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## Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses

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### Cover Page Footnote

Associate Professor of Law, Fordham University School of Law. B.A., 1978, J.D., 1981, Yale. I prepared this Article for a December 3-5, 1993 Conference on Ethical Issues in Representing Older Clients cosponsored by the Fordham University School of Law Stein Center for Ethics and Public Interest Law, American Bar Association [hereinafter ABA] Commission on the Legal Problems of the Elderly, ABA Section on Real Property, Probate and Trust Law, American Association of Retired Persons, American College of Trust and Estates Counsel, and National Academy of Elder Law Attorneys. I am greatly indebted to my colleague Bruce Green for his insights and encouragement. I am grateful for the comments of Teresa Collett, Janet Dolgin, Tom Morgan, Debra Pearce McCall, Louise Parley, Tom Shaffer, Louis Silverstein, and David Thomas, as well as to those of the participants in a spirited discussion at a Fordham Faculty Scholarship Colloquium: Dan Capra, Mary Daly, Debbie Denno, Jill Fisch, Martin Flaherty, Jim Fleming, Jackie Nolan Haley, Tracy Higgins, Bob Kaczorowski, Jim Kainen, Mike Lanzarone, Mike Martin, Maria Marcus, Dan Richman, Terry Smith, Steve Thel, Bill Treanor, and Lloyd Weinreb. I am deeply grateful for the invaluable contributions of my research assistants Kim Heyman, Sam Levine, Sarah Moskowitz, David Roth, and Michael Shapiro, as well as my student Nancy Meyers. Special thanks to the participants in the Conference, especially the participants in the working group on spousal conflicts who are not mentioned above: Larry Fox, Louis Mezullo, John Price, Scott Severns, Clare Springs, Peter Strauss and Erica Wood.

# FAMILY VALUES AND LEGAL ETHICS: COMPETING APPROACHES TO CONFLICTS IN REPRESENTING SPOUSES

*RUSSELL G. PEARCE\**

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## INTRODUCTION

THE term "family values" evokes strong reactions. During the 1992 Presidential campaign, controversy surrounding family values generated memorable moments. These included Vice President Quayle's attack on television character Murphy Brown's decision to become a single parent<sup>1</sup> and the nationally televised speeches of Patrick Buchanan and Pat Robertson at the Republican National Convention attacking the Democrats as enemies of the family.<sup>2</sup> Even after the campaign, family

1. See Vice President Quayle challenged Murphy Brown for "mocking the importance of fathers, by bearing a child alone, and calling it just another 'life style choice.'" Andrew Rosenthal, *Quayle Says Riots Sprang from Lack of Family Values*, N.Y. Times, May 20, 1992, at A1, A20. He also attributed recent urban riots to the "breakdown" of family values. *Id.*; see also Orrin G. Hatch, *A Dependence on the People*, 77 Cornell L. Rev. 959, 962 (1992) ("The leading social problem in this country today is the breakdown of the American family."); Thomas B. Edsall, *Clinton Steps Up Economic Attacks*, Wash. Post, Sept. 21, 1992, at A10 (candidate Bill Clinton asserts Bush policy "talks about family values, but doesn't value working families"); Robin Toner, *As Simple as Life Itself*, N.Y. Times, Aug. 12, 1992, at A1 ("Republican Party has staked out 'family values' as a principal theme this year").

2. See, e.g., R.W. Apple, Jr., *The Economy's Casualty*, N.Y. Times, Nov. 4, 1992, at A1, B3 (suggesting that "[w]omen in particular were offended" by convention speeches of

values issues continue to play a significant political role.<sup>3</sup>

Less well known to the public, but also the subject of emotionally charged rhetoric, is the debate within the legal profession regarding the place of family values in legal ethics. This debate occurs in the context of determining the proper ethical boundaries of representing family members, an effort which necessarily implicates definitions of the family. While this Article will focus primarily on conflicts of interest issues that arise during the representation of spouses, its analysis and conclusions will also apply more broadly to the representation of families.<sup>4</sup>

The larger debate concerning how to represent families ethically is not new. Opponents of the nomination of Louis Dembitz Brandeis to the United States Supreme Court accused him of improperly representing the conflicting business interests of family members.<sup>5</sup> During the 1916

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Pat Robertson and Patrick Buchanan asserting that those who disagreed with their perspective on family values "were somehow not fully American"); William Safire, *Family Values*, N.Y. Times, Sept. 6, 1992, § 6 (Magazine), at 14 (quoting Pat Robertson's speech to Republican Convention as asserting that "'Bill and Hillary Clinton . . . are talking about a radical plan to destroy the traditional family'"); Robin Toner, *Critical Moments; How Bush Lost Five Chances to Seize the Day*, N.Y. Times, Oct. 11, 1992, § 4, at 1 ("The [Republican] convention became known not for its economic prescriptions, but for its nightly appeals to 'family values,' delivered by such tribunes of the right as Mr. Buchanan and the Rev. Pat Robertson."); Tom Wicker, *The Democrats as the Devil's Disciples*, N.Y. Times, Aug. 30, 1992, § 4, at 3 (describing opponents of the Democratic party as charging that the party "ha[s] no concept of families.").

3. See, e.g., Richard Benedetto, *Religious Right to Flex Muscles*, USA Today, Sept. 10, 1993, at 5A (describing Washington, D.C. convention of Christian Coalition activists who are "drawn to grass-roots politics by what they see as breakdowns in morality and threats to traditional family values"); Celia W. Dugger, *Workers' Partners Added To Health Plan by Dinkins*, N.Y. Times, October 31, 1993, § 1, at 40 (on eve of election, Mayor announces health benefits for domestic partners of homosexual City workers and states that "if we are really for family values we must then value all families").

4. The approaches discussed in this Article would also apply to representation of intergenerational families, including single parent families, as well as non-traditional families. See *infra* notes 347-49 and accompanying text.

5. See John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. Ill. L. Rev. 741, 753-55 (1992); John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 Stan. L. Rev. 683, 694-98 (1965). Professor Dzienkowski summarizes this incident as follows:

In 1888, Brandeis represented S.D. Warren and Company, a paper mill corporation owned by the father of his law partner. When the owner died in 1888, Brandeis represented the estate and the individual family members in the voluntary formation of a trust. The trust received all of the property and subsequently leased it to his law partner and another substantial owner of the business. For the next decade, the Brandeis firm continued to represent the trustees and the lessees. In 1909, one of the family members brought suit against the lessees to declare the lease invalid and to obtain an accounting, partly out of dissatisfaction with the manner in which Brandeis's former law partner was running the business. Brandeis represented the lessees against the former client. Eventually, other family members bought out the plaintiff family members' interests, and the litigation was terminated.

Dzienkowski, *supra*, at 753-54 (footnotes omitted). At the hearings on Brandeis's nomination, the charges against him arising from the Warren representation were "'that he for a long time represented and collected fees from two clients whose interests were dia-

Senate hearings on this and other allegations of unethical conduct, Brandeis and his supporters defended his representation of seemingly conflicting interests on, among other grounds, the basis that he was acting ethically as "lawyer for the situation," rather than for the particular individuals.<sup>6</sup>

In recent years, the issue of how to represent spouses in estate planning has generated considerable controversy. Professor Thomas L. Shaffer, one of the leading scholars in the field of professional responsibility, has labelled established applications of conflicts doctrine to family representation "corrupting," "false," "irresponsible," and "untruthful."<sup>7</sup> Also challenging the established approach, but in a less confrontational manner, the ABA Section of Real Property, Probate and Trust Law ("Real Property Section") has recommended guidelines for ethical representation of spouses.<sup>8</sup> The Real Property Section's Recommendations, while on their face claiming to conform to established ethical doctrine, in fact propose a number of departures from that doctrine. These departures include an assumption of unitary spousal interests, a narrow view of when keeping confidences of one spouse from another creates a conflict, and a broad view of the lawyer's ability to represent simultaneously and separately two spouses with differing or opposing interests.<sup>9</sup> In turn, Professor Teresa Stanton Collett has criticized the Real Property Section's acceptance of separate, simultaneous representation as undermining the "unity" of the family<sup>10</sup> and unnecessarily "excus[ing] the disloyalty inherent in the lawyer's actions."<sup>11</sup>

This Article explores the debate surrounding the ethical representation

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metrically opposed to each other and when they, later, went to law over those same conflicting interests he took employment for one of them against the other.' " *Id.* at 753 n.64 (quoting 3 The Supreme Court of the United States: Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee, 1916-1975, at 298-99 (Roy M. Mersky & J. Myron Jacobson eds., 1977)).

6. Dzienkowski, *supra* note 5, at 748-57; Geoffrey C. Hazard, Jr., *Ethics in the Practice of Law* 61 (1978).

7. Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 *Tex. L. Rev.* 963, 982, 987 (1987) [hereinafter Shaffer, *Individualism*].

8. See *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) [hereinafter *Real Property Section's Recommendations*]; Malcolm A. Moore & Anne K. Hilker, *Representing Both Spouses: The New Section Recommendations*, 7 *Prob. & Prop.*, July-Aug. 1993, at 26.

9. See *Real Property Section's Recommendations*, *supra* note 8; *infra* part IV. The American College of Trusts and Estate Counsel appears to be taking a similar position with regard to joint and separate representation. See Jackson M. Bruce, Jr., *Husband and Wife Representation Guideline Withdrawn; Project to Continue*, 15 *Prob. Notes* 302 (1990) (draft guideline has been modified "to make the joint representation and separate representation approaches equally permissible").

10. Teresa S. Collett, *And the Two Shall Become as One . . . Until the Lawyers are Done*, 7 *Notre Dame J.L. Ethics & Pub. Pol'y* 101, 142-43 (1993) [hereinafter Collett, *And the Two*].

11. *Id.* at 143.

of families and proposes changes in legal ethics to serve families better.<sup>12</sup> Part I of the Article reviews the general application of conflicts doctrine to spousal representation and the specific application of the doctrine to two hypotheticals.<sup>13</sup>

In the "Estate Hypothetical," spouses John and Mary meet with and retain Ms. Lawyer for estate planning. They ask her to prepare mirror wills for them. The Article suggests that established doctrine permits Ms. Lawyer to represent John and Mary after consideration of possible differences, client consent, and Ms. Lawyer's reasonable belief that the representation or lawyer-client relationship will not be adversely affected.<sup>14</sup> Two days after Ms. Lawyer agrees to the representation, Mary calls Ms. Lawyer and asks her to prepare a different will for Mary and to keep confidential from John both the terms of Mary's will and Mary's separate consultation with Ms. Lawyer.<sup>15</sup> At this point, if Mary refuses to agree to disclose this information to John, Ms. Lawyer must withdraw from representation of both spouses and probably can not disclose Mary's call to John.<sup>16</sup>

In the "Nursing Home Hypothetical," Ozzie and Harriet contact Mr. Lawyer, a legal services staff attorney, who previously represented them both in a dispute with their landlord. Harriet has suffered a series of strokes, cannot take care of herself physically, and has periods of disorientation. Ozzie wants to place Harriet in a nursing home. Harriet refuses. Ozzie and Harriet love each other and want to resolve their differences amicably. They turn to Mr. Lawyer for guidance about their legal rights and the best way to proceed. If Mr. Lawyer cannot help them resolve their differences, Ozzie intends to seek legal assistance and

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12. See *infra* part V. A spirited debate exists regarding the definition of family. See, e.g., Martha A. Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 Conn. L. Rev. 955, 972 (1991) (suggesting that the definition of family "has undergone serious revision" as "[n]onmarital heterosexual cohabitation has dramatically increased, and even same-sex relationships are gaining some acceptance," and urging that the "social concept of what constitutes a family" be extended to single mother families); Karl Zinsmeister, *Parental Responsibility and the Future of the American Family*, 77 Cornell L. Rev. 1005, 1008 (1992) (arguing for policies to promote the traditional "nuclear family" on the ground that "[n]either substitute families nor pseudo-families nor family supplements are able to do for society what traditional nuclear families have done as a matter of course for millennia"). See generally Kris Franklin, Note, "A Family Like Any Other Family:" *Alternative Methods of Defining Family in Law*, 18 N.Y.U. Rev. L. & Soc. Change 1027 (1990-91) (arguing that it is necessary to adapt family law to the changing definition of "family"). This Article does not propose a definition of the family. In both the established ethics doctrine, and this Article's alternative approach, the legal ethics codes need not define who is or is not a family. See *infra* notes 347-49 and accompanying text.

13. See *infra* part I.

14. See *infra* text accompanying notes 105-22.

15. This hypothetical is loosely based on the famous hypothetical *The Case of the Unwanted Will*, 65 A.B.A.J. 484 (1979). For other analyses of this hypothetical, see Deborah Rhode & David Luban, *Legal Ethics* 476-483 (1992); Shaffer, *Individualism*, *supra* note 7, at 968-91.

16. See *infra* text accompanying notes 105-22.

Harriet intends to defend herself.<sup>17</sup> For purposes of this hypothetical, assume that Harriet, while periodically disoriented, is competent at the time of consultation with Mr. Lawyer.<sup>18</sup> The Article suggests that established doctrine probably requires Mr. Lawyer to refuse to represent Ozie and Harriet.<sup>19</sup>

In Part II, the Article examines the view of the family underlying established doctrine. This part explains how the established doctrine reflects the understanding that the family is primarily a collection of individuals, rather than a family unit.<sup>20</sup> Parts III and IV describe challenges to the established doctrine arising from different perspectives of the family. Part III examines Professor Shaffer's view, derived from his understanding of families as organic communities, that established doctrine improperly views families as collections of individuals. He suggests instead that lawyers represent the family as a unit.<sup>21</sup> Part IV explains the Real Property Section's Recommendations which, confusingly, are simultaneously both more communitarian and more atomistic in their approach to the family than the established doctrine.<sup>22</sup>

Part V proposes a new legal ethic for representing families. In addition to separate, joint, or intermediation representation under established doctrine, family members could choose Optional Family Representation. Optional Family Representation would permit representation of family members as a group even where actual or potential risks to individual interests would prohibit joint or intermediation representation under established doctrine.

Part V.B. examines the reasons for permitting Optimal Family Representation, including an appropriate deference to the group's identity and harmonies, and the individual choices of family members. Part V.C. responds to the potential challenges to permitting Optional Family Repre-

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17. This hypothetical is loosely based on a hypothetical in 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, 325 (1992). Ms. Batt, in turn, draws this hypothetical from Exploring Ethical Issues in Meeting the Legal Needs of the Elderly 27 (American Bar Association Marie Walsh Sharpe Legal Awareness of Older Americans Project 1987).

18. In many health impairments, the individual is neither competent nor incompetent all the time. Periods of disorientation are episodic. See Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, in Ethical Issues in Representing Older Clients, 62 Fordham L. Rev. 1177 (1994). For a further discussion of client competence issues in representing the elderly, which are beyond the scope of this article, see Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, in Ethical Issues in Representing Older Clients, 62 Fordham L. Rev. 1073 (1994); Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices: What's an Attorney to Do?: Within and Beyond the Competency Construct*, in Ethical Issues in Representing Older Clients, 62 Fordham L. Rev. 1101 (1994); Roca, *supra*.

19. See *infra* text accompanying notes 123-30.

20. See *infra* part II.

21. See *infra* part III.

22. See *infra* part IV.



sentation by explaining specific provisions of Optional Family Representation that address the problems these challenges identify. Under these provisions the family must establish procedures for communicating with the lawyer and making decisions. The lawyer must determine that a bona fide family group exists. The lawyer must also provide each individual family member with relevant counsel and information necessary for them to evaluate the advantages and disadvantages of family group representation throughout the representation. Accordingly, the lawyer must not keep confidential from family members information relating to other individuals or the entity. Last, to avoid the confusion and perception of disloyalty that could arise from continued representation of some group members when others withdraw from representation, consent of the withdrawing family members should be necessary to continued representation of others. Insofar as all of these proposed modifications are appropriate for all representations of small groups, the Article proposes modifying either Model Rules of Professional Conduct ("Model Rules") Rule 1.13 or 2.2, rather than providing a separate rule for family representation.<sup>23</sup> With these changes, legal ethics would give greater respect to families.

### I. THE DOCTRINAL PERSPECTIVE

This Part reviews the established doctrinal perspectives on spousal and family representation. Part I.A. offers an overview of the conflicts of interest rules.<sup>24</sup> Part I.B. provides an analysis of how these rules would generally apply to spousal representation. Part I.C. then applies these rules to two specific hypotheticals. Both the general and specific analyses of the conflicts rules suggest that they limit lawyers' representation of spouses. The spouses' potential differences require the lawyer generally to obtain informed consent to spousal representation. However, consent alone is not sufficient to permit the lawyer to initiate or continue representation. The lawyer must also objectively determine that continued representation of one spouse will not adversely affect the relationship with, or representation of, the other. Therefore, in a number of instances, lawyers may not be able to represent both spouses, even with their consent.

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23. See ABA Model Rules Of Professional Conduct Rules 1.13, 2.2 (1993) [hereinafter Model Rules]. Of the fifty States and the District of Columbia, thirty-seven have adopted the Model Rules. See Laws. Man. On Prof. Conduct (ABA/BNA) 1:3-1:4 (1994). All but two of the remainder follow the Model Code Of Professional Responsibility (1980) [hereinafter Model Code], but often with modifications to reflect changes introduced in the Model Rules. See *id.* The Article will focus on the Model Rules, but will provide citations to relevant Model Code provisions in footnotes.

24. Although the term "conflict of interest" does not appear in the text of the relevant rules, see Model Rules Rules 1.7, 1.9; Model Code, *supra* note 23, Canon 5, it does appear in the title of the relevant provisions of the Model Rules, see Model Rules Rules 1.7, 1.9; and in commentaries, see, e.g., Charles W. Wolfram, *Modern Legal Ethics* § 7.1.1 (1986) (discussing "conflicts of interest" in legal practice).

### A. Overview of Conflicts Rules

The lawyer's obligation to avoid representation of clients with conflicting interests<sup>25</sup> is often derived from the lawyer's duty of loyalty to her client.<sup>26</sup> As Professors Hazard and Hodes observe in their treatise, however, conflicts issues broadly "implicate . . . [t]he basic duties a lawyer owes to a client—competence, confidentiality, communication, and loyalty."<sup>27</sup> The proposed Restatement of the Law Governing Lawyers elaborates by noting that conflicts undermine a client's "trust" in her lawyer's "undivided loyalty," impair the lawyer's judgment and dedication necessary to competent representation, and increase the opportunity for "use of confidential information against interests of the client."<sup>28</sup> In addition, the prohibition of conflicts "protect[s] interests of the legal system in obtaining adequate presentation of matters to tribunals."<sup>29</sup> Professors Hazard and Hodes further note that duties of communication arise from the lawyer's obligation to consult with clients in obtaining waivers of conflicts.<sup>30</sup>

The proposed Restatement acknowledges, however, that because "conflict avoidance can impose significant costs on lawyers and clients alike[, a]ny prohibition of conflicts of interest should reach no farther than necessary."<sup>31</sup> These costs include the multiple clients obtaining separate

25. Professor Monroe Freedman has identified some common confusion in conflicts terminology. He notes:

an 'actual' conflict of interest . . . ordinarily mean[s] that the substantive impropriety that the conflict of interest rule was designed to prevent has in fact taken place. Thus, two distinct ideas—the initial conflict of interest and the resultant breach of zeal or confidentiality—are collapsed into the single phrase, 'actual conflict of interest.' It would be more accurate to say, therefore, that the lawyer had been involved in a conflict of interest which then resulted in a breach of confidentiality.

Monroe Freedman, *Understanding Lawyers' Ethics* 181 (1992). The use of the phrase "actual conflict of interest" has led to the use of the "redundant" phrase "potential conflict of interest" even though "every conflict of interest is 'potential' in the sense that the proscription seeks to prevent a substantive ethical violation from occurring." *Id.* The phrase "an appearance of a conflict of interest" is similarly "redundant" "because . . . one thing that 'conflict of interest' connotes is 'an appearance of impropriety.'" *Id.*; see also Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 *Geo. J. Legal Ethics* 823, 846-47 (1992) (criticizing use of phrases "actual" and "potential" conflicts of interest). This Article will refer to actual or potential differences, rather than actual or potential conflicts.

26. See, e.g., *Model Rules*, *supra* note 23, Rule 1.7 cmt.

27. 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 1.1:101 (2d ed. Supp. 1992 & 1993). See Freedman, *supra* note 25, at 174 ("[T]here is no distinct ethical imperative of loyalty. It can be equated with zeal, or it can serve as a convenient way of saying confidentiality, zeal, competence, and communication."). But see McMunigal, *supra* note 25 (criticizing established conflicts doctrine as an ambiguous mix of competing risk avoidance, resulting impairment, and appearance approaches).

28. Restatement of the Law Governing Lawyers § 201 cmt. b (Tent. Draft No. 4 1991) [hereinafter *Restatement Governing Lawyers*].

29. *Id.*

30. See 1 Hazard & Hodes, *supra* note 27, § 1.7:101.

31. Restatement Governing Lawyers, *supra* note 28, § 201 cmt. b.

representation, interference with client expectations of retaining a particular lawyer, disclosures or delays necessary to obtain consent to conflicts, and limits on "lawyers' own freedom to practice according to their own best judgment of appropriate professional behavior."<sup>32</sup>

The established conflicts doctrine represents a "balancing of the interests involved."<sup>33</sup> The doctrine does not bar all representation of clients with conflicting interests. It permits, however, such representation only with client consent and the lawyer's objective determination that the representation of, or relationship with, the clients will not be adversely affected.

Rule 1.7<sup>34</sup> of the Model Rules provides the basic guide for concurrent representation of clients with conflicting interests, whether the conflicts developed before or during the representations.<sup>35</sup> Rule 1.7 has two parts. Rule 1.7(a) applies where representation of one client will be "directly adverse to another client,"<sup>36</sup> while Rule 1.7(b) applies where the lawyer's responsibilities to one client may materially limit representation of another.<sup>37</sup>

Under Rule 1.7(a), a lawyer may represent clients directly adverse to each other only where "each client consents after consultation" and "the

32. *Id.*

33. 1 Hazard & Hodes, *supra* note 27, § 1.7:101.

34. The text of the rule is as follows:

Rule 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Model Rules, *supra* note 23, Rule 1.7.

35. The analogous Model Code provisions are DR 5-105 (B) & (C) which provide:

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105 . . . (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

Model Code, *supra* note 23, DR 5-105 (B)-(C).

