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Cover Page Footnote
Professor, South Texas College of Law, Houston, Texas. The Article reflects the benefit of participating in the Fordham Conference on Ethical Issues in Representing Older Clients held December 3-5, 1993. The author is particularly grateful to the National Academy of Elder Law Attorneys for their support of her participation. Professors Catherine Burnett, Matthew Mitten, and Jeffrey Pennell, as well as Raymond Young, Esq. and Michael Gilfix, Esq. provided insightful editorial comments on early drafts of this Article.
THE ETHICS OF INTERGENERATIONAL REPRESENTATION

TERESA STANTON COLLETT*

Because the family plays a central role in most estate-planning decisions, commentators and courts have sought to develop ways of defining a lawyer's ethical obligations in representing elder clients who seek estate-planning advice. These new views of legal ethics emphasize the fact that clients may not merely seek to further their own individual interests but, rather, may seek advice from an attorney about what is best for their family as a whole. In this Article, Professor Collett analyzes the four types of representation that are available to elder clients who seek estate planning advice: individual representation, representation as an intermediary, joint representation, and family representation. She analyzes the benefits and difficulties that accompany each of these options. Next, Professor Collett critiques family representation, and she concludes that this form of representation may be inappropriate because it eliminates the lawyer's accountability to individual family members who seek representation.

INTRODUCTION

Every lawyer engaged in estate planning or elder law recognizes that family is a central element in the lives of most people. It has been suggested that families, not individuals, are the fundamental building blocks of society.¹ Caring for family members, both during and after life, is a high priority of many clients.² This is true whether the lawyer represents a parent or an adult child or some combination of family members. Yet the rules that govern lawyers' conduct are largely premised upon an understanding of clients as single, perhaps even isolated, individuals.³ Duties of loyalty⁴ and confidentiality⁵ run only to the "client." In many jurisdictions only the "client" has standing to sue for inju-

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1. See Lee E. Teitelbaum, Family History and Family Law, 1985 Wis. L. Rev. 1135, 1169 ("What has changed is not the belief that the family is a building block of the larger society, but the prevailing picture of the larger society itself."); Note, State Power and Discrimination by Private Clubs: First Amendment Protection for Nonexpressive Associations, 104 Harv. L. Rev. 1835, 1845 (1991) ("The family receives the protection of substantive due process because it is an irreducible building block of a free society.").

2. See Thomas L. Shaffer, The Planning and Drafting of Wills and Trusts 24 (1979) ("Property is used to keep the family together at least as much as the family is used to keep the property together.").


4. See Model Rules of Professional Conduct Rules 1.7-1.9 (1992) [hereinafter "Model Rules"].

5. See Model Rules, supra note 4, Rule 1.6.
ries resulting from an attorney's negligence. Legal and ethical consideration of the interests of "non-clients" is limited largely to avoiding deceitful or fraudulent practices. Yet estate planners and elder law specialists regularly counsel individuals who expect the lawyer to consider the interests of others—spouses, children, parents, or other family members. This seeming incongruity between the individualism inherent in the Model Rules of Professional Conduct and the practical experience of most estate planning and elder law attorneys was the subject of consideration by the Fordham Conference on Ethics and the Representation of the Elderly working group on intergenerational representation. This Article is a result of the author's participation in that working group.

Examined in this Article are the various types of intergenerational representation that clients may obtain. Part I discusses how clients may initiate representation. This part focuses on the issue of who identifies the client and the consequences that flow from this identification. Part II discusses the four types of representation that intergenerational clients may choose from: individual representation, representation by an intermediary, joint representation, and family representation. Part III critiques family representation, which is the most recent form of multiple representation. This Article concludes that family representation is an inappropriate form of multiple representation because it reduces the lawyer's accountability to individual family members seeking representation.

I. INITIATING REPRESENTATION

Intergenerational representation typically arises in one of two ways. In estate planning, often it arises in the context of "long-term" repres-

6. See Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 7.1 (3d ed. 1989) ("Traditionally, attorneys' malpractice exposure has been limited to their clients."); Joan Teshima, Attorney's Liability, to One Other Than Immediate Client, for Negligence in Connection with Legal Duties, 61 A.L.R.4th 615, 634 (in general, attorney cannot be liable to nonclient).

7. See Model Rules, supra note 4, Rule 4.1; Mallen & Smith, supra note 6, § 6.1.

8. The seeming inapplicability of the Model Rules to elder law and estate planning has been noted by a number of commentators. See, e.g., Patricia M. Batt, The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys, 6 Geo. J. Legal Ethics 319, 320 (1992) (arguing that "the Model Rules should be modified to address the elder lawyer's practice"); Ronald C. Link et. al., 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, 32 (1987) (arguing that Model Rules do not specifically address estate planning).

9. For purposes of this Article, intergenerational representation refers to related representation of multiple family members who seek to attain a common goal either through employing the services of the lawyer as intermediary under the terms of Model Rule 2.2 or as joint counsel in addressing a particular concern or goal.

10. The vigorous discussion of the working group has led to significant refinement of the author's understanding of the issues in this area. Members of the Intergenerational Conflicts Working Group were Mary Daly, Sia Arnason, Jerry Cohen, Ayn Crawley, Wiley Dinsmore, Michael Gilfix, Hal Leiberman, and Raymond Young. Meg Reed and Lori Stiegel, as staff support, also provided additional insight in their attempts to summarize the group's discussions.
tation. An attorney begins a relationship with an individual client which ripens into long-term representation of the client's business and personal interests. Over the course of many years, the client confides in the attorney not only information concerning the structure and disposition of financial assets, but also intimate details concerning his or her personal life. Having obtained and retained the trust of the initial client, the lawyer soon is sought out by other family members for advice and counsel concerning their affairs, thus becoming “the family lawyer.” In this context, the representation evolves from representation of a single, long-term client into the representation of multiple family members, sometimes for matters that concern only an isolated individual, and sometimes for a common concern or enterprise involving several family members. The following hypothetical fact pattern illustrates how such multiple representation can arise, as well as the conflicts of interest that may develop as the representation continues:

**Hypothetical 1:** Lawyer has represented Father since he began his manufacturing business in the early 1960s. During the first fifteen years, the business struggled, barely able to provide a reasonable living to Father and his family. However, during the sixteenth year, Child, having completed a bachelor's degree in engineering, joined the company and began to initiate substantial changes in its production and marketing methods. Child sought the advice of Lawyer as the lawyer for the company as well as personal advisor for Child's estate planning. Due to the expansion of the business and increased financial risks from potential liability, the company was incorporated with Father as majority shareholder. Lawyer continued to advise Father, Child, and the corporation.

In spite of Father's majority ownership, Child's influence in the corporation increased and Father's influence in the corporation diminished. While this shift in authority within the company was accompanied by minor conflict between Father and Child, it never escalated to the point where Lawyer was asked to intervene beyond providing judicious advice about the corporation's best interests from a legal perspective. Recently, Child contacted Lawyer and expressed substantial concerns about Father's failing health and perceived diminished capacity to make decisions. Father, at age 70, has become more irascible over the years, and Child is concerned that Father will block corporate innovations necessary to respond to the increasing globalization of the manufacturing industry. In addition to concerns related to the business, Child is genuinely concerned about Father's decision-making capacity concerning health care. It seems that Father has increasingly suffered from occasional trembling and yet refuses to seek medical diagnosis and treatment. After revealing all of this information to Lawyer, Child asks Lawyer about the various legal mechanisms available to shift decision-making authority from Father to Child.

Lawyer has not met with Father within the past two years and has no

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personal knowledge that would help in evaluating the legitimacy of Child’s concerns. Over the years, Lawyer has had only minimal contact with Mother, and that contact has always related to the drafting of her will as a part of the family’s estate planning. To Lawyer’s knowledge, Mother has never been involved in the company or attempted to exert any sort of control over the financial decisions of her husband concerning their property. Child is an only child.

