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Toward a Theory of Reciprocal Responsibility Between Clients and Lawyers: A Comment on David Wilkins' *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*

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Toward a Theory of Reciprocal Responsibility Between Clients and Lawyers: A Comment on David Wilkins' *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*

CARRIE MENKEL-MEADOW*

INTRODUCTION

On my plane flight to attend the American Association of Law Schools meeting at which Professor David Wilkins presented his paper, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons From the Diversity Wars*,¹ the pilot requested passengers to “assist the flight attendants in their principal duty of providing safety to all passengers,” following a recent incident with mid-flight turbulence in which one person died and several were injured. The pilot reminded us that “service” was only a secondary function of the flight attendants, with their principal duty being to ensure that all of us traveled and arrived safely, and that we should assist the flight attendants (not just cooperate with them) in this effort. “Aha!” I thought, our culture is moving to a recognition of reciprocal responsibilities between providers and recipients of service,² and that is what Professor Wilkins’ paper is about. It is also about the familiar recognition that ethical responsibilities are often complex and contradictory,³ with multiple sources of law and ethics guiding choices and behavior.⁴

* Professor of Law, Georgetown University Law Center and Chair, CPR-Georgetown Commission on Ethics and Standards in ADR. This Comment is a slightly expanded version of comments delivered at the 1998 Professional Responsibility Section Panel at the annual meeting of the Association of American Law Schools in San Francisco on January 9, 1998.

1. David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855 (1998).

2. As I will discuss a bit more fully below, this may have implications for the providers and users of products as well, as has been recognized in ever changing standards of tort law and products liability.

3. Competing concerns often include “zealous advocacy” versus “officer of the court,” confidentiality vs. accountability, and the duty to client, system, and self, just as flight attendants have multiple duties for safety and service.

4. In my professional responsibility and legal profession classes over the years, I have often used Venn diagrams to map the sometimes overlapping and sometimes differing ethical obligations that lawyers have to the system, their clients, others (third parties or society), and themselves. The fact that the “circles of responsibilities” do not completely overlap with each other (with the applicable “rules” indicated in each circle) demonstrates graphically how lawyers must often choose among competing sets of responsibilities. One can also use such diagrams to map the conflicting sources of ethical, legal, and moral obligations to which lawyers are subject. Different circles of law represent Constitutional, statutory (the *Model Rules* and other statutory enactments), common law, and ethics opinions as positive law pronouncements, which themselves don’t always completely overlap. In a sense, David Wilkins now asks me to overlay another circle on this map — that clients

In this Comment, I suggest that Professor Wilkins'⁵ arguments for client responsibilities in "the diversity wars" raise important questions for other issues in lawyer and client "relationship" ethics. What responsibilities should clients have toward their lawyers generally, beyond the important particular concern of diversification in the legal profession? Because Professor Wilkins' arguments are directed to normative values about the diversification of the legal profession (and, by implication, the larger society), one could go further and ask what responsibilities lawyers and clients should also have to others, such as third parties who are affected by the legal work that clients and lawyers conduct together. I will leave this bigger issue of the duties, obligations, and responsibilities to third parties (or "ethical externalities" of the lawyer-client relationship) to another day⁶ and confine myself here to Professor Wilkins' principal concern about clients' obligations to their lawyers. However, I will broaden my attention to the more general issues of client duties to lawyers (not just in diversity matters) that are raised by his paper.

I want to start simply by proclaiming that I am a friendly critic and commentator. I support the two bedrock notions of Professor Wilkins' article: (1) that diversification of the legal profession is a normative good that we should use

"ought" to engage in certain normative exhortations that lawyers should be "responsible" to, beyond those more conventional duties and responsibilities that lawyers have to their clients under the *Model Rules* and positive law. MODEL RULES OF PROFESSIONAL CONDUCT (1995) [hereinafter MODEL RULES].

5. David Wilkins is my friend so I find it awkward to call him Professor Wilkins. However, in the interest of consistency and convention, I feel that I must.