36. Model Rules, *supra* note 23, Rule 1.7(a).

37. See Model Rules, *supra* note 23, Rule 1.7(b).

lawyer reasonably believes the representation will not adversely affect the relationship with the other client."<sup>38</sup> Professors Hazard and Hodes note that while client consent is "highly relevant in appraising the probable effect of the representation on the client-lawyer relationships,"<sup>39</sup> a lawyer's reasonable belief that the representation will not adversely affect the relationship<sup>40</sup> will be "relatively rare."<sup>41</sup> They suggest that "Rule 1.7(a) contemplates the practical equivalent of an absolute ban on concurrent representation of clients whose interests are in direct conflict."<sup>42</sup> This "presumption against concurrent representation of clients with directly conflicting interests" is especially strong "where one of the clients is an individual, as opposed to a business or other entity, [because] the client's personal feelings will almost always be bound up in any legal transaction to which he or she is a party."<sup>43</sup>

While Rule 1.7(a) applies to existing and direct adversity, Rule 1.7(b) applies even where the lawyer's responsibilities may only indirectly limit representation.<sup>44</sup> Rule 1.7(b) governs situations where representation of a client "may be materially limited by the lawyer's responsibilities to another client."<sup>45</sup> Rule 1.7(b) permits such representation only where "the client consents after consultation" and "the lawyer reasonably believes the representation will not be adversely affected."<sup>46</sup> The Rule further specifies that the consultation for representing "multiple clients in a single matter . . . shall include [an] explanation of the implications of the common representation and the advantages and risks involved."<sup>47</sup> One of the risks is that "information received from one joint client about the subject matter of the joint representation is not *privileged* from disclosure against the other client, [even though] it may be a *confidence* that the lawyer has a duty not to disclose to the other client."<sup>48</sup>

38. Model Rules, *supra* note 23, Rule 1.7(a).

39. 1 Hazard & Hodes, *supra* note 27, § 1.7:207.

40. See Model Rules, *supra* note 23, Rule 1.7(b).

41. 1 Hazard & Hodes, *supra* note 27, § 1.7:207. Professors Hazard and Hodes note that the omissions of "terms such as 'materially' or 'substantially' . . . suggests that *any* impairment of the client-lawyer relationship precludes concurrent representation in situations of *direct* client-to-client conflict." *Id.* Also, Rule 1.7(a) cases "involve the two main dangers that Rule 1.7 as a whole is designed to avoid." *Id.* These are:

First, that confidential information will "leak" from one camp to the other; second, that clients and the public at large will be disturbed by the sight of one lawyer disloyally "playing both sides of the street," earning two fees, and possibly pulling his punches.

*Id.*

42. *Id.* § 1.7:207. Professors Hazard and Hodes note that the provisions of DR 5-105(C) would lead to similar result. *Id.*

43. *Id.*

44. See *id.* § 1.7:300. But see Freedman, *supra* note 25, at 191 (arguing that Rule 1.7(a) is unnecessary because all the situations it covers are included within Rule 1.7(b)).

45. Model Rules, *supra* note 23, Rule 1.7(b).

46. Model Rules, *supra* note 23, Rule 1.7(b)(1).

47. Model Rules, *supra* note 23, Rule 1.7(b)(2).

48. Geoffrey C. Hazard, Jr. & Susan P. Koniak, *The Law and Ethics of Lawyering* 229 (1990) (citing *Brennan's Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168 (5th Cir.

Professors Hazard and Hodes note that "Rule 1.7(b) is more flexible than Rule 1.7(a), for it speaks to *material* limitations on the representation[s] [and it] forces a case-specific inquiry into the precise effect that a particular combination of conflicting responsibilities might engender."<sup>49</sup> At the same time, Rule 1.7(b) is a "strong 'client-protecting' rule [that] will sometimes require a careful lawyer to decline representation of a client who very much wants to be represented by that lawyer" on account of "the long-term public interest in protecting clients against foolish waivers, or against waivers that will reflect poorly on the legal system."<sup>50</sup> Indeed, the requirement of the lawyer's reasonable belief "may be somewhat more stringent" under Rule 1.7(b) than Rule 1.7(a) because the client can judge the "quality of the client-lawyer relation-

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1979)). Professors Hazard and Koniak's comment indicates that although under the law of evidence joint clients waive the attorney-client privilege regarding their joint representation in the event that they later sue each other, their confidences are otherwise protected under the lawyer's duty of confidentiality under the legal ethics codes. While authorities agree that joint clients waive the attorney-client privilege, *see, e.g.*, *Eureka Investment Corp. v. Chicago Title Ins. Co.*, 743 F.2d 932, 936-37 (D.C. Cir. 1984) (holding that communications to plan legal action of one joint client against the other were not for purposes of joint representation and were therefore protected by the attorney-client privilege), differences exist regarding whether they waive the duty of confidentiality. Most authorities agree with Professors Hazard and Koniak. *See, e.g.*, N.Y.S. Bar Ass'n Op. Comm. on Professional Ethics, 555 (1984) [hereinafter N.Y.S. Bar Op. 555] (requiring duty of confidentiality between joint clients); Monroe County Bar Ass'n Ethics Comm., Op. 87-2 (1987) (lawyer not permitted to disclose co-plaintiff husband's intent to divorce co-plaintiff wife); 1 Hazard & Hodes, *supra* note 27, § 1.7:306 (in representing spouses jointly for an amicable divorce, even where the proposed "agreement is slightly more favorable to one party than is normal for someone in that party's economic position[, the lawyer's] duty to the advantaged client would be to withhold disclosure of the fact, since such a disclosure would violate the basic confidentiality of Rule 1.6."); *cf.* *Hotz v. Minyard*, 403 S.E.2d 634, 637 (S.C. 1991) (while upholding a claim for breach of fiduciary duty against lawyer who had separately represented both father and daughter and had affirmatively misled daughter as to existence of a second will diminishing her bequest, court acknowledged that the lawyer "had no duty to disclose the existence of the second will against his client's (Mr. Minyard's) wishes."). Some authorities, however, suggest that joint clients impliedly waive confidentiality with regard to each other. *See, e.g.*, *Allegaert v. Perot*, 434 F. Supp. 790, 800 (1977) (finding parties waived confidentiality with regard to each other); ACTEC Commentaries on the Model Rules of Professional Conduct 37 (1993) (joint "representation usually implies that information will be shared by clients with respect to the subject of the representation"); N.Y.S. Bar Op. 555, *supra* (discussing authorities that reject duty of confidentiality between joint clients). At least one authority has required that spouses waive the lawyer's confidentiality duty to each as individuals before commencing joint representation. *See* Allegheny County Bar Association Professional Ethics Committee, *Estate Planning—Attorney Representing Both Spouses*, 131 Pitt. Legal J. 28, 30 (1983) [hereinafter Allegheny County Bar Op.] (waiver necessary to prevent fraud or conflicts). For a further discussion of confidentiality issues, *see* Burnele Powell & Ronald Link, *The Sense of Client: Confidentiality Issues in Representing the Elderly in Conference on Ethical Issues in Representing Older Clients*, *Fordham L. Rev.* 1197 (1994); Teresa S. Collett, *Disclosure, Discretion, or Deception: The Estate Planner's Ethical Dilemma from a Unilateral Confidence*, 28 *Real Prop., Prob. & Trust J.* 683 (1994) [hereinafter Collett, *Disclosure*].

49. 1 Hazard & Hodes, *supra* note 27, § 1.7:301. Professors Hazard and Hodes note that Rule 1.7(b) is similar to the approach of Canon 5 of the Code. *Id.*

50. *Id.*

ships . . . at least as well as the lawyer[ ],” while “only the lawyer can fully judge” “the quality of the representation to be provided.”<sup>51</sup>

In addition to Rule 1.7, Rule 2.2 is relevant to conflicts issues arising in the representation of multiple clients in a single matter. Rule 2.2 applies to “intermediary” representation which occurs “when the lawyer represents two or more parties with potentially conflicting interests.”<sup>52</sup> In the intermediary role, the lawyer seeks “to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. . . . The lawyer seeks to resolve potentially conflicting interests by developing the parties’ mutual interests.”<sup>53</sup>

Rule 2.2 requires the same types of disclosures that Rule 1.7(b) requires for joint representation. Rule 2.2 specifies disclosure of “the effect on the attorney-client privileges”<sup>54</sup> which presumably would fall within “advantages and risks” under Rule 1.7(b).<sup>55</sup> Furthermore, Rule 2.2 substitutes two related provisions for Rule 1.7(b)’s requirement of the lawyer’s reasonable belief that “the representation will not be adversely affected.”<sup>56</sup> Rule 2.2(a)(2) requires the lawyer’s reasonable belief:

that the matter can be resolved on terms compatible with the clients’ best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful.<sup>57</sup>

Rule 2.2(a)(3) requires the lawyer’s reasonable belief “that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.”<sup>58</sup>

Rule 2.2 was intended to provide an opportunity to “lawyer for the situation,” as opposed to individual clients.<sup>59</sup> The use of the term “common representation,”<sup>60</sup> in Rule 2.2 as opposed to the term “multiple clients” in Rule 1.7,<sup>61</sup> could mean that Rule 2.2 envisions the lawyer representing the family entity rather than the individuals.<sup>62</sup> Similarly,

51. *Id.* § 1.7:305.

52. Model Rules, *supra* note 23, Rule 2.2 cmt. While some commentators have suggested a far narrower construction of Rule 2.2, *see, e.g.*, Real Property Section’s Recommendations, *supra* note 8, at 11, Professor Dzienkowski notes that “[t]he most widely accepted definition of intermediation focuses on the major problem that Model Rule 2.2 is designed to address, that is, the potential conflict of interest that arises between or among the clients in a multiple representation.” Dzienkowski, *supra* note 5, at 772.

53. Model Rules, *supra* note 23, Rule 2.2 cmt.

54. Model Rules, *supra* note 23, Rule 2.2(a)(1).

55. Model Rules, *supra* note 23, Rule 1.7(b)(2).

56. Model Rules, *supra* note 23, Rule 1.7(b)(1).

57. Model Rules, *supra* note 23, Rule 2.2(a)(2).

58. Model Rules, *supra* note 23, Rule 2.2(a)(3).

59. Dzienkowski, *supra* note 5, at 744; 1 Hazard & Hodes, *supra* note 27, §§ 2.2:102, 2.2:103.

60. Model Rules, *supra* note 23, Rule 2.2(a)(1).

61. Model Rules, *supra* note 23, Rule 1.7(b)(2). *See also* Model Code, *supra* note 23, Canon 5, EC 5-15 to 5-19.

62. *See* Shaffer, *Individualism*, *supra* note 7, at 972 & n.37 (In contrast to “common

Rule 2.2 speaks of the "clients' best interests," rather than the interest of each client separately,<sup>63</sup> and the Comment to the Rule discusses adjusting a "relationship."<sup>64</sup> The language and intent of Rule 2.2 could therefore support a broader representation of individuals with conflicting interest than Rule 1.7.

Despite these considerations, most commentators have concluded that Rule 2.2 does not afford lawyers an opportunity to undertake or continue a representation that would be prohibited by Rule 1.7. Professor Thomas Shaffer observes that Rule 2.2's use of "a behavioral checklist to make exceptional, multiple-client employment possible" evidences that "[t]he rule rests on the assumption that employment by individuals is the norm."<sup>65</sup> Indeed, as noted above, the conditions that a lawyer must satisfy to represent clients under Rule 2.2 are only a more specific explication of Rule 1.7's requirements.<sup>66</sup> Accordingly, Professors Hazard and Koniak observe that Rule 2.2 "may be considered a specific application of 1.7(b)."<sup>67</sup>

In light of the similarities between Rules 1.7(b) and 2.2, it is unclear whether Rule 2.2 or Rule 1.7 governs a joint representation. The Comment to Rule 2.2 which applies the rule to all situations where "the lawyer represents two or more parties with potentially conflicting interests,"<sup>68</sup> suggests that it includes all joint representations. Such a construction, however, would be inconsistent with the express language of Rule 1.7(b) which contemplates "representation of multiple clients in a single matter."<sup>69</sup> A more plausible interpretation is that the lawyer may choose to apply Rule 2.2 in appropriate cases where the lawyer makes the disclosures, obtains the consents, and reaches the objective conclusions required by Rule 2.2. Indeed, Professors Hazard and Hodes observe that the provisions of Rule 2.2 "are so confining that prudent lawyers often will not undertake this role, but will treat the representa-

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representation," "multiple clients" suggests that "(1) prototypical lawyer employment is employment by an individual and (2) employment for more than one person on the same matter is, in some sense, employment by each of them.").

63. Model Rules, *supra* note 23, Rule 2.2(a)(2).

64. Model Rules, *supra* note 23, Rule 2.2 cmt.

65. Shaffer, *Individualism*, *supra* note 7, at 972.

66. See *supra* text accompanying notes 54-58.

67. Hazard & Koniak, *supra* note 48, at 588. Professors Hazard and Hodes observe "that it might well have been possible either to dispense with Rule 2.2 altogether or to have made it a subsection of Rule 1.7. . . . Rule 2.2 reiterates much of the language of Rule 1.7(b)(2) in requiring caution, consultation, and consent." 1 Hazard & Hodes, *supra* note 27, § 1.7:102.

68. Model Rules, *supra* note 23, Rule 2.2 cmt. (Rule 2.2 applies to situations where "[t]he lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests.").

69. Model Rules, *supra* note 23, Rule 1.7(b)(2). Indeed, in the event of a conflict between the comment to Rule 2.2 and the text of Rule 1.7(b), the text of Rule 1.7(b) prevails. See *id.* at Scope (Although "[t]he Comments are intended as guides to interpretation, . . . the text of each Rule is authoritative.").

tions as . . . involving a 'consented conflict' under Rule 1.7(b)."<sup>70</sup>

Another possibility for analyzing conflicts is to view the client as an organization. Under Rule 1.13, the lawyer represents the organization, not its constituents.<sup>71</sup> If a conflict arises between a constituent and the organization, the lawyer's duty is to represent the organization.<sup>72</sup> In such circumstances, the lawyer has an obligation to make sure that the constituent "understands that . . . the lawyer for the organization cannot provide legal representation for that constituent individual and that discussions between the lawyer for the organization and the individual may not be privileged."<sup>73</sup>

The last rule generally relevant to conflicts in family representation is Rule 1.9 which governs conflicts between current and former clients. Rule 1.9 bars representation of a client "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."<sup>74</sup> If the concurrent representation commenced under Rule 2.2, the restrictions on continuing to represent one multiple client after withdrawal from representing another are even stricter. Rule 2.2 requires the lawyer to withdraw from representing all multiple clients "if any of the clients so requests" or if any of the conditions of the representation are no longer satisfied.<sup>75</sup>

### B. *Applying Conflicts Doctrine to Spousal Representation*

As in any other matter, the lawyer should as a "first step . . . identify whether a conflict exists."<sup>76</sup> Professor Wolfram suggests that the lawyer "identify[] at the outset of the representation the legal and other interests that the several clients have and that they may wish to assert or seriously consider as the transaction proceeds."<sup>77</sup>

If the lawyer discovers that the spouses' interests are directly adverse, Rule 1.7(a) virtually prevents her from representing both.<sup>78</sup> One example of where some authorities permit representation of spouses whose interests are directly adverse is in the preparation of a dissolution agreement in an amicable situation where the spouses consent to joint representation and "reasonable prospects of an agreement exist."<sup>79</sup>

70. 1 Hazard & Hodes, *supra* note 27, § 2.2:103.

71. *See* Model Rules, *supra* note 23, Rule 1.13.

72. *See id.* cmt.

73. *Id.*

74. Model Rules, *supra* note 23, Rule 1.9(a).

75. Model Rules, *supra* note 23, Rule 2.2(c).

76. Wolfram, *supra* note 24, § 7.3.4.

77. *Id.* *See* Restatement Governing Lawyers, *supra* note 28, § 211, cmt. c ("While a lawyer should not try to suggest discord where none exists, when a material conflict is reasonably foreseeable, the lawyer must be sure that all affected clients are informed of the advantages and risks to them of the multiple representation and have given uncoerced consent.")

78. *See supra* text accompanying notes 37-42.

79. Restatement Governing Lawyers, *supra* note 28, § 211 cmt. d, illus. 3. *See also* 1



Even where the lawyer does not find direct adversity, she may discover evidence that representation of one spouse "may be materially limited" by representation of the other under Rule 1.7(b).<sup>80</sup> Although Rule 1.7(b) and its comment do not offer specific guidance for spousal representation,<sup>81</sup> the authorities suggest that dual representation will often create a potential material limit because of the spouses' many potential differing interests. In estate planning, for example, spouses may have different interests regarding which assets should be provided to each other, their children together, other children they may have, relatives, friends, and charities; which assets are joint and separate; the implications of the rights each spouse might have to a statutory share and whether a waiver of such rights is appropriate; and whether to use trusts and asset transfers to minimize tax liabilities.<sup>82</sup> In light of these difficult issues, Professor Jeffrey Pennell, a leading scholar in the area of trusts and estates, has observed that even when representation of spouses begins, "the risk of conflict is significant. . . . There always is the potential for conflicts of interest in a representation of both spouses."<sup>83</sup> Similarly, the proposed

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Hazard & Hodes, *supra* note 27, § 1.7:202. Authorities permitting and forbidding joint representation in an amicable divorce are collected in Dzienkowski, *supra* note 5, at 762-63 n.119. The Restatement limits its endorsement of joint representation to the preparation of the dissolution agreement, *see* Restatement Governing Lawyers, *supra*, note 28, § 209 cmt. c; § 211 cmt. d; but acknowledges that some authorities permit joint representation of the spouses in hearings on uncontested divorces. *See id.* § 209, Reporter's Note, cmt. c.; *see also* Wolfram, *supra* note 24, § 7.3.4 (observing that courts are more tolerant of conflicts in nonlitigation matters).

80. Model Rules, *supra* note 23, Rule 1.7(b).

81. The comment to Rule 1.7 does refer to estate planning but offers no specific guidance. It acknowledges that "[c]onflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise." Rule 1.7 cmt. It is unclear whether this language merely acknowledges, like other authorities, that potential differences exist in most such representations, *see infra* notes 81-89 and accompanying text, or whether, to the contrary of those authorities, the language implies that spousal representation does not pose potential differences unless particular facts of the representations suggest so. *See* ABA Real Property Section's Comm. on Significant New Developments in Probate and Trust Law Practice, *Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules of Professional Conduct*, 22 Real Prop. Prob. & Tr. J. 1, 17 (1987) [hereinafter *Developments*] (suggesting language of comment "was intended to avoid any automatic finding of conflict of interest in the family estate planning context"). The Model Code includes estate beneficiaries as an example of clients whose "potentially differing interests," EC 5-17, should lead the lawyer to "resolve all doubts against the propriety of the representation." Model Code, *supra* note 23, EC 5-15.

82. This list of potential differences is based on Jeffrey N. Pennell, *Ethics in Estate Planning and Fiduciary Administration: The Inadequacy of the Model Rules and the Model Code*, 45 Rec. Ass'n. B. City N.Y. 715, 719 (1990). *See also* Allegheny County Bar Op., *supra* note 48, at 28 ("[D]istrust, divergent distributive views, avarice, second marriages, etc., can quickly generate direct conflict between the interests of husband and wife.").

83. Pennell, *supra* note 82, at 719. The Report of the Committee on Significant New Developments in Probate and Trust Law Practice of the Real Property Section notes that "the probate, trust and estate planning practitioner is frequently found in a thicket of multiple representations where the conflicts between the various parties' interests are sub-

Restatement of the Law Governing Lawyers finds that where the spouses ask a lawyer to draft "reciprocal wills" there exists "substantial risk that the lawyer's representation of [one spouse] would be materially and adversely affected by the lawyer's duties [to the other]."<sup>84</sup>

Another common situation where differences potentially limit representation occurs where the lawyer "has had substantial prior dealings with one member of the couple but not the other."<sup>85</sup> Professors Hazard and Hodes suggest two types of limits which may result. First, "it is likely that [the lawyer] will have confidences of the established client that he cannot reveal to the other client, but which the other client has a need to know."<sup>86</sup> Second, the lawyer "may not trust his own ability to be fair to both by putting aside his prior relationship."<sup>87</sup> In these cases, while "self-disqualification" is not "automatic," the lawyer "should be particularly careful to explain his concerns, and to make certain that the established client authorizes him to reveal all confidences to the other spouse."<sup>88</sup> If the lawyer discovers "[t]he slightest hesitation on the part of the established client[, it] is a warning that he or she considers himself or herself to be the 'main' client, and [the lawyer] must then refuse to represent the other."<sup>89</sup>

In many instances of spousal representation, therefore, Rule 1.7(b) will require the lawyer to obtain the client's informed consent to the representation in light of the potential for material limits and to reach a reasonable belief that the representation of one will not adversely affect representation of the other.<sup>90</sup> If the spouses are to be represented jointly, the consultation must include a discussion "of the implications of the common representation and the advantages and risks involved."<sup>91</sup> In light of the potential differences, the lawyer could also represent the spouses under Rule 2.2. She would then have to satisfy the requirements

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tle, pervasive, indirect, continuously shifting and, in many instances, even difficult to recognize." *Developments, supra*, note 81, at 2.

84. Restatement Governing Lawyers, *supra* note 28, § 211 & § 211 cmt. c, illus. See also Wolfram, *supra* note 24, § 7.3.4 at 356-57 ("arranging for one client . . . to sign a will leaving substantial property to another client" presents a "conflicting representation[ ]" where a "material interest of different clients diverges in a significant way").

85. 1 Hazard & Hodes, *supra* note 27, § 1.7:306. See Model Rules, *supra* note 23, Rule 1.7 cmt. (in assessing potential adverse affects in non-litigation conflicts, lawyer should consider "the duration and intimacy of the lawyer's relationship with the client or clients involved").

86. 1 Hazard & Hodes, *supra* note 27, § 1.7:306.

87. *Id.*

88. *Id.*

89. *Id.*

90. Indeed, in estate planning, it seems impossible to conceive of a situation where spouses would not have at least potential differences with regard to disposition of their assets. See Pennell, *supra* note 82, at 729-30 (under existing rules, "the estate planner's only safe approach is to assume the knowing consent of each affected individual is required").