These facts represent a typical long-term client situation, presenting legal issues that impact upon both the person and estate of Father and the estates of Child and Mother.\(^\text{12}\)

The second circumstance that gives rise to representation of multiple family members will be referred to throughout this Article as the “new client situation.” This situation is most common in elder law, in which immediate assistance is sought in ordering an older person’s estate or providing for the care of his or her person. Often another family member attends the initial meeting with the lawyer, and it is common for additional family members to be consulted prior to undertaking any action.

**Hypothetical 2:** Family consults Lawyer for assistance in determining how to help Husband. An unrelated client recommended Lawyer to Family. Husband and Wife are seventy and sixty-five years old, respectively, and have been married for forty-five years. They have two adult children, A and B. Husband, who is becoming increasingly disoriented and frail, Wife, A, and B come to Lawyer seeking legal advice. Wife can no longer care for Husband and is considering placing him in a long-term care facility. A and B, as heirs to their parents’ estate, have concurrent, potentially conflicting concerns about their mother’s financial and physical well-being and their father’s increasing need for long-term care. They also may have a conflicting interest in maintaining their inheritance. Husband says that he does not want to go to a long-term care facility but also says that he trusts his family and Lawyer’s judgment.\(^\text{13}\)

These facts illustrate the new client situation, encompassing legal issues that affect both the person and estate of Husband and Wife, as well as the expectant interests of A and B.

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12. Clearly Child and Corporation are present clients; Father is probably a present client, although arguably a former client; and Mother is more likely a former client, although she too may be a present client. The classification of present or former client controls the ethical standards to be applied to the attorney’s conduct. In deciding whether any conflicting interests of the clients require the lawyer to withdraw, Model Rule 1.7 precludes continued representation in cases of direct adversity or when the attorney could not reasonably believe that representation of all clients would be free of material limitation, while Rule 1.9 allows the former client to consent to continued representation regardless of the nature or degree of conflicting interests. For a discussion of the proper classification of family members as clients, see generally 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 (1993).

13. This hypothetical fact pattern was adapted from Batt, *supra* note 8, at 321. It was one of the hypothetical fact patterns presented to the working group addressing intergenerational conflicts at the Fordham Conference.
Avoiding conflicts\(^{14}\) while maintaining confidences\(^{15}\) and independent professional judgment\(^{16}\) are the controlling ethical considerations in accepting representation of multiple family members in both the long-term and new client situations. To maximize the possibility of ethical representation, the mode of representation to be provided must be determined at the outset.\(^{17}\) The choices currently available to the client and attorney are: (1) representation of only a single family member, requiring other family members to seek representation by other lawyers;\(^{18}\) (2) representation as intermediary between clients;\(^{19}\) and (3) joint representation of multiple individual family members.\(^{20}\) Legal commentators are suggesting consideration of a fourth form of representation—representation of the family as an entity.\(^{21}\)

This Article examines these four models and identifies inherent limitations in each. Careful consideration reveals that only the first three models respect the traditional relationship between the individual client and the attorney, preserving the decision-making autonomy of elderly clients in the face of increasing pressures to surrender control of their assets\(^{22}\) or

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14. See Model Rules, supra note 4, Rules 1.7-1.9.
15. See Model Rules, supra note 4, Rule 1.6.
16. See Model Rule, supra note 4, Rules 1.7 cmt. For an interesting discussion distinguishing avoiding conflicts and maintaining independent judgment, see Nancy J. Moore, Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy, 61 Tex. L. Rev. 211, 217-18 (1982) ("Although loyalty and independent professional judgment are not necessarily incompatible, they are clearly different: the essence of loyalty is emotional commitment, while the essence of independent professional judgment is intellectual detachment.").
18. Hereinafter referred to as "individual representation."
19. Hereinafter referred to as "intermediary representation" or "intermediation." This mode of representation is defined and limited by the terms of Rule 2.2. See Model Rules, supra note 4, Rule 2.2.
20. Representation of multiple individuals engaged in a common enterprise will hereinafter be referred to as "joint representation." This term is used in cases defining the evidentiary privilege that is afforded clients making disclosures in the presence of other clients engaged in a common enterprise and seeking representation by a single lawyer. See, e.g., 8 John H. Wigmore, Evidence in Trials at Common Law § 2312 (John T. McNaughton rev. ed. 1961 & supp. 1993).
22. Contrast the current practice of *inter vivos* gifts for medicaid and estate planning purposes with the biblical wisdom:

Let neither son nor wife, neither brother nor friend, have power over you as long as you live. While breath of life is still in you, let no man have dominion over you. Give not to another your wealth, lest then you have to plead with him; far better that you should look to their generosity. Keep control over all
their lives. Individual representation provides the greatest measure of protection for client confidences and attorney loyalty, while posing some danger of isolating the client. Joint representation allows unified representation of multiple family members in their dealings with non-family members, but fails to accommodate fully competing individual considerations related to the joint representation. Intermediation recognizes the individual considerations of each family member, and emphasizes harmonizing those interests in the context of representation that focuses upon the adjustment or creation of a relationship among multiple clients. Yet this model precludes continued representation when all interests can not be harmonized, or when one family member no longer desires representation. Family entity representation has been proposed in hopes of allowing family interests to predominate over individual interests, and allowing representation to continue regardless of the changing composition of the family entity. After careful consideration of the arguments presented by its proponents, this Article concludes that family entity representation offers few benefits not available under the current models of representation. In its attempt to emphasize the very real benefits of an understanding of family as more than a mere collection of competing individual interests, it disregards the threat that such an understanding poses to both family and individual autonomy when used to define the responsibilities of lawyers to clients.

A. Determining Client Identity

It is necessary to identify the client and determine the model of representation to be provided by the lawyer at the beginning of the representation. In deciding who the client is, it is important to consider both the process of making that determination, as well as the substantive question of who or what might properly be regarded as a client. A major component in the process of identifying the client is discerning who should make that decision.

Outside of the context of constitutionally mandated representation, there are three options: (1) the lawyer will iden-
tify the client; 26 (2) the person or people seeking legal services will identify the client; 27 or (3) the lawyer and the person or people seeking legal services will jointly identify the client. 28

The Model Rules of Professional Conduct seem to contemplate the third option. Both the attorney and the prospective client must agree to the representation before an attorney-client relationship is established. 29

Individual necessarily denied that person the right to speak for himself and to control (albeit misguidedly) all aspects of the presentation. See id. at 833-34.

26. Allowing the lawyer to identify the client is consistent with the American tradition of allowing lawyers to accept or decline clients based primarily upon the lawyers' personal predilections. See Model Rules, supra note 4, Rule 1.2 cmt. ("A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant."). By empowering the lawyer to make the decision, the lawyer is an independent moral actor who controls the nature of the affiliation which he or she is willing to undertake. This acknowledges the moral autonomy of the lawyer as an individual, separate from the role of lawyer that he or she may have undertaken.

Independent of respecting the lawyer's moral independence, empowering the lawyer to make the ultimate decision concerning client identity ensures that the decision will be made by the one who has the greatest knowledge concerning the legal consequences of any particular client identification. Often individuals seeking the assistance of the lawyer outside of a litigation context are convinced that their situation is one that will amicably resolved through sincere and good faith dialogue among the family. While this is often true, lawyers have a particular sensitivity to the very real possibility that dialogue will not resolve all differences amicably and that ultimately individual family members will be unpersuaded by the positions of others and thus seek individual representation for purposes of a more adversarial resolution of the problem.