6. The issue of legal liability to third parties for legal work is a long-standing issue in malpractice and legal ethics. See, e.g., Symposium, *The Lawyer's Duties and Liabilities to Third Parties*, 37 S. TEX. L. REV. 957 (1996) (presenting opinions of authors from a diverse range of practice areas on how a duty to third parties should dictate lawyers' conduct). In mediation, for example, there has been a long standing debate about whether mediators ought to be accountable to third parties who may not be present, but who may be significantly affected by the outcome of a particular mediation, in both individual, as well as public policy disputes. See, e.g., Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981) (discussing environmental disputes and the mechanisms by which environmental mediators could be held accountable); Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981) (criticizing the idea that mediators should be non-neutral). Discussion of what ethical obligations lawyers have to others outside of the lawyer-client relationship has become an old "chestnut" of ethics debates, ranging from duties to disclose confidential information involving bodily harm or financial fraud, see, e.g., MODEL RULES Rule 1.6 (1995) (advising on the amount of information a lawyer may reveal relating to the representation of a client), in issues ranging from the *Hidden Bodies Case*, see TOM ALIBRANDI & FRANK ARMANI, *PRIVILEGED INFORMATION* (1984) (discussing the underlying facts behind *New York v. Belge*); see, e.g., *New York v. Belge*, 372 N.Y.S.2d 798 (1975), *aff'd* 50 A.2d 1088 (N.Y. App. Div. 1975) (holding that a lawyer who failed to disclose the location of a dead body he had found based on a client's information was not in violation of public health laws because attorney-client privilege "shielded" the defendant-attorney from what otherwise would have been a violation of the public health law), and disclosure of client financial fraud, see Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271 (1984) (discussing the problem of client financial fraud and the adequacy of ABA proposed rules that deal with it), to drafting properly for third party beneficiaries, see *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961) (finding that a lack of privity between a lawyer and will beneficiaries does not preclude beneficiaries from maintaining a tort action against the lawyer), and considering the effect on "third party" children in divorce and other family proceedings.

various means to achieve;⁷ and (2) that clients owe some duties and responsibilities to those who provide them with legal services, though the contours of those duties may be very difficult to define.⁸ I write this comment to explore further the ramifications of these propositions, both as a friendly critique of Professor Wilkins' current paper, and to encourage further thinking about the deeper issue that is imbedded here. What ought to be the nature of the interdependence between lawyers and clients in terms of ethical, moral, or other duties and responsibilities?

The relationship of Professor Wilkins' two basic arguments is not clear or unproblematic. If we want to hold clients "accountable" for encouraging lawyers to diversify their representation in demographic terms, and we want to make lawyers answerable to those demands or claims, then might we not be reinforcing the conventional norm of "hired gun" that requires the lawyer to do all the client asks that is within the bounds of the law?⁹ How can we define the "normative" limits of clients' responsibilities to include those values which we favor as ethical, moral, or political virtues without further empowering already powerful clients¹⁰ to get what they want at the hands of overly dutiful lawyers? Moreover, how shall we select among competing normative visions of what clients should be "responsible" for in relation to what they ask their lawyers to do?

Under the traditional allocation of lawyer-client decision-making authority,¹¹ does a client's responsibility for such "means" as who the lawyer is reallocate those dividing lines so that clients and lawyers may both be responsible for means and ends?¹² Though I will raise some issues and perhaps unanswerable

7. Wilkins, *supra* note 1, at 857. Much of my own scholarly and teaching career has been devoted to diversification of the legal profession, not only on the basis of racial and ethnic categories, but for gender, as well as other previously "excluded" groups. See Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987) (exploring the effects excluding particular groups from the legal profession has had on the perceptions and practice of law); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75 (1994) (examining the effects of gender on lawyers' work and decision-making strategies); Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621 (1994) (describing and prescribing change in the legal profession, including the effects of gender on lawyering).

8. Wilkins, *supra* note 1, at 855-56.

9. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7 (1980) [hereinafter MODEL CODE] (advising that "a lawyer should represent a client zealously within the bounds of the law").

10. See, e.g., ROBERT NELSON, PARTNERS WITH POWER (1988) (reporting on the power of corporate clients over law firm partners).

11. MODEL RULES Rule 1.2 (stating that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued").

12. In the wake of several recent financial scandals, many commentators have argued that lawyers should be responsible not only for the means of representation, but for the ends as well. See, e.g., Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507 (1994) (discussing how legal representation of corporate clients often leads to blurred distinctions between lawyers' actions and clients' actions).

questions here, I am encouraged by the effort for us all to articulate and develop an ethics of “reciprocal responsibility” between lawyers and clients.¹³

I. TWO ARGUMENTS FOR CLIENT OBLIGATIONS TO DIVERSIFY THE LEGAL PROFESSION

In his article, Professor Wilkins asserts that two arguments have been offered for client involvement in efforts to diversify the profession.¹⁴ First, the “self-interested diversity” argument suggests that instrumentally and economically, it is good for clients to demand diversity among their lawyers, particularly in an increasingly diversified and globalized world of consumers.¹⁵ As presented, this is largely a demographic argument, suggesting that “race, ethnic, and gender matching” of lawyers to clients or to ultimate consumers or users of corporate products will increase profitability in market terms for corporate clients, as well as their lawyers, through access to more differentiated markets and multi-lingual skills to understand and serve customers better.¹⁶ Though this is a potentially dangerous continuation of racial, ethnic, and gender stereotyping,¹⁷ there is some evidence that “race-matching” can be effective on both instrumental and other grounds. The exclusion of religious and ethnic minorities from elite law firms in such cities as New York and Chicago led to the founding of “ethnic” law firms that serviced their own and eventually were largely successful, both in