91. Model Rules, *supra* note 23, Rule 1.7(b)(2). See also Allegheny County Bar Op., *supra* note 48, (because of potentially differing interests, DR 5-105(c) requires disclosure and consent before joint representation of spouses in estate planning).

of disclosure and consent, as well as the objective determinations required by that Rule.<sup>92</sup>

If conflicts develop during representation, the lawyer will have to withdraw from representing one or both spouses.<sup>93</sup> Under Rule 1.9, the lawyer could not continue to represent one spouse in the same or substantially related matter where the spouses' interests were materially adverse without the other spouse's consent.<sup>94</sup> This would appear generally to bar a lawyer from continuing to represent one spouse where conflicts had developed in representing both.<sup>95</sup> If the representation is under Rule 2.2, the lawyer must withdraw from representing both at the request of either or if the conditions for representation are no longer satisfied.<sup>96</sup>

Rule 1.13 offers another possible perspective on conflicts in family representation. The text and comment to Rule 1.13 authorize a lawyer to represent an organization, as opposed to its constituents. The Rule applies to organizations of any size, whether incorporated or not.<sup>97</sup> Rule 1.13 does not define the term "organization," but does describe Rule 1.13's purpose as providing representation for legal entities which "cannot act except through . . . constituents."<sup>98</sup> This would seem to include families which are often "legal entities" that can act only through constituent family members.<sup>99</sup> Professors Hazard and Hodes further suggest that the crux of eligibility for representation under Rule 1.13 is

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92. See Model Rules, *supra* note 23, Rule 2.2(a).

93. Where representation will violate Rule 1.7, withdrawal is mandatory. See Model Rules, *supra* note 23, Rule 1.7 cmt.; Rule 1.16(a)(1). Rule 1.16 requires withdrawal where "representation will result in violation of the rules of professional conduct . . ." Model Rules, *supra* note 23, Rule 1.16(a)(1). The Model Code similarly requires the lawyer to withdraw if he "knows or it is obvious that [his] continued employment will result in violation of a Disciplinary Rule." Model Code, *supra* note 23, DR 2-110(B)(2).

94. See Model Rules, *supra* note 23, Rule 1.9(a).

95. See Collett, *And the Two*, *supra* note 10, at 115-16 (concluding that where attorney prepared wills for spouses as joint clients, Rule 1.9 bars subsequent representation of one spouse to draft a will secretly and to the disadvantage of the other); Wolfram, *supra* note 24, § 7.3.4 at 358 ("A hazard of joint representation, however, is that if the transaction breaks down and litigation ensues, the lawyer may not represent either party because of the confidentiality principle.") (footnote omitted).

96. See Model Rules, *supra* note 23, Rule 2.2(c).

97. See Model Rules, *supra* note 23, Rule 1.13 & cmt.; 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).

98. Model Rules, *supra* note 23, Rule 1.13 cmt.

99. The laws of divorce, testacy, and intestacy recognize a marriage as a legal institution. See *infra* notes 157-60. So do concepts of joint tenancy and tenancy by the entirety. See 1 Arthur R. Gaudio, *The American Law of Real Property* § 4.02 (1991); 4 George W. Thompson, *Real Property* §§ 1770-74, 1784. Other areas of law that similarly provide for the family as a legal entity include bankruptcy and tax. See generally 11 U.S.C. § 302(a) (1988) (permitting joint bankruptcy filing); 26 U.S.C. § 6013(a) (1988) ("[a] husband and wife may make a single return jointly of income taxes"); 26 U.S.C. § 6212(b)(2) (1988) (where there is a joint income tax filing, "notice of deficiency may be a single joint notice"); 42 U.S.C. § 2333(a) (1988) (allowing for exercise of priorities by "a husband and wife . . . in their joint names").

whether "the group will be regarded as an entity that is distinct from its individual constituents."<sup>100</sup> While formality of "the association, the longer its duration, and the more elaborate its purposes" evidence organizational status, "even a small group informally organized for a limited purpose can be considered an entity."<sup>101</sup> Both traditional and non-traditional families have elements of formality, duration, and elaborate purposes sufficient to fall within this understanding of Rule 1.13.<sup>102</sup>

Despite the existence of a reasonable fit between Rule 1.13 and family representation, no authority has yet applied Rule 1.13 to family representation.<sup>103</sup> Perhaps this is due to the pervasiveness of the assumption in established doctrine that family members are separable individuals.<sup>104</sup> Perhaps, too, authorities have understood Rule 1.13's use of corporate governance terminology, such as references to shareholders and boards of directors, to indicate an intent to limit the scope of Rule 1.13 to business or business-like organizations. In any event, the absence of authority for applying Rule 1.13 to families should make a practitioner leery of doing so.

### C. *Specific Application of Conflicts Doctrine*

This Section reviews the application of the established doctrine to two hypothetical situations which further illustrate the operation of the established doctrine in spousal representation.

#### 1. The Estate Hypothetical

The Estate Hypothetical presents Ms. Lawyer with two separate quandaries: whether to represent John and Mary initially and what to do after Mary's phone call asking her to prepare a separate will and keep it confidential from John.<sup>105</sup> As to the first, at the initial meeting with John and Mary, Ms. Lawyer should explain the potential differing interests the spouses could have and explored whether any actual or potential differences existed. The authorities discussed above suggest that even if there is no evidence of direct adversity or existing differences, Ms. Lawyer should treat the situation as one posing a potential material limit on the lawyer's representation under Rule 1.7(b).<sup>106</sup> Of course, if Ms. Lawyer had previously represented one of the spouses separately, that would specifically implicate Rule 1.7(b).<sup>107</sup> Accordingly, Ms. Lawyer should obtain the clients' consent to the representation after explaining "the

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100. 1 Hazard & Hodes, *supra* note 27, § 1.13:103.

101. *Id.* § 1.13:103.

102. *See generally* Franklin, *supra* note 12, at 1048-50.

103. *See, e.g.,* Batt, *supra* note 17, at 336 (suggesting change in Rule 2.2 to accommodate entity representation of family similar to Rule 1.13).

104. *See, e.g.,* Allegheny Bar Op., *supra* note 48, at 28 (observing that representation of a family is the representation of individuals and not the family unit).

105. *See supra* text accompanying notes 14-16.

106. *See supra* text accompanying notes 80-91.

107. *See supra* text accompanying notes 85-91.

implications of the common representation and the advantages and risks involved."<sup>108</sup> Ms. Lawyer may proceed with the representation only if she "reasonably believes the representation will not be adversely affected"<sup>109</sup> by the potential material limit on her responsibilities.<sup>110</sup> Assuming these conditions have been satisfied, Ms. Lawyer can undertake the representation under Rule 1.7(b).

Ms. Lawyer can similarly decide that she prefers to represent John and Mary under Rule 2.2 if she makes the disclosures, obtains the consents, and makes the determinations required by that rule.<sup>111</sup> It does not appear, however, that Rule 2.2 provides Ms. Lawyer, John or Mary with any particular advantages.<sup>112</sup>

Assuming Ms. Lawyer has commenced representation under either Rule 1.7(b) or Rule 2.2, Ms. Lawyer next faces the question of how to respond to Mary's request that Ms. Lawyer prepare a new, different will for Mary and keep both the conversation and the terms of the will confidential from John. The conversation suggests direct adversity implicating Rule 1.7(a) insofar as Mary's desire for confidentiality from John reflects her view that this course of action would put her in opposition to John's goals. Mary's request also suggests a material limit on the lawyer's zealous representation of John, who would probably want to know of this information in making his own plans.<sup>113</sup> Even though Ms. Lawyer has previously obtained consent from John under Rule 1.7(b), the circumstances of the conversation indicate that it is unlikely that John contemplated that he was consenting to the course of action proposed by Mary.<sup>114</sup>

To remedy the situation, Ms. Lawyer can attempt to persuade Mary either to discuss the matter with John or to permit Ms. Lawyer to talk to John. If Mary agrees to either course, Ms. Lawyer will then have to consider whether the particular facts present "direct adversity" or only a

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108. Model Rules, *supra* note 23, Rule 1.7(b)(2).

109. Model Rules, *supra* note 23, Rule 1.7(b)(1).

110. See Model Rules, *supra* note 23, Rule 1.7(b).

111. See *supra* text accompanying notes 55-64.

112. See *supra* text accompanying notes 52-70; see also 1 Hazard & Hodes, *supra* note 27, § 2.2:103 ("[t]heoretically, little is gained or lost by proceeding as if under Rule 1.7(b) rather than Rule 2.2").

113. See, e.g., *Spector v. Mermelstein*, 361 F. Supp. 30, 39-40 (S.D.N.Y. 1972) (holding that client has a right to information "which, if known to the client, might well have caused him, acting as a reasonable man, to alter his proposed course of conduct"); N.Y.S. Bar Ass'n Op. 555, *supra* note, 48 (providing relevant information to client "is a duty owed by an agent acting in a fiduciary capacity") (citing Restatement (Second) Agency § 381 (1957)); Collett, *And the Two*, *supra* note 10, at 142-43.

114. See Restatement Governing Lawyers, *supra* note 28, § 202 cmt. f ("significant change in the factual basis on which the client originally gave consent may justify a client in withdrawing consent"); cf. Mercer D. Tate, *Handling conflicts of interest that may occur in an estate planning practice*, 16 Est. Plan. 32, 36 (1989) (where lawyer represents Mr. and Mrs. Able in estate planning, "if Mr. Able attempts to have you make a secret change to his will, you should decline further estate services to him and advise Mrs. Able that you are no longer able to provide estate planning services to her").

“material limit” and therefore satisfy the conditions for continuing representation under Rules 1.7(a) or 1.7(b), or, if applicable, Rule 2.2.

If Mary refuses to permit disclosure, Ms. Lawyer probably could not obtain the necessary consent from John to continue representation under Rules 1.7(a) or 1.7(b).<sup>115</sup> At this point, where Ms. Lawyer began representing John and Mary jointly for their estate planning, the planning for one is “the same or a substantially related matter”<sup>116</sup> as planning for the other and the interests of the two would be “materially adverse.”<sup>117</sup> Ms. Lawyer would therefore have to withdraw from representing both John and Mary under Rule 1.9.<sup>118</sup> While most authorities suggest that Ms. Lawyer would have to keep Mary’s confidence from John, some authority is to the contrary.<sup>119</sup>

The situation is more complicated under Rule 2.2. The split of authority makes it impossible to determine a generally accepted approach to whether the duty of confidentiality to any individual client arises under Rule 2.2.<sup>120</sup> Whether or not any duty of confidentiality arises, Mary’s refusal to disclose, as well as the prejudice to Mary of disclosure or to John of non-disclosure, would vitiate the impartial and non-prejudicial representation necessary to satisfy Rule 2.2,<sup>121</sup> and would require Ms. Lawyer to withdraw from representing both John and Mary even before disclosure pursuant to Rule 2.2(c).<sup>122</sup>

115. See Model Rules, *supra* note 23, Rule 1.7 cmt. (“when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent”).

116. Model Rules, *supra* note 23, Rule 1.9(a). See Collett, *And the Two*, *supra* note 10, at 115.

117. Model Rules, *supra* note 23, Rule 1.9(a). See Collett, *And the Two*, *supra* note 10, at 116.

118. See *supra* text accompanying notes 93-96.

119. See *supra* note 48 and accompanying text.

120. See Dzienkowski, *supra* note 5, at 805. The language of the comment to Rule 2.2 is ambiguous. It provides both that “the lawyer is still required . . . to maintain confidentiality of information relating to the representation,” and that “between commonly represented clients the privilege does not attach.” Model Rules, *supra* note 23, Rule 2.2 cmt. The former quote appears to apply to confidentiality of the common representation with regard to third parties, but it could be read to apply to individual clients. The latter quote, by expressly indicating the privilege does not attach, might be read to imply that the duty of confidentiality does attach as it does under joint representation pursuant to Rule 1.7(b). Compare Wolfram, *supra* note 24, at 729 and N.Y. State Bar Op. 555, *supra* note 48 (comment to Rule 2.2 suggests that duty of confidentiality applies to individuals) with 1 Hazard & Hodes, *supra* note 27, § 2.2:202 (“While Rule 1.6 will continue to protect the confidences of each of the clients from disclosure to third parties, Rule 2.2 will require that those same confidences be shared within the group.”).

121. See Model Rules, *supra* note 23, Rule 2.2(a); 1 Hazard & Hodes, *supra* note 27, § 2.2:202 (parties’ refusal to share confidences “is highly suggestive that the requisite trust is lacking, and that intermediation ought not be attempted.”).

122. See Model Rules, *supra* note 23, Rule 2.2(c).

## 2. The Nursing Home Hypothetical

When Ozzie and Harriet inform Mr. Lawyer that they disagree as to whether Harriet should enter a nursing home but want to reach a consensus,<sup>123</sup> they present a conflicts problem. Despite their desire to seek a resolution of their differences, Ozzie and Harriet's interests are directly adverse in that they seek opposing goals. Under Rule 1.7(a), Mr. Lawyer would have to obtain their consent and make a reasonable determination that the representation would not adversely affect the relationship with each. On one hand, such a representation is not totally foreclosed. The proposed Restatement suggests:

even if the possibility of litigation is substantial at the outset of the representation, and even though consent would not permit the lawyer to represent all parties if litigation should result . . . , a lawyer could accept multiple representation in an effort to reconcile the differences of the clients short of litigation."<sup>124</sup>

On the other hand, Rule 1.7(a) essentially bans such representation.<sup>125</sup> In light of the grave importance to Ozzie and Harriet of the issue of Harriet's institutionalization, any differences that arise during the representation are likely to cause feelings of anger and betrayal. It is therefore reasonably foreseeable that the representation of both will to some degree adversely affect Mr. Lawyer's relationship with one or the other.<sup>126</sup>

Even if the representation satisfied Rule 1.7(a), it would pose further problems under Rule 1.7(b). In this instance, representation of both would probably prejudice the position of one or the other in the potential future litigation. For example, conversations with Mr. Lawyer, which would not be protected by the attorney-client privilege in subsequent litigation between Ozzie and Harriet, might provide valuable evidence for one party or the other.<sup>127</sup> Accordingly, even if the clients consented to these risks, Mr. Lawyer would be likely to believe reasonably that representation of one spouse could "adversely affect" the representation of the other and decline representation under Rule 1.7(b).

If Ozzie and Harriet presented the extraordinary circumstances which would permit representation under Rule 1.7 or 2.2, Mr. Lawyer would be unable to represent either in the litigation between them, in the event the attempt at conciliation fails.<sup>128</sup> Rule 1.9 would bar representation in the "same or substantially related matter" where Ozzie and Harriet would be

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123. See *supra* text accompanying notes 17-19.

124. Restatement Governing Lawyers, *supra* note 28, § 211 cmt. d.

125. See Model Rules, *supra* note 23, 1.7(a). See *supra* text accompanying notes 38-43.

126. See *supra* note 41.

127. See Model Rules, *supra* note 23, 1.7(b). See *supra* note 48 and accompanying text.

128. See, e.g., Restatement Governing Lawyers, *supra* note 28, § 211 cmt. d. ("the effort to overcome differences might ultimately fail and require the lawyer's partial or complete withdrawal from the matter"); Wolfram, *supra* note 24, § 7.3.4, at 358 ("A hazard of joint representation . . . is that if the transaction breaks down and litigation

materially adverse absent the other's consent.<sup>129</sup> Rule 2.2 would require withdrawal from representation of both upon the request of either or upon the failure of any of the conditions for the representation.<sup>130</sup>

## II. THE ESTABLISHED DOCTRINE'S PERSPECTIVE ON THE FAMILY

This Part examines the established doctrine's perspective on the family by placing the established doctrine in the context of legal developments regarding the family. While recognizing the family both as an entity and as a collection of individuals, the trend in the law has been to move from considering the family as a unit to considering it as a collection of individuals. Following this trend, established legal ethics doctrine favors the individual over the family unit. The structure of established doctrine also provides that the legal profession or the lawyer, and not the family, determine the contours of family representation.

Many commentators have observed that, beginning in the Enlightenment, Western culture has shifted from the perspective "that family and marriage were the essential determinants of an individual's economic security and social standing"<sup>131</sup> to the notion that the individual determines her own standing.<sup>132</sup> Professor Raymond Williams observes:

The emergence of notions of *individuality*, in the modern sense, can be related to the break-up of the medieval social, economic and religious order. In the general movement against feudalism there was a new stress on a man's personal existence over and above his place or function in a rigid hierarchial society.<sup>133</sup>

Sir Henry Maine's famous observation of the move "from Status to Contract"<sup>134</sup> refers to the transformation from "a society in which all the relations of Persons are summed up in the relations of Family . . . towards a phase of social order in which all these relations arise from the free agreement of Individuals."<sup>135</sup> Complementing this change were political philosophies which "began from individuals, who had an initial and primary existence, and laws and forms of society were derived from them: by submission, as in Hobbes; by contract or consent, or by the

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ensues, the lawyer may not represent either party because of the confidentiality principle.").

129. See Model Rules, *supra* note 23, Rule 1.9(a), (c).

130. See Model Rules, *supra* note 23, Rule 2.2(c).

131. Mary Ann Glendon, *The Transformation of Family Law* 292 (1989) [hereinafter, Glendon, *Transformation*].

132. See Mary Ann Glendon, *The New Family and the New Property* 42 (1981) [hereinafter Glendon, *The New Family*].

133. Raymond Williams, *Keywords: A Vocabulary of Culture and Society* 163 (rev. ed. 1983). Professor Williams also notes "a related stress, in Protestantism, on a man's direct and individual relation to God, as opposed to this relation MEDIATED (q.v.) by the Church." *Id.* at 163-64.

134. Henry S. Maine, *Ancient Law* 422 app. (Peter Smith ed. 1970) (10th ed. 1884).

135. *Id.* at 99. See Janet L. Dolgin, *Status and Contract in Feminist Legal Theory of the Family: A Reply to Bartlett*, 12 *Women's Rts. L. Rep.* 103, 105-06 (1990) (discussing Maine's observations); Glendon, *The New Family*, *supra* note 132, at 41-43 (same).



new version of natural law, in liberal thought."<sup>136</sup>

The law reflected this transformation. Professor Mary Ann Glendon notes that until recently "[f]amily solidarity and the community of life between spouses were emphasized over the individual personalities and interests of family."<sup>137</sup> According to Professor Lawrence Friedman, the law aspired to "empower[ ] *families*, rather than individuals."<sup>138</sup> The State sought to preserve families and make difficult their dissolution. Divorce "was only permitted for state-defined reasons—acts constituting 'fault.'<sup>139</sup> Within the family, the husband had "despotic rights,"<sup>140</sup> "to govern and discipline family members."<sup>141</sup> Professor Martha Minow observes that "criminal laws against rape and assault exempted husbands and no rules against child abuse existed until the end of the nineteenth century."<sup>142</sup> Under the entity theory of the family, the law refused to

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136. Williams, *supra* note 133, at 164. Like the field of mathematics, "[t]he political thought of the Enlightenment mainly followed [the] model" of "postulat[ing] the individual as the substantial entity . . . from which other categories and especially collective categories were derived." *Id.* Professor Williams further observes that "[i]n classical economics, trade was described in a model which postulated separate individuals who decided, at some starting point, to enter into economics or commercial relations." *Id.* See also Robert N. Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life* 143 (1985) (tracing individualism in American culture to the Lockean tradition that "[t]he individual is prior to society, which comes into existence only through the voluntary contract of individuals trying to maximize their own self-interest"). The use of the individual as the basic political unit was not without opposition. Conservatives, such as Burke, argued that "'the individual is foolish, . . . the species is wise.'" Williams, *supra* note 133, at 164. From the left, Marx "attacked the opposition of the abstract categories 'individual' and 'society' and argued that the individual is a social creation, born into relations and DETERMINED (q.v.) by them." *Id.*

137. Glendon, *Transformation*, *supra* note 131, at 291. See Elizabeth Fox-Genovese, *The Legal Status of Families as Institutions*, 77 *Cornell L. Rev.* 992, 992 (1992) ("[O]ur legal tradition . . . has preferred to treat the family as a corporate unit rather than as a collection of isolated individuals."). Blackstone wrote:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing . . . Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.

*Id.* (quoting William Blackstone, *Of the Rights of Persons, in 1 Commentaries of the Laws of England* 430 (Univ. of Chicago Press ed. 1979) (1765) (citations omitted)).

138. Lawrence M. Friedman, *The Concept of the Self in Legal Culture*, 38 *Clev. St. L. Rev.* 517, 533 (1990).

139. Martha A. Fineman, *The Illusion of Equality* 19 (1991). Moreover, Professor Lawrence Friedman notes that "[i]n England, divorce was, basically, not available at all until 1857, and in the United States, divorce was not common even in those states (chiefly northern) which permitted judicial divorce and did not require a special act of the legislature to end a marriage." Friedman, *supra* note 137, at 531-32 (footnotes omitted).

140. Friedman, *supra* note 138, at 533.

141. Martha Minow, *The Role of Families in Medical Decisions*, 1991 *Utah L. Rev.* 1, 14 (1991).

142. *Id.* at 13-14. See also Jane E. Larson, *The Sexual Injustice of the Traditional Family*, 77 *Cornell L. Rev.* 997, 997 (1992) (analyzing the traditional family model in which the law permitted a husband to beat and rape his wife).

enforce contracts between family members or to permit them to sue each other.<sup>143</sup>

Professor Mary Ann Glendon has observed that the law has shifted "increasingly to emphasize the individuality of the members of the conjugal family as well as to facilitate their independence from it and each other"<sup>144</sup> as a result of the modern emphasis on "[i]ndividual liberty and the relative independence and equality of family members" . . . made possible by the decreasing economic importance of the marriage and the family.<sup>145</sup> While "individualistic, egalitarian, and secularizing trends . . . have been gaining power in Western legal systems since the late eighteenth century,"<sup>146</sup> most changes in law occurred in the 1960s and thereafter.<sup>147</sup>

As Professor Friedman notes, "family law has evolved . . . toward fragmenting the family legally speaking, into separate *individuals*."<sup>148</sup> With the development of statutes permitting divorce without fault, "access to divorce [has been] made easy."<sup>149</sup> Within the family, the husband is no longer the ruler of a cohesive unit. The Supreme Court has held that the Constitution prohibits States from requiring a wife to obtain her husband's consent for her abortion.<sup>150</sup> Governmental authorities now prosecute husbands for marital rape as well for spouse and child abuse.<sup>151</sup> With regard to civil liability, Professor Minow notes that "courts have recognized and enforced contracts between family members and permitted tort suits."<sup>152</sup>

While the trend is to treat family members as individuals, that is not the exclusive approach of modern law. The law respects the family's authority unless a compelling interest, such as the prevention of the abuse and neglect of children, justifies intervention.<sup>153</sup> Despite the increased

143. See Minow, *supra* note 141, at 13.

144. Glendon, *The New Family*, *supra* note 132, at 43.

145. *Id.* at 41. Professor Glendon observes that today, in contrast, while "[f]amilies . . . continue to exert an extremely important influence on the life prospects of their members," Glendon, *Transformation*, *supra* note 131, at 292, "an individual's wealth, power, and standing are decreasingly determined by family membership and increasingly by his or her own labor force activity, or in a negative way, by his or her dependency relationship with government." *Id.*

146. Glendon, *Transformation*, *supra* note 131, at 292.

147. See *id.*

148. Friedman, *supra* note 138, at 533. See also, e.g., Glendon, *Transformation*, *supra* note 131, at 295 ("pervasive in all the recent developments we have surveyed is the tendency for law and social programs to break the family down into its component parts and to treat family members as separate and independent").