This sensitivity to the potential for conflict within the family poses a double-edged sword when lawyers decide who the client is. One of the most consistent criticisms of lawyers in this area is that conflict is too quickly assumed to exist and often exacerbated by the involvement of attorneys in the problem-solving process. Rather than seeking to make peace and maintain the unity of the family, lawyers too often encourage individuals to assert their legal rights in the face of persuasive reasons that would counsel accommodation of competing interests rather than sharply define spheres of individual rights. This danger leads to the position that the person or people seeking representation might more suitably identify the client and the nature of the representation to be undertaken.

27. See Russell G. Pearce, Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses, 62 Fordham L. Rev. 1253 (1994). Allowing the person or people seeking representation to decide the identity of the client is supported by three basic arguments: (1) the person seeking representation will ultimately bear the most significant consequences from the manner in which the client is identified; (2) the individuals seeking representation have far greater knowledge about the history, dynamics, and decision-making process of the family; and (3) allocating this decision to the person or people seeking representation acknowledges and respects the inherent dignity of every individual by virtue of its reliance upon their autonomous decisionmaking.


28. See 1 Hazard & Hodes, supra note 21, § 1.2:302.

It has already been noted that no lawyer is legally required to accept any particular matter, save in the case of court appointment. This means that while Rule 1.2(b) approves the willingness of lawyers to represent clients and causes they do not believe in, it does not reproach those who choose to reject matters on moral grounds.

Id.

29. A formal attorney-client relationship is not necessary in order for the lawyer to be
This option accommodates both the prospective client's right to select the attorney\textsuperscript{30} and the attorney's right to represent only those individuals whom he or she desires.\textsuperscript{31} Ideally in this collaborative model, the prospective client provides sufficient information about family history, dynamics, and decision-making processes for the lawyer to make an informed decision to accept or reject representation of the person or entity to be identified as the client.\textsuperscript{32} Likewise, in this model, the lawyer provides sufficient information about the models of representation available and the various persons or entities who could be identified as clients for the person or people seeking representation to make an informed decision about which person or entity, if any, should be the lawyer's client.\textsuperscript{33} Either the prospective client or the lawyer can unilaterally decline to initiate representation.\textsuperscript{34}

Client identification is rarely at issue when the person seeking representation contacts the attorney directly.\textsuperscript{35} This is most common in the


\textsuperscript{31} See Model Rules, supra note 4, Rule 6.2 cmt ("A lawyer ordinarily is not obligated to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified."). The qualifications referred to include the need for unpopular cases or clients to be represented, and the lawyer's duty to accept court appointments. See id.

\textsuperscript{32} When the client fails to be candid at the initial interview, but the attorney subsequently comes to learn the true circumstances surrounding the representation, the attorney may withdraw from representation absent harm to the client or a court order requiring continued representation. See Model Rules, supra note 4, Rule 1.16; Monroe H. Freedman, Understanding Lawyers' Ethics 57 (1990).

\textsuperscript{33} See Margulies v. Upchurch, 696 P.2d 1195, 1203-04 (Utah 1985).

For client consent to be adequate in a conflict of interest situation, the attorney must not only inform both parties that he is undertaking to represent them, but must also explain the nature and implications of the conflict in enough detail so that the parties can understand why independent counsel may be desirable. See also Roger W. Anderson, \textit{Informed Decisionmaking in an Office Practice}, 28 B.C. L. Rev. 225, 234 (1987) ("Before accepting the representation, the lawyer's obligation is to educate all potential clients about the nature of these potential disputes."). Cf. Lee A. Pizzimenti, \textit{The Lawyer's Duty to Warn Clients About Limits on Confidentiality}, 39 Cath. U. L. Rev. 441 (1990) (discussing limits of attorney-client confidentiality).

\textsuperscript{34} The client continues to be able to reject representation even after the attorney-client relationship is undertaken. See Wolfram, supra note 29, § 9.5.2 ("It is now uniformly recognized that the client-attorney contract is terminable at will by the client."). See Model Rules, supra note 4, Rule 1.16(b) (limiting discretionary withdrawal to cases where withdrawal can be accomplished without adversely affecting the client); see generally Wolfram, supra note 29, § 9.5.3.

\textsuperscript{35} Geoffrey C. Hazard, Jr., Ethics in the Practice of Law 43 (1978) ("The client is the troubled fellow who walks into the office, papers in hand, wanting someone to help him in a legal matter."). Of course this clarity of client identity can be lost by subsequent events during the representation. See Pascale v. Pascale, 549 A.2d 782, 784, 790-91 (N.J.)
long-term client scenario. Client identification is far more complex when
the initial contact is made by someone other than the person seeking
representation, or when several individuals meet with the lawyer initially.

When a person other than the individual seeking representation con-
tacts the lawyer, the lawyer must clarify the role of the liaison. It is
common in both estate planning and elder law for the lawyer to be con-
tacted by an adult child who requests an initial appointment for a par-
ent. Sometimes the child attends the meeting with the parent, and on
occasion even pays the parent's legal fees. Each of these actions by the
child compounds the difficulty in identifying the client as the parent ex-
clusively. When the issues presented to the lawyer impact legal-recog-
nized interests of both parent and child, the lawyer has a clear obligation
to clarify the relationship to be established with each person. The more
family members attending the initial meeting with the lawyer, the more
complicated it becomes to identify the client or clients and define the
nature and scope of representation.

B. Consequences of Client Identification

Determining who is the “client” is of critical importance because that

1988) (client directed attorneys to “deal directly” with son or accountant, and contact
with son led to court determination that an attorney-client relationship was formed).

1950) (discussing how prospective beneficiary of testator initially approached attorney
regarding preparation of testator’s will); see also Mark Falk, Ethical Considerations in
Representing the Elderly, 36 S.D. L. Rev. 54, 54 (1991) (noting that, with increasing
frequency, elderly persons will be accompanied by younger relatives when initially visit-
ing attorneys).

37. The effect of this upon the attorney-client privilege is troubling. See Annotation,
Privilege as to Communications to Attorney in Connection with Drawing of Will, 66

38. See Model Rules, supra note 4, Rule 1.8(f). Rule 1.8(f) states:

(f) lawyer shall not accept compensation for representing a client from one
other than the client unless:

(1) the client consents after consultation;
(2) there is no interference with the lawyer’s independence of profes-
sional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as re-
quired by rule 1.6 [which discusses confidentiality].

Id.; see also ABA Committee on Significant New Developments in Probate and Trust
Law Practice, Developments Regarding the Professional Responsibility of the Estate Plan-
& Tr. J. 1, 14 (1987) (examining the possible conflicts of interest when a conflict exists
between the person paying and the person receiving the lawyer’s services).

39. Model Rules, supra note 4, Rule 4.3 (dealing with unrepresented person); see also
Pascale v. Pascale, 549 A.2d 782, 784, 790-91 (N.J. 1988) (client directed attorneys to
“deal directly” with son or accountant, and contact with son led to court determination
that an attorney-client relationship was formed); Bohn v. Cody, 832 P.2d 71 (Wash.
1992) (en banc) (reinstating malpractice claim against daughter’s attorney for losses
casted by daughter’s failure to repay loan to parents where it was foreseeable that parents
would be harmed by such non-payment and where attorney had given unrepresented
parents information concerning loan).
determination defines the duties of the lawyer. Professor Geoffrey Hazard has identified the underlying thesis of the current system of legal ethics as "us" versus "them." The "us" are lawyers and their clients. The "them" are everyone else. Even transactional practice can be seen as fundamentally adversarial in nature because "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."

Lord Brougham eloquently expressed this perspective in his famous statement while defending Queen Caroline:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

The client's interests are paramount. But even more than that, they are the only proper object of consideration by the lawyer. No consideration of others' interests, regardless of the importance of those interests, is proper or even permissible, when adhering to this ideal of pure partisanship.