13. This is an effort that others have begun. See, e.g., DOUGLAS ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974) (demonstrating, with empirical data, that clients who actively participate in their cases often achieve better outcomes); Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078 (1979) (discussing lawyer and client “moral dialogue”); Painter, *supra* note 12 (arguing for the recognition of the interdependence of lawyer and client responsibilities based on how decisions are actually made in the corporate setting); William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (1978) (arguing for a “non-professional advocacy” in which “the advocate and client must each justify himself to the other” in mutual recognition of individual ends and means); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) (discussing informed consent and lawyer and client participation in decision-making). These efforts in the literature of the legal profession can be distinguished from the arguments in the interviewing/lawyering literature that suggest that lawyering tasks (interviewing and counseling) should be “client-centered.” See, e.g., DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH* (1991) (explaining and advocating an approach to legal practice that focuses on viewing problems from a client's point of view). The client-centered approach may give too much deference to the client in all contexts, without a particular normative content attached to what the client may want to do or want the lawyer to do.

14. Wilkins, *supra* note 1.

15. *Id.* at 856.

16. *Id.* at 862 (citing David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., Sept./Oct. 1996 at 79, 83).

17. Do African-Americans, Hispanics, and women seek only “their own kind” in lawyers? This raises the specter of racial, ethnic, and gender “essentialism” that bothers many theorists and lawyers. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (arguing against the idea that an “essential women's experience” can be isolated and described independently of race, class, sexual orientation, and other components of identity); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (criticizing the claims of “essentialism” made by critical race and feminist legal theorists).

monetary terms, and eventually in integrating on ethnic and religious grounds.¹⁸ Specialized women's law firms, however, have been less successful.¹⁹

Professor Wilkins describes the use of African-American lawyers in cities with African-American mayors and other political office holders, the employment of Hispanic lawyers to work with South and Latin American companies, Asian-American lawyers to work with Asian clients,²⁰ and women to work with consumer product industry clients.²¹ While this may increase the "benefits" of employment, it risks the "burdens" of job segregation and stereotyping, and reduces job choices for some lawyers in the "push-pull" channeling effects of job assignment for illegitimate and perhaps unlawful reasons.

On a less obviously instrumental level, one recent study of "race/ethnic-matching" in the justice system noted that litigants were more likely to feel satisfied with legal processes when the third-party neutrals were the same race/ethnicity as the litigant.²² Legal outcomes for different groups differed

18. See generally JEROLD AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976) (describing the formation of, and eventual assimilation of, ethnic and religiously based law firms in the twentieth century American legal profession); JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (rev. ed. 1994) (providing a systematic analysis of the social structure of Chicago's bar).

19. See Carrie Menkel-Meadow, *Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers*, in *LAWYERS IN SOCIETY: AN OVERVIEW*, 221-80 (Richard Abel & Philip S.C. Lewis eds., 1995) (discussing the meaning of changes that the influx of women in the legal profession will produce); Juliet Eilperin, *Female Lawyer Fined For Not Accepting Male Client*, *NAT'L L.J.*, May 12, 1997, at A7 (discussing *Stropnick v. Nathanson*, a Massachusetts administrative decision where a female attorney was fined for refusing to represent a male in a divorce action); *Stropnick v. Nathanson*, Commonwealth of Massachusetts Commission Against Discrimination 91-BPA-0061 (holding that Massachusetts anti-discrimination laws prohibit attorneys from turning away clients based solely on gender). I have recently been retained by several law firms to present "specialized" training programs for women lawyers and their women clients (in-house and governmental agency women lawyers) as a marketing device for the law firms. See Grace Giesel, *The Business Client is a Woman: The Effect of Women as In-House Counsel on Women in Law Firms and the Legal Profession*, 72 *NEB. L. REV.* 760 (1993) (discussing women in the legal profession and their underrepresentation in the partnership ranks).

20. Some years ago a Japanese-American female law student of mine (who was fluent in Japanese and wished to work in the Pacific Rim commercial practice area) told me that a noted California law firm hired her but would not let her work in Japan because they told her the Japanese were less comfortable with "Japanese" women in the work-place than with American women whom they just concluded were as "other" as American male lawyers. Thus, our "multi-cultural, post-modern, globalization" processes are highly complex and problematic. The employer argument here is the unlawful "customer preference" defense rejected over twenty-five years ago in *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971). The requirements of Title VII of the Civil Rights Act of 1964 do not apply outside of the U.S. borders. See *EEOC v. Arabian American Oil*, 499 U.S. 244 (1991) (holding that Title VII does not apply to the employment practices of U.S. firms employing American citizens abroad), but the assignment of lawyers to representational tasks ("terms and conditions of employment" under Title VII) usually occurs within U.S. boundaries.