149. Fineman, *supra* note 139, at 19.

150. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 71 (1976); Minow, *supra* note 141, at 14.

151. See Minow, *supra* note 141, at 14. Some states, however, continue to exempt spousal rape from rape statutes. See Anne L. Buckborough, *Family Law: Recent Developments in the Law of Marital Rape*, 1989 Ann. Surv. Am. L. 343, 343-44 (1989).

152. Minow, *supra* note 141, at 14.

153. See Franklin, *supra* note 12, at 1051; see also Dolgin, *supra* note 135, at 107 ("Present law, like the society it reflects, assumes that the family is and should remain

recognition of children as legal actors separate from the family,<sup>154</sup> courts generally continue to evaluate parenthood as a matter of status in surrogate motherhood<sup>155</sup> and adoption cases.<sup>156</sup> Although "the state's concern [in divorce] now centers on 'equity' and 'justice' between the spouses in dividing up their accumulated debts and assets and in awarding custody of their children[.]"<sup>157</sup> property awards and custody determinations continue to include notions that the family is a community for both economic and child rearing purposes.<sup>158</sup> The doctrine of tenancy by the entirety, while changing to acknowledge women's equality, continues to treat the interests of husband and wife as a unity.<sup>159</sup> In accord with the view of the family as a community is the trend to increase the surviving spouse's rights under both intestacy and testacy.<sup>160</sup> Similarly, the recently enacted Family and Medical Leave Act seeks to support membership in family units by providing a legal right for individuals to fulfill obligations to other family members.<sup>161</sup>

Like these other areas of law,<sup>162</sup> legal ethics mixes treatment of families as collections of individuals and communities. Legal ethics both limits representation of the family as a unit when conflicts would interfere with adequate representation of individuals and acknowledges that, at least in some ways, families are communities.

The framework for legal ethics is representation of the individual. Professor John Leubsdorf has noted that "[t]he lawyer-client relationship

primarily a universe defined in status terms, a universe of love, not money, of commitment, not negotiation, of relationship, not autonomy.") (footnote omitted).

154. See, e.g., *Twigg v. Mays*, No. 88-4489-CA-01, 1993 WL 330624, at \*3 (Fla. Cir. Ct. Aug. 18, 1993) (holding that child has standing in dispute regarding parental rights to her).

155. See Dolgin, *supra* note 135, at 108-10.

156. See, e.g., *In re B.G.C.*, 496 N.W.2d 239, 245 (Iowa 1993) (rejecting adoption of child on ground that biological father had not consented to adoption despite evidence of "exemplary care" on the part of prospective adoptive parents and "poor performance record as a parent" on the part of biological father). But see *Twigg*, 1993 WL 330624, at \*5-\*6 (rejecting attempt of biological parents to assert parental rights to child that others have raised).

157. Fineman, *supra* note 139, at 19.

158. See, e.g., *Anonymous v. Anonymous*, N.Y.L.J., Sept. 24, 1993, at 22 (N.Y. Sup. Ct.) (in awarding wife share of husband's interest as partner in Cravath, Swaine & Moore, court notes "that a marriage is an economic partnership, and the compensation of the one who is employed is, in that sense, earned by the married couple as a team"); Gerald D. McLellan, *Equitable Distribution Law and Practice* § 1.9 (1985) ("[t]he underlying premise of the concept [of equitable distribution] is to consider the marriage to be an economic financial partnership, and in the event of a divorce, to distribute the property under the guiding force of equity"); J. Thomas Oldham, *Divorce, Separation and the Distribution of Property* § 3.02[2][d] (1990) ("[c]ourts now generally perceive marriage as a partnership whose term is the duration of the marriage").

159. See Collett, *And the Two*, *supra* note 10, at 120-21.

160. See Glendon, *The New Family*, *supra* note 132, at 58-60; 7 Richard R. Powell & Patrick J. Rohan, *Powell on Real Property* ¶ 994[1] (1993) (discussing intestacy and the rights of spouses).

161. See 29 U.S.C. § 2601 (1993).

162. See *supra* notes 144-61 and accompanying text.

traditionally has been conceived as one between individuals."<sup>163</sup> Although joint representation of clients as individuals is permitted under Rules 1.7 and 2.2, consideration of a group as an entity is rare. Group representation arises under only one rule, Rule 1.13, which appears to deal with corporations and business organizations.<sup>164</sup> Even in the context of corporate representation, Professor Hazard has observed that the application of norms derived from individual representation to corporate representation have made "the responses of courts and scholars . . . baffled and baffling."<sup>165</sup>

Those applying the conflicts rules to family representation acknowledge the primacy of viewing clients as separable individuals. A leading bar opinion notes that while "one tends at times to think abstractly in terms of preserving the 'estate' or benefiting the 'family,' as a whole, the professional estate planner is, in fact, representing individuals."<sup>166</sup> Similarly, in discussing family representation, commentator Gerald Le Van reminds lawyers that "[t]he legal world focuses on individuals as basic units in society."<sup>167</sup>

Indeed, the very existence of conflicts rules illustrate the individual orientation of legal ethics. These rules require the lawyer to provide "exclusive devotion" to the interests of her client.<sup>168</sup> The task of providing exclusive devotion, and of avoiding conflicts between clients' interests, rests on the assumption that one can identify separable, individual interests of clients. In contrast, as Professor Hazard has observed, if lawyers viewed clients as "complex interdependencies," clients' situations would

163. John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 Cornell L. Rev. 825, 825 (1992). He observes that "this conception is built into the very words we use to describe the relationship. Scholarship, professional rules, and judicial opinions speak of 'a lawyer' and 'a client.'" *Id.* (footnote omitted). See also Ellmann, *supra* note 97, at 1104 ("the reader of the codes of legal ethics might be forgiven for assuming that most legal work is done on behalf of individuals"). Professor Theresa Glennon further observes that the dominant approach to teaching professional responsibility in law school "is based on a 'liberal' vision of a social world peopled by autonomous, separate individuals in competition with one another." Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 Hastings L.J. 1175, 1176 (1992).

164. See Model Rules, *supra* note 23, Rule 1.13; *supra* text accompanying notes 97-104.

165. Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 Geo. J. Legal Ethics 15, 30 (1987).

166. Allegheny County Bar Op., *supra* note 48, at 28.

167. Gerald Le Van, *Lawyers, Families and Feelings: Representing the Family Relationship*, 5 Prob. & Prop., Jan.-Feb. 1991, at 19, 21.

168. The origin of established doctrine is often traced to Justice Storey's observation that "[w]hen a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree with his exclusive devotion to the cause confided to him." Hazard & Koniak, *supra* note 48, at 580 (quoting *Williams v. Reed*, 3 Mason 405, 418, F. Cas. (C.C. Maine 1824) (No. 17,733)). Other commentators who find the source of conflicts doctrine in the instruction of Luke 16:13 and Matthew 6:24 paraphrase these sources to assert that "[n]o lawyer can serve two masters." Collett, *And the Two*, *supra* note 10, at 143.

"not lend themselves to analysis in terms of friend or foe."<sup>169</sup>

Implementing this relatively individualistic understanding of the family, established doctrine places restrictions on family representation. Even where the family seeks, and consents to, representation as a unit, established doctrine requires that the lawyer refuse to initiate or continue representation where she reasonably believes the representation or client relationship will be adversely affected.<sup>170</sup> In the Nursing Home Hypothetical, therefore, Mr. Lawyer probably could not represent Ozzie and Harriet.<sup>171</sup> In the Estate Hypothetical, Ms. Lawyer would be able to represent John and Mary initially, but would have to withdraw if Mary insisted on keeping secret from John her intent to obtain a separate will.<sup>172</sup> In this way, established doctrine generally treats family members as individuals with separable interests.

Rather than embodying a pure ethic of individualism, though, legal ethics is similar to other areas of law that respect family choices absent a compelling reason to the contrary.<sup>173</sup> Indeed, the established doctrine expressly permits joint representation of spouses and other family members absent impermissible conflicts.<sup>174</sup> While some authority expressly prefers joint representation,<sup>175</sup> a lawyer representing family members jointly faces exposure to sanction or disqualification on conflicts grounds. A lawyer representing only one family member faces no such risk.<sup>176</sup>

169. Hazard, *supra* note 165, at 30 (suggesting that "lawyer-guardian-ward and lawyer-corporation-corporate officer situations" contain such "complex interdependencies").

170. *See supra* text accompanying notes 38-43.

171. *See supra* text accompanying notes 123-30.

172. *See supra* text accompanying notes 105-22.

173. *See supra* text accompanying notes 144-61.

174. *See supra* notes 162-63 and accompanying text; *see, e.g.*, Restatement Governing Lawyers, *supra* note 28, § 211 cmt. c; Allegheny County Bar Op., *supra* note 48; Va. State Bar Standing Comm. on Legal Ethics, Op. 728 (1985).

175. One bar opinion, for example, recognizes that spouses generally act as a community to favor "solutions which are a compromise of economic benefits, personal preferences and prejudices and overall family advantage." Allegheny County Bar Op., *supra* note 48, at 28 (contrasting spousal representation with a commercial situation "where counsel is expected to achieve the maximum economic advantage for his client.") Accordingly, they view their lawyer "as an intermediary and a problem solver, not a partisan advocate." *Id.* The opinion expressly prefers joint to separate representation. It acknowledges that "[a]dversarial juxtaposition in estate planning matters can . . . spark marital discord even to the extent, in extreme cases, of encouraging resort to the ultimate weapon in this adversary relationship—divorce." *Id.*

At the same time that it favors representation of spouses as a community, the opinion recognizes that "the professional estate planner is, in fact, representing individuals." *Id.* It therefore requires a "full disclosure to each party of all assets involved and the terms and significance of the distributive scheme adopted by each." *Id.* at 430. It further goes beyond the general rule of confidentiality between joint clients, *see supra* note 48 and accompanying text; to require a "waiver or consent to reveal confidences or secrets." Allegheny County Bar Op., *supra* note 48, at 30.

176. *See, e.g.*, Model Code, *supra* note 23, EC 5-15 (urging lawyers to "resolve all doubts against the propriety of the representation").

### III. PROFESSOR THOMAS SHAFFER'S CHALLENGE TO ESTABLISHED DOCTRINE: THE FAMILY AS AN ORGANIC COMMUNITY

Professor Thomas Shaffer challenges the established doctrine's tendency to view family members as separate individuals, rather than as a family unit. Shaffer argues that because families are communities, the approach of the established doctrine is both unrealistic and immoral.<sup>177</sup> Professor Shaffer describes established doctrine as "The Legal Ethics of Radical Individualism."<sup>178</sup> He illustrates this point with an analysis of the approach of leading practitioners to *The Case of the Unwanted Will*,<sup>179</sup> the hypothetical upon which this Article's Estate Hypothetical is based. In that hypothetical, John and Mary ask a lawyer to draft wills for them. Before John and Mary are to sign their wills, the lawyer meets with Mary alone to ask if the terms of the will are as she desires.<sup>180</sup> Mary says that there are:

several provisions that are contrary to her wishes, and that she would change if her husband were not to know the ultimate disposition of her estate. However, she says that she would not be willing to precipitate the domestic discord and confrontation that would occur if her husband were to learn that she had drawn a will contrary to his wishes and in accordance with her own desires.<sup>181</sup>

Mary asks the lawyer to make changes and he refuses "but suggests that she go ahead and sign this will and then, as soon as possible, go to some other lawyer and have her will rewritten in accordance with her true wishes."<sup>182</sup> Mary signs the will.<sup>183</sup>

In the ABA Journal article that presents *The Case of the Unwanted Will*, two leading practitioners comment on the ethical issues. Both view the lawyer as having two clients, John and Mary.<sup>184</sup> Both agree that the lawyer should not have asked to speak to Mary separately.<sup>185</sup> One commentator suggests that it would have been improper even to meet with her separately at Mary's request. He observes that the problem of whether to sign a will she does not want "is Mary's and she should decide what to do about it. The lawyer, by meeting privately with Mary, has permitted her to transfer the problem to him."<sup>186</sup> Both commenta-

177. See Shaffer, *Individualism*, *supra* note 7.

178. *Id.* at 963.

179. *The Case of the Unwanted Will*, *supra* note 15.

180. See *id.* at 484. In the Estate Hypothetical, in contrast, Mary calls the lawyer to ask for separate advice. See *supra* text accompanying notes 15-16.

181. *The Case of the Unwanted Will*, *supra* note 15, at 484.

182. *Id.*

183. See *id.* *The Case of the Unwanted Will* also includes facts and ethical dilemmas not relevant to this Article. John and Mary are having their wills drafted "prior to going on a trip abroad." *Id.* Mary does not obtain a new will before the trip, during which both John and Mary die "in an airplane accident." *Id.*

184. See *id.* at 484-86.

185. See *id.* at 484-88.

186. *Id.* at 488. Cf. Jeffrey N. Pennell, *Professional Responsibility: Reforms are Needed to Accommodate Estate Planning and Family Counselling*, 25 U. Miami Philip E.

tors agree that the lawyer properly refused to change Mary's will without making a disclosure to John.<sup>187</sup>

In Professor Shaffer's view, "[i]t follows from this typical analysis [on the part of the commentators] that the lawyer's moral mistake was in talking to Mary alone."<sup>188</sup> If the lawyer had not talked to her alone, her "secret intention never would have come to his attention; her thoughts would be hidden, and that is appropriate because John's thoughts are hidden."<sup>189</sup> Shaffer identifies four premises underlying the traditional approach to legal ethics which these commentators exemplify:

First, a lawyer's proper employment is by or for an individual. Second, employment by or for more than one individual is exceptional. Third, as a consequence, multiple party employment is necessarily superficial. Finally, the means for protecting the superficiality (or, if you like, the means for protecting the principle that employment is ordinarily and properly by or for individuals) is ignorance of any facts known to one of the individuals but not to the other.<sup>190</sup>

Shaffer suggests that these premises form the basis of "the legal ethics of radical individualism."<sup>191</sup> Legal Ethics "looks on Mary as a collection of interests and rights that begin and end in radical individuality."<sup>192</sup> John and Mary's family, their relationship to each other and their children, are "seen as a product of individuality(!), of contract and consent, of promises and the keeping of promises—all the consensual connections that lonely individuals use when they want circumstantial harmony."<sup>193</sup> The individuals who are in the family employ the lawyer as a result of "promise and consent." The family is "relevant to the legal business at hand only because the (radical) individuals, each in momentary and circumstantial harmony with one another, want it to be."<sup>194</sup> This perspective, in turn, shapes how lawyers represent families. It suggests that "[t]he things that people share . . . are relatively superficial; they are the harmonies that radically autonomous individuals *choose* to have."<sup>195</sup> Therefore, "[e]mployment by a group of persons is possible only if the lawyer stays with chosen harmonies. The employment is imperiled if the

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Heckerling Inst. on Est. Plan. ¶ 18-1, ¶ 18-29 (1991) [hereinafter Pennell, *Professional Responsibility*] (under approach of no confidentiality between joint clients, "the attorney escapes being in the middle of a terrible situation and essentially puts the monkey on the back of the spouse with a secret").

187. See *The Case of the Unwanted Will*, *supra* note 15, at 484-88.

188. Shaffer, *Individualism*, *supra* note 7, at 969 (citation omitted).

189. *Id.*

190. *Id.*

191. *Id.* at 970.

192. *Id.*

193. *Id.*

194. *Id.* Shaffer describes this moral perspective as one where "the highest good I can seek for a person on whom I focus my beneficence is that he be free—and free here means self-ruling and radically not committed." *Id.* at 975.

195. *Id.* at 975.

lawyer intrudes on these individualistic choices."<sup>196</sup> At the point where "employment will necessarily intrude on these choices, then the radically individualistic nature of the persons who are client(s) requires separate lawyers for each individual."<sup>197</sup>

In light of this individualistic approach, Shaffer finds it "unlikely . . . that the people who drafted and adopted the Model Rules would encourage a lawyer to exert herself to keep a client group together."<sup>198</sup> Instead, "[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."<sup>199</sup> Indeed, "had [Rule 2.2 as the Rule most favorable to group representation] been invoked in *The Case of the Unwanted Will*, the lawyer would at any rate have learned, as he protected himself from the debris, not to focus attention on a will-making wife in the absence of her husband."<sup>200</sup>

Shaffer rejects this legal ethic of radical individualism as "sad, corrupting, and untruthful."<sup>201</sup> He argues that "this one-lawyer-for-each-person way of first seeing a moral quandary in this situation and then resolving the quandary with the ethics of autonomy (the ethics of aloneness) leaves the family out of the account."<sup>202</sup> The "truthful description," however, "is that the lawyer's employer is a family."<sup>203</sup> Indeed, the family is an "organic community"<sup>204</sup> which is "prior to individuality."<sup>205</sup>

196. *Id.*

197. *Id.*

198. *Id.* at 974.

199. *Id.*

200. *Id.* Shaffer does, however, concede that Rule 2.2 is somewhat ambiguous and potentially susceptible to an alternative construction. *See id.* at 972 & n.37.

201. *Id.* at 970.

202. *Id.*

203. *Id.* Shaffer notes that "[t]hose in contemporary ethics who concentrate on the importance of the truthful account argue first that fact and value are not separate — that stating the facts is, as Iris Murdoch put it, a moral act, a moral skill, and a moral art . . ." *Id.* at 965.

204. *Id.* at 970 n.26. Such "organic communities of persons are prior in life and in culture to individuals—in other words, . . . the moral agent is not alone." *Id.* at 965-66 (footnote omitted). The term generally applies to three types of relationships:

First. — An organic community is created by people through the mutual practice of the virtues, and through mutual support in the pursuit of the good. . . .

Second. — An organic community is created, sustained, and redeemed by God. . . .

Third. — An organic community is recognized by people who discover a psychological or biological commonality in one another.

*Id.* at 965-66 n.8 (citations omitted). Shaffer asserts that the view of the family as an "organic community" is consistent with our cultural and religious traditions. *See id.* at 970.

205. *Id.* at 971. Shaffer describes his perspective on the family as anthropological:

It is not normative, in the sense in which modern moral philosophy usually separates the normative from the descriptive. The family is not, always and



To illustrate the family as an "organic community," Shaffer uses author Anne Tyler's metaphor of "a magnifying glass all cracked and broken" that makes "broken things" appear "whole again."<sup>206</sup> In Tyler's cracked magnifying glass, even when physically alone, "all of us live[ ] in a sort of web, criss-crossed by strings of love and need and worry."<sup>207</sup> Applying this understanding to *The Case of the Unwanted Will*, Shaffer contends that "the family created the promises, the contract, the consent, and the circumstantial harmony—not the other way around."<sup>208</sup> In his view, "[t]he family causes people to seek human harmonies and, consequently, to create more families."<sup>209</sup>

Shaffer describes how families create the field of estate planning. The family provides "the lens through which we understand death as the death of an owner, and property as something owned by dead people."<sup>210</sup> It offers "the cracked magnifying glass that shows how things broken by discord and death are whole."<sup>211</sup> Indeed:

[t]he family is normally why people bother with estate planning—'normally' in the sense that, but for the family, estate planning would not be a legal subject. The family is the cultural focus for the realization that estate planning is a worthwhile thing for people to do, because it reflects the hope that none of us will die alone.<sup>212</sup>

Shaffer concludes that "[t]he human fact that is prior to the moral agency [that is, 'the capacity to make choices that determine one's character']<sup>213</sup> of which moral philosophy usually speaks is the family; the moral art of description in the legal ethics of estate planning is the skill to describe a family."<sup>214</sup>

Shaffer's approach differs in some ways from that of the established doctrine. Shaffer's lawyer would actively seek information about the family. This would include learning about potential differences, like the established doctrine,<sup>215</sup> but would also include, and indeed would emphasize, learning about the harmonies of the spousal relationship. This activist approach differs from that of the commentators to *The Case of the Unwanted Will*. Although established doctrine would not bar sepa-

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everywhere, good teleologically; nor is it always and everywhere good for its members. The family is part of the way people are.

*Id.* at 972 n.35.

206. *Id.* at 963 (quoting Anne Tyler, *The Accidental Tourist* 278-79 (1985)).

207. Shaffer, *Individualism*, *supra* note 7, at 966 (quoting Tyler, *supra* note 205, at 182).

208. *Id.* at 970.

209. *Id.* at 971.

210. *Id.* at 967.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at n.14.

215. *See supra* text accompanying notes 76-92.

rate meetings with John and Mary,<sup>216</sup> the commentators suggested that the lawyer, as a matter of prudent practice, should not have initiated a separate conversation with Mary. Shaffer asserts that the lawyer's activist approach of noticing that Mary was passive in discussion with the lawyer and asking to speak with her alone, enabled the lawyer to learn that Mary did not want to sign the will as drafted. The lawyer, therefore, obtained "a more truthful description of the reality that is the goal of the lawyer's work."<sup>217</sup> As Shaffer observes, "[i]f the lawyer had not talked to Mary alone, he would not have learned that she didn't want her will. She would still not have wanted it; the change would be that her lawyer wouldn't know."<sup>218</sup>

After Mary conveys her desire to obtain a separate will, Shaffer identifies only one of the options available under established doctrine as an appropriate next step. The established doctrine permits (but does not require) the lawyer to focus exclusively on differences between the spouses and recommend separate representation. Shaffer rejects this approach because it would treat Mary "as a radical individual rather than as a wife, a mother, and a member of a family."<sup>219</sup> Rather, Shaffer approvingly describes how our "19th century forebears" would have responded: "The thing for Mary to do is to tell *John* what she's thinking—or to tell me and let me tell him—and get this thing out in the open and solve it. So that Mary gets the will she wants and John knows about it."<sup>220</sup> This approach, while not the one taken by the commentators to *The Case of the Unwanted Will*, is not inconsistent with the legal ethics codes.

What Shaffer would suggest if Mary refuses to consent to the disclosure is less clear. Acknowledging that a family approach to ethics raises "sticky and uncertain"<sup>221</sup> issues, Shaffer suggests that lawyers adopt a "paternalistic" approach that takes into account "the virtues of good parents and the failures of bad parents."<sup>222</sup> Depending on the lawyer's vision of a good parent, she might continue the representation believing that to maintain the peace of the family she should accede to Mary's

216. See, e.g., Allegheny County Bar Op., *supra* note 48, at 30 ("Counsel should be neither required nor precluded from meeting with the spouses jointly or separately.")