Some commentators have read the Model Rules of Professional Conduct as incorporating this conception of the lawyer's duties. While this interpretation of the Model Rules has been ably disputed, it remains

40. See Hazard, supra note 35, at 43. Hazard states:

The lawyer's professional responsibilities may not end with concern for his client, but clearly they start there. Confidential information is a secret if it relates to a client, valuable evidence if it relates to someone else. Conflict with the client must be avoided, conflict with everyone else is what a lawyer is retained to handle.

Id. This dichotomy is modified somewhat when the client has fiduciary responsibilities to individuals whom Hazard identifies as "relevant others." See Geoffrey C. Hazard, Jr., Triangular Lawyer Relationships: An Exploratory Analysis, 1 Geo. J. of Legal Ethics 15, 33-36 (1987).

41. Freedman, supra note 32, at 66. An example of this is that in drafting estate planning documents, attorneys seek to preempt challenges from both taxing authorities and disappointed individuals who had anticipated receiving some gift.

42. Wolfram, supra note 29, § 10.3.1 (quoting, 2 Trial of Queen Caroline 8 (1821)).

43. See Spaulding v. Zimmerman, 116 N.W.2d 704, 709 (Minn. 1962), provides an example of conduct consistent with this understanding of the lawyer's duty. Defense attorneys learned that the sixteen-year-old plaintiff had an aneurysm of which he was unaware. Because the aneurysm might have been caused by the accident that led to the litigation, defense counsel did not inform the plaintiff of their discovery, even though the aneurysm was life threatening. David Luban comments upon this case in Lawyers and Justice 11-16 (1988).


beyond dispute that many lawyers believe that they have no right to consider the interests of people other than their clients, and do so only reluctantly and with great trepidation.\textsuperscript{46}

Yet when dealing with families, particularly families including an elderly person, the extreme model of partisan representation does not accommodate most clients' desires.\textsuperscript{47} Many elderly clients seek to harmonize family relationships rather than destroy them.\textsuperscript{48} Many lawyers specializing in estate planning and elder law aspire to create or ensure the continuation of loving, caring relationships rather than solidify or encourage the development of antagonistic, individualistic stances.\textsuperscript{49} Thus the "devil take 'em" approach to non-clients inherent in the partisan model of representation often ill serves both the clients and the lawyers in these areas of practice.

Because of dissatisfaction with the partisan model, an alternative model is emerging (or to state it more accurately "reemerging")\textsuperscript{50} which

\textit{But see} David Luban, Lawyers and Justice, app. 1 (1988) (arguing that, while there may be other schools of thought on interpretation of professional ethics, the conception that the lawyer's duty is to his client first is largely dominant in interpretation of the Model Rules).

\textsuperscript{46} See 1 Hazard & Hodes, supra note 21, § 1.1:203-1 ("Many lawyers and some courts apparently believe that this concept [duty to non-clients] is antithetical to the traditions of the legal profession: they mistakenly believe that the lawyer's duty is one of unconditional loyalty to the client, a loyalty that leaves no room for concern for anyone else.").


\textsuperscript{48} See, e.g., Estate of Koch, 849 P.2d 977 (Kan. Ct. App. 1993). Here the court stated:

Throughout her life, Mary professed love for all of her sons. There is overwhelming evidence, however, consisting of many letters written by Mary and testimony by her relatives, friends, and doctors who examined and treated her, that she was appalled and distressed for a period of 10 years prior to her death by the disputes and lawsuits involving her sons and by the resulting publicity. . . .

On May 9, 1981, Mary wrote Frederick [one of four sons]: "All I want these last years of my life are peace and harmony in my family and I hope and pray that you will help me to mend bridges not destroy them." Mary expressed identical thoughts in numerous other letters written to Frederick and William [another son] and in many conversations with relatives and friends during the last years of her life.

\textit{Id.} at 983.


\textsuperscript{50} See David Hoffman, A Course of Legal Study 754 (2d ed. 1836). He states:

If, after duly examining a case, I am persuaded that my client's claim or defense (as the case may be,) cannot, or rather ought not, to be sustained, I will promptly advise him to abandon it. To press it further in such a case, with the hope of gleaning some advantage by an extorted compromise, would be lending myself to a dishonorable use of legal means, in order to gain a portion of that,
has most recently been christened "socially responsible lawyering." 51 Under the "socially responsible" model, the impact on third parties, and even society at large, is an independent consideration in the attorney's decisions during representation. Thus an elder law attorney operating under this model might decline to assist a client in transferring assets to the client's children in order to accelerate the client's eligibility for Medicaid assistance. The socially responsible lawyer might reason that Medicaid was established to assist the poor, not to insure the inheritance of children of the middle-class. 52 Alternatively, the lawyer might urge a client to engage in Medicaid planning because the lawyer believes that society as a whole has an obligation to provide for its infirm, and consumption of personal assets for long-term care delays the political process of society recognizing this obligation. 53

While illustrating the operation of the "socially responsible lawyer" model, this example also illustrates one of its great weaknesses. "Society" has no spokesman, or perhaps too many, to articulate its interests coherently. 54 Can such interests be perceived objectively independent of the attorney's moral system? 55 If the letter of the law does not forbid conduct, may the attorney assume the mantle of "society's" spokesman and urge the client to forgo legally permissible conduct in order to incur some benefit for the amorphous group identified as "society?" 56

These questions may diminish in magnitude when only considering "family-responsible" representation, yet answering them remains a daunting task. With the decline of the patriarchal structure within American families, it is increasingly difficult to determine who speaks for "the family." If different family members take varying positions concerning a proposed course of action, what weight, if any, should the law-

*the whole* of which I have reason to believe would be denied to him both by law and justice.

*Id.*


53. Cf. Robert N. Brown, *The Rights of Older Persons* 2 (2d ed. 1989) (American Civil Liberties Union handbook) ("Continued advocacy is needed to assure that existing [governmental benefits] programs fulfill their objectives [insuring the elderly's right to an adequate income] and that needed enhancements are enacted."); see also Dobris, *supra* note 52, at 30-31 (arguing that Medicaid should be available to everyone).

54. How would lawyers go about deciding whether Jesse Helms or Ted Kennedy (or neither) speaks for "society"?


56. These questions lead inevitably to the issues pondered by Stephen L. Pepper in *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 4 Am. B. Found. Res. J. 613 (1986) (noting the decline of other institutions that would impart some sense of moral limitations to the client, and questioning the viability of an amoral society).
yer give to each position? To what extent, if any, does a particular family member have a preemptive right to make certain decisions? Is there any justification for a lawyer to consider the interests of any person other than those of "the client"? The complexity of these questions has led many lawyers to ignore them and hope that they never become an issue in their practice.57

Alternatively, some thoughtful practitioners and academicians are persuaded that considerations concerning "family" motivate the vast majority of both estate planning and elder law clients.58 These authors have accepted the challenge of defining a "family-responsible" model of lawyer-client relationships that serves both the interests of individual clients and the family from which and within which the clients have their being. Often their attempts have begun with a call to recognize the propriety of representing the family as an entity.59 As a prelude to evaluating the effects of permitting family entity representation, it is important to understand the strengths and limitations of the models of representation currently available. Individual representation is the simplest manner of addressing the concerns of conflicts, confidentiality, and independence of judgment. Intermediation and joint representation are more complex and require the lawyer to engage in case-specific analysis to determine whether the benefits of multiple representation outweigh the inherent threats to the lawyer's loyalty and ability to maintain confidences and independent judgment. Family entity representation attempts to obtain the simplicity of the model of individual representation by treating the interests of multiple family members as singular, while retaining the ability to counsel multiple family members. This Article examines each of these models in turn.

II. FOUR MODELS OF REPRESENTATION

Elder clients who seek estate-planning advice from an attorney may shape the scope of the attorney-client relationship to conform with one of four models of representation: individual representation, representation by an intermediary, joint representation, and family representation.

