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SYMPOSIUM: “SHOULD THE FAMILY BE REPRESENTED AS AN ENTITY?”

Foreword to Symposium on “Should the Family Be Represented as an Entity?”:[†] Reexamining the Family Values of Legal Ethics

Russell G. Pearce*

This symposium on whether the family should be represented as an entity marks another milestone in the development of legal ethics as a field central to understanding the operation of law in our society, and not merely as a set of dry, largely irrelevant rules.¹ It does so by acknowledging that ethical rules of lawyers who represent families have very real consequences for those families. Building on earlier efforts to address this topic,² this symposium’s authors confront what some commentators have described as the individualist impulse of the ethics codes³ and whether this impulse is beneficial or harmful to families. In response to hypotheticals provided by the *Seattle University Law*

† This is the title the editors of the *Seattle University Law Review* selected for this symposium.

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1. For a further discussion of this point, see Russell G. Pearce, *The Union Lawyer’s Obligations to Bargaining Unit Members: A Case Study of the Interdependence of Legal Ethics and Substantive Law*, 37 S. TEX. L. REV. 1095, 1117-26 (1996).

2. See, e.g., Patricia M. Batt, Note, *The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 GEO. J. LEGAL ETHICS 319 (1992); Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 FORDHAM L. REV. 1453 (1994); Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253 (1994); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987). Leading casebooks have also considered these questions. See, e.g., JOHN T. NOONAN, JR. & RICHARD W. PAINTER, PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER 427-34 (1997) (discussing excerpt from Pearce, *supra*).

3. See, e.g., Pearce, *supra* note 2, at 1277-79, 1296-1301; Shaffer, *supra* note 2, at 969-75.

Review,⁴ the articles take very different approaches to analyzing whether the ethics codes are indeed elastic enough to encompass an organic conception of the family or whether new ethics rules are needed or appropriate.

I. FAMILY VALUES AND LEGAL ETHICS

The perceived tension between legal ethics and family representation has resulted in attacks on the legal ethics codes for being antifamily and prompted proposals to change the ethics codes to allow lawyers better to represent families as an entity.⁵

In 1987, Professor Thomas Shaffer condemned the approach of the ethics codes to family representation.⁶ He asserted that in family representation "the lawyer's employer is a family"⁷ and that a family is an "organic community."⁸ To the detriment of the family, the legal ethics codes embody a "sad, corrupting, and untruthful" ethic of "radical individualism,"⁹ which forces lawyers to focus on the differences between individual family members and to neglect the commonalities which are the foundation of the family.¹⁰ Shaffer suggested that lawyers representing families adopt a "paternalistic approach" based on "the virtues of good parents and the failures of bad parents."¹¹

4. See hypotheticals *infra* Appendix.

5. A number of trust and estate practitioners have also sought to defuse this tension by claiming that the legal ethics codes operate differently in the trust and estates area. See generally AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL, COMMENTARIES ON MODEL RULES OF PROFESSIONAL CONDUCT (1993); ABA *Special Probate and Trust Division Study Committee on Professional Responsibility: Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife* (approved by the Section on May 2, 1993); Malcolm A. Moore & Anne K. Hilker, *Representing Both Spouses: The New Section Recommendations*, 7 PROB. & PROP. 26 (July/Aug. 1993). Legal ethics scholars have observed that these efforts distort legal ethics doctrine and offer contradictory policy goals. See Teresa Stanton Collett, *And the Two Shall Become as One . . . Until the Lawyers Are Done*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 101, 129-144 (criticizing proposal for separate simultaneous representation) (1993); Geoffrey C. Hazard, Jr., *Conflict of Interest in Estate Planning for Husband and Wife*, 20 PROB. L. 1, 4 (1994) (noting that "the intimations that probate practice has a law unto itself come only from probate practitioners themselves"); Pearce, *supra* note 2, at 1285-86 (asserting that these proposals diverge significantly from established doctrine and that they "embody a contradictory vision of the family which is both more and less communitarian than established doctrine").

6. Shaffer, *supra* note 2, at 963.

7. *Id.* at 970.

8. *Id.* at 970 n.26.

9. *Id.* at 970.

10. *Id.* at 969-75.

11. *Id.* at 987.