21. Wilkins, *supra* note 1, at 862.

22. Michelle Hermann et al., *Metro Court Project Study Final Report* (1992); Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 *L. & SOC'Y REV.* 767 (1996). The study examined both adjudicative and mediational legal processes and judges and mediators included African-Americans, Hispanics, and Anglos, but most minorities in the study were Hispanics. Outcomes differed on both monetary and non-monetary terms, depending on whether the

depending on who the legal decision-maker or neutral was, with very interesting implications for the political legitimacy and acceptability of a legal system that is or is not diverse and responsive to its constituents.

More troubling, however, is Professor Wilkins' illustration of a kind of "negative" instrumentalism in the use of minority or women lawyers to defend against race or sex discrimination cases. Such an "affirmative action" hiring and a lawyer deployment practice increases diversity in the profession by assuming that minority lawyers will be useful in the defense against claims of client discrimination.²³ Minority lawyers may be hired for their "symbolic" demographic value. As Professor Wilkins points out, this "race card" lawyering was played out in the O.J. Simpson case and occurs every day in areas where jurors are more diverse. Law firms attempt to "use" demographics by staffing their defense lawyers depending on what they believe will be the racial or gender composition of the jury.²⁴

Before I leave this issue, having exposed some of the downsides of the instrumental approach to client "demand side" appeals for diversity, let me suggest that there is one more instrumental argument that could be made, though it too suffers from the dangers of essentialism and stereotyping. It is possible that diversification of the profession will in fact admit to the profession different kinds of people with different kinds of approaches to legal problems that might improve and diversify the provision of legal services. I have made this claim, somewhat controversially, with respect to women lawyers in that they might be more likely to use less adversarial methods of legal problem-solving, and that they might be more conscious of how legal decision-making might affect those beyond the immediate client, such as employees, other family members etc.²⁵ I believe the

disputants were Anglo, male or female, or minority, and also depending on the process utilized. Satisfaction with the processes employed also varied by gender and ethnicity. The findings of this rigorous, but geographically limited, study are fascinating and complex and demonstrate the importance of more empirical testing of the claims made with respect to race, ethnicity and gender in comparative legal processes.

23. This description comports with my own experience. When, in 1976, I was a plaintiffs' civil rights lawyer representing African-Americans and women with race and sex discrimination claims, I was offered a job with a major law firm known for its aggressive Title VII defense work (there were no women or African-American lawyers in the department at that time). When I asked the one Jewish lawyer in the labor department how he had come to work for the firm he told me proudly that he had made his reputation defending the firm's clients against religious discrimination claims (often claims of anti-Semitism). Thus, this form of "race-matching" may "benefit" clients, law firms, and those "minorities" who wish to use their particular form of "human capital" to make implicit legal arguments ("If I am African-American and this law firm and this client hired me, how can the company be adjudged discriminatory?"), but I doubt whether this serves the normative goals Professor Wilkins and others like him, including myself, seek to achieve.

24. Wilkins, *supra* note 1, at 863. Thus, defense counsel in race, ethnic, religious, and gender discrimination cases will be matched to defend the category challenged. In the criminal justice area too, it has been noted that minority lawyers will be chosen (both by prosecutors and defense teams) where juries have large minority representation.

25. See, e.g., Carrie Menkel-Meadow, *Portia In a Different Voice: Speculations on A Women's Lawyering Process*, 1 BERKELEY WOMEN'S L. J. 39 (1985) (exploring the effects of growing numbers of female lawyers on the legal profession); Carrie Menkel-Meadow, *What's Gender Got to Do With It?: The Politics and Morality of*

same instrumental argument can be made for all forms of diversification of the legal profession. Clients will be better served by more diverse lawyers, not because of "demographic matching," but because different kinds of people will have different ways of perceiving the world, processing information, and thinking about solutions.²⁶ Thus, diversification may breed innovation in legal services and this, I would think, would be an additional "instrumentalist" argument for clients to insist on greater diversity among lawyers.

Professor Wilkins finds most of these instrumentalist arguments somewhat wanting, even if they have had some palpable success. He recounts the data on minority hiring and income from the ABA's Commission on Minorities in the Profession report.²⁷ He argues that it might be more effective and more honest if we coupled these instrumentalist arguments (greater profitability) to the normative claims that this is just "the right thing to do" as a way of ameliorating past discrimination and injustices to those previously excluded from the legal profession. Thus, in his second argument, he advocates a "principled, moral" argument for clients, particularly corporate clients, to take responsibility for ensuring that law firms hire and fairly utilize minority lawyers.