57. See Malcolm A. Moore & Jeffrey N. Pennell, Practicing What We Preach: Eso-

teric or Essential?, 1993 Inst. on Est. Plan. ¶ 12-8-12-10.

58. See Patricia M. Batt, The Family Unit as Client: A Means to Address the Ethical

(arguing that the entity-as-client principle in Model Rule 1.13 should be applied to the
family unit); Gerald Le Van, Lawyers, Families and Feelings: Representing the Family
Relationship, Prob. & Prop., Jan./Feb. 1990, at 20 (discussing ethical rules as applied to
estate planning for husband and wife); Russell G. Pearce, Family Values and Legal Eth-
ics: Competing Approaches to Conflicts in Representing Spouses, 62 Fordham L. Rev.
(1994); Thomas L. Shaffer, The Legal Ethics of Radical Individualism, 65 Tex. L. Rev.
963, 969-70 (1987) (describing the family unit as the client in an estate case).

59. See, e.g., Russell G. Pearce, Family Values and Legal Ethics: Competing Ap-
proaches to Conflicts in Representing Spouses, in Ethical Issues in Representing Older
Clients, 62 Fordham L. Rev. 1253 (1994); Batt, supra note 8, at 335-41.
A. Individual Representation

When viewed from the narrow perspective of avoiding conflicts of interests, representation of only a single family member is the ideal. Premised upon an attempt to achieve "zero risk" of any impairment of the lawyer's ability to serve his or her client loyally, this model of representation requires the lawyer to represent only one family member or entity, declining representation of all others.

Utilizing individual representation as the model for determining proper conduct on the part of an attorney in Hypothetical 1, described earlier in this article, the attorney would decline to represent anyone other than Father as long as Father is a current client. Representation of Child, the corporation eventually formed, and Mother would all be declined as posing a threat to the lawyer's loyalty to Father. Similarly in Hypothetical 2, individual representation would require the lawyer and prospective clients to decide at the outset which individual the lawyer would represent. If Husband is chosen as the client, under traditional concepts of partisanship, the lawyer must seek to persuade the other family members that Husband should remain at home. The lawyer is limited in attempts to persuade other family members only by the rules contained in article 4 of the Model Rules of Professional Conduct which govern transactions with third parties. The lawyer's responsibilities to the client are clear—advise Husband individually and privately, while advocating his position to the other family members. These responsibilities to the client do not change if another family member is selected to be the lawyer's sole client, although the position the lawyer advocates may.

This limiting concept of individual representation is not required under even a stringent reading of the Model Rules of Professional Conduct. Rule 1.7 defines the lawyer's duty to avoid representation of conflicting interests. By its terms, the rule permits representation of multiple clients with interests that may conflict in the future if: (1) the lawyer determines that representation will not materially limit the ability of the lawyer to serve the interests of both clients; and (2) all potentially affected clients consent to the multiple representation. Adherence to this rule requires the lawyer to speculate about both the nature of any future conflicts in clients' interests and the likelihood that the conflict will actually occur.

Courts have differed concerning the permissible level of risk that may

61. See supra note 12 and accompanying text.
62. See supra note 13 and accompanying text.
63. Model Rule 2.1 describes the lawyer's duties while acting as an advisor, while a combined reading of Rules 1.1 requiring competence and 1.6 outlining the duty of confidentiality strongly suggests private meetings with the client.
64. See Model Rules, supra note 4, Rule 1.7(a).
be incurred in undertaking multiple representation.\textsuperscript{65} Limited case law supports the notion that any recognizable future conflict of interest is sufficient to require counsel to decline representation of more than one client.\textsuperscript{66} A majority of courts and commentators has suggested that the better rule prohibits multiple representation only when there is a substantial risk that conflicting interests will emerge.\textsuperscript{67} Under the first view, representation of multiple family members is virtually impossible due to the complex web of rights, duties, and expectations that flow between family members.\textsuperscript{68} Under the second view, the lawyer need not automatically assume that family members will fail in their duties, aggressively assert their rights, or intentionally frustrate or be frustrated in their expectations. Marriage is not viewed as merely a divorce waiting to happen, nor is every family presumed to be dysfunctional. Instead the lawyer is called upon to engage in a case-specific analysis to determine the nature of the relationship among family members who seek multiple representation. Under the terms of Rule 1.7, if the attorney reasonably concludes that the relationship is and will continue to be predominantly harmonious, multiple representation is permissible if all clients consent.

Independent of whether the individual representation model is required under the Model Rules, accepting representation of only one family member limits the type of ethical dilemmas that can arise during representation. By representing only one family member, any threat that the lawyer will be forced to withdraw due to an actual conflict of interests emerging is minimized. The least desirable time for a client to lose his or her lawyer is when controversy erupts into direct adversity. If

\textsuperscript{65} Compare Haynes v. First Nat'l State Bank of N.J., 432 A.2d 890, 900 (N.J. 1981) ("A conflict of interest, moreover, need not be obvious or actual to create an ethical impropriety. The mere possibility of such a conflict at the outset of the relationship is sufficient to establish an ethical breach on the part of the attorney.") (citations omitted) with Estate of Koch, 849 P.2d 977, 995 (Kan. Ct. App. 1993). The Koch court stated:

If we choose to adopt a highly theoretical analysis, it is possible to make an elusive argument and "find" a conflict. If, however, we take a down-to-earth, real world, functional approach in which we insure that confidentiality is preserved and that the client's wishes are served, we are hard pressed to find any ethical violation upon which additional legal arguments can be hinged.

\textit{Id.} at 995. \textit{See generally} McMunigal, \textit{supra} note 60 (discussing conflicts of interest).


\textsuperscript{67} \textit{See Restatement} (Third) of the Law Governing Lawyers, \S 201 (tentative draft No. 3 1990).

\textsuperscript{68} Several duties and privileges flow between family members. For example, the law recognizes a fiduciary relationship between parent and child as well as between husband and wife. \textit{See, e.g.}, Daffin v. Daffin, 567 S.W.2d 672, 678 (Mo. Ct. App. 1978) ("the relationship between husband and wife entails the highest trust and confidence and justifies their mutual reliance"); Haynes v. First Nat'l State Bank, 432 A.2d 890, 899-900 (N.J. 1981) (finding fiduciary relationship between parent and child where former is testatrix of will and latter is principal beneficiary). Additionally several states have relative responsibility laws requiring adult children to contribute to the support of indigent parents. \textit{See generally} Catherine D. Byrd, \textit{Relative Responsibility Extended: Requirement of Adult Children to Pay for Their Indigent Parent's Medical Needs}, 22 Family L.Q. 87, 87 (1988) (listing 27 states with "relative responsibility" laws).
multiple representation is undertaken, and the conflict of interests ripens into direct adversity of clients' interests, the lawyer must withdraw from representing any of the joint clients in relation to the matter of joint representation. This can be particularly damaging if any of the client-lawyer relationships are long-standing and substantial. This prospect becomes more remote with individual representation as the operational model.

Separate from the benefits of reducing the risk of conflicting interests and insuring continued representation, individual representation affords the client greater informational and decisional privacy. Informational privacy is enhanced in two ways: 1) the attorney has no conflicting duty to provide information to another client that might entail unauthorized disclosure of confidential information, and 2) the attorney's contact with other family members will be more limited than if the attorney represented multiple family members, therefore reducing the possibility of inadvertent disclosure of confidential information.

Decisional privacy is enhanced by the exclusion of other family members from the formal decision-making process of the client. The client may freely confide concerns and explore considerations that he or she might be reluctant to express or consider in the presence of others. The attorney also may feel more at ease in candidly communicating observations about family relationships or misgivings about the client's proposed course of action. Proposed conduct by the client which is perceived as unduly harsh or unfair can be questioned, without fear that the expression of such concerns subsequently will be used by other family members to the client's disadvantage. Under the model of individual representation, the attorney's primary concern and care need only encompass the individual who has been identified as the client.

