settle comes from the fact that any settlement agreed to prior to the filing of the lawsuit is paid out of the budget of the agency involved, whereas litigated judgments are paid out of the general revenue. Additionally, young lawyers often join government agencies in order to gain work experience, which may lead to government lawyers having strong incentives to litigate rather than settle cases.

A second risk is that government attorneys will engage in career-building. Agency attorneys who plan to go into private practice have strong incentives to “sell out” their agencies in order to curry favor with private-sector attorneys. Just as private-sector law firms have the potential to be “captured” by an agency that they wish to develop a long-term relationship with, government lawyers have the risk of being “captured” by the private law firms they later hope to practice with. We do not mean to suggest that government lawyers will be “bad lawyers,” rather we suggest that government lawyers have incentives to act favorably towards interest groups repre-

55 See id. at 31.
56 Id. at 31, 34 (quoting Victor Savikas of Jones, Day, Reavis & Pogue).
57 Id. at 34.
58 See supra note 3 and accompanying text.
sented by private-sector firms with which the government attorney hopes to practice. Thus, in trying to establish themselves as "good lawyers," government lawyers may end up advocating the cause of the regulated.

B. Problems Created by a Lack of Monitoring

In the private sector, a lawyer's interests are generally provided by the client. The client can be expected to understand what his interests are, and to monitor the behavior of the lawyer to ensure that the lawyer continues to represent the interests of the client. The private-sector lawyer knows that if she strays too far from the client's interests she risks losing the client, or worse, a malpractice suit.

Public-sector lawyers, by contrast, often do not have the benefit of a clearly defined client. This lack of monitoring constraint creates the potential for the interests of government lawyers to change with the political winds. The Justice Department's recent switch in the case of Taxman v. Board of Education59 illustrates exactly this kind of shift. The case involves a white teacher, Sharon Taxman, and a black teacher, Debra Williams, who were hired on the same day in 1980 to teach in the business education department at Piscataway High School.60 In 1989, budget cuts forced the school board to eliminate one of the positions.61 The board's policy in the situation where two teachers have equal seniority was to draw lots.62 Instead of following this procedure, the school board chose to fire Taxman on the basis of the district's affirmative action policy, as Ms. Williams was the only black teacher in Piscataway High School's business education department.63

The Justice Department under the Bush Administration brought a Title VII claim against the Piscataway school board on behalf of Ms. Taxman, who was later added as a plaintiff.64 After the United States and Ms. Taxman prevailed at the district court level, the Piscataway school board appealed to the United States Court of Appeals for the Third Circuit. The current assistant attorney general for civil rights, Deval Patrick, decided to switch sides in the suit.65 The United States withdrew as a plaintiff and recently filed an amicus brief on behalf of the school board.66 The Justice Department’s switch raises significant ethical concerns about confidentiality and attorney-client privilege, in the light of the fact that the Department's lawyers worked closely in the original trial with Ms. Taxman's lawyer. Thus, the case illustrates the kinds of ethical problems that administrative agencies are prone to because of monitoring problems and suggests the need for ethical guidelines to help control lawyer behavior in this area.

60 Id. at 839-40.
61 See id. at 840.
62 Id.
63 Id.
64 See id. at 837.
66 Id.
C. Bureaucratic Drift and Turf-Building

In addition to ethical problems created by the lack of market controls and monitoring difficulties, government attorneys also face unique ethical problems due to the general tendencies of turf-building and bureaucratic drift\(^{67}\) within administrative agencies. Because of their expertise in the legal system, government lawyers are particularly adroit at engaging in these activities. The result is that government attorneys will seek to expand their power within an agency at the expense of the agency, or to expand the power of the agency at the expense of society.

As Anthony Downs has observed, there exists in all bureaucracies a tendency to substitute private, self-interested objectives for the public objectives that provided the impetus for their origination.\(^{68}\) This substitution occurs because the people who comprise the workforce of an agency have made highly specific investments of human capital in the agency. Consequently, agency employees develop a vested interest in maintaining and expanding the agency’s role in the government structure.\(^{69}\) Similarly, government attorneys have strong incentives to seek legal solutions to problems in order to expand the relative importance of attorneys within the agency and of the agency as a whole.

Public-choice theory, meanwhile, has demonstrated that the objectives of administrative agencies tend to drift away from the original objectives of the agency as the agency fights for influence and prominence within the political arena.\(^{70}\) This “bureaucratic drift” results in “changes in administrative agency policies that lead to outcomes inconsistent with the original expectations of the legislation’s intended beneficiaries.”\(^{71}\) Thus, even where the government lawyers’ clients can be clearly identified as the legislation’s intended beneficiaries, bureaucratic drift will cause the agency’s interests to shift away from the interests of those beneficiaries.

A recent attempted settlement by the Equal Employment Opportunity Commission (“EEOC”) with the California Public Utilities Commission (“PUC”) illustrates this point. In that case, a group of PUC employees were represented by the EEOC in an age discrimination suit.\(^{72}\) The EEOC’s at-

\(^{67}\) See infra notes 70-71 and accompanying text.

\(^{68}\) ANTHONY DOWNS, INSIDE BUREAUCRACY 82 (1967).


\(^{70}\) Cf. Murray J. Horn & Kenneth A. Shepsle, Commentary on “Administrative Arrangements and the Political Control of Agencies”: Administrative Process and Organizational Form as Legislative Responses to Agency Costs, 75 VA. L. REV. 499, 500-01 (1989) (concluding that elected politicians utilize “intelligent foresight” when creating agencies by devising initial enactments that will protect against the influence of bureaucrats and subsequent political coalitions); Matthew D. McCubbins et al., Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 VA. L. REV. 431, 432 (1989) (stating that legislatively imposed procedural constraints play a critical role in controlling bureaucratic agents).


tempted settlement with PUC was rejected by U.S. District Court Judge Barbara Caulfield. Judge Caulfield's rejection cited objections by class members who maintained that the government attorneys were selling them out. Lawyers at the EEOC, who attempted settlement because they believed that the employee's case was "weak," had made institutional reform their primary interest in the case, despite demands from the class that any settlement include a payout to class members. The EEOC's belief that the employees' case was weak conflicted with a jury verdict in Judge Caulfield's court of $323,958 against the PUC brought by two PUC employees who had sued the PUC without the EEOC.

Conclusion

This Article has examined the topic of government lawyers and professional responsibility from a law and economics perspective. We identify a new potential ethical dilemma for lawyers who represent private-sector clients in their dealings with government bureaucracies. As we observe, such lawyers have strong incentives to refrain from vigorously asserting their clients' interests where their clients' interests are threatening to the interests of the agency, or where such zealousness would risk exposure to sanctions. In such cases, lawyers may try to preserve their relationship with the agency, or protect themselves from sanctions, at the expense of their clients.

In addition, we have argued that the absence of market discipline over government attorneys makes the possibility of ethical violations particularly acute for government lawyers. Such lawyers are more likely than private-sector attorneys to put their own interests ahead of the interests of their agency because of the absence of market constraints on their behavior. Monitoring problems also create ethical problems for government lawyers. The problems result from the fact that the interests that the lawyer is supposed to represent often are not clearly defined, and can change with the political winds. Finally, even in those instances in which the government attorney may be able to identify his client, bureaucratic drift will pull the objectives of the agency away from the original purposes of the agency.

73 Id. at *2.