My 1994 article on *Family Values and Legal Ethics*¹² accepted Shaffer's framework, but proposed a somewhat different understanding of the problem and its solution. Recognizing the trend in law and in society to treat the family more as a collection of individuals than a community,¹³ I noted that at present, legal ethics (similar to other areas of law) treats families as both a collection of individuals and a community.¹⁴ On one hand, the conflicts rules do permit family members to consent to their joint representation by a single attorney.¹⁵ On the other hand, even where they consent, the rules bar such representation if the lawyer objectively determines that the representation of any of them will be adversely affected by joint representation.¹⁶

This provision limits family representation in three ways. First, it forbids lawyers from representing families in some circumstances where they want such representation. Second, it describes families as collections of separable individuals by expressly asking lawyers only to identify differences between family members and not to promote commonalities.¹⁷ Third, it gives lawyers the incentive to view family members as a collection of individuals. The lawyer who errs in failing to identify potential differences between family members faces sanctions or disqualification, which are not a threat to the lawyer who insists on representing only a separate individual.¹⁸

To respect both the group and individual aspects of families, I proposed Optional Family Representation.¹⁹ Optional Family Representation builds on the suggestions of Patricia Batt²⁰ and

12. Pearce, *supra* note 2.

13. *Id.* at 1274-77.

14. *Id.* at 1274-79. For a more complete discussion of the shift from understanding the family as a community to understanding it as a collection of individuals, see Janet L. Dolgin, *The Morality of Choice: Estate Planning and the Client Who Chooses Not to Choose*, 22 SEATTLE U. L. REV. 31 (1998).

15. Pearce, *supra* note 2, at 1279. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983) [hereinafter MODEL RULES]. For a more comprehensive analysis of established legal ethics doctrine, see Pearce, *supra* note 2, at 1259-70.

16. See Pearce, *supra* note 2, at 1279. See MODEL RULES, *supra* note 15, Rule 1.7(b).

17. Pearce, *supra* note 2, at 1278.

18. Pearce, *supra* note 2, at 1279. Cf. Shaffer, *supra* note 2, at 974 (noting that "[t]he safer recourse, should fissures appear in the human harmony that first allowed the lawyer to be lawyer for the group, is to stand back, let things fall apart, and then take professional refuge from the falling debris by withdrawing from the representation."). For a discussion of possible sanctions, including liability, see Steven H. Hobbs, *Family Matters: Nonwaivable Conflicts of Interest in Family Law*, 22 SEATTLE U. L. REV. 57 (1998).

19. Pearce, *supra* note 2, at 1294-1301 (explaining benefits of optional family representation).

20. Batt, *supra* note 2.

Stephen Ellmann²¹ that families are appropriate for representation as groups similar to the entity representation provided under Rule 1.13.²² It permits lawyers to represent families who choose family representation despite the existence of nonwaivable conflicts and encourages lawyers to respect the harmonies of these families as well as their differences. To implement these changes, I suggested modifying existing rules to accommodate small groups, rather than to create a rule specifically for families.²³ Families could choose representation as a collection of individuals under the existing rules or could choose family representation under the following conditions: (1) they establish that a bona fide group identity exists and create procedures for communicating information and making decisions;²⁴ (2) the lawyer must inform members of the advantages and disadvantages of group representation at the initiation of representation and at all times when new advantages and disadvantages arise;²⁵ (3) they agree that confidentiality will not exist within the group;²⁶ and (4) for purposes of withdrawal from representation, "the lawyer's representation should be deemed to apply to group members in their individual capacity as well as their group affiliation."²⁷

Teresa Collett and Geoffrey C. Hazard, Jr. have defended the established doctrine against these proposals for family representation. They argue that families are not legal entities, that family representation affords lawyers too much discretion, and that the established doctrine is necessary to protect individual family members.²⁸ I have responded to these critiques in a previous article.²⁹

21. Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1115-18 (1992).

22. MODEL RULES, *supra* note 15, Rule 1.13.

23. Pearce, *supra* note 2, at 1313-14, n.414.

24. *Id.* at 1312-13.

25. *Id.* at 1313.