217. *Id.* at 978. See Shaffer, *The Family as a client—Conflict or Community?*, Res Gestae, Oct. 1990, at 68 [hereinafter *Family*]. Shaffer asserts that "[t]he job of the lawyer for the family properly includes the description, in the language that is the law, of what a family knows, of what a family is, of what *this* family is." Shaffer, *Individualism*, *supra* note 7, at 982.

218. Shaffer, *Family*, *supra* note 217, at 68. Professor Stephen Ellmann presents an alternative explanation. He suggests that the lawyer might have been able to obtain the same information by questioning Mary in John's presence and that "the lawyer's insistence on separating the spouses is a form of disrespect for this couple *as a couple*." Ellmann, *supra* note 97, at 1125.

219. Shaffer, *Individualism*, *supra* note 7, at 987.

220. Shaffer, *Family*, *supra* note 217, at 62.

221. Shaffer, *Individualism*, *supra* note 7, at 984.

222. *Id.* at 987. For the Article's analysis of this perspective, see *infra* part IV.

approach and perhaps that the provisions of Mary's will were for the best. Alternatively, she might decide that John and Mary's family is not functioning properly and should not be represented further.

In the Nursing Home Hypothetical, Shaffer's approach would appear to differ drastically from established doctrine. Where established doctrine strongly disfavors representing the spouses with conflicting interests, Shaffer places a much greater weight on their mutual intent to seek the lawyer's aid in reaching an amicable resolution. Shaffer's vision of legal ethics requires Mr. Lawyer to take the risk and represent Ozzie and Harriet.

#### IV. THE REAL PROPERTY SECTION'S CHALLENGE TO ESTABLISHED DOCTRINE: "DON'T ASK, DON'T TELL"<sup>223</sup>

Although the Real Property Section's Recommendations<sup>224</sup> purport to be consistent with established doctrine, in fact, they represent a significant departure. The Section grounds its recommendations on a presumption of spousal unity, facially similar to Shaffer's approach, and a related goal of conforming legal ethics to client expectations. Contrary to Shaffer's perspective, however, the Real Property Section's Recommendations use these assumptions to propose a "Don't Ask, Don't Tell" approach under which the lawyer can assume the absence of, and need not inquire into, potential differences between spouses. When differences emerge, such as confidences to be kept from one spouse, the Recommendations take a much narrower view than the established doctrine in determining when such differences implicate the lawyer's duty to disclose and obtain consent, or withdraw. Under this narrow view, the lawyer may in her discretion decide whether, and how to, withdraw or disclose the confidence to the other spouse. Accordingly, the Recommendations

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223. The phrase "don't ask, don't tell" has become a popular way to describe various approaches, including President Clinton's, to the status of lesbian and gay members of the military. Under the "don't ask, don't tell" approach, the military would as a matter of policy exclude homosexuals from service but would not ask persons if they were homosexual and would not investigate or "pursue" if they didn't "tell" by revealing their sexuality on military premises. See, e.g., Thomas L. Friedman, *Chiefs Back Clinton on Gay-Troop Plan: President Admits Revised Policy Isn't Perfect*, N.Y. Times, July 20, 1993, at A1.

224. The Real Property Section's Recommendations are the product of a two year effort on the part of the Section's Study Committee on Professional Responsibility which included distinguished practitioners and academics. See Moore & Hilker, *supra* note 8, at 26. The leadership of the Section then approved the Recommendations. See Real Property Section Council Resolution (May 2, 1993); Moore & Hilker, *supra* note 8. The Real Property Section has not asked the ABA Standing Committee on Ethics and Professional Responsibility or the ABA House of Delegates to approve the Recommendations or comment on the issues they raise. See Comments of Anne K. Hilker & Jackson M. Bruce, Jr., "It's a Family Affair: Ethical Problems for Estate Planners," 19th National Conference on Professional Responsibility (May 22, 1993). The Study Committee did correspond with the drafters of the American Law Institute Restatement of the Law Governing Lawyers, but has refused to release that correspondence. See Letter from Malcolm A. Moore to Russell G. Pearce, dated Aug. 17, 1993 (on file with the *Fordham Law Review*).

embody a contradictory vision of the family which is both more and less communitarian than established doctrine.

The Recommendations purport to provide guidance for practitioners which is consistent with the legal ethics codes.<sup>225</sup> The Recommendations seek to provide "a prescriptive guide to the serious ethics issues estate planners routinely face"<sup>226</sup> as a result of "inadequate guidance from the ABA Model Rules of Professional Conduct and other available guidelines."<sup>227</sup> Yet, the Recommendations do not seek either to make significant changes in the existing legal ethics codes<sup>228</sup> or to propose changes in the established practice of trusts and estates lawyers.<sup>229</sup>

Despite the stated intent to conform to the legal ethics codes, the Recommendations propose major changes from established doctrine in both joint and separate representation of spouses. These changes are based on the Recommendations' two "working assumptions" for construction of the legal ethics codes.<sup>230</sup> First, the Recommendations instruct the lawyer to "assume that each spouse will fulfill" the "ethical obligations of the marriage commitment."<sup>231</sup> Second, the Recommendations advise constructing the ethical codes "to provide appropriate delivery of legal services without excessive cost or duplication of services, and fulfillment of client expectations about the lawyer's role whenever possible."<sup>232</sup> There appears, however, to be an unstated third "working assumption" that supports departures from established doctrine. This assumption seeks to conform the Recommendations to the actual behavior of trusts and estates practitioners. Evidence of this assumption is the divergence from

225. See Moore & Hilker, *supra* note 8, at 26.

226. *Id.*

227. *Id.*

228. See *id.* The Real Property Section's Recommendations do suggest revising Rule 1.7 or its comment to read: "The status of marriage does not by itself create a material risk that the representation of one spouse may be materially limited by the lawyer's responsibilities to the other spouse for purposes of Rule 1.7." Real Property Section's Recommendations, *supra* note 8, at vii n.12.

229. For example, while the Recommendations state that agreements regarding the contours of the representation and discussions of potential differences to be preferable, they reject the idea that such agreements are necessary for ethical practice. Moore & Hilker, *supra* note 8, at 27-28; Real Property Section's Recommendations, *supra* note 8, at 19.

230. Real Property Section's Recommendations, *supra* note 8, at 8.

231. *Id.* at 8. The Real Property Section's Recommendations state that "husbands and wives, by virtue of their marriage commitment, have certain rights and obligations between themselves." *Id.* at 7. While the Recommendations do not detail these "rights and obligations," they mention that "[s]ome states have codified a fiduciary obligation of husbands and wives to each other in transactions relating to, and disclosure of the property of, each spouse." *Id.* at 8. Lawyers who assume that "the spouses' behavior will fail to honor that commitment . . . risk undermining the ethical structure and importance of the marriage itself." *Id.* at 7-8 (emphasis omitted). The premise underlying this view is apparently that "[a]dversarial juxtaposition in estate planning matters can . . . spark marital discord even to the extent, in extreme cases, of encouraging resort to the ultimate weapon in this adversary relationship—divorce." *Id.* at 7 n.7 (quoting Allegheny County Bar Op., *supra* note 48).

232. *Id.* at 7.

established doctrine discussed below and the criticism of that doctrine found in a recent article by two members of the Recommendations' drafting committee. These authors find that "the bulk of [trust and estates practitioners in their survey] do not engage in conduct that the writers for the ethics rules regard as mandatory to avoid an ethics violation."<sup>233</sup> Rather than urge compliance with ethics rules, they conclude:

It is not likely that 75 percent of all estate planners who responded to this survey are in fact unethical, which may indicate that the rules are not in tune with reality, and there appears to be no empirical evidence that the rules need to, or should, dictate conduct that is so deviant from reality.<sup>234</sup>

Perhaps the Recommendations are intended to remedy this "deviance."

The following analysis identifies specific differences between the Recommendations and established doctrine. Even though the Recommendations claim to use these assumptions only where the ethical codes are unclear, they in fact employ them contrary to established doctrine with regard to the lawyer's duty to inquire regarding conflicts, to obtain informed consent in conflict situations, and to withdraw where conflicts are unconsented or where conflicts will adversely impact the representation.

#### A. *No Duty to Inquire*

Contrary to authority that lawyers should inquire into possible differences between joint clients,<sup>235</sup> the Recommendations suggest generally that the lawyer need make no inquiry because she should presume "the couple [is] unified in goals and interests until shown otherwise."<sup>236</sup> This "Don't Ask, Don't Tell" approach is also consistent with an assumption of cost effectiveness and client expectations which favors joint representation "if the need for separate counsel is not clear."<sup>237</sup>

The Recommendations' approach to the duty to inquire in separate simultaneous representation is less clear. Although the Recommendations require an "agreement" before commencing such representation, which presumably indicates informed consent under Rule 1.7, the Recommendations provide little guidance as to the inquiry the lawyer should make and the content of the necessary agreement.<sup>238</sup>

233. Malcolm A. Moore & Jeffrey N. Pennell, *Practicing What We Preach: Esoteric or Essential?* 27 U. Miami Philip E. Heckerling Inst. on Est. Planning ¶ 12-10 (1993).

234. *Id.*

235. See *supra* notes 76-77 and accompanying text; see, e.g., Wolfram, *supra* note 24, § 7.3.4 (lawyer should as a "first step . . . identify whether a conflict exists [by] identifying at the outset of the representation the legal and other interests that the several clients have and that they may wish to assert or seriously consider as the transaction proceeds").

236. Real Property Section's Recommendations, *supra* note 8, at 8.

237. *Id.* at 7.

238. See *id.* at 16.

### B. *No General Duty to Obtain Consent to Joint Representation*

Although established doctrine generally requires lawyers to obtain informed consent to joint spousal representation,<sup>239</sup> the Recommendations reject the need for informed consent absent specific evidence of differences.<sup>240</sup> The established doctrine apparently relies on the numerous potential differences between spouses in estate planning.<sup>241</sup> In contrast, the Recommendations permit the lawyer to avoid informed consent by presuming marital unity absent specific evidence to the contrary.<sup>242</sup>

### C. *A Higher Threshold for Applying Rule 1.7 to Joint Representation*

Under established doctrine,<sup>243</sup> differences in spousal objectives regarding apportionment of bequests or how to balance tax benefits and the survivor's control of the estate, would certainly implicate Rule 1.7(b) and, depending on the nature of the differences, might even present direct adversity under Rule 1.7(a). The Recommendations, however, assert that differences regarding such objectives do not implicate the require-

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239. See *supra* text accompanying notes 76-91; see, e.g., Restatement Governing Lawyers, *supra* note 28, § 211 cmt. c & illus. 1 (noting that lawyer must obtain informed consent to represent spouses with "common preferences . . . consult[ing] a Lawyer for estate planning advice and drafting of reciprocal wills" because "there is a substantial risk that the lawyer's representation of one or more of the clients would be materially and adversely affected by the lawyer's duties to one or more of the other clients").

240. See Real Property Section's Recommendations, *supra* note 8, at 7-10. The Recommendations attempt to distinguish the Restatement's position on the ground that its illustration of spouses seeking representation for estate planning "refers to the lawyer's role in intermediation to achieve a contractual commitment, requiring a single lawyer to achieve a binding, guaranteed result," and not generally to spousal representation. *Id.* at 11 n.16. However, as the Recommendations implicitly acknowledge, the Restatement's use of the term "reciprocal" does not appear to be limited to such contractual commitments. See *id.* In any event, the potential for actual or potential differences in objectives can be just as great for binding as non-binding reciprocal wills. The only major distinction between these wills is that the binding reciprocal will is more difficult to change. Further evidencing that it is not limited to binding reciprocal wills, the Restatement's illustration refers to "estate planning" as well as reciprocal wills. See Restatement Governing Lawyers, *supra* note 28, at illus. 1.

241. See *supra* text accompanying notes 76-91.

242. See Real Property Section's Recommendations, *supra* note 8, at 8-9 ("joint representation [of spouses] may proceed without prior discussion of the rules of the representation absent an existing conflict or evidence that the lawyer's independent professional judgment is likely to be adversely affected by the representation") (citing *In re Samuels and Weiner*, 674 P.2d 1166, 1171 (Or. 1983)). Nowhere does the opinion upon which the Recommendations rely ever suggest any presumption against informed consent. In that case, the court found informed consent unnecessary because there was "no evidence that . . . suggests that there either was an existing conflict of interest or that the accused's independent professional judgment was or likely would be adversely affected by the employment." *In re Samuels and Weiner*, 674 P.2d at 1171. Moreover, that case arose in a business, and not a family, context. Its result is contrary to much authority directly on point to family representation. See *supra* part II. Indeed, the Allegheny County Bar Op., see *supra* note 48, upon which the Recommendations rely to create the assumption of spousal unity, Real Property Section's Recommendations, see *supra* note 8, at 7 n.7, requires informed consent before all spousal representation in estate planning.

243. See *supra* text accompanying notes 78-91.

ments of Rule 1.7.<sup>244</sup>

In addition, although established doctrine would include under Rule 1.7(b) any potential differences regarding goals of the representation,<sup>245</sup> the Recommendations generally exempt "different choices made by each spouse with respect to his or her own assets" from the differences which implicate the conflicts rules.<sup>246</sup> Such a conflict arises only where "spouses disagree on issues in which only one spouse can succeed, such as ownership rights or the characterization of property as separate or community, or where the exercise of a forced share right will defeat the other spouse's intended plan."<sup>247</sup>

The Recommendations take a similar approach to the conflicts implications of one spouse asking the lawyer to keep a confidence from the other. While acknowledging that some confidences implicate Rule 1.7, the Recommendations take a narrower view than the established doctrine. The Recommendations do acknowledge that "adverse" confidences will implicate Rule 1.7(a) if one spouse asks a lawyer to take an action that "would reduce or defeat the other spouse's interest in the confiding spouse's property or pass the confiding spouse's property to another."<sup>248</sup> Such a request would "indicate[ ] substantial potential of material harm to the interests of the other spouse,"<sup>249</sup> or inform the lawyer "that the expectations of one spouse with respect to the plan, or the spouse's understanding of the facts on which the plan is based, are not true."<sup>250</sup> Contrary, however, to established doctrine which requires the lawyer to disclose all relevant information to the client,<sup>251</sup> the Recommendations assert that confidences regarding extra-marital relationships, significant hidden assets, and the strength of the marriage would not necessarily implicate Rule 1.7.<sup>252</sup> The Recommendations suggest that such "non-adverse" confidences implicate Rule 1.7(b) only if they "define[ ] or exchange[ ] . . . [marital rights,] . . . defeat[ ] the other spouse's rights[, or]

244. See Real Property Section's Recommendations, *supra* note 8, at 9-10.

245. See *supra* notes 80-82 and accompanying text.

246. See Real Property Section's Recommendations, *supra* note 8, at 10.

247. *Id.* at 10.

248. *Id.* at 12 (emphasis omitted).

249. *Id.* (emphasis omitted) (e.g., where "a lawyer has recommended spousal gifts to equalize estates and the donee spouse confides that he or she plans a divorce immediately after receiving the gift").

250. *Id.* at 13 (emphasis omitted).

251. See *supra* note 113.

252. See Real Property Section's Recommendations, *supra* note 8, at 13 (suggesting such disclosures "may range from earnest disclosures to joking exclamations" and that a "disclosure about the strength of the marriage, such as a statement of intent to divorce, if no marital rights are defined or exchanged, is not one that defeats the other spouse's rights, nor any expectation about the operation of the plan"). It would, however, be hard to imagine a circumstance where a lawyer would not reasonably believe that a client engaged in estate planning would not want this information. Cf. Monroe County Bar Ass'n Ethics Comm. Ethics Op. 87-2 (1987) (where spouses are joint plaintiffs in personal injury suit, husband's disclosure of intent to divorce wife implicates conflicts rules).

any expectations about the operation of the plan."<sup>253</sup>

Whether resulting from confidences or not, differences that implicate Rule 1.7 must rise to a higher level under the Recommendations than under established doctrine. The Recommendations reach this approach from an unusually high standard of materiality,<sup>254</sup> the assumption of spousal unity which minimizes the threat of actual or potential differences,<sup>255</sup> and a view that if one spouse has no legal right to property of the other, differences regarding that property are irrelevant.<sup>256</sup>

#### D. *An Even Higher Threshold for Applying Rule 1.7 to Separate Simultaneous Representation.*

In ambiguous language, and contrary to established doctrine, the Recommendations establish a conflicts threshold for separate simultaneous representation<sup>257</sup> that is even higher than that for joint representation.

On one hand, the Recommendations effectively read Rule 1.7(b)'s limitations out of separate representation by noting that conflicts analysis is not implicated "until the parties' interests actually become adverse."<sup>258</sup> Similarly, unlike joint representation, "adverse confidences" alone<sup>259</sup> or "[c]hanges in the estate plan that alter the other spouse's interest, revocations of matching bequests, and changes to formerly reciprocal plans"<sup>260</sup> do not require the application of conflicts doctrine unless "actual adversity" results.<sup>261</sup> On the other hand, the Recommendations also provide that Rule 1.7(b) would apply to separate representation if actual or potential differences would impair the lawyer's independent judgment.<sup>262</sup>

The Recommendations' explanation of the distinction in treatment between joint and separate representation is confusing. The Recommendations argue that "[b]ecause the lawyer's exposure to conflicting interests

253. Real Property Section's Recommendations, *supra* note 8, at 13.

254. The Recommendations use language that Rule 1.7(b) applies only where "the lawyer discerns that there is a substantial potential for a material limitation upon the lawyer's representation of either spouse" to create this high standard. Real Property Section's Recommendations, *supra* note 8, at 9 (emphasis omitted). On the other hand, the Recommendations expressly borrow this language from the Restatement, *See id.*; which finds a potential material limit in all cases of joint spousal representation in estate planning. Restatement Governing Lawyers, *supra* note 28, § 211 cmt. c.

255. *See* Real Property Section's Recommendations, *supra* note 8, at 7-8.

256. *See id.* at 9-10.

257. In joint representation, the lawyer represents the spouses together "to accomplish a mutual goal." Real Property Section's Recommendations, *supra* note 8, at 4. In separate representation, "each spouse is a separate client, entitled separately to the lawyer's counsel for his or her own interest." *Id.*

258. *Id.* at 16.

259. *Id.* at 18-19.

260. *Id.* at 17.

261. *Id.* at 16, 18. The Real Property Section's Recommendations offer as examples of "directly adverse," *id.* at 10, or "truly adverse," *id.* at 16, representations "the assertion of differing rights to assets, concealment of assets belonging to the other spouse, or the active deception of the other spouse." *Id.* at 16.

262. *See id.* at 18.



is greater in a joint representation than in a separate representation, the lawyer will sooner reach the threshold of conflict."<sup>263</sup> Perhaps the Recommendations also treat separate representation differently because they require some unspecified form of conflict waiver before commencing separate, but not joint, representation, and therefore these differences have been waived in advance of their occurrence.<sup>264</sup> Yet the Recommendations also concede that "[t]he Model Rules provide the same analysis of the need for a conflict waiver in joint and separate representations."<sup>265</sup>

Although Rule 1.7 might apply differently to situations where actual or potential differences arise after a conflict waiver,<sup>266</sup> established doctrine would not set a higher threshold for separate as opposed to joint representation. If the same rules apply, the same factual evidence of a conflict based on actual or potential differences would have the same implications for the need for consent to representation.

Indeed, to the extent established doctrine distinguishes between joint and separate representation, it tolerates more differences in joint representation. The commitment to common interests underlying a decision to seek and continue representation would be a factor weighing in favor of continuing representation in the face of direct adversity or a material limitation.<sup>267</sup> In addition, although established doctrine suggests that the requirements of Rule 1.7(b) and Rule 2.2 are similar,<sup>268</sup> a reasonable argument exists that a lawyer should have greater discretion under Rule 2.2 to act as a "lawyer for the situation" in seeking to reconcile divided interests.<sup>269</sup>

#### E. *Giving Lawyers Greater Discretion to Disclose Confidences or Avoid Withdrawal*

While established doctrine requires a lawyer to withdraw from representation where a conflict arises<sup>270</sup> and probably to protect the confidences of one spouse from the other, absent an agreement to the

263. *Id.* at 5 (emphasis omitted).

264. *See id.* at 6, 16.

265. *Id.* at 5. *See also id.* at 4-5, 10 (discussing conflicts and conflict waivers in joint representation).

266. *See* Restatement Governing Lawyers, *supra* note 28, § 202 cmts. d, f.

267. For example, the Restatement provides:

Even if the possibility of litigation is substantial at the outset of the representation, and even though consent would not permit the lawyer to represent all parties if litigation should result . . . , a lawyer could accept multiple representation in an effort to reconcile the differences of the clients short of litigation.

*Id.* § 211 cmt. d. Of course, the failure to consent to disclosure of a confidence that implicates Rules 1.7(a) or (b) prevents continued representation because consent could not be obtained without disclosure. *See* Model Rules, *supra* note 23, Rule 1.7 cmt.

268. *See supra* text accompanying notes 51-69.

269. 1 Hazard & Hodes, *supra* note 27, § 2.2:103. For example, Rule 2.2's test of resolution "compatible with the clients' best interests" perhaps suggests a greater emphasis on common interests over existing or potential differences than Rule 1.7(b) which would clearly look at the adverse effect on the representation of the individual.

270. *See supra* text accompanying notes 93-96.

contrary,<sup>271</sup> the Recommendations provide a lawyer with significant discretion to delay withdrawal<sup>272</sup> or to disclose the confidence which creates a conflict.<sup>273</sup> Under the Recommendations, if confidences rise to the level of creating a conflict under Rule 1.7(a)<sup>274</sup> or Rule 1.7(b),<sup>275</sup> the lawyer should apply a balancing test in deciding whether to disclose or withdraw. If the lawyer finds that “the potential for harm from failure to disclose is . . . greater [than the harm of disclosure],” the lawyer should, but need not, disclose the confidence even without the confiding spouse’s consent.<sup>276</sup> If the confiding spouse does not consent to the disclosure, the lawyer may disclose and must eventually withdraw,<sup>277</sup> but also must “balance . . . the potential for material harm arising from an unexpected withdrawal against the potential for material harm arising from failure to disclose the confidence”<sup>278</sup> in determining whether to delay withdrawal “for the short term” in order “to prevent disclosure” resulting from the withdrawal.<sup>279</sup> In apparent contradiction to this balancing test, the Recommendations also state that “[i]n no case may the lawyer act upon the confidence to the detriment of the other spouse” and that “the lawyer must withdraw at the first reasonable opportunity.”<sup>280</sup>

#### F. *Applying the Real Property Section’s Recommendations*

The Recommendations’ approach to the Estate Hypothetical differs from that of established doctrine. Applying the presumption of spousal unity, Ms. Lawyer could represent John and Mary jointly, without any

271. See *supra* note 48 and accompanying text.

272. In contrast to permissive withdrawal where a lawyer must consider “if withdrawal can be accomplished without material adverse effect on the interests of the client,” Model Rules, *supra* note 23, Rule 1.16(b), mandatory withdrawal, such as where continued employment would violate Rule 1.7, see Model Rules, *supra* note 23, Rule 1.7 cmt.; Rule 1.16(a)(1), includes no such consideration. In all withdrawals, however, “a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests.” See Model Rules, *supra* note 23, Rule 1.16(d). While these steps include ministerial steps such as “giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned,” *id.*, they do not contemplate delaying withdrawal where it results in the lawyer violating the rules.