This model of representation is premised upon an understanding of legal ethics that emphasizes what Professor Thomas Shaffer has called "radical individualism." Radical individualism views an individual as

69. See Model Rules, supra note 4, Rule 1.7 cmt., Rule 1.16.
70. For a full discussion of the conflicting duties of disclosure and confidence when representing both spouses see Teresa S. Collett, Disclosure, Discretion, Deception: The Estate Planner's Ethical Dilemma from a Unilateral Confidence?, Real Prop., Prob. & Tr. J. (forthcoming Winter 1993).
71. See 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, 127-28 (1993). A collateral but important benefit of limiting conferences to only the attorney and client is avoiding any waiver of the evidentiary privilege as to communications during the conferences.

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 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.

Id. at 969.
a collection of interests and rights that begin and end with the individual. Family relationships are seen as a product of "contract and consent, of promises and the keeping of promises—all the consensual connections that lonely individuals use when they want circumstantial harmony." Because all interests and rights accrue to and derive from the individual, the lawyer properly limits representation to only one person.

The interests and rights of other family members are relevant only to the extent that the individual client considers them relevant. Absent such consideration, the client is treated as if existing in complete isolation, accountable only to himself or herself in determining the objectives of legal representation. Conflicting claims that might otherwise engage the attorney's attention and evoke at least some emotional support are minimized by the absence of any claims to the attorney's loyalty by other individuals identified as clients.

Offsetting the advantages of individual representation are the disadvantages that flow from isolating the client. These include reducing the amount of information available to the attorney in helping the client determine objectives, and limiting the context for interpreting information that the client provides. Any consultation with non-client family members must be conducted in a manner which protects client confidences and avoids creating an unintentional, but implied, attorney-client relationship. To the extent that the lawyer asks non-client family members to compromise a legally recognized interest, the lawyer must guard against overreaching that could vitiate the transaction.

Additionally, while autonomy is most popularly understood as the capacity to make decisions independent of any undue outside influences, isolation itself can constitute an undue influence. When isolated, it is difficult, if not impossible, to ascertain the true balance of interests that prevails when returning to the more natural state of community or family. While alone, it is easy to succumb to the false allure of total self-centeredness. Yet when surrounded by family, it is sometimes difficult to maintain an independence of interests that adequately expresses individ-

73. Id. at 970.
75. See Shaffer, supra note 60, at 983 ("Collective isolation probably is not good politically, nor is it an adequate premise for a professional ethic that ignores the realities of the communities that we, in our communal isolations, have.").
76. See Baltins v. Baltins, 212 Cal. App. 3d 66 (Ct. App. 1989) (divorce settlement dividing property set aside because wife was thwarted in her attempts to obtain independent counsel); Hotz v. Minyard, 403 S.E.2d 634 (S.C. 1991) (lawyer sued for misrepresentations made on behalf of father when discussing testamentary plan with daughter).
77. Cf McNeil v. McNeil, 76 N.E.2d 621 (Ohio Ct. App. 1947) (evidence of children being denied access to testator was admissible to show undue influence); 79 Am. Jur. 2d, Wills, § 484 (1975) (preventing testator from meeting with other people may be undue influence).
Isolating the client may also lead to over-dependence upon the only other individual included in the private consultations—the lawyer.\textsuperscript{79} Case law dealing with allegations of undue influence in the area of \textit{inter vivos} and testamentary gifts recognizes this.\textsuperscript{80} Absent a preexisting decision concerning the objectives to be achieved, the influence of the lawyer is intensely magnified in advising a client who has been separated from other family members by the lawyer's refusal to accept multiple representation.

The final criticism of this model is that it multiplies the legal effort expended to achieve a family's objective. If the objective of the individual client affects the legal interest of other family members and if the lawyer declines to represent more than one client, other family members must either employ separate counsel to represent their individual interests, or proceed unrepresented. By employing separate counsel, legal costs are necessarily increased. These costs may act as a barrier to access to legal services, thus frustrating the family members' attempt to achieve their objective through the use of the law.\textsuperscript{81} Alternatively, the increased cost can be viewed as unnecessarily reducing family wealth for no pro-


\textsuperscript{79} See Knutsen v. Krippendorf, 862 P.2d 509, 515 (Or. 1993) (“[A] finding of dominance does not require evidence that an authoritative, controlling person bullied or directed the actions of a subservient one. Dominance can be expressed more subtly, such as by suggestion or persuasion or by fostering a sense of need and dependence.”). Cf William J. Bowe & Douglas H. Parker, \textit{Page on the Law of Wills} § 15.4 (rev. ed. 1960) (“A suggestion by one who occupies a dominant position in the relation of trust and confidence, such as an attorney, may amount to undue influence, although such a suggestion, if made by a stranger, would not amount to undue influence.”).

\textsuperscript{80} See 79 Am. Jur. 2d, \textit{Wills}, § 444 (1975) (“Denial of access of relatives at the time the testator makes his will is always considered a circumstance of more or less weight tending to prove undue influence[.]”) (footnote omitted). \textit{See also} Duckett v. Duckett, 134 F.2d 527 (D.C. Cir. 1943). The \textit{Duckett} court stated:

\begin{quote}
A jury might reasonably decide that appellee, after taking sole charge of testatrix, first made false statements to other relatives with the purpose and effect of inducing them not to visit her and then allowed her to suppose, contrary to the fact, that they were making no efforts to see her, doing nothing for her, and showing no interest in her welfare. In our opinion such conduct would constitute both fraud and undue influence.
\end{quote}

\textit{Id.} at 528. Cf Bowe & Parker, \textit{supra} note 79, § 14.7 (“False statements of relatives of testator, made to induce them to stay away, and representations to testator that such relatives stayed away through lack of affection and interest, constitute fraud.”).

\textsuperscript{81} \textit{E.g.} Estate of Koch, 849 P.2d 977, 998 (Kan. App. 1993) (“Legal services must be available to the public in an economical, practical way, and looking for conflicts where none exist is not of benefit to the public or the bar.”). Cf \textit{In re} Brownstein, 602 P.2d 655, 657 (Ore. 1979). The \textit{Brownstein} court stated:

\begin{quote}
This court does not say that a lawyer cannot put together small transactions in which the amounts involved are not large enough to justify the expense required for each interested party to have individual representation. However, when such a transaction is handled, it should be with extreme caution and with a clear and explicit understanding concerning whom the lawyer represents.
\end{quote}

\textit{Id.}
ductive purpose. In addition to increased legal costs, involvement of multiple lawyers often changes the focus of representation from achieving a common goal through cooperation among individual family members to preserving individual interests without regard to the collective cost such preservation entails.\(^8^2\)

In those instances when other family members forgo separate representation, there is a significant risk that such forbearance is not merely an attempt to minimize legal costs. Rather, family members may decline to seek other counsel, based upon an unexpressed belief that neither the client nor the lawyer would harm the interests or expectations of the unrepresented family member. While neither the client nor the lawyer may intend to harm the interests of these family members, in hindsight any diminution of the unrepresented family members' interests often will be perceived as a betrayal of trust.\(^8^3\)

On balance, strict adherence to the model of individual representation minimizes the risk that the lawyer's loyalty to the client will be compromised by competing claims and insures continued representation during periods of conflict with other family members. Also it enhances informational and decisional privacy. Inherent in this form of representation, however, is the risk of isolating the client. This model minimizes contact with the client's family members which might provide necessary information and context to client communication. Isolation creates a substantial danger that, absent clear client objectives and desires, the client will give the lawyer's opinions and moral assessment disproportionate weight. Increased participation by multiple lawyers, often a byproduct of this model, indiscriminately increases the costs of achieving family objectives, and threatens the creation of adversarial relationships when none had previously existed. By representing only one family member, the attorney risks claims by unrepresented family members of overreaching or exerting undue influence in establishing and accomplishing the client's objectives.