26. *Id.*

27. *Id.*

28. Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 FORDHAM L. REV. 1453, 184-1501 (1994); Geoffrey C. Hazard, Jr., *Conflict of Interest in Estate Planning for Husband and Wife*, 20 THE PROB. LAWYER 1, 19-22 (1994).

29. Pearce, *supra* note 2, at 1301-12 (responding, *inter alia*, to arguments that "families lack identifiable group characteristics necessary to legal representation," "family representation will result in the lawyer substituting her judgment for that of the family," and "power imbalances within the family make family representation inappropriate") (initial capitalization omitted).

II. THE CONTINUING DEBATE: SHOULD THE FAMILY BE REPRESENTED AS AN ENTITY?

The editors of the *Seattle University Law Review* decided to expand the debate by creating this symposium on whether families should be represented as entities. To sharpen the focus of the submissions, the editors, with assistance from Teresa Collett and myself, developed two hypotheticals.³⁰ They asked the authors to address both the general topic and the hypotheticals. The resulting submissions take the debate on family representation to a new stage of refinement and complexity.

A. *The Hypotheticals*

The hypotheticals present situations where the lawyer would either have to deny representation or take a risk under established legal ethics doctrine. In both, married couples consult an attorney for estate planning and related advice under circumstances where significant potential differences abound. In both, one member of the couple seeks to delegate all decisions to the other. In the first hypothetical, a wealthy and well-educated wife seeks to delegate all decisions to her businessman husband because of her religious belief that wives should be submissive to husbands.³¹ In the second, a construction supervisor who plans to become a house husband seeks to delegate all decisions to his physician wife.³²

B. *Reexamining the Family Values of Legal Ethics*

The five articles in this symposium enhance the existing debate and extend it into new areas. At the risk of oversimplifying these unique and fascinating articles, I will try to describe briefly how they fit within the context of scholarly consideration of family representation and, in particular, how they compare with my proposal for Optional Family Representation. Three of the articles offer important contributions within the current framework. They accept and—in two instances—help explain the individualist basis of the legal ethics rules. The two remaining articles mark a departure—one larger than the other—from the existing scholarly debate in that they employ the

30. See *infra* Appendix.

31. Hypothetical I, app. at 14.

32. Hypothetical II, app. at 16.

existing ethics rules to family representation in a largely communitarian fashion.³³

1. Modeling Established Doctrine

In *The Power of Narrative: Listening to the Initial Client Interview*,³⁴ Raven Lidman uses a dialogue between lawyer, husband, and wife to provide a model of the approach of established legal ethics doctrine. In the dialogue, the lawyer tells the spouses in Hypothetical One that "I cannot represent you as a family."³⁵ He explains that as a matter of legal ethics and family law, "I don't write a family will, I write a will for each person."³⁶

Within the context of established doctrine, Lidman explores the dynamics between lawyer and client. Lidman's lawyer both informs the clients of the law's individualist bias and offers to be sensitive to the couple's preferences within that framework. He proposes to "always try to be conscious of how your choices could affect your children, when they come along, as well as others in your family. I recognize that family ties are often our most significant relationships."³⁷ Lidman suggests that the clients' response to the lawyer's disclosures is uncertain. She offers two versions. In one, the clients "wish it were simpler," but appreciate the lawyer's candor.³⁸ In the other, the clients appreciate his candor, but feel "he was sort of patronizing" and decide to consult another lawyer.³⁹

33. Until now, the participants in the existing debate have treated the legal ethics codes as embodying an individualistic orientation and have disputed whether an individualistic or communitarian orientation is preferable. See *supra* p. 3. However, in the context of bar organization deliberations, arguments for a communitarian construction of the legal ethics codes have been offered. For references to these arguments and critiques of these arguments, see *supra* note 5. Apparently as a result of lobbying by bar groups, the American Law Institute modified the Restatement of the Law Governing Lawyers to permit lawyers greater flexibility in limiting their obligations to individual family members in joint representation. See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 112 Illustrations 2 & 3 & Comment L (proposed Final Draft No. 1 March 29, 1996) (comment describes how the Council reversed its earlier position that "disclosure to an affected, non-informed co-client was mandatory" in favor of the view of the American College of Trusts and Estates Council); compare RESTATEMENT OF THE LAW GOVERNING LAWYERS (tent. Draft No. 4 1991) (emphasizing the potential for conflicts in drafting reciprocal wills for spouses) with RESTATEMENT (March 29, 1996), *supra*, at § 211 Comment c, Illustrations 1 & 3 (emphasizing circumstances where consent is not necessary to represent spouses in drafting wills).