273. Asserting that “authority is scant and offers little analytical guidance,” Real Property Section’s Recommendations, *supra* note 8, at ix n.20, the Recommendations concede that “available ruling authority—itsself founded on client expectations—points toward the conclusion that a lawyer is not required to disclose an adverse confidence to the other spouse.” *Id.* at 14 (footnote omitted). Indeed, while the weight of authority requires confidentiality, the minority authority favors a full waiver of confidentiality, not the balancing test the Recommendations propose. See *supra* note 48 and accompanying text.

274. See Real Property Section’s Recommendations, *supra* note 8, at 14-16.

275. See *id.* at 18-19.

276. See *id.* at 14.

277. *Id.* at 14-15.

278. *Id.* at 15.

279. *Id.*

280. *Id.* at 14-15 (emphasis omitted).

discussion of potential differences, or separately, based on an agreement. Mary's request for a separate and different will probably does not require either disclosure or withdrawal unless it presents an "adversarial" confidence.<sup>281</sup> If it does, Ms. Lawyer will have to apply the balancing test to determine whether to disclose or withdraw.<sup>282</sup> The Recommendations define Rule 2.2 so narrowly as to be inapplicable to the Estate Hypothetical.<sup>283</sup>

In the Nursing Home Hypothetical, the Recommendations would appear to vary little from the established doctrine. Despite the presumption of spousal unity, Ozzie and Harriet's directly adverse interests would bar joint or separate representation.

The Recommendations therefore present a rather complex and inconsistent perspective on the family. They start with a presumption of spousal unity<sup>284</sup> which certainly appears to recognize family as a community. Indeed, application of the presumption furthers a communitarian perspective by permitting representation of families in situations where established doctrine would forbid it.<sup>285</sup>

In contrast to this communitarian perspective are the Recommendations's significant individualistic aspects. They stretch restrictions on direct adversity and material limitations on representation but do not reject them as Shaffer's approach conceivably does.<sup>286</sup> Mr. Lawyer could not represent Ozzie and Harriet under the Recommendations.<sup>287</sup>

In other areas, the Recommendations are more individualistic than established doctrine. The "Don't Ask, Don't Tell" approach permits a lawyer to avoid engaging family members about issues which are important to them in ways that established doctrine would require.<sup>288</sup> The Recommendations' creation of a special conflicts category for separate

281. See *supra* text accompanying notes 236-56.

282. See *supra* text accompanying notes 270-79.

283. The Recommendations are somewhat misleading in their assertion that "Rule 2.2 only rarely applies to the representation of spouses," Real Property Section's Recommendations, *supra* note 8, at 11 (emphasis omitted), such as where "the couple seeks to guarantee reciprocity or binding mirror image wills, or concludes an agreement exchanging or modifying spousal rights." *Id.* at 11, 16-17. The Recommendations assert that "the lawyer is not intermeddling to achieve a common goal" in a situation where "spouses seek to dispose of their own assets in ways that conform with any applicable minimum forced share requirements." *Id.* at 11. This analysis appears to rest on a narrow reading of the statement in the comment to Rule 2.2 that "[a] lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis." Model Rules, *supra* note 23, Rule 2.2 cmt. However, estate planning for spouses, even where they have separate assets and conform to minimum forced share requirements, creates or adjusts relations between them on both a legal and emotional level. Moreover, the comment to Rule 2.2 expressly provides that it applies to situations, like estate planning, "when the lawyer represents two or more parties with potentially conflicting interests." *Id.*

284. See *supra* text accompanying notes 224-29.

285. See *supra* text accompanying notes 239-56.

286. See *supra* part III.

287. See *supra* text accompanying notes 283-84.

288. See *supra* text accompanying notes 235-38.

simultaneous representation permits lawyers to undermine the family unit by helping spouses treat each other as separate individuals, take actions that are not in the family's interest, and keep confidences from each other.<sup>289</sup> Furthermore, the Recommendations' narrow understanding of where actual and potential differences implicate conflicts doctrine<sup>290</sup> implies a vision of family members as almost purely atomistic. For example, to assert that one spouse has no interest in how the other spouse disposes of her own assets<sup>291</sup> is to view the spouses as totally separate individuals without a common familial interest in how each member of the community disposes of their assets. Similarly, to assert that secret marital infidelity or the intent to obtain a divorce might not potentially create differences between spouses<sup>292</sup> is to write the fact of their relationship out of their representation.

Accordingly, the challenge of the Recommendations to established doctrine, while expressly grounded in an understanding of the family as a unit, actually is both more individualistic and more communitarian than established doctrine.

## V. A NEW LEGAL ETHIC FOR REPRESENTING FAMILIES

This Part examines how best to represent families. It proposes permitting families the option of deciding whether to obtain representation as a family or as a collection of individuals. Part V.A. distinguishes between Optional Family Representation and other alternatives. Part V.B. explains the advantages Optional Family Representation offers. Part V.C. acknowledges the potential problems of Optional Family Representation and offers methods for minimizing these problems. Part V.D. suggests revisions in either Rules 1.13 or 2.2 that would be necessary to permit Optional Family Representation. Part V.E. applies Optional Family Representation to a number of hypothetical situations.

### A. *Optional Family Representation Distinguished From Alternative Approaches*

Optional Family Representation allows family members to determine how they will be represented. It provides them with the option of choosing representation as a collection of individuals under established conflicts rules or as a family group.<sup>293</sup> Within the family group, Optional

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289. See Collett, *And the Two*, *supra* note 10, at 141-44; *supra* text accompanying notes 257-69.

290. See *supra* text accompanying notes 243-56.

291. See *id.*

292. See *id.*

293. As a definition of the term "group," this Article relies on Professor Clayton Alderfer's description of a human group:

a collection in individuals: a) who have significantly interdependent relations with each other; b) who perceive themselves as a group by reliably distinguishing members from non-members; c) whose group identity is recognized by non-members; d) who have differentiated roles in the group as a function of expecta-

Family Representation protects the ability of each family member to obtain the information relevant to, and participate equally in, all decisions, including the option to withdraw from the family representation at any time.

Optional Family Representation contrasts with four other alternatives. One, the Real Property Section approach inconsistently applies communitarian and individualist approaches without a principled ground for such distinctions.<sup>294</sup> Two, from an extreme individualist perspective, legal ethics could view family members only as individuals and require that each family member obtain separate representation in all circumstances. Three, from the other extreme, legal ethics could define the family exclusively as an organic whole and require representation of the family as a unit in all circumstances. Four, between these two extremes is the established doctrine. While treating family members fundamentally as individuals, it acknowledges that some group identity exists. Established doctrine permits representation of the family as a unit in the limited circumstances where the individuals and their lawyer determine that the individuals' differing interests are unlikely to adversely affect the representation.<sup>295</sup>

Optional Family Representation is in some ways similar to the established doctrine. Both perspectives understand families as simultaneously having group and individual aspects. Both also require lawyers to ensure that family members are aware of the impact of group representation on their individual interests and that family members have the opportunity, if they choose, to refuse or withdraw from group representation, and seek separate individual representation.

Despite these similarities, Optional Family Representation differs from the established doctrine in significant ways. Optional Family Representation permits families greater latitude to require the lawyer to respect the group aspect of the family unit. Accordingly, Optional Family Representation permits representation of families as groups even where established doctrine would bar such representation because the lawyer

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tion from themselves, other members and non-groups; and e) who as group members acting alone or in concert have significantly interdependent relations with other groups.

Leroy Wells, Jr., *The Group-as-a-Whole: A Systemic Socio-Analytic Perspective on Interpersonal and Group Relations*, in 2 *Advances in Experiential Social Processes* 165, 166 (C. P. Alderfer & C. I. Cooper eds., 1980) (quoting Alderfer). This Article will distinguish between the "group" and "individual" aspects of the family. In terms of legal representation, this Article will use the term group when the lawyer represents the family as a group or entity, as opposed to individuals who have joint representation. This usage contrasts with an earlier usage in the debate regarding representation of organizations. In discussions during the enactment of the Model Rules the term entity referred to representation of the organization as an entity and the term group referred to representation of the organization as a collection of individuals. See 1 Hazard & Hodes, *supra* note 27, 231-37, 244.

294. See *supra* part IV.

295. See *supra* part II.

objectively determines that it would pose risks to the individual family members. Moreover, while established doctrine requires lawyers to focus on family disharmonies,<sup>296</sup> Optional Family Representation encourages lawyers also to pay attention to family harmonies. The details of Optional Family Representation are discussed further below.

### B. *Why Optional Family Representation is Preferable*

This section explains why Optional Family Representation's balance of the individual and group aspects of the family is preferable to that of established doctrine. Only Optional Family Representation permits representation of both the harmonies and disharmonies of families who choose it, while protecting the free choices of individual family members. The arguments favoring Optional Family Representation, however, also provide the grounds to reject requiring individual representation of each family member. The liberal<sup>297</sup> and communitarian<sup>298</sup> arguments for having family members choose the form of representation, as well as the problems with group representation discussed in Part IV.C., make Optional Family Representation preferable to required family representation.

Many perspectives on the family support Optional Family Representation's approach of simultaneously valuing the group aspect of the family and protecting the individual's ability to reject or withdraw from the group. Family therapy perspectives, for example, emphasize attending to both the group and individual aspects of the family. Additionally, Professors Karpel and Strauss note that in "family system theory:"

individuals are not unrelated atoms that are motivated only by internal urges and instincts, but . . . are parts of larger systems which exert considerable influence on their thoughts, feelings and actions. Nevertheless, even in the language of system theory, individuals are also whole systems with internal dynamics which mediate their reactions to systems forces.<sup>299</sup>

Similarly, Professor Nichols argues "that ignoring the subjective experience and private motivations of individual family members could be as limiting as ignoring the effect of family interactional patterns."<sup>300</sup>

As in family therapy, the field of organizational behavior supplies an understanding that a family, like other groups, has a group identity that transcends the individual identities of family members. Professor Leroy Wells, for example, describes the "group-as-a-whole" perspective in

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296. See *supra* part II.

297. This Part uses "liberal" and "individualist" interchangeably. For a discussion of liberalism, see *supra* text accompanying notes 131-36.

298. This part uses the "communitarian" label to refer to perspectives that support viewing the family as a community or group, rather than a collection of individuals.

299. Mark A. Karpel & Eric S. Strauss, *Family Evaluation* 14 (1983).

300. Michael Nichols, *The Individual in the System*, *Networker*, Mar.-Apr. 1987, at 33, 36.

which a group is both "more *and* less than the sum total of the individual co-actors (members) and . . . has a life of its own distinct from but related to the dynamics of the co-actors who comprise the group membership."<sup>301</sup>

Observers of the family, from the perspectives of social science and law, note that while families in general have become more individualistic and less organic, many families retain a communitarian character.<sup>302</sup> Professor Mary Ann Glendon finds that "most men and women still spend most of their lives in emotionally and economically interdependent family units."<sup>303</sup> Sociologist Father Andrew Greeley, analyzing data regarding American families, concludes that for many:

[t]he marriage bond between a man and a woman is more than a legal contract, though it may begin with a contract and involve the continuation of a contract through the life together. It is a union of minds and bodies, not union in the romantic or ideal sense, but rather as that which occurs in the hard reality of everyday life."<sup>304</sup>

A number of religious sources similarly support valuing the group aspect of families. Significant Jewish and Christian sources<sup>305</sup> assert that while spouses have individual identities,<sup>306</sup> their relationship creates a distinct and merged entity. These sources often rely on the teaching of Genesis that spouses "shall be one flesh."<sup>307</sup> The eminent Twentieth Century Jewish thinker Rabbi Joseph B. Soloveitchik observed that "[m]arriage is not a utilitarian transaction, a partnership agreement, a casual relationship. It is an existential commitment, a uniting of two lonely, incomplete souls to share a common destiny with its joys and sorrows . . . . It is a metaphysical fusion."<sup>308</sup> Similarly, Pope John Paul

301. Wells, *supra* note 293, at 169. See also Clayton P. Alderfer & David A. Thomas, *The Significance of Race and Ethnicity for Understanding Organizational Behavior*, 1988 Int. Rev. of Indust. Org. Psychol. 1, 6 (1988).

302. See Bellah et al., *supra* note 136, at 89-90; Glendon, the New Family, *supra* note 132, at 3-4; Gregg Temple, *Freedom of Contract and Intimate Relationships*, 8 Harv. J.L. & Pub. Pol'y 121 (1985).

303. Glendon, Transformation, *supra* note 131, at 312.

304. Andrew M. Greeley, Faithful Attraction: Discovering Intimacy, Love, and Fidelity in American Marriage 240 (1991).

305. These examples are used as illustrations of particular perspectives and are not intended to exhaust Jewish or Christian perspectives, or to represent the totality of religious perspectives, many of which are neither Jewish nor Christian.

306. See, e.g., IX New Catholic Encyclopedia 267 (1967) (spouses "'must always respect the incommunicable and irreducible individuality of the other; for . . . man and wife are and remain not identical, but complementary beings'") (quoting M. M. Philippon, *The Sacraments in the Christian Life* (1954)).

307. Genesis 2:24 (Jewish Publication Society).

308. Joseph B. Soloveitchik & Abraham R. Besdin, Reflections of the Rav 121-22 (1979). For other Jewish sources, see, e.g., 1 Samson Raphael Hirsch, *The Pentateuch: Genesis 69* (Issac Levy Trans. 1959) ("Man and Woman become one single body. But that can only take place if at the same time they become one mind, one heart, one soul, and this again is only possible if they subordinate all their strength and efforts, all their thoughts and desires to the service of a higher will."); 1 Sforino, Commentary on the Torah 27 (Mesorah 1987) ("In all their actions they will aim to attain the perfection

II has written that “‘there is no separation between [spouses] in spirit or flesh; in fact they are truly two in one flesh, and where the flesh is one, one is the spirit.’”<sup>309</sup> An example of a corresponding Protestant perspective is that of the eminent theologian Karl Barth. He describes “[m]arriage as a life-partnership” where “two should become one body in the comprehensive sense of the New Testament.”<sup>310</sup>

In most of these religious perspectives, while the group aspect of the family predominates, the individual identity of family members remains. The New Catholic Encyclopedia, for example, explains that spouses “‘must always respect the incommunicable and irreducible individuality of the other; for . . . man and wife are and remain not identical, but complementary beings.’”<sup>311</sup>

Communitarian philosophical perspectives also support valuing the group aspect of families. Professor Michael Sandel, for example, rejects the notion that the individual self is “epistemologically prior as well as morally prior[. . .] that w[e] are distinct individuals first, and then we form relationships.”<sup>312</sup> He asserts that for members of a society “community describes not just what they *have* as fellow citizens but also what they *are*, not a relationship they choose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity.”<sup>313</sup>

Philosopher Alasdair MacIntyre similarly notes that “I am someone’s son or daughter, someone else’s cousin or uncle; I am a citizen of this or that city, a member of this or that guild profession.”<sup>314</sup> As a result, “the self has to find its moral identity in and through its membership in communities such as those of the family, the neighbourhood, the city and the tribe.”<sup>315</sup>

A communal understanding of the family favors Optional Family Rep-

intended by man’s creation, as though the two were only as one (flesh).”). See also Martin Buber, *I and Thou* 95 (Walter Kaufman trans. 1970) (“Marriage can never be renewed except by that which is always the source of all true marriage: that two human beings reveal the You to one another. It is of this that the You that is I for neither of them builds a marriage.”).

309. Pope John Paul II, *The Role of the Christian Family in the Modern World* 25 (1981) (quoting Tertullian, *Ad Uxorem*, II, VIII, 6-8: CCL, I, 393).

310. III Karl Barth, *Church Dogmatics: The Doctrine of Creation 189-90* (G. W. Bromiley & T. F. Torrance eds. 1961).

311. IX New Catholic Encyclopedia, *supra* note 306, at 267 (quoting M. M. Philippon, *The Sacraments in the Christian Life* (1954)); see also Maurice Lamm, *The Jewish Way in Love and Marriage* 162 (1980) (“The form, the contract and the process are contractual. The context, the bond, and the resulting relationship are covenantal.”).

312. Michael J. Sandel, *Liberalism and the Limits of Justice* 133 (1982).

313. *Id.* at 150.

314. Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* 204-05 (1981).

315. Alasdair MacIntyre, *The Virtues, the Unity of a Human Life and the Concept of a Tradition* 125, 143, in *Liberalism and its Critics* (Michael Sandel ed. 1984). MacIntyre acknowledges that the self has the capacity to move beyond “the moral *limitations* of the particularity of those forms of [the] community . . . [in] the search for the good, for the universal.” *Id.*



resentation over all alternatives except mandatory family representation. While a communal perspective might support requiring family representation, it could also favor Optional Family Representation as best protecting a family's choices. Optional Family Representation allows families, and not the legal profession, to decide how to represent them. In so doing, it respects the choices of a family as a community and minimizes the legal profession's intrusion into the family.

The alternatives to Optional Family Representation do not permit the family to determine the scope of its representation. Under either mandatory family or individual representation, established doctrine, or the Real Property Section approach, the legal profession defines for families how lawyers will represent them. Mandatory individual representation defines family members solely as individuals, while established doctrine treats them predominantly as individuals.<sup>316</sup> Mandatory family representation requires families to obtain representation as a community. The Real Property Section's Recommendations assume that spouses are a "unity" for some purposes and atomistic individuals for others.<sup>317</sup>

From the perspective of the individual, rather than the family unit, a liberal approach that values the individual choices of family members<sup>318</sup> would also favor Optional Family Representation. Such a liberal approach would allow family members to choose whether to be represented as individuals or as a family unit. Family members would be like any other group of persons who sought representation as a group rather than as joint individuals.

Professor Monroe Freedman observes that if legal ethics values individual autonomy "the affected clients should have the power to waive conflicts of interest, as long as the clients act voluntarily and with full knowledge of all of the risks of the conflict."<sup>319</sup> He notes that he "cannot think of any conflict of interest that should not be waivable, as long as the judgment can fairly be made that the client had a complete understanding of the risks and made a voluntary decision to accept the risks that come with the particular lawyer."<sup>320</sup> A liberal perspective would require only consent and would remove from the legal ethics codes the test of the lawyer's objective determination of the propriety of the representation.<sup>321</sup>

Applying this approach to families would permit family members to waive conflicts and obtain representation as a family unit, much like any

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316. See *supra* part II.

317. See *supra* part IV.

318. A liberal paternalistic approach that doubts the ability of individuals to make free and informed choices regarding family representation would pose a challenge to Optional Family Representation. See *infra* part V.C.4.

319. Freedman, *supra* note 25, at 182.

320. *Id.* at 182-83. He further suggests that a lawyer should be wary of representing clients who have waived conflicts where the circumstances suggest potential future exposure for the lawyer. *Id.* at 183.

321. See *supra* notes 38-43 and accompanying text.

other group of persons. Indeed, Professor Stephen Ellmann has observed that “[p]eople’s membership in groups is often itself an expression of their individual autonomy[, including the choice] to become husbands or wives.”<sup>322</sup>

While protecting the family members’ choice of group representation, Optional Family Representation also protects the individual family member’s right to make an informed choice to reject or leave family representation. In so doing, it accords with a liberal understanding of the family. Professor Jeremy Waldron, for example, has defended the law’s individualistic approach to the family on the ground that it “provide[s] each person with secure knowledge of what she can count on in the unhappy event that there turns out to be no other basis for her dealings with her erstwhile partner in the relationship” and benefits society and individuals by permitting the development of new relationships.<sup>323</sup> Acknowledging that “we live in and for communities of one sort or another most of the time,” Waldron observes that a legal system that focuses on the rights of individuals as “fall-backs” provides individuals with a “vantage point” for scrutiny of these communities.<sup>324</sup>

Optional Family Representation ensures that the individual continually has both information regarding the implications of the representation for her individual interests and the ability to withdraw. This guarantee provides the individual with the freedom to alter her relationships and a “fall-back” if family representation is not satisfactory.<sup>325</sup>

The final advantages of Optional Family Representation are related to legal practice.<sup>326</sup> In at least three ways, family representation is preferable to individual representation. First are financial considerations. One lawyer for a family is of course more affordable than a lawyer for each member of the family.<sup>327</sup> Questions of affordability are especially important in light of the difficulties persons of low and moderate means face in obtaining legal services.<sup>328</sup>

Second is the dynamics of the legal representation. One lawyer can better facilitate an amicable resolution of family issues than multiple lawyers.<sup>329</sup> Lawyers for individuals will seek to maximize that individual’s

322. Ellmann, *supra* note 97, at 1123.

323. Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights*, 11 Harv. J.L. & Pub. Pol’y 625, 629 (1988).

324. *Id.* at 645.

325. Part V.C. responds to arguments that, especially in light of gender inequality, Optional Family Representation fails to protect adequately the rights of individual family members.

326. Potential disadvantages in legal representation are discussed *infra* at Part V.C.

327. See, e.g., John R. Price, Price on Contemporary Estate Planning § 1.14.3 1992 (discussing Rule 2.2 and reduction of attorney’s fees); Restatement Governing Lawyers, *supra* note 28, § 201 (noting that because of the costs imposed by prohibitions of conflicts such prohibitions should be no “broader than necessary”).

328. See *N.Y.S. Bar Association Committee on Legal Aid: The New York Legal Needs Study* (rev. 1993).

329. See Allegheny County Bar Op., *supra* note 48, at 28.

position.<sup>330</sup> While multiple lawyers could take non-adversarial approaches to such representation, prevailing professional norms place limits on how non-adversarial a lawyer's thinking will be. Professor Monroe Freedman observes that "any lawyer who counsels a client, negotiates on a client's behalf, or drafts a legal document for a client must do so with an actual or potential adversary in mind."<sup>331</sup> In contrast, a lawyer for the family will seek to do what is best for the family as a group. This task requires supporting and enhancing the relationship between family members as well as paying attention to issues that divide them. Illustrating the comparison between a lawyer for the family and lawyers for the individuals underscores this point. It seems obvious that a negotiation where each family member has her own lawyer would have a character quite different than one where all the family members share one lawyer.