These normative arguments consist of claims that all citizens should "help rectify the continuing effects of racial injustice."²⁸ Corporate clients in particular are argued to have a greater social responsibility, or at least a social responsibility particular to them as business entities,²⁹ and to satisfy certain "stakeholder" interests beyond simple short-term bottom line profit.³⁰ Additionally, the argu-

an Ethic of Care, 22 N.Y.U. REV. L. & SOC. CHANGE 265 (1996) (examining the relationship of gender to an ethic of care); *Culture Clash*, *supra* note 7.

26. Louis Auchincloss develops this point nicely, if frighteningly, by showing how the younger, more rapacious generation of "1980s lawyers" (all within the same assumed ethnic and social class) chooses different means to accomplish litigation and merger and acquisition ends. LOUIS AUCHINCLOSS, *DIARY OF A YUPPIE* (1981). I do not endorse the ways of either the younger or older lawyer here. I merely suggest that different groups (age cohorts, genders, ethnic and racial groups, immigrants, natives, religious groups) may bring a broader repertoire to lawyering choices, even within the presumed homogeneity of our legal educations, that could very well benefit clients instrumentally in giving them a wider choice of options.

27. Wilkins, *supra* note 1, at 858; American Bar Association Commission on Minorities in the Profession: *Into the Mainstream: Report of the Minority Counsel Demonstration Project 1988-91*.

28. Wilkins, *supra* note 1, at 868.

29. *Id.* at 872. Professor Wilkins also argues that corporations may have a special responsibility to ensure equality in law firms to the extent that their own practices created the economic and other conditions that perpetuated racial and other inequalities. *Id.* at 874.

30. *Id.* at 872-73. Corporate stakeholders include shareholders, suppliers, customers, the local community in which a business may be located and, some would argue, the larger global community. Consider the reputational condemnation that Nike is experiencing for its use of poorly paid foreign labor in the court of public opinion (and in the pages of the *Doonesbury* comic strip). While Professor Wilkins makes an argument for "corporate image" in the instrumentalist part of his paper, here he means to suggest that corporate entities have a duty to act socially responsibly, as well as projecting an image that will facilitate profit-making. This raises empirical questions about the importance of a socially conscious "image" versus action, both in the market place and in moral attacks on particular companies. Consider the moral repulsion directed against, but the continued profitability of, the tobacco companies and the economic and moral conflicts about companies doing business in South Africa during the regime of apartheid.

ments suggest that a modern and more realistic reconstruction of the agency model of lawyer-client interaction will demonstrate that corporations and their law firms form “joint ventures” with interdependent moral responsibilities to each other, and possibly with each other as to third parties.³¹

Professor Wilkins presents a useful review of how the *Model Rules* and conventional agency principles might provide some arguments for clients to affect lawyer choices in positive ways, such as (1) reassigning “staffing” decisions to the “objectives” side of the means-objectives division of Rule 1.2,³² (2) using indemnification and compensation rules to control staffing, training, and assignment of lawyers,³³ and (3) arguing that as information asymmetries have been reduced between lawyer and client (at least among some corporate clients), law firms may be more like “employees” than agents, and subject to greater control³⁴ by their client-employers.

Professor Wilkins’ most creative contribution here is to ask us to reconceive the lawyer-client relation as one of “joint venture” and mutual responsibility.³⁵ It is to this theory and approach that I want to pose some questions and concerns.

II. TOWARD A THEORY OF RECIPROCAL RESPONSIBILITY BETWEEN CLIENT AND LAWYER: WHOSE ETHICS? WHOSE RESPONSIBILITIES?

Professor Wilkins is intent on suggesting that corporations, as clients of law firms, have a responsibility in a joint venture to insist on or to encourage law firms to diversify their employee portfolios.³⁶ Why is Professor Wilkins so sure that client corporations will necessarily diversify better than law firms have done themselves with both existing and threatened instrumental and normative incentives? This is an empirical question that requires more study.³⁷ Have America’s

31. *Id.* at 887.

32. MODEL RULES Rule 1.2; *see also* note 11 and accompanying text.

33. Wilkins, *supra* note 1, at 880.

34. As I will comment below, that corporations are exercising more control over their lawyers in a wide variety of spheres, including cost containment, use of alternative dispute resolution and other specific forms of legal strategy, internalization of legal work, etc. is hardly contestable. What is contestable is whether all of these developments are necessarily normatively “good,” either on their own account, or for lawyers and their professional independence, or for the values that Professor Wilkins wants corporations to express and “enforce” on their lawyers. While it may be empirically true that corporations are exercising more control over their lawyers, it is not so clear that this “control” is exercised in ways that are always consistent with Professor Wilkins’ desired normative arguments. There will at least be variations within client conduct because not all corporations act alike.