34. 22 SEATTLE U. L. REV. 17 (1998).

35. *Id.* at 28.

36. *Id.* at 23.

37. *Id.* at 28.

38. Lidman, *supra* note 34, at 28.

39. *Id.* at 29.

2. Significant New Contributions to the Current Framework

Two articles advance the current framework of debate through theoretical and doctrinal development of established doctrine, but take different approaches to the preferred representation of families.

In *The Morality of Choice: Estate Planning and the Client Who Chooses Not to Choose*,⁴⁰ Janet Dolgin offers what is probably the most sophisticated account thus far of how the legal ethics rules for representing families fit within the context of developments in family law and family relationships. She traces “the transformation of American families (and correspondingly of family and of estate law) within the past half century.”⁴¹ She explains how families and the laws governing families have, in general, shifted from the notion of the “family as a hierarchical social whole” to the family “as collections of individuals, free to structure the scope of their association. . . .”⁴² As Dolgin notes, though, “a new ideology and morality of domestic relationships have not simply replaced older ones. Rather, a wide set of options reflecting ‘modern’ and ‘traditional’ families are present at once.”⁴³ The result is “ambivalence and confusion.”⁴⁴

In this context, Dolgin generally prefers the legal profession’s “morality of individualism”⁴⁵ to Optional Family Representation.⁴⁶ She acknowledges the benefits of Optional Family Representation for the spouses in the two hypotheticals who present a clear understanding of their relationship as a communal enterprise. For them, “[t]he optional family approach harmonizes with the parties’ own understandings of their relationship, while offering some protection to the spouse who chooses subservience.”⁴⁷ But she concludes that Optional

40. 22 SEATTLE U. L. REV. 31 (1998).

41. *Id.* at 39.

42. *Id.* at 42.

43. *Id.* at 49.

44. *Id.*

45. Dolgin, *supra* note 40, at 54-55.

46. Dolgin ironically observes that strategies for providing families with choices between individualist and communitarian “options” in the name of respecting communitarian families (such as offered by Optional Family Representation discussed in text at notes 20-29 above or the communitarian analyses of the existing legal ethics rules discussed in Part II.B.3. below) “are products of modernity’s obsession with choice.” *Id.* at 39. Communitarian choices need not, of course, serve the goal of returning to traditional understandings of the family. Where they do, however, Dolgin insightfully notes that “[t]raditional domestic life, understood as *chosen* rather than as an inevitable correlate of natural or supernatural truths, illustrates the allure of modernity more firmly than it represents the preservation of a hallowed past.” *Id.* at 40 (emphasis in original).

47. *Id.* at 52.

Family Representation asks too much of families. Most families are uncertain about the contours of their relationship and, for all families, the possibility of changes in understanding exist.⁴⁸

Dolgin also suggests that Optional Family Representation asks too much of lawyers. She recognizes that "Optional family representation is more likely to encourage lawyers to be more aware and careful than alternative approaches."⁴⁹ It does so by "actively involv[ing] clients in designing the terms of their own representation" and by requiring "lawyers to acknowledge individual and communal concerns and to be aware of areas of harmony as well as areas of disharmony between spouses."⁵⁰ Dolgin suggests that these tasks may be beyond the competence of most lawyers, who "will not be adequately attuned to the communal interests at stake" or "identify consciously or less consciously with one spouse or the other."⁵¹ She also doubts that lawyers will have the same facility in "attending to both the group and individual aspects of the family" as psychologists.⁵² She suggests that "even were lawyers able, without extensive training, to understand family identities, the law itself limits the usefulness of that understanding by failing—or perhaps refusing—to recognize communal rights."⁵³

While reaching a different conclusion, Stephen Hobbs similarly makes a significant—but very different—contribution to our understanding of the individualist orientation of the legal ethics codes. In *Family Matters: Nonwaivable Conflicts of Interest in Family Law*,⁵⁴ Hobbs provides a comprehensive analysis of the cases and rules regarding the nonwaivability of conflicts in family representation. He then employs the principles underlying legal ethics doctrine⁵⁵ and the insights of family systems theory⁵⁶ to explain and apply Optional Family Representation to the families in the two hypotheticals.