Third, the lawyer representing the family is likely to obtain more information relevant to understanding the family than the lawyer would obtain in representing individuals. A lawyer representing an individual obtains information from that individual and from others at their sufferance or in the course of adversary proceedings. In family representation, the lawyer receives information from all family members and will therefore be able to learn more about the relationship between family members than would a lawyer for an individual.<sup>332</sup>

### C. Challenges to Optional Family Representation

This section considers arguments against permitting Optional Family Representation and responds to them. Some of these challenges are theoretical ones which require theoretical responses. Other challenges raise serious issues about the implementation of Optional Family Representation. Addressing these challenges requires the development of specific procedures for implementing Optional Family Representation.

#### 1. The Lawyer's Function is to Represent Individuals, Not Families

One could challenge Optional Family Representation on the grounds that the primary function of lawyers under the legal ethics codes is to

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330. One could argue that a broad definition of the individual's self-interest would include the interest in harmony and family, as Professor Lloyd Weinreb suggested at the Fordham Scholarship Colloquium; however, lawyers often view zealous representation as requiring primary attention to maximizing the individual client's material well being. Moreover, the focus on disharmonies between individuals which the established doctrine requires for joint representation, *see supra* part I.A., indicates the legal profession's tendency to view relationships through the lens of conflict, rather than cooperation. *See infra* note 331.

331. Freedman, *supra* note 25, at 66. *Cf.* Geoffrey C. Hazard, Jr., *Ethics in the Practice of Law* 43 (1978) ("conflict with everyone else is what the lawyer is retained to handle").

332. These advantages are of course available when families qualify for joint representation or intermediation under established doctrine. Family representation makes these advantages more widely available.

represent individuals.<sup>333</sup> Lawyers seek to maximize their client's individual interests. The ethical codes permit joint representation of individuals only where the lawyer can maximize, and not compromise, those individual interests.<sup>334</sup> Representing a family, however, would require a lawyer to mediate among a number of individual interests, none of which, in this view, would receive optimal representation. Mediation is not the ethical norm for a lawyer's conduct.<sup>335</sup> Intermediation between clients is appropriate only under the limited circumstances prescribed by Rule 2.2 where the sufficient commonality of individual interest and circumstance, suggest little risk of harm to any individual's interests.

While it is true that the language of legal ethics focuses on individual representation, legal ethics also permits representation of groups.<sup>336</sup> Rule 1.13 provides for representation of both corporations and unincorporated associations.<sup>337</sup> Rule 1.13 is not limited to large groups. For example, it could include a corporation with only two shareholders. Similarly, Rule 1.13 is not limited to formal organizations. A voluntary group of persons, such as a tenants' association, may seek representation as a group.<sup>338</sup> Not only is group representation permitted, but despite the largely individualistic language of the legal ethics codes group representation is common.<sup>339</sup>

Given that under the terms of legal ethics and practice of the legal profession, individuals are generally able to form groups for purposes of legal representation, family members should have the same opportunity. Preventing a group of family members from obtaining an option available to other groups of individuals requires specific justification. Potential justifications for such disparate treatment are discussed below.

## 2. In Contrast to Other Groups, Families Lack Identifiable Group Characteristics Necessary to Legal Representation

One could argue that group representation is appropriate only for organizations with formal hierarchies that make it possible for the lawyer to determine which organizational representatives have authority to speak, or exchange information, on behalf of the entity. A corporation has a charter and bylaws and a partnership has an agreement.<sup>340</sup> A corporation further has officers and directors. Indeed, much of Rule 1.13 uses the language of corporate structure to discuss a lawyer's duties to an organization.<sup>341</sup>

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333. See *supra* part II.

334. See *supra* part I.A.

335. See *supra* note 331.

336. See Leubsdorf, *supra* note 163, at 825.

337. See Model Rules, *supra* note 23, Rule 1.13.

338. See Ellmann, *supra* note 97, at 1123; see *supra* text accompanying notes 97-102.

339. See Ellmann, *supra* note 97, at 1105; Leubsdorf, *supra* note 163, at 825.

340. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-361 (July 12, 1991) (finding a partnership to be an entity under Rule 1.13).

341. See Model Rules, *supra* note 23, Rule 1.13.

As discussed above, however, Rule 1.13 expressly applies to unincorporated associations, including "even a small group informally organized for a limited purpose,"<sup>342</sup> such as a group of homeowners<sup>343</sup> or a tenants' association.<sup>344</sup> Although a group's formality, "duration," and "elaborate . . . purposes" are relevant to determining whether it is an organization for purposes of Rule 1.13, the test of whether a group qualifies for representation is whether the group identity "is distinct from its individual constituents."<sup>345</sup> Families will often have identities "distinct from [their] individual constituents."<sup>346</sup> Even with regard to the non-dispositive, but persuasive, characteristics listed above, families will often be of long duration, formally organized under legal or religious rules regarding marriage and family, and quite elaborate in shared purposes.

One could further argue, however, that modern families are so varied and fluid that they are not susceptible to identification as a distinct group.<sup>347</sup> The variation of modern families, for example, includes heterosexual marriages with or without children, single parent families, multigenerational families, and lesbian and gay families.<sup>348</sup> The fluidity of families raises questions of whether, for purposes of legal representation, they would include parents only, their children together, children from previous relationships, previous spouses or partners, or grandparents.

If legal ethics sought to define the family for purposes of legal representation, the variation and fluidity of the family might make family representation problematic. The solution to this dilemma, however, is to treat family groups like other groups. Family members, like members of other groups, will define the identity of their group for purposes of the representation. Family relationships outside the group will of course remain relevant to understanding the situation of the represented group of family members. That does not make families different from all other groups eligible for group representation. For example, a lawyer who represents a tenant group that is less than all of the tenants in a building will have to deal with the existence of non-represented tenants in providing representation to the tenant group. Similarly, separate lawyers could represent general partners and limited partners.

Where family members choose group representation, questions may still arise regarding whether group identity is indeed distinct from individual interests. This problem is not limited to family representation. It would seem to arise for all small groups. In close corporations, for exam-

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342. 1 Hazard & Hodes, *supra* note 27, § 1.13:103.

343. *See id.* § 1.13:204.

344. *See* Ellmann, *supra* note 97, at 1123.

345. 1 Hazard & Hodes, *supra* note 27, § 1.13:103.

346. *Id.*

347. *See* Teresa Stanton Collett, *The Ethics of Intergenerational Representation, in Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 1453 (1994) [hereinafter Collett, *Intergenerational Representation*].

348. *See, e.g.*, Franklin, *supra* note 12, at 1030 (describing various modern family units).

ple, the differing interests of the entity's constituents may make it impossible to identify a group or corporate interest.<sup>349</sup>

In Optional Family Representation, as indeed all group representations, the lawyer must therefore ensure that a distinct group identity exists. For example, family members who do not indicate at the start of representation that they seek a common or mutually acceptable resolution of their legal issues should not obtain group representation. Similarly, family members who initially shared a common purpose may later deadlock over specific plans.

Even where a distinct group identity exists for the family, one could argue that modern families, as opposed to traditional patriarchal families or corporations and partnerships, fail to offer procedures for communicating information and making decisions necessary to group representation.<sup>350</sup> Again, this problem is not limited to family groups. For example, a group of tenants who organize for the purpose of a rent strike is unlikely to have previously established organizational rules, such as by-laws. Similarly, a partnership may exist without the benefit of a written agreement. Even in representation of publicly-owned corporations, situations may arise where the lawyer finds it difficult to ascertain the corporation's will.<sup>351</sup> The solution to this problem is to require that all groups and entities, including family groups, specify in the retainer agreement<sup>352</sup> the procedures for communicating with the lawyer and making decisions.

Where the existence of a group is clear, confusion may still continue regarding whether the lawyer represents the individual group members as well as the group. Commentators have noted that such confusion occurs frequently in the representation of close corporations.<sup>353</sup> Accord-

349. See Lawrence E. Mitchell, *Professional Responsibility and the Close Corporation: Toward A Realistic Ethic*, 74 Cornell L. Rev. 466, 477-481 (1989); Note, *An Expectations Approach to Client Identity*, 106 Harv. L. Rev. 687, 687-88 (1993).

350. See Geoffrey C. Hazard, Jr., *Conflicts of Interest in Estate Planning for Husband and Wife*, 1994 Tractman Lecture, at 24 (on file with the *Fordham Law Review*) (criticizing earlier draft of this Article).

351. See Hazard & Koniak, *supra* note 48, at 764-65; Kenneth Kipnis, *Legal Ethics* 60-62 (1986). Some commentators have even suggested that publicly-owned corporations, the paradigm of group representation may lack a single, readily identifiable group identity. See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 Colum. L. Rev. 1416, 1426 (1989) (questioning the "personhood" of a corporation due to "disparate independent actors"); Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 Colum. L. Rev. 1757, 1764 (1989) (stating that "the firm is not an individual").

352. Changes during the course of representation would result in changes in the retainer agreement.

353. See, e.g., Mitchell, *supra* note 349, at 476 (discussing the unique nature of close corporations); Note, *supra* note 349, at 687 (stating that the distinction between entity and individual is blurred in closely-held corporations); cf Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 Wm & Mary L. Rev. 587, 625-28 (1991) (discussing analogous question of when a corporation speaks in the context of corporate political expenditures, for whom does it speak).

ingly, although the established doctrine generally permits continued representation of an entity after a constituent's withdrawal, courts and commentators have forbidden continued representation of a close corporation without consent of the departing constituent where the distinction between corporate entity and shareholders blur.<sup>354</sup>

The same blurring of group and individual is likely to occur in other small groups, such as a family. As a result of this common misunderstanding, group members are likely to perceive a lawyer as disloyal for continuing representation of adverse group members after the individual's withdrawal and absent the individual's consent. To protect confidence in the legal system, and recognizing the inevitability of some degree of blurred identity in small groups, small group representation should treat withdrawal of an individual group member as the withdrawal of an individual from joint representation and require consent to continued representation of other group members who have a materially adverse interest in the same or substantially related matter.<sup>355</sup>

### 3. Family Representation Will Result in the Lawyer Substituting Her Judgment for that of the Family

Some have suggested that representation of the family group will result in the lawyer substituting her judgment for that of the family and its members.<sup>356</sup> Professors Hazard and Koniak have observed a similar danger in corporate representation. They suggest that lawyers for corporations tend to either treat the organization's constituents as the actual clients or act "as lawyer 'for the situation,' empowered to act to further the best interests of all concerned as the lawyer perceives those interests."<sup>357</sup> As "lawyer for the situation," the lawyer would "ultimately decid[e] on the legal course that best serves the corporation."<sup>358</sup> Professors Hazard and Koniak observe that "[t]his approach, if taken to its conclusion, divests management of control of the corporation's legal actions and places enormous power in the hands of 'disinterested' lawyers."<sup>359</sup>

Representing families as a unit presents the same danger. The broad, unbounded, discretion afforded under Shaffer's proposal of representing the family "paternalistically" and the Real Property Section's discretionary Recommendations permit lawyers to substitute their judgment for that of family members. Representing a family as an organization, without limits or without clear direction from the family as client, would offer

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354. See Mitchell, *supra* note 349, at 477-78; Note, *supra* note 349, at 687; see also Wolfram, *supra* note 24, § 8.3.2 at 422.

355. See Model Rules, *supra* note 23, Rule 1.9.

356. See Collett, *Intergenerational Representation*, *supra* note 347 at 1495.

357. Hazard & Koniak, *supra* note 48, at 764.

358. *Id.* at 764-65.

359. *Id.* at 765. Cf. Dzienkowski, *supra* note 5, at 784 ("The label 'lawyer for the situation' is too nebulous to adequately communicate to the potential clients the manner in which the lawyer is going to represent their interests.").

the confusion between constituent and "situation" representation that Hazard and Koniak describe.<sup>360</sup>

This problem underscores the need, even beyond family representation, for the requirement, discussed above, that the retainer specify how the group members communicate with the lawyer and make decisions. With these provisions, the lawyer would have an obligation to follow their terms and seek the family's guidance on issues rather than substitute her judgment. Family representation would then offer the opportunity for the lawyer to seek to reconcile the interests of family members without displacing the authority of the family unit. While this proposal would not prevent lawyer manipulation of clients altogether, it would make it more difficult and would limit it to the extent possible in any legal representation.<sup>361</sup>

#### 4. Power Imbalances Within the Family Make Family Representation Inappropriate

Many commentators have observed that power imbalances exist within the family generally to the detriment of women, or to the elderly in multigenerational families. One could argue that family representation will perpetuate these imbalances and lead to results unfair to less powerful family members.<sup>362</sup> In contrast, the argument goes, by requiring sepa-

360. See Hazard & Koniak, *supra* note 48, at 764-65.

361. Even where the clients' interests are readily identifiable, the problem of lawyer manipulation of clients remains. One commentator has identified the danger that the lawyer will "persuad[e] the family to adopt the lawyer's sense of fairness under the circumstances." Le Van, *supra* note 167, at 20. This latter problem of the individual lawyer imposing her values on the family is unfortunately one which this Article's proposal will not by itself address. Neither will the proposal increase its occurrence. As noted above, this difficulty exists in representing families under the present rules. Moreover, empirical studies suggest that "lawyers manipulate clients to achieve the lawyers' financial and professional interests" except perhaps in corporate practice. Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 Geo. J. Legal Ethics 241, 278 n.291 (1992). See, e.g., Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Coaptation of a Profession*, Law & Soc'y Rev., June 1967, at 15, 22-31 (criminal defense practice); Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 Buff. L. Rev. 177 (1986) (bankruptcy practice); Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* (1974) (personal injury practice); Austin Sarat & William L.F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 Law & Soc'y Rev. 737 (1988) (divorce representation). For corporate practice, compare Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 Stan. L. Rev. 503, 504-05 (1985) (lawyers follow the dictates of corporate clients even where they conflict with the lawyer's personal ethics) with Lisa G. Lerman, *Lying to Clients*, 138 U. Pa. L. Rev. 659 (1990) (suggesting lawyers mislead corporate clients regarding billing and services). Accordingly, all lawyers need to consider how to serve better the interests of clients, and not of themselves.

362. In the context of family law, for example, Professor Janet Dolgin has cautioned that communitarian perspectives on the family have historically "been used as an argument in support of oppression; and nowhere, perhaps, to more destructive effect than against women, especially in their aspect as mothers." Dolgin, *supra* note 135, at 112.



rate representation of family members where their interests diverge, or are at risk, established doctrine protects less powerful family members from exploitation.

While theoretically any individual might have more power within a family, commentators have suggested that men generally have more power than women.<sup>363</sup> Studies suggest that men generally have tangible advantages, such as higher income and educational levels, and intangible advantages, such as higher self-esteem, status, and aspirations.<sup>364</sup>

Even were power between spouses equal, some commentators suggest that men are more individualistic and women more communitarian in their perspectives.<sup>365</sup> To the extent this observation is accurate, female family members may be more likely to defer to male family members<sup>366</sup> and male family members are more likely to seek dominance.<sup>367</sup>

In light of these considerations, some commentators have challenged assertions that the contextual and communal process of mediation, rather than the formal and adversarial process of litigation, better fits the familial aspects of a divorce.<sup>368</sup> These critics argue that imbalances between husband and wife will cause a neutral mediation to favor the husband.<sup>369</sup> A mediator could achieve fairness only by interfering with the substance of the result, contrary to mediation's goals of neutrality and party empowerment.<sup>370</sup> These commentators suggest that having a separate lawyer protects the wife far better than a mediator would.<sup>371</sup>

Similar arguments could be made regarding the role of the elderly in a multigenerational family. A commentator has suggested, for example, that comparable to the women's perspective mentioned above, elderly persons place a higher priority on "harmoniz[ing] family relationships."<sup>372</sup> Likewise, commentators have suggested factors which would make elderly persons less powerful within a multi-generational family. They may be dependent on the younger generation for "love and support."<sup>373</sup> They may also suffer from "the loss of physical and mental capacities."<sup>374</sup>

363. See, e.g., Dolgin, *supra* note 135, at 104; Susan Moller Okin, *Justice, Gender, and the Family* 4 (1989).

364. See Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 *Buff. L. Rev.* 441, 449-81 (1992).

365. See, e.g., Carol Gilligan, *A Different Voice* (1982); Robin West, *Feminism, Critical Social Theory and Law*, 1989 *U. Chi. Legal F.* 59, 84.

366. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *Yale L.J.* 1546, 1551 (1991).

367. See Bryan, *supra* note 364, at 463-65.

368. See, e.g., Bryan, *supra* note 364, at 445; Grillo, *supra* note 366.

369. See Bryan, *supra* note 364, at 500, 509.

370. See Bryan, *supra* note 364, at 510-511.

371. See *id.* at 519-23; Grillo, *supra* note 366 at 1597-1600.

372. Collett, *Intergenerational Representation*, *supra* note 347, at 1463 (citing as an example *Estate of Koch*, 849 P.2d 977, 983 (Kan. App. 1993)).

373. Jay J. Sangerman, *Ethical Issues in Elder Law*, *N.Y. St. B.J.*, Sept.-Oct. 1993, at 35.

374. Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the*

It could be argued that these power imbalances and the resulting potential for unfair treatment of less powerful persons justifies established doctrine's balance in favor of the individual within the family.<sup>375</sup> Established doctrine requires the lawyer to focus on actual and potential disharmonies and forbids joint representation of family members where the representation poses a threat to the interests of one of the individuals.<sup>376</sup>

Undermining this justification for different treatment of family representation is the continued domination of less powerful family members under established doctrine. For example, one report on estate planning found that the attorney's contact with the family is through the husband and "[i]t is not uncommon for the attorney never to speak to the wife."<sup>377</sup> Similarly, another commentator has suggested that "[w]hat often passes for family lawyering involves . . . implementing the wishes of the dominant family member."<sup>378</sup>

One possible explanation for this situation is the failure of many lawyers to follow established doctrine in representing families.<sup>379</sup> Even were they following established doctrine, however, its impact would be limited. As Professor Stephen Ellmann has observed in the context of marriage, the reality of families is that family members participate in "a vast range of joint decisionmaking, the fairness of which will be essentially unreviewable by any third party."<sup>380</sup> If power imbalances persist within a family, even where each family member has separate representation, the family relationship will dictate the result of a legal transaction. At best, separate representation will provide individual family members with counsel's advice regarding the efficacy of alternative choices.

Optional Family Representation could provide the same advantage by requiring that counsel provide the same type of information to each individual family member. At each stage of the representation the lawyer should advise each family member of the advantages and disadvantages of family representation and of all other decisions for that individual. The lawyer's duty to provide the individual family member with all information relevant to the member's individual and group interests and prohibits a duty of confidentiality to any individual family member with regard to information relevant to another.<sup>381</sup> In contrast, the weight of authority under established doctrine appears to favor a duty of confidentiality to each individual client in joint representation.<sup>382</sup>

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*Law*, 42 *Hastings L.J.* 683, 697 (1991). See also Marshall B. Kapp, *Representing Older Persons: Ethical Challenges*, Fla. B.J., June 1989, at 25, 25 ("[t]he elderly are more likely to suffer from chronic physical and/or mental impairment").

375. See *supra* part II.

376. See *supra* text accompanying notes 38-48.

377. *Developments*, *supra* note 81, at 10.

378. Le Van, *supra* note 167, at 20.

379. See Moore & Pennell, *supra* note 233, at ¶ 12-03.

380. Ellmann, *supra* note 97, at 1125.

381. See *supra* note 113.

382. See *supra* note 48 and accompanying text.

This approach has the unavoidable disadvantages of discouraging individuals from disclosing to lawyers information they do not want other family members to know or placing the lawyer in the uncomfortable position of having to reveal embarrassing information where an inadvertent disclosure occurs. Unfortunately, however, protecting sensitive information from disclosure is incompatible with providing relevant information to the other family members. Moreover, the individual hoping to keep information confidential might refuse to join, or withdraw from, family representation. When the individual inadvertently reveals embarrassing information relevant to another family member, the lawyer either causes harm to one family member by disclosing or to another by failing to disclose. The need for disclosure, combined with the family member's consent to disclosure as a condition of family representation, makes disclosure the fairer alternative.<sup>383</sup>

In addition to precluding a duty of confidentiality to individuals, the lawyer's duty to provide advice and information to individual family members also precludes a duty of confidentiality to the family entity, as is the established approach for group representation under Rule 1.13.<sup>384</sup> Unlike publicly owned corporations, small groups, such as families or close corporations, require that each group member have relevant information to maintain continued group identity and decisionmaking abilities. In a somewhat analogous context, the ABA Committee on Professional Responsibility has recently opined that "information received by a lawyer in the course of representing the partnership is 'information relating to the representation' of the partnership, and normally may not be withheld from individual partners."<sup>385</sup>

By providing family members with relevant disclosures any time the interests of an individual member might differ from that of the family unit or of other family members, Optional Family Representation will approximate the protections afforded under established doctrine.<sup>386</sup>

One could further argue for denying group representation to family members on the ground that they lack the substantive protections afforded by legal duties which constituents owe to entities such as corporations and partnerships.<sup>387</sup> Partners and corporate constituents, for example, have fiduciary duties to act in the best interests of the entity, even where these actions may conflict with their own self-interest.<sup>388</sup>

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383. Of course, the lawyer should seek to persuade the family member who has revealed the embarrassing information to disclose it to the other family member. However, in light of the lawyer's duty to reveal the information if the family member does not, the lawyer's "persuasion" will be somewhat coercive.

384. See Model Rules, *supra* note 23, Rule 1.13.

385. ABA Comm. on Ethics and Professional Responsibility Formal Op. 361 (1991).

386. See *supra* notes 377-80 and accompanying text; cf. Dzienkowski, *supra* note 5, at 792 (suggesting a similar approach to representation under Rule 2.2).

387. Cf. Collett, *Intergenerational Representation*, *supra* note 347, at 1484.

388. See, e.g., William L. Cary & Melvin A. Eisenberg, *Cases and Materials on Corporations* 471-548 (duty of care), 556-94 (duty of loyalty) (6th ed. 1988); Harold G. Reus-

These duties include disclosure of all relevant information and substantive fairness in dealings with the entity.<sup>389</sup>

Significant fiduciary duties, however, do exist within the family. Courts have required good faith and fair dealing within families under the confidential relationship doctrine and imposed constructive trusts where the confidential relationship has been abused.<sup>390</sup> In the context of post-marital agreements, for example, fiduciary duties require spouses to disclose all relevant "financial and non-financial information," to refrain from exercising "undue influence," and to avoid contract terms that are, depending on the jurisdiction, either unreasonable or unconscionable.<sup>391</sup>

These fiduciary duties do not arise in all family relationships. While some commentators suggest that a confidential relationship exists for all spousal relationships,<sup>392</sup> others suggest a family relationship is not sufficient to establish a confidential relationship.<sup>393</sup> Some require, in addition, "the actual placing of trust and confidence."<sup>394</sup> Others further require a significant "disparity of position," such as where the "beneficiary of the confidential relation is in a weak position because of advanced age, or youth, or lack of education, or ill health, or mental weakness" or subordinate status.<sup>395</sup>

Although generally not as pervasive as fiduciary duties owed corpora-

chlein & William A. Gregory, *Handbook on the Law of Agency and Partnership* § 188 (1979); Henry G. Henn & John R. Alexander, *Laws of Corporations and Other Business Enterprises* § 235 (3d ed. 1983). In *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928), Justice Cardozo provided what has become the classic description of fiduciary obligation as "the duty of the finest loyalty . . . . Not honesty alone, but the punctilio of an honor the most sensitive." *Id.* at 546.