B. Representation as Intermediary

Responding to clients' desires for multiple representation by counsel with whom the family is familiar, and to avoid the increased costs and


\(^8^3\). See Bohn v. Cody, 832 P.2d 71 (Wash. 1992) (en banc) (attorney's failure to advise parents to seek independent counsel is betrayal of trust). Cf. Briggs v. Wyoming Nat'l Bank, 836 P.2d 263, 265 (Wyo. 1992) (husband's failure to seek independent counsel to review agreement drafted by wife's attorney resulted in binding waiver against his interest); Brooks v. Zebre, 792 P.2d 196, 201 (Wyo. 1990) (rejecting malpractice claim of unrepresented widow against attorney for lessees because widow was not attorney's client).
contentiousness that involvement of multiple lawyers might bring, many lawyers agree to represent multiple family members. This representation takes two forms—joint representation and intermediation. Joint representation involves assisting multiple clients in establishing or adjusting a relationship with non-clients. Representing co-plaintiffs or co-defendants is a common example of joint representation. Acceptance of clients and conduct of the lawyer during joint representation is governed primarily by Rules 1.4, 1.6, 1.7, and 2.1.87

In contrast, Rule 2.2 governs the lawyer's conduct when engaged in intermediation. Although the text of the rule does not define intermediation, the commentary provides some insight on this point:

A lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.

A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in the settlement of an estate or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interest. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.88

The language of the first paragraph would support application of Rule 2.2 in all cases of multiple representation, but such a construction would render Rule 1.7, governing conflicts of interests between current clients, meaningless. In order to avoid this result, emphasis must be placed upon

84. See Model Rules, supra note 4, Rule 1.4 (setting forth the duty to communicate with clients). Reading Rule 1.4 in conjunction with Rule 2.1, which concerns the lawyer's duties as advisor, a lawyer must give a client all relevant information that he or she is aware of. See Model Rules, supra note 4, Rule 2.1. The conflict between the duty to give information and the duty to maintain confidences when representing spouses is fully explored in Collett, supra note 70.

85. Model Rules, supra note 4, Rule 1.6 (describing the lawyer's duty of confidentiality).

86. See Model Rules, supra note 4, Rule 1.7 (outlining prohibited transactions arising from conflicts of interests with or among present clients).

87. See Model Rules, supra note 4, Rule 2.1 (governing the lawyer's conduct as an advisor).

88. Model Rules, supra note 4, Rule 2.2 cmt.
the language in the second paragraph of the quotation. Under this construction intermediation involves assisting clients in establishing or adjusting a relationship between them. It entails representation of multiple clients who have “sought the services of one lawyer to help them resolve differences or execute a transaction between or among themselves.”

Before a lawyer may act as an intermediary, four conditions must be met. The lawyer must obtain informed consent from each client after having explained the advantages and disadvantages of common representation. Independent of that consent, the lawyer must reasonably believe[] 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.

Having concluded that the requisite three beliefs are reasonable, and having obtained the clients’ informed consent, the lawyer may act as intermediary. While acting as an intermediary, the lawyer must be impartial as to the competing interests of the individual clients, and must avoid any “improper effect on other responsibilities the lawyer has to any of the clients.”

Application of this model to the two hypothetical fact patterns yields strikingly different results from the application of the individual representation model. By definition, when acting as an intermediary, the lawyer represents multiple clients. In Hypothetical 1, the lawyer appears to act as an intermediary in advising Father, Child, and the corporation. As the relationship of Father and Child with the corporation changed, the lawyer facilitated that change or adjustment. The lawyer did not act as an intermediary merely by agreeing to represent Child in estate planning, while currently representing Father. Absent some interest of Father’s that was affected by Child’s estate plan, representation of Father and Child as to Child’s estate planning was merely simultaneous representation.

Simultaneous representation differs from joint representation

89. Dzienkowski, supra note 11, at 775; see also Collett, supra note 12, at 116-19 (suggesting that lawyers rarely act as intermediaries when representing both spouses for estate planning purposes, since such representation focuses on adjusting the clients’ relationship with non-clients rather than between themselves).
90. See Model Rules, supra note 4, Rule 2.2 (a) (1).
91. Model Rules, supra note 4, Rule 2.2 (a) (2).
92. Model Rules, supra note 4, Rule 2.2 (a) (3).
93. See supra text accompanying note 12.
94. Depending upon the nature of the estate planning, the conclusion could change. If a child’s estate planning includes the drafting and execution of a shareholders’ agreement with Father, the lawyer would be acting as an intermediary if representing both Child and Father as to that matter. See Pascale v. Pascale, 549 A.2d 782, 783 (N.J. 1988) (father attempted to set aside transfer of stock in family business to son due to lawyer’s representation of both father and son); see also Maryland St. B. Ass’n Op. 85-18 (undated), in ABA/BNA Lawyer’s Manual on Professional Conduct (1980-85) (determining that under the Maryland version of the ABA Code of Professional Responsibility, lawyer
tion and representation as intermediary because the matters for which the attorney has accepted representation are totally independent. In Hypothetical I when Child sought assistance with estate planning, he or she was neither seeking to adjust the relationship with Father by the estate planning process nor seeking to join with Father in a common endeavor.

In Hypothetical 2 the family is expressly seeking assistance in determining the proper manner of assisting a family member who is included in the deliberations. Due to the inclusion of Husband in the decision-making process, the proper classification of the role that the lawyer is being asked to fulfill is intermediary. The lawyer is being asked to accept Husband, Wife, and both children as clients, in their attempt to redefine their relationship in light of Husband's declining health. It is this "inward-looking" nature that distinguishes intermediation from joint representation. Had Husband not been included in the consultation, nor intended to be the lawyer's client, Wife and the adult children would be joint clients of the lawyer, once they had defined their common objective as to Husband. This is because the representation would be "outward looking," in attempting to persuade Husband, a non-client, to comply with the clients' requests.95

In the context of representing multiple family members, the intermediary model of representation emphasizes harmony over discord, and unity over isolation. Its candid recognition of existing differences in the individual desires and interests of clients at the beginning of the representation requires both clients and counsel to assess whether there is a realistic prospect of voluntarily reconciling those interests. Only if such a prospect exists is counsel allowed to go forward with the intermediation.96

Additional benefits from this model include reduced transaction costs in the form of reduced legal fees,97 and increased sources of information, often giving the attorney a fuller understanding of the situation. Disloyalty to any individual client is protected against by the mandate of Rule 2.2 that representation of all clients terminate if representation of one terminates. Representation as intermediary must terminate upon the withdrawal from representation of any single client, or when the attorney determines that the relationship of the clients has changed in such a manner that the four preconditions to intermediation no longer exist.98 This is most likely to occur by the lawyer deciding that it is no longer reasonable to believe that the matter can be resolved "on terms compatible with

who, after advising client on estate planning, is consulted by client's father regarding father's estate, shall not reveal to either client his representation of the other, nor is such undisclosed simultaneous representation necessarily an impermissible conflict of interest).

95. Cf. Restatement (Third) of Law Governing Lawyers § 211 cmt. b (Tentative Draft No. 4, 1991) (making similar distinction between representation of multiple clients "with common interests" and multiple clients with differences to be resolved).
96. See Model Rules, supra note 4, Rule 2.2(a)(2).
97. See Dzienkowski, supra note 11, at 765.
98. See Model Rules, supra note 4, Rule 2.2(c).
the clients' best interests." 99

This forced termination of all representation is required whether or not the client terminating the representation would consent to continued representation of the others. This restriction on further representation renders Rule 2.2 more strict than the rules governing individual or joint representation. Under these other models, new representation is controlled by Rule 1.9, which allows continued representation on the same or a substantially related matter with the consent of the former client, even if such representation is "materially adverse" to the interests of the prior client. 100 Rule 2.2's bar on continued representation when the former client would give informed consent is the greatest disadvantage to intermediation.