Hobbs's thorough analysis demonstrates fairly conclusively that the law and ethics of lawyering is largely, but not wholly, individualistic in its approach to family representation.⁵⁷ While the rules

48. *Id.* at 52-53.

49. *Id.* at 55.

50. *Id.*

51. Dolgin, *supra* note 40, at 55.

52. *Id.*

53. *Id.*

54. 22 SEATTLE U. L. REV. 57 (1998).

55. *Id.* at 86-87 (particularly "two key factors, loyalty and zealotness").

56. Hobbs describes family systems theory at *id.* at 60-65.

57. This conclusion contrasts with Shaffer's observation that the legal ethics codes embody "radical individualism," *see supra* note 9, and is consistent with my suggestion that the codes treat families as both collections of individuals and a community. *See supra* note 14.

themselves have individualistic implications,⁵⁸ the cases and bar opinions are actually quite mixed in how they construe the rules.⁵⁹ Some decisions have a more individualist result, while others take a more communitarian approach to the family.⁶⁰ Nonetheless, as discussed above, even this diversity of results favors an individualist approach. The lawyer who abandons the ethic of individualism places herself at risk.⁶¹

Hobbs moves beyond a description of the doctrine to propose a method for analyzing nonwaivable conflicts. He starts with two principles he derives from the doctrine—loyalty and zealous representation.⁶² He asks that lawyers represent both the individuals and the family loyally and zealously.⁶³ To achieve these goals, he employs Optional Family Representation, which permits families to choose representation as a family unit even where “individual interests may be different or conflicting.”⁶⁴ In accepting such representation, the “lawyer must conduct a self-assessment of the risks involved [and] . . . consider whether he or she can provide the requested services in a manner that honors the family’s concerns and honors the fundamental principles of professionalism.”⁶⁵

In both hypotheticals, Hobbs urges representation despite the potential conflicts and the actual risks to one of the spouses. He suggests that loyalty to the family and the individuals requires the lawyer to honor the choices they make.⁶⁶ Zealousness requires the lawyer to explain the advantages and disadvantages to the individuals

58. Hobbs, *supra* note 54, at 68, 79.

59. *Id.* at 65-89 (analyzing cases and bar opinions).

60. Some of these distinctions may result from the different tests courts use for determining whether a conflict exists in the contexts of disqualification motions, criminal proceedings (both in terms of representation and appeals based on claims of ineffective assistance of counsel), and disciplinary proceedings. Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 *FORDHAM L. REV.* 71, 110-13 (1996) (arguing that conflicts standards may be different in the disqualification versus disciplinary context); Bruce A. Green, *Through a Glass, Darkly? How the Courts See Motions to Disqualify Criminal Defense Lawyers*, 89 *COLUM. L. REV.* 1201, 1211-22 (1989) (Supreme Court decision on disqualification in criminal case establishes standard independent of disciplinary rules).

61. Hobbs describes the application of the rules to multiple client representation as characterized by “softness and uncertainty.” Hobbs, *supra* note 54, at 59 n.5. See *supra* note 18 and accompanying text.

62. *Id.* at 60.

63. *Id.* at 65.

64. *Id.* at 90. For a description of the elements of Optional Family Representation, see *supra* text at notes 25-29.

65. Hobbs, *supra* note 54, at 90.

66. *Id.* at 91.

and the family.⁶⁷ Hobbs further advises “the lawyer to gauge the family dynamics to determine if the requested services will be used to pursue a common goal,”⁶⁸ as well as whether the lawyer’s temperament and ability permit her to undertake the representation.⁶⁹

In the first hypothetical, Hobbs advises representation if the husband shares his wife’s religious values and the family operates “under a jointly-held belief system, which then informs me how they experience the world and make decisions.”⁷⁰ In the second hypothetical, Hobbs also advises respecting the family’s choices, provided that the lawyer makes full disclosure of individual options and investigates the “history” and “dream[s]” of the family to ensure that the wife is not using the representation to exploit the husband.⁷¹ In both hypotheticals, the lawyer must “assess[] his or her ability” to provide “appropriate[] and professional[]” representation⁷² in light of the demand for “practice experience and family counseling skills” necessary to manage “the conflicts inherent in providing legal services to multiple family members.”⁷³