389. *See, e.g.*, Restatement (Second) of Agency § 13 (1958) (summarizing duties agent owes to the principal); *id.* §§ 387-431 (discussing the agent's fiduciary duties); Uniform Partnership Act § 20 ("Partners shall render on demand true and full information of all things affecting the partnership to any partner . . ."); Harry G. Henn, *Handbook of the Law of Corporations* § 218 (2d ed., 1970) ("[D]irectors . . . are subject to duties (a) to act intra vires and within their respective authority, (b) to exercise due care, and (c) to observe applicable fiduciary duties." (footnotes omitted)); *id.* § 235 (listing fiduciary duties); William E. Knepper & Dan A. Bailey, *Liability of Corporate Officers and Directors* §§ 3.01-03 (4th ed., 1988) (describing the duties of corporate directors and officers regarding loyalty to their corporation, conflicts of interest in transactions of their corporation, and disclosure of all material facts germane to corporate transactions); Reed Rowley, *Rowley on Partnership* § 20.0 (2d ed., 1960) ("[T]he duty [to disclose] extends beyond [§ 20 of the Uniform Partnership Act] . . . and there is an additional duty to reveal information unknown or inaccessible to a copartner.").

390. *See* George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 482 (2d ed. rev. 1978).

391. Louis I. Parley, *Post-Marital Agreements*, *J. Am. Acad. Matrim. Law.* 125, 129-32 (1992).

392. *See id.*

393. *See* Bogert & Bogert, *supra* note 390, § 482; *see, e.g.*, *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) ("marriage does not, without more, create a fiduciary relationship").

394. Bogert & Bogert, *supra* note 390, § 482.

395. *Id.*

tions and partnerships,<sup>396</sup> family fiduciary duties do offer weaker family members some protection from more powerful ones. Indeed, the fiduciary duties in family relationships provide greater protection from power imbalances than in some other groups, such as tenant associations.<sup>397</sup> The existence of family fiduciary duties, and the absence of duties for some groups qualifying for group representation, undermines the argument for a special exclusion of families from group representation.

This discussion of power imbalances, however, suggests that changes in the lawyer's duties along the lines of enforcing minimal fiduciary duties would enhance representation of families and other small groups and avoid legal representation becoming a vehicle for exploitation of some group members. The role of the lawyer would be to protect a minimum level of fairness in group process.<sup>398</sup> The lawyer must have a reasonable belief that family members in good faith share common family purposes.<sup>399</sup> The lawyer must also ensure that group decisions are made by

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396. For example, family duties are owed to other family members, rather than the entity. Compare *id.* (discussing fiduciary and confidential relationships within the family) with Robert C. Clark, Corporate Law § 4.1 ("Directors . . . owe their corporations . . . a fiduciary duty of loyalty."). In this regard, families are similar to partnerships where the partners' obligations run to each other. See e.g., Rowley, *supra* note 389, § 20.0 (discussing copartners obligations). Regarding protection of less powerful family members, however, a duty to individual family members may actually be more protective than one to the organization. In addition, instead of arising automatically from group membership, the duties derive from a confidential relationship related to a particular transaction. Compare Bogert & Bogert, *supra* note 390, § 482 (family) with *supra* note 389. Therefore, family fiduciary obligations might fail to arise either generally or for the particular relationship which occurs during the legal representation.

397. Cf. Comment, *The Confidential Relationship Theory of Constructive Trust: An Exception to the Statue of Frauds*, 29 Fordham L. Rev. 561, 564 (1961) ("In a majority of cases wherein a confidential relationship has been found, a family relationship has also existed between grantor and grantee.") (footnote omitted).

398. The lawyer's process protecting role is somewhat akin to the role that political theorists, such as John Hart Ely, have suggested for the courts within our system of government. See John H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980); James G. Pope, *Two Faces, Two Ethics: Labor Union Lawyers and the Emerging Doctrine of Entity Ethics*, 68 Ore. L. Rev. 1, 27 (1989). Ely, for example, argues for the paradoxical role of unelected courts in protecting representative democracy. See, e.g., Ely, *supra*, at 102-04. In a similarly paradoxical role, under Optional Family Representation the lawyer paternalistically interferes with group process to ensure the conditions necessary for the individual group members and the group itself to assert their autonomy. See generally Ellmann, *supra* note 97. Some might argue that such a paternalistic role is inconsistent with the lawyer's duties. But see Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 Geo. J. Legal Ethics 241, 241 (1992) (contrary to prevailing assumption that "the legal ethics codes embody an adversarial ethic," they provide lawyers with broad discretion to further the common good). It is, however, less paternalistic than the lawyer's response to conflicts in joint representation under the established doctrine. The legal ethics rules currently require the lawyer paternalistically to refuse representation entirely where the lawyer has made an objective determination that risks exist, despite the express wish of client family members. See *supra* part I. In contrast, Optional Family Representation permits representation in such circumstances, see *supra* notes 322-27, subject to the limitations in part V.D. *infra*.

399. See *supra* note 353 and accompanying text; cf. Batt, *supra* note 17, at 341 (urging

individuals who are aware of all relevant information.<sup>400</sup> The lawyer must reasonably believe that family members are dealing fairly with each other and are disclosing relevant financial and nonfinancial information. The lawyer must advise each family group member regarding the substantive fairness to the individual, as well as the group, of various alternatives.<sup>401</sup> The lawyer must also reasonably believe that group members have had an equal opportunity to participate in the decisionmaking process.

The lawyer must be careful, however, to avoid using these duties as an excuse to substitute her judgment for that of the group.<sup>402</sup> As Professor Stephen Ellmann cautions, "the lawyer should consider herself responsible for assuring a baseline of democratic and participative process within the group, but beyond this baseline she generally should not override arrangements evolved by the group itself."<sup>403</sup> Similarly, while the lawyer must advise each individual family member regarding the fairness to that individual of possible decisions, the lawyer should not interfere with the substance of decisions the group makes.<sup>404</sup>

#### D. *Modifying the Rules to Permit Optional Family Representation*

The Model Rules could implement Optional Family Representation through changes either to Rule 2.2<sup>405</sup> generally or to Rule 1.13 specifically for representation of small groups, including close corporations.

First, the rules should require that members of small groups, such as families, identify both in form and in purpose of representation the identity of the group and its procedures for communicating information and making decisions.<sup>406</sup> The rules should further require that the lawyer reasonably believe at the initiation and throughout the representation that a bona fide group identity exists and that group members are dealing fairly with each other and disclosing all relevant information.<sup>407</sup> Although similar to Rule 2.2's requirement that the lawyer reasonably believe "that each client will be able to make adequately informed deci-

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that entity representation of families not be permitted where some family members "are attempting to gain an advantage over one another").

400. For a more extensive discussion of confidentiality issues, see *supra*, notes 384-91 and accompanying text.

401. This is precisely the type of information commentators suggest would be necessary to address power imbalances in divorce mediations. See *supra* note 373.

402. See *supra* part V.C.3.

403. Ellmann, *supra* note 97, at 1145. Professor Ellmann's understanding of the lawyer's role in protecting process is more limited than that of Optional Family Representation. See *infra* note 431.

404. See *infra* part V.E.2.

405. See Batt, *supra* note 17, at 339-41; Pennell, *Professional Responsibility*, *supra* note 186, ¶¶ 18-51 to 18-52. But see Collett, *And the Two*, *supra* note 10, at 117-18 (arguing Rule 2.2 not appropriate for family representation because of its focus on financial relationships).

406. See *supra* part V.C.2.

407. See *id.*; *supra* text accompanying notes 381-401.

sions in the matter,"<sup>408</sup> these provisions would revise both Rules 1.13 and 2.2.

Second, the rules should require the lawyer to inform members of small groups, such as families, of the advantages and disadvantages of group representation and of the availability of separate representation or representation under Rule 1.7. The lawyer should make these disclosures and obtain each individual's consent to representation, at the initiation of the representation, at every point where these considerations are relevant to group decisions and at times when new advantages and disadvantages arise.<sup>409</sup> This analysis of advantages and disadvantages will of course, include a substantive evaluation of how alternatives affect individual group members. Such disclosures are similar to the disclosures currently required under Rule 2.2, but would be new to Rule 1.13.

Third, to facilitate such disclosures, the rules must preclude any duty of confidentiality to individual group members or the group entity.<sup>410</sup> The preclusion of confidentiality to an individual would clarify a lawyer's duties under Rule 2.2,<sup>411</sup> but would be unnecessary under Rule 1.13 which currently does not provide any duty of confidentiality to an organizational constituent. The preclusion of confidentiality to an entity would be contrary to the existing provisions of Rule 1.13 and new to Rule 2.2.

Fourth, as a number of authorities have suggested for partnerships and close corporations,<sup>412</sup> the lawyer's representation should be deemed to apply to group members in their individual capacity as well as their group affiliation for purposes of subsequent representation. Accordingly, if group members withdraw from the group, the remaining members would require their consent to representation by the same lawyer in the "the same or substantially related matter" where the group's interests "are materially adverse to the interests of the former" group member.<sup>413</sup>

With these changes, a specific rule for family representation<sup>414</sup> is unnecessary. As noted above, problems in defining and communicating with the client, and in avoiding unfair treatment of individual members of a group, occur generally in small groups, including those with corporate or partnership structures.<sup>415</sup> Accordingly, changes to the Rules to accommodate Optional Family Representation should apply to all small

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408. Model Rules, *supra* note 23, Rule 2.2(a)(2).

409. This provision is much more favorable to constituents than Rule 1.13 which requires disclosure that the lawyer represents the organization only when the organization's interests "are adverse" to those of the constituent. Model Rules, *supra* note 23, Rule 1.13(d).

410. See *supra* text accompanying notes 381-85.

411. See *supra* note 120 and accompanying text.

412. See *supra* note 353 and accompanying text.

413. See *supra* text accompanying note 355.

414. For example, some participants at the conference proposed a rule specifically for family representation. See Ethical Issues in Representing Older Clients, *Working Group Report on Intergenerational Conflicts*, 62 Fordham L. Rev. 1037 (1994).

415. See *supra* text accompanying notes 340-54.

groups. This approach offers the further benefit of avoiding debate regarding the definition of family<sup>416</sup> and of permitting family members, like other group members, to determine for themselves whether or not they constitute a group for purposes of legal representation.

### E. *Applying Optional Family Representation*

To illustrate the operation of Optional Family Representation, this section will apply it to the Estate and Nursing Home Hypotheticals used in this Article, as well as to two multigenerational hypotheticals, one of which is an extension of the Nursing Home Hypothetical.

#### 1. Estate Hypothetical

In the Estate Hypothetical, Optional Family Representation would require disclosures similar to established doctrine before initiating representation.<sup>417</sup> One additional disclosure required under Optional Family Representation is the lack of confidentiality for disclosures relevant to the other family member. Under established doctrine, disclosure regarding loss of the attorney-client privilege in subsequent litigation between John and Mary is necessary, but disclosure regarding confidentiality depends on whether the jurisdiction recognizes a duty of confidentiality to individuals in a joint representation.<sup>418</sup>

After discussion of the advantages and disadvantages with the client, under Optional Family Representation, Ms. Lawyer would have to determine whether she reasonably believes that John and Mary share a common group purpose in obtaining the representation. If she makes this determination, she may accept the representation, even if facts exist suggesting a risk to either John or Mary that would make representation unacceptable under established doctrine.<sup>419</sup>

Optional Family Representation also provides both similar and different responses to Mary's subsequent disclosure to Ms. Lawyer that she desires a new will to be kept secret from John. Established doctrine would permit Ms. Lawyer to urge Mary to share this information with John, but would not require her to do so.<sup>420</sup> It would require Ms. Lawyer to withdraw from representation if Mary refuses to share the information with John. Depending on the jurisdiction's rule, Ms. Lawyer would also have to maintain Mary's confidentiality.<sup>421</sup> Even if Mary made the disclosure, Ms. Lawyer would have to obtain informed consent to continuing the representation and would have to withdraw if a reasonable lawyer would find that continued representation would adversely

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416. See, e.g., Franklin, *supra* note 12.

417. See *supra* text accompanying notes 398-404.

418. For a discussion of the confusion regarding this issue, see *supra* note 48.

419. See *supra* part I.C.1.

420. See *id.*

421. See *supra* note 48.



affect the representation.<sup>422</sup> Upon withdrawal, she could represent either spouse individually only with the consent of the other.<sup>423</sup>

In Optional Family Representation, Mary would have been on notice from the start of representation that Ms. Lawyer had no duty of confidentiality to her.<sup>424</sup> While this makes it less likely that she would have confidentially disclosed to Ms. Lawyer her desire to obtain a secret will, it makes it more likely that in deciding whether to enter family representation, she would have raised the concerns underlying this desire and might even have discussed them with John and the lawyer. If Mary inadvertently discloses this desire, which is certainly relevant to John's estate planning interests, Ms. Lawyer must disclose this information to John if Mary refuses to do so.<sup>425</sup> Although Optional Family Representation would not require Ms. Lawyer to urge Mary to make the disclosure, Ms. Lawyer's obligation to the family's harmonies, as well as its disharmonies, and her obligation to promote the sharing of information within the family,<sup>426</sup> would make her more likely to urge Mary to make disclosure. Mary, faced with the fact that disclosure would be made no matter what she decided, would of course be more likely to disclose. If Mary refused to disclose, Ms. Lawyer would have to withdraw from representation of the family after making the disclosure and, as under established doctrine, could only represent John or Mary individually with the other's consent.<sup>427</sup>

Even if Mary made the disclosure, Ms. Lawyer would have to obtain informed consent to continue the representation, as in established doctrine. In addition, Ms. Lawyer would have to determine that the group identity persisted.<sup>428</sup> As with the initiation of the representation, if these conditions were satisfied, Ms. Lawyer could continue the representation even if a reasonable lawyer would have found that the continued representation could adversely affect the interests of either individual.

## 2. Estate Hypothetical Revisited: The Patriarchal Family

Modifying the Estate Hypothetical to posit a patriarchal family further illuminates Optional Family Representation. When John and Mary meet with Ms. Lawyer, they explain that John as the husband is the head of the family. Mary asks Ms. Lawyer to communicate only with John who will make all decisions. This hypothetical appears to create a conflict between the family members' determination of the procedures for communicating with the lawyer and the lawyer's role in protecting group

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422. *See supra* part I.C.1.

423. *See id.*

424. *See supra* text accompanying notes 406-11.

425. *See id.*

426. *See id.*

427. *See supra* text accompanying notes 398-401, 406-13.

428. *See id.*

process.<sup>429</sup> Under Optional Family Representation, however, the family members cannot use their responsibility for establishing procedures for consultation<sup>430</sup> to modify the lawyer's duty to ensure that each family member receives full information and a full opportunity to make decisions.<sup>431</sup> Accordingly, Ms. Lawyer cannot agree to communicate exclusively with John. The family's procedures for communicating with the lawyer must include advice to Mary, as well as her participation in group decisions. On the other hand, in making decisions, Mary is free to decide to defer to John.

### 3. Nursing Home Hypothetical

Established doctrine's focus on family disharmonies is likely to prohibit Mr. Lawyer's representation of Ozzie and Harriet because of Ozzie's desire to institutionalize Harriet and her intent to resist institutionalization.<sup>432</sup> In contrast, if Ozzie and Harriet demonstrate a commitment to reach a mutually satisfactory resolution of their differences, Optional Family Representation would permit family representation upon informed consent and a determination of the existence of a bona fide family group.<sup>433</sup> If at some point it becomes clear that Ozzie and Harriet cannot resolve their differences in a manner acceptable to both, the lawyer must withdraw from family representation and may only represent either spouse individually with the other's consent.<sup>434</sup>

### 4. Multigenerational Nursing Home Hypothetical

The analysis of the Nursing Home Hypothetical described above would similarly apply if children Ricky and David join Ozzie and Harriet in seeking family representation.

Professor Teresa Stanton Collett has further raised the question as to whether, under family representation, a majority vote of Ozzie, Ricky, and David could force the institutionalization of Harriet over her objection.<sup>435</sup> The answer to this question is clearly no. By participating in family representation, Harriet does not give other family members control of decisions she is legally empowered to make.<sup>436</sup> She need not com-

429. See *supra* notes 398-404, 406-11 and accompanying text.

430. See *supra* note 406 and accompanying text.

431. See *supra* notes 398-404, 406-11 and accompanying text. Professor Ellmann's concept of the lawyer's role in protecting process would not extend this far. He suggests that it would be improper for the lawyer to insist on an equal vote for a wife who wishes to delegate all decisions to her husband. Ellmann, *supra* note 97, at 1153 n.131. Under Optimal Family Representation, however, this interference in John and Mary's autonomy is necessary to ensure a minimum level of fairness to individuals within the family. See *supra* part V.C.4.

432. See *supra* part I.C.2.

433. See *supra* text accompanying notes 406-13.

434. See *supra* text accompanying notes 405-12.

435. See Collett, *Intergenerational Representation*, *supra* note 347, at 1484.

436. The family members would have to obtain appointment of a guardian, conservator, or committee to gain such control. See Austin W. Scott & William F. Fratcher, *The*

ply with her family members' desire to institutionalize her. At all times, moreover, she retains the right to withdraw from family representation.<sup>437</sup> Were she not to withdraw formally, Mr. Lawyer would have to terminate family representation if the family members deadlocked regarding the purpose of the representation.<sup>438</sup>

Alternatively, if Harriet decided voluntarily to follow the guidance of the majority, despite her inclination to the contrary, Mr. Lawyer could continue to represent the family if the family group continued to satisfy the conditions for family representation. Additional issues which might arise regarding Harriet's capacity<sup>439</sup> are beyond the scope of this Article which limits itself to issues arising in the representation of competent family members.<sup>440</sup>

### 5. Multigenerational Family Business Hypothetical

Harriet owns a restaurant business which her children Eddie and Laura manage with her.<sup>441</sup> Harriet, Eddie, and Laura consult Ms. Lawyer for estate planning. As part of the representation, Harriet prepares a will leaving her business equally to Eddie and Laura. Later, Harriet's relationship with Laura cools and Harriet asks Ms. Lawyer to draft a new will for her which leaves the business exclusively to Eddie. Aware of the chill in her relationship with her mother, Laura asks Ms. Lawyer if her mother is planning to draft a new will removing Laura's interest in the business.

The results of this hypothetical are similar to the Estate Hypothetical, including the conditions for initiating and continuing representation.<sup>442</sup> Here, under Optional Family Representation, Ms. Lawyer must inform Laura and Eddie of Harriet's request if, after consultation, Harriet refuses to do so.<sup>443</sup> In contrast, under established doctrine, Ms. Lawyer may have an obligation to keep the request confidential, but cannot lie to Laura.<sup>444</sup> If Harriet discloses her request, continued representation requires satisfaction of the conditions of representation under either established doctrine or Optional Family Representation.<sup>445</sup> If Harriet refuses to disclose, under both established doctrine and Optional Family Representation, Ms. Lawyer must withdraw from representation of the family

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Law of Trusts § 7 (4th ed., 1987) (guardianship); Bogert & Bogert, *supra* note 391, § 13 (guardianship and conservatorship).

437. See *supra* text accompanying notes 398-404, 406-11.

438. See *id.*

439. See Collett, *Disclosure*, *supra* note 48.

440. See *supra* note 18.

441. The names for this hypothetical are taken from my son Seth's favorite television show *Family Matters*. The facts are very loosely based on *Hotz v. Minyard*, 403 S.E.2d 634 (S.C. 1991).

442. See *supra* part V.E.1.

443. See *supra* text accompanying notes 398-404, 406-11.

444. See *Hotz v. Minyard*, 403 S.E.2d at 637; *supra* text accompanying notes 114-21.

445. See *supra* text accompanying notes 33-48, 406-11.

members.<sup>446</sup> Similarly, under both Optional Family Representation and established doctrine, after termination of joint or family representation, representation of any of the family members in this matter would require consent of the others.<sup>447</sup>

### CONCLUSION

Established legal ethics doctrine generally tends to restrict lawyers to viewing families as collections of individuals, rather than family groups. This approach is contrary to how many families view themselves and how many family professionals view families. Modifications of the legal ethics codes are therefore needed to permit lawyers to offer representation to families as communities, rather than a collection of individuals.

In contrast to other alternatives, this Article's proposal for Optional Family Representation would allow families, and not lawyers, to choose whether their representation should be as a family or as a collection of individuals. At the same time, it would avoid unfairness to individual family members by requiring the existence of a bona fide family group and continual disclosure of relevant information to afford family members the opportunity to withdraw if they so choose.

These changes alone will not suffice to ensure that lawyers value families and seek to use the law to reflect their truths. They would only make it both permissible and easier for lawyers to do so. To understand families better, lawyers will have to learn from experts in other fields, such as family therapy. Just as a lawyer representing a business needs to understand balance sheets and business practices,<sup>448</sup> a lawyer representing a family needs to understand family processes.<sup>449</sup> How lawyers should seek and apply this knowledge are questions for another day.

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446. *See id.*

447. *See supra* text accompanying notes 93-96, 409-11.

448. *See* Mary C. Daly, *Competence and Confidentiality: Understanding Financial Statements—Understanding Lawyers' Professional Responsibilities*, in *Accounting for Lawyers* 1993, at 431, 433 (PLI Corp. Law & Practice Course handbook Series no. 830, 1993) (“[t]he lawyer who fails to understand financial statements runs the risk of both disciplinary sanctions and malpractice liability.”).

449. *See, e.g.*, Steven H. Hobbs & Fay Wilson Hobbs, *The Ethical Management of Assets for Elder Clients: A Context, Role, and Law Approach*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1411 (1994) (incorporating insights from multisystems therapy into analysis of lawyer's role in representing elderly clients); Le Van, *supra* note 166, at 21-22 (discussing lessons from family therapy for family representation); Deborah L. Rhode & David Luban, *Legal Ethics* 481 (1992) (including perspective of family therapists in discussions of how lawyers should treat family secrets).