35. Wilkins, *supra* note 1, at 888-91.

36. *Id.*

37. In a recent CBS/New York Times Poll (December 13, 1997, based on a national sample and an oversampled California sub-sample, conducted from December 6-9, 1997, n = 1,258 adults), there were marked differences among blacks and whites on the meaning, effectiveness, and desirability of “affirmative action.” For example, 23% of all blacks, but only 13% of whites thought that “affirmative action” meant “equal rights”; 77% of blacks, but only 32% of all whites, thought it was “very important” to have a racially diverse workforce; and 22% of whites thought that when equally qualified people were available for hiring, blacks would get the job, while 83% of blacks thought that whites would get the job in the same circumstances. While

corporations diversified more, better, and faster than law firms or other kinds of social institutions? What has the effect been of the ABA Commission on Minorities, the addition of anti-discrimination provisions to lawyers' ethics codes,³⁸ and the application of Title VII to law firms³⁹ and to law school anti-discrimination initiatives in recruiting? Are some corporate sectors better or worse than others? Are there regional or size variations? A case must still be made that the joint venture approach will improve diversification.

Will normative arguments or responsibilities imposed on the client actually improve diversification? From where are the client's ethical duties or responsibilities to diversify derived? Why are corporate clients assumed to be a positive influence on this normative end? I fear that Professor Wilkins has fallen into the trap of the 1990s embrace of privatization. If laws and formal exhortations have not done their full job for providing equality of access, opportunity, and achievement in the legal profession, can we hope that the private sector will step up to the plate and finish the work that a supposedly public-minded profession has been unable to do for itself? Has the private sector really "morphed" that much in the twenty-five years that "customer preferences" claimed by corporations were used to defend discriminatory actions to now demand more equality from corporate suppliers, like lawyers? Maybe, but I need some more empirical evidence to convince me of this; evidence of both the empirical reality and that the "sources" of corporate commitment or responsibility for diversity are likely to be durable in this joint venture.

this poll of individuals cannot explain corporate attitudes, behaviors, or actual hiring statistics, it does demonstrate the continuing racial divide in attitudes toward affirmative action hiring, and the need for a diversified workforce. Whether this racial divide of attitudes extends to corporate or law firm hiring cannot be deduced from this data. With census and other data sets available, it might be useful to analyze whether law firms, large corporations, or other segments of the economy have been more or less successful at diversifying the workforce. We know that, generally, the public sector has often been more responsive to civil rights law and diversification, Menkel-Meadow, *supra* note 19, but I suspect there will not be simple sectoral differentiation here. Regionalisms might make law firms and their corporate clients in one area more similar to each other in particular employment sectors. I suspect that some industries will clearly be "better" than others and similarly, law firms that service particular sectors may be "better" than others. Thus, as an empirical matter, it is not clear to me that urging corporate clients to ask their lawyers to diversify will necessarily improve matters in the legal workforce. It might just be that even though law firm records on these matters are not good, they may be better or no worse than those of their corporate clients. We need more data to assess these arguments. See BARBARA F. RESKIN, *THE REALITIES OF AFFIRMATIVE ACTION IN EMPLOYMENT* (1998) (reporting on and reviewing social science evidence on affirmative action in employment in the U.S.). Professor Wilkins could simply reply that whether "better or worse," the additional "pressure" of a client responsibility to diversify could at least be additive to current law firm efforts.

38. See, e.g., DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT Rule 9.1 (advising that "a lawyer shall not discriminate against any individual in conditions of employment because of the individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap"); Robert T. Begg, *Revoking the Lawyer's License to Discriminate in New York: The Demise of a Traditional Professional Prerogative*, 7 GEO. J. LEGAL ETHICS 275 (1993) (describing how the laws and rules of New York affect lawyers' right to discriminate in selecting clients).

39. See *Hishon v. King & Spaulding*, 467 U.S. 69 (1984) (holding that Title VII can be applied where a law firm associate was denied partnership status because of sex-based discrimination).

Thus, Professor Wilkins must explain and defend the claim that imposing a corporate client responsibility to demand diversification from lawyers will actually increase the diversification of the legal profession. It may be that Professor Wilkins can defend this claim narrowly — that with respect to diversification in particular, corporations have a duty/obligation and responsibility to require their suppliers to diversify as a matter of correcting past corporate and legal profession injustices. This would be a particularized “reparations” argument and could stand or fall on general reparations principles⁴⁰ or on a more legalistic “reparations” argument from past discrimination.⁴¹ Corporations have a particular responsibility to remedy (in any way they can, including in the hiring of lawyers and selection of “suppliers”) that which they helped cause — a discriminatory society. On the other hand, why shouldn’t law firms, because lawyers have a state-supported monopoly on the licensure of lawyers, also have a particular responsibility to remedy the effects of past discrimination in their “public” profession?⁴²

Or, if a more generalized source of corporate responsibility is to be articulated, Professor Wilkins may be returning us to arguments made for Corporate Social Responsibility in the late 1960s and 1970s (although many of these efforts may have originated with lawyers drafting corporate social responsibility plans for their clients). In a sense, he is making this claim because the old arguments for corporate social responsibility are very similar to the current “stakeholder” arguments for wider corporate responsibility than only to short-term shareholder profit maximizing.⁴³

40. See, e.g., Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 321 (1987) (discussing standard objections to reparation claims). I have always liked the German word for reparations, “wiedergutmachung” (to make good again), as an expression of repayment for racial harms. My family members were eligible for some forms of reparations for their losses following the Holocaust.