3. Communitarian Constructions of the Legal Ethics Codes

In contrast to the other authors in the symposium (and the previous analysis of Tom Shaffer and myself),⁷⁴ two articles offer a communitarian construction of the legal ethics rules, which may be anticipating new developments in established doctrine.⁷⁵ These articles differ both in their proposed guidelines for representing families and in the justifications they offer for their preferred guidelines. This Foreword will focus primarily on their proposed guidelines.⁷⁶

67. *Id.*

68. *Id.* at 92.

69. *Id.*

70. Hobbs, *supra* note 54, at 92-93.

71. *Id.* at 94.

72. *Id.* at 95.

73. *Id.*

74. *See supra* note 2. *See also* pp. 3-4.

75. For example, the organized efforts of trust and estates lawyers recently appear to have succeeded in modifying the Restatement to reflect a more communitarian approach, at least to the extent of recommending that lawyers have greater discretion to limit their obligations to individual family members. *See supra* note 33.

76. The articles differ on whether it is appropriate to analogize delegations of authority from one spouse to another to business delegations, Naomi Cahn & Robert Tuttle, *Dependency and Delegation: The Ethics of Marital Representation*, 22 SEATTLE U. L. REV. 97, 106 (1998); Teresa Stanton Collett, *Love Among the Ruins: The Ethics of Counseling Happily Married Couples*, 22 SEATTLE U. L. REV. 139, 158 (1998); and on the danger of subordination of women posed by “traditional” family arrangements. Cahn & Tuttle, *supra* at 119-21; Collett, *supra* at 159-67.

In *Dependency and Delegation: The Ethics of Marital Representation*,⁷⁷ Naomi Cahn and Robert Tuttle offer the more communitarian understanding of the legal ethics codes. They construe the legal ethics codes to permit family members broadly to waive conflicts in order to facilitate representation of the family which views itself as a unit.

This understanding apparently derives from their view that "typically" the only nonwaivable conflicts under the legal ethics codes "involv[e] simultaneous representation of adverse parties in litigation."⁷⁸ In making this assertion, they take a position contrary to that of established doctrine. As Stephen Hobbs observes, a sphere of nonwaivable conflicts exists.⁷⁹ Consent is not sufficient to waive a conflict under the ethics rules which require that the lawyer objectively determine that the parties will receive adequate representation.⁸⁰

By adopting a more communitarian construction of the legal ethics codes, Cahn and Tuttle are able to propose a broad delegation of authority from one spouse to another under the current legal ethics rules. They would allow initial consent to delegation to abrogate the need for continuing informed consent for each client, except where the delegated spouse takes "action[] that has potential to 'substantially injure' the delegating spouse."⁸¹

This delegation is significantly broader than that permissible under either established legal ethics doctrine or Optional Family Representation. In addition to allowing representation where nonwaivable conflicts exist, Cahn and Tuttle would limit required disclosures after the initial consent to those regarding "substantial injury" to the delegating spouse. In contrast, Rule 1.7(b) requires disclosure and consent whenever the representation of the delegating spouse "may be materially limited by the lawyer's responsibilities" to the delegated spouse,⁸² a lower test than "substantial damage."

The Cahn-Tuttle approach also provides less protection to individual family members than Optional Family Representation.

77. Cahn & Tuttle, *supra* note 76.

78. *Id.* at 100.

79. Hobbs, *supra* note 54, at 85.

80. See, e.g., MODEL RULES, *supra* note 15, Rule 1.7 (requiring in addition to consent that the representation satisfy an objective requirement that "the representation will not adversely affect the relationship" under Rule 1.7(a) and that "the representation will not be adversely affected" under Rule 1.7(b)).

81. Cahn & Tuttle, *supra* note 76, at 126.

82. MODEL RULES, *supra* note 15, Rule 1.7(b). The Comment to Rule 1.7 makes clear that Rule 1.7 applies to conflicts that "arise[] after representation has been undertaken." MODEL RULES, *supra* note 15, Rule 1.7 cmt. para. 2. See also CHARLES WOLFRAM, MODERN LEGAL ETHICS (1986).

Although both proposals do permit families to consent to representation as a group, they differ in their requirement for continuing consultation. Optional Family Representation requires communication of all material information to all family members, including all new advantages and disadvantages to Optional Family Representation whenever they arise.⁸³

Despite the limited protection for individual family members under their proposal, Cahn and Tuttle do acknowledge the risks which representation of the family as a unit poses for its individual members. Indeed, their discussion of dependency, vulnerability, autonomy and manipulation within the family, and the potential risks to women in representation of the family as a community, makes a significant contribution to the literature.⁸⁴

Although her approach is similar to that of Cahn and Tuttle in its advocacy of the communitarian potential of the legal ethics rules,⁸⁵ Teresa Collett's proposal in *Love Among the Ruins: The Ethics of Counseling Happily Married Couples*,⁸⁶ is more consistent with established doctrine. Without suggesting any change in the existing rules, Collett urges lawyers to respect (and not to patronize) clients who take a more communitarian approach to their family relationships.⁸⁷ In both hypotheticals, she eloquently argues for lawyers to accept the delegation of authority from one spouse to another so long as the delegation is consistent with the law⁸⁸ and "the lawyer's ability to provide competent representation."⁸⁹

83. See *supra* notes 24-27 and accompanying text.

84. Cahn & Tuttle, *supra* note 76, at 111-21.

85. In her earlier work, Collett has championed a more individualistic approach to the ethics rules and opposed communitarian proposals for family representation. See generally Collett, *Intergenerational Representation*, *supra* note 2. See also Cahn & Tuttle, *supra* note 76, at 104 (citing Collett's opposition to communitarian forms of representation); Hobbs, *supra* note 54, at 62 (same). In her present article, she does not explain whether her current approach represents a shift in her thinking or an elaboration. The relatively narrow communitarian scope of her proposal suggests she may only be expanding the bounds of her analysis within the context of an individualistic framework and not abandoning her earlier conclusions.

86. Collett, *supra* note 76.

87. Collett criticizes Cahn and Tuttle for advocating "paternalism." *Id.* at 164. Collett explains the reasonableness of Ruth's request (in the first hypothetical) to delegate decisions to Bob in light of her religious belief in "her duty of submission [and] her husband's duty of servant leadership." *Id.* at 152. She explains how Joe's delegation (in the second hypothetical) "seems premised upon a concept of 'burdens borne,' [under which] individuals who bear the greatest burden of complying with a decision should have the greatest say in making the decision." *Id.* at 169.

88. *Id.* at 164.

89. Collett, *supra* note 76, at 167.

Collett's requirement of competent representation leads her closer than Cahn and Tuttle to established doctrine. In her view, competent representation requires full participation in the representation by both spouses.⁹⁰ Collett would therefore allow a spouse to delegate decision making authority, but (unlike Cahn and Tuttle) would not permit delegation of participation. With her insistence on mandatory participation of all family members, her proposal comes much closer than Cahn and Tuttle's proposal to Rule 1.7(b)'s requirement of consultation whenever "representation of [a] client may be materially limited by the lawyer's responsibilities to another client."⁹¹

As a proponent of Optional Family Representation, I find myself quite sympathetic with Collett's approach. In its requirement both of respect for the family's vision of itself and for continuing participation of all family members, it shares the spirit—if not the entire substance—of Optional Family Representation.

CONCLUSION

The lively debate among the authors in the symposium suggests at least three conclusions. First, efforts to provide families with a communitarian form of representation may be gathering strength. Three of the five articles favor offering the choice of some type of communitarian representation. Second, the authors' disagreements regarding the proper purposes and contours of family representation reflect the uncertainty in society regarding both the nature of the family and the role of legal ethics. Third, the authors' agreement that the ethics of lawyers has very real implications for the families they represent marks a shift in approach to legal ethics and offers the promise of further advances in doctrinal and theoretical analysis. While it is unclear how the debate over representation of the family as an entity will eventually be resolved, what is clear is that through this symposium, the *Seattle University Law Review* has provided distinguished authors with an important opportunity to assess the interaction between legal ethics, the various laws regulating family relationships, and families themselves.