41. If past discrimination is the standard, there may be an advantage to allocating this function to the private corporate sector. There would be no legalistic need to “prove” intentional past discrimination as is required for governmental discriminatory actions and remedial programs. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (showing the burden of proving past discrimination); *Washington v. Davis*, 426 U.S. 229 (1976) (stating the fifth amendment requirement to prove racial discrimination by showing intent to discriminate); Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing the challenge of the *Davis* motive standard and demonstrating that much discrimination is “unconscious” or not intentional as defined by law).

42. Many have argued that the state monopoly over the entry and regulation of the legal profession obligates those who benefit from that monopoly to perform “public service” and to work for the “public good.” See, e.g., ROBERT A. KATZMANN, *THE LAW FIRM AND THE PUBLIC GOOD* (1995) (discussing why lawyers have an obligation to do public interest work).

43. Is corporate stakeholder theory old wine in new bottles? This is fine with me, since I think discussion of wider corporate responsibility to a wider berth of constituents is appropriate. In many respects, the world we currently inhabit, including multi-state, multi-national corporate ownership, is much more affected by the actions of large and distant corporations than by the state or by smaller business entities. One major difficulty with corporate responsibility or stakeholder theory is that with multi-nationals, it is even more problematic to determine where the “source” of ethics or social responsibility should come from. Do European or Asian

To the extent that Professor Wilkins' argument for corporate client responsibility for diversity rests on the "joint venture" model of mutual or reciprocal responsibility that is different from the traditional principal-agent model, there are some important additional issues that must be explored. If a "joint venture" model of mutual responsibility suggests more client control over both the means and objectives of the deal or representation, then Professor Wilkins must elaborate what, if anything, the lawyer is left to decide on her own. Will all decisions, not just about diversification of the representation, have to be subject to more "client responsibility"? In other words, if joint venturing is the model, how can corporate-client responsibility be limited only to issues of diversification? Do corporate clients have "normative" ethical responsibilities only in this area, or in others? What about client "responsibility" for non-normative issues, like whether to pursue a particular course of action (like the reallocation of or loss of jobs from a particular merger or acquisition)? Furthermore, if the "joint venture" model applies only where conditions like "information asymmetries" have been reduced by modern technology, changed economics, or more sophisticated clients, will there be different standards for lawyer-client responsibilities dependent on how close a relationship comes to the "joint venture" model? What if the individual client is Bill Gates or Donald Trump? A small business operator with under 15 employees who wants to discriminate? Again, why should the "joint venture" model necessarily assume a non-discriminatory obligation on the part of the client or the lawyer?

Despite these questions and concerns, I want to suggest that the notion of client and lawyer mutual or reciprocal responsibilities is one that is compelling to me and which more accurately reflects what the lawyer-client relationship should be, even beyond the corporate client context in which Professor Wilkins situates his argument. There are a number of legal profession scholars who recognize, in whatever words we use, what Professor Wilkins articulates here. Professor Warren Lehman suggests a "moral dialogue."⁴⁴ Professor David Luban suggests the notion of the lawyer having to do "justice."⁴⁵ Professor Howard Lesnick suggests that it does not matter who ultimately makes a decision as long as the client and lawyer treat each other as independent, caring individuals with their own interests and sensibilities.⁴⁶ Professor Stephen Ellmann and I suggest that

"owned" corporations bear a social responsibility for our domestic racist and sexist policies? Certainly they have their own "guilt" on these issues, but will responsibility be judged on global or national bases?

44. See Lehman, *supra* note 13, at 1091 (suggesting that a lawyer-client discussion of moral issues should be a necessary component of legal representation).

45. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988) (discussing the special relationship of the public interest lawyer to the client, a "political" relationship justifying different kinds of lawyer-client control).