90. *Id.* at 165.

91. MODEL RULES, *supra* note 15, Rule 1.7(b).

APPENDIX

HYPOTHETICAL I

Bob and Ruth need estate planning. They have been married approximately two months. Bob is a successful sole proprietor and the net worth of his assets is approximately two million dollars. This is his first marriage. Ruth also has separate assets (commercial real estate) valued at approximately five million dollars, which she inherited at the death of her first husband. Neither Bob nor Ruth have any children, although they hope to in the next year or two.

Ruth has a bachelor's degree in finance. She met her first husband when she had just graduated from college and was working as a loan officer at a bank. At the beginning of her first marriage, Ruth decided to stay home and accompany her husband on his many business trips. She has not been employed in years, nor does she plan to be in the future. She intends to devote herself to "making a home for our family, and being involved in local charities." She currently chairs the land acquisition committee of the local Habitat for Humanity affiliate, which acquires, on average, ten residential lots a year.

Bob has a bachelor's degree in computer science. He owns and operates the local Internet access provider. The majority of his assets are business related and owned free and clear. He is considering using them as collateral to upgrade his server, and expand his market geographically. He also plans to expand his service of creating and maintaining web sites for his commercial customers. He expects this part of his business to explode after the public becomes more confident about transmitting credit card information via e-mail.

Neither Bob nor Ruth have a lawyer they consider as "their lawyer." Bob has occasionally consulted with various attorneys on business related matters, but has no sense that any one of them is "his attorney." Ruth worked with her husband's first lawyer during the probate, but has not had a need to talk with him since. Neither have consulted the hypothetical lawyer or any member of the firm before.

During the initial interview, Ruth tells the lawyer that she believes that Bob, as the head of the household, should be the one to make all decisions ultimately. Responding to the lawyer's uncomfortable (or sardonically amused) look, she explains that she hopes to be a wife like the woman described in scripture (*Proverbs* 31:10-31). She is confident that St. Paul was correct in his admonition "Wives be submissive to your husbands, and husbands love your wives as Christ loves the church." See *Ephesians* 6:22-32. She understands this passage to require her to defer to Bob in all things, and Bob to be prepared to

sacrifice himself, even to the point of death, for her. She considers this an unequal bargain, which is ultimately in her favor.

Ruth indicates that she is willing to transfer assets to Bob for the expansion of his business or if it seems desirable in order to save taxes. She specifically states that the lawyer is both authorized and directed to rely upon Bob's decisions, even in matters relating to the assets she brought to the marriage.

HYPOTHETICAL II

Joseph and Susan also need estate planning. This is the only marriage for both, and they have been married approximately six years. Joe and Susan married while Susan was serving her residency in neuro-ophthamology. Joe works as a construction supervisor. Susan has been in private practice for three years, and is expecting their first child. Joe plans to quit his job to stay home with the baby since Susan loves her work, and makes 10 times what he does. At some point, Joe wants to go back to college and finish his degree, but not until their family is well established.

Susan's net value is approximately \$750,000, including paid-up insurance. Joe's is approximately \$50,000, comprised of two rental houses he bought before they were married.

Neither Joe nor Susan have consulted the hypothetical lawyer or any member of the firm before. The couple have come to the lawyer in order to have the lawyer review a request by the medical practice group that all physicians have their spouses execute a release of any claims to the practice, its assets, or its revenues. By its terms, the release includes any claims that would arise from dissolution of the physician's marriage, either by death or divorce. The release would preclude claims based upon equitable division of property or alimony in a divorce, as well as claims based upon the elective share or family allowance.

During the initial interview, Joe indicates he has no objection to executing the release if Susan wants him to. He believes that any assets they have or will acquire are bound to be the product of Susan's efforts, and ultimately she should make all decisions about their financial affairs. He specifically states that the lawyer is both authorized and directed to rely upon Susan's decisions, even in matters relating only to Joe's assets. *Cr. Stropnick v. Nathanson*, Docket No. 91-BPA-0061, Mass. Comm. Against Discrimination (opinion rendered February 25, 1997).

Can the lawyer accept either of these couples as clients? Can he accept the spouse's directive to accept the directions of only one spouse?