46. See Howard Lesnick, *Comment, in BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM 200-02* (Elizabeth Dvorkin et al. eds., 1981). Professor Lesnick suggests that while following the informed consent literature in lawyer-client decision-making, he has come to the view that it does not matter who is "allocated" the final decision-making responsibility as long as the client and lawyer treat each other as independent thinkers and moral beings with their own needs and sensibilities. Thus, the "joint

the conception of an "ethic of care" is appropriate in the lawyer-client relationship.⁴⁷

The lawyer-client relationship does impose duties and obligations, as well as responsibilities and rights, on both sides. Whether it is the ethics of relationship such as not to lie to or cheat each other,⁴⁸ and to reduce the "paternalism" that exists when either lawyer or client dominate each other, or other substantive values like doing "justice" with the products of the relationship, lawyers and clients, like flight attendants and passengers, are mutually responsible for each other's safety. Whether such "joint ventures" of mutual relationships apply only in the service professions, or whether they should apply more broadly to our consumerist society in the production of things, as well as services, is a question I will leave for another day.⁴⁹

Thus, Professor Wilkins argues for expanding instrumentalist arguments for "demand-side" client pressures on law firms to diversify by including a set of normative arguments that asks corporate clients, and particularly the in-house lawyers in corporations who control corporate legal activity, to act "socially responsible" in their joint ventures with their lawyers by seeking increased employment of minority lawyers. These goals are laudable and are ones with which I am in agreement.

Nevertheless, the arguments require more elaboration and justification. Where are the client's duties or responsibilities to be derived? If clients are to be socially responsible and demand obligations of their lawyers in this regard, where else will clients have the "right" to demand ethical or socially responsible activity from their lawyers? And why should we assume that clients will be any better on this issue, or any other issue, than the lawyers they hire who, at the very least, have a formal body of ethical requirements governing their behavior. What else besides laudable "normative" goals might clients be able to ask of their joint venturers?⁵⁰

venture" here is moral, relational, and discursive rather than drawing the bright lines of ethics rules or legal agency principles. For Lesnick, the issue is one of mutual caring of client and lawyer and a real human grappling with both the legal and non-legal issues implicated in any representation. *See also* MODEL CODE EC 7-7 (recognizing the lawyer's obligation to discuss non-legal aspects of the client's case or matter).

47. *See* Menkel-Meadow, *What's Gender Got to Do With It?*, *supra* note 25, at 256 (discussing the importance of an ethic of care in all lawyering, whether, gendered or not); Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993) (exploring how a more "connective" approach improves the attorney-client relationship).

48. *See, e.g.*, Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990) (discussing the obligations of attorneys to disclose information to clients); Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761 (1990) (proposing a rule of candor in the attorney-client relationship).

49. If clients have responsibilities to their lawyers, do producers of products have obligations and responsibilities to the consumers of those products? If responsibilities are "mutual," does that reinvigorate consumer "assumptions of the risk" or "contributory negligence" defenses if we are all to act "responsibly" within modern joint venture relationships? Or is the "passive" purchase and use of products outside the scope of Professor Wilkins' "joint ventures"?

50. Professor Wilkins is not the first to conceive of lawyers and clients as "co-venturers." *See* HOWARD

Finally, because I am most sympathetic to the notion of reciprocal responsibilities and obligations between clients⁵¹ and lawyers on this issue, how can we develop and elaborate a substantive and procedural set of mutual obligations between lawyers and clients? If relational ethics, informed consent, law, and contract set some of the content of the relationship between lawyers and clients, from what other sources can we derive obligations for lawyers and clients to be “socially responsible” to each other⁵² and further, to those who are effected by their work together?

Professor Wilkins has offered us some provocative ideas to think about. He leaves us with much work to complete in order to develop fully a theory and rationale for reciprocal relationships and ethical duties between clients and lawyers, as well as their “mutual” social responsibilities to the rest of us. We should thank him for broadening the scope of “legal ethics” and “professional responsibility” to the other side of legal services — those who benefit from the services. Now we should all get to work to develop the content of legal ethics that would include the responsibilities and obligations of clients as well as lawyers.

LESNICK, BEING A LAWYER: INDIVIDUAL CHOICE AND RESPONSIBILITY IN THE PRACTICE OF LAW 115 (1992) (classifying lawyers and clients as co-venturers).

51. Both Judge Jack Weinstein and I have argued, in the mass tort class action context, that clients who are injured by the same product or in the same accident might have some “communitarian” obligations to each other in sharing legal resources and potential remedies. See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* (1995) (discussing the obligations of multiple plaintiffs to each other); Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159 (1995) (exploring different incentives in mass tort litigation). The sources of these client “communal” and mutual responsibilities to each other are no better defined than those of the client in Professor Wilkins’s joint venture. We simply hope that people will “do the right thing” and “share” scarce resources and not take advantage of each other. Though these arguments supply some of the rationales for various forms of mass tort class action settlements, they have been less than successful in all cases. See *Amchem v. Windsor*, 117 S. Ct. 2231 (1997) (denying class certification due to the lack of class commonality).

52. For analogous arguments that public interest lawyers and clients have “different” relationships and duties to each other, see LUBAN, *supra* note 45; Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (discussing advocacy relationships within the desegregation context with conflicting client constituencies).