An example of the unnecessary harshness of the termination rule is where the attorney agrees to act as intermediary in the intergenerational transfer of a family business. Father and Mother are exclusive owners prior to this representation and seek to transfer ownership to Son and Daughter and their respective spouses. Lawyer agrees to act as intermediary on behalf of Father, Mother, Son, Daughter-in-law, Daughter, and Son-in-law. Midway through the intermediation Son and Daughter-in-law divorce. Daughter-in-law is satisfied with the division of marital property and makes no claim to the family business. She is willing to consent to Lawyer continuing the intermediation among the family without her participation. Rule 1.9 would allow Lawyer to continue representation, but Lawyer must withdraw from representing all family members because he or she is acting as an intermediary and bound by Rule 2.2.

Other disadvantages inherent in the intermediary model include the absence of any external check upon the fairness of the result, 101 and the possibility that intermediation will result in a compromise of individual interests that would not have occurred with individual representation. 102 All rights to confidentiality and attorney-client privilege may be waived as between the clients involved in the intermediation, although the commentary to Rule 2.2 suggests that it may be possible to preserve some limited rights. 103 Additionally, should intermediation fail, each individ-

99. Model Rules, supra note 4, Rule 2.2(a)(2). This assumes that the "best interests" are identified as the individual best interest of each client, rather than the collective best interest of the group. Professor Dzienkowski provides a thorough analysis of this point and concludes that the drafters intended individual best interests to be the relevant test. See Dzienkowski, supra note 11, at 791-98.
100. See Model Rules, supra note 4, Rule 1.9.
101. See Dzienkowski, supra note 11, at 777.
102. See id.
103. The comment to Rule 2.2 provides:
A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 and 1.6. Complying with both require-
ual must seek new counsel. This is not only costly in terms of time and money, but also may result in terminating long-standing attorney-client relationships that individual clients want to preserve.

When compared to the model of individual representation, in the context of intergenerational representation of family members, intermediation avoids the dangers inherent in isolating the client. Intermediation is inclusive, while individual representation is exclusive. The operational premise of the intermediary is accommodation of others' interests. The operational premise of the lawyer for the individual is indifference to them.

This last distinction is both a strength and weakness of the intermediary model. Should Husband accommodate the interest of his adult children in the preservation of his estate? Should he accommodate the interest of Wife in preserving her health? If accommodation should be made, how far should that accommodation go—placement in a long-term facility, acceptance of substandard care to reduce costs and maintain his assets? In contrast, individual representation insures that the client's individual interests are always the object of the attorney's attention. It guarantees that the client can depend upon continued representation if family members oppose him or her. Finally, individual representation affords the client the opportunity to communicate candidly with counsel, knowing that the communications will be held in confidence and protected by the attorney-client privilege.

C. Joint Representation of Multiple Individuals

Joint representation occurs when multiple clients seek representation in adjusting or creating a relationship with non-clients. Such objectives can be sought through adversarial proceedings, in which the clients are

ments while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.


104. This last point is a traditional justification of strong enforcement of the duty to maintain confidences. Limited empirical evidence suggests, however, that client disclosures are not made in direct reliance upon the duty of confidentiality or the existence of the attorney-client privilege. See Fred C. Zacharias, Rethinking Confidentiality, 74 Iowa L. Rev. 351, 396 (1989).
co-plaintiffs or co-defendants, or through negotiations, in which the clients seek a common resolution of a matter involving non-clients. Model Rules 1.4, 1.6, 1.7, and 2.1 are the principle rules concerning the acceptance and conduct of joint representation.

Model Rule 1.7(b) establishes the standard the attorney must employ in deciding whether joint representation is possible:

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.

Clearly the rule requires the attorney to assess whether loyal representation of all interests is possible. This is done through the risk analysis described earlier in this Article; in this analysis the lawyer considers whether there is a risk that his or her loyalty to any individual client will become impaired due to the representation of others. If a risk exists, and if it is substantial, the lawyer should not undertake representation regardless of the clients' willingness to consent.

105. An example given in the Reporter's Note of the Restatement (Third) of The Law Governing Lawyers is representation of family members joined as co-plaintiffs in a wrongful death suit to recover for the loss of another. See Restatement (Third) of The Law Governing Lawyers § 209 cmt. d(i) (Tentative Draft No. 4, 1991) (citing Hurt v. Superior Court, 601 P.2d 1329 (Ariz. 1979) (In Bank) (permitting common representation of wife and child in suit seeking to recover for wrongful death of husband-father)).

106. Restatement (Third) of The Law Governing Lawyers § 211 cmt. c (Tentative Draft No. 4, 1991) deals with representation of multiple clients in non-litigated matters. The non-litigious situations involving joint representation as defined by this Article are discussed in Comment c "Assisting clients with common interests":

When multiple representation by a lawyer involves clients who have common interests with respect to issues, at least at the outset, the role of the lawyer is to advise on relevant legal considerations, suggest alternative ways of meeting common objectives, and perhaps draft instruments necessary to accomplish the desired results. Such multiple representation may not even present a conflict of interest requiring client consent. See § 201. Many such representations will, however, involve at least a potential conflict. At minimum, each client's right to communicate in confidence with the attorney should not be lost by inadvertence. See § 125. 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. See § 202.

Id. The example given is the counseling of Husband and Wife in the drafting of reciprocal wills.

107. Model Rules, supra note 4, Rule 1.7(b).

108. See supra notes 60-83 and accompanying text.

109. See Wolfram, supra note 34, § 7.2.3 (discussing problems that arise when a lawyer represents adverse parties).
When family members seek any form of concurrent representation, the attorney should consider the potential for conflicting interests inherent in the representation of family members, due to the duties and privileges of family members recognized by the law. When joint representation is sought, the lawyer must reasonably believe that any potentially conflicting individual desires are subordinate to the clients’ desires to achieve a common goal. Absent such a belief, the risk of clients’ interests diverging and becoming directly adverse renders it impossible for the lawyer reasonably to believe that multiple representation will not materially limit the lawyer’s ability to serve each client faithfully.

If the lawyer reasonably believes that the clients’ desires to achieve a common goal dominate their other individual desires and that no other aspect of the clients’ relationship poses a substantial risk of impairing the lawyer’s loyalty and independent judgment, joint representation is permissible if the clients give informed consent.

In obtaining their informed consent, clients must be advised of the advantages and risks entailed in joint representation. Possible advantages of joint representation are: (1) the presumption of harmonious objectives after the initial determination that the common objective predominates; (2) pooling of information and resources relevant to attaining the desired objective; (3) complete coordination of individual legal positions; (4) reduced legal fees; and (5) a limited right to continued representation if one member of the group terminates representation.

The limited right of continued representation can accrue either because continued pursuit of the previous common objective is not adverse to the interests of the client terminating personal representation, or because he or she consents to continued representation of the remaining clients. An example of nonadverse continued representation would be where an attorney represented multiple family members in their attempt to purchase a vacation home from a third party. If one family member terminated representation because of a change in his or her financial ability to participate in the proposed purchase, the attorney could continue representing the remaining family members because such representation would not be adverse to the interests of the terminating family member.

Continued representation is also possible even when it is adverse to the

110. Concurrent representation is any representation of two or more clients during the same time period. As used in this Article “simultaneous representation” is concurrent representation in totally independent matters; “representation as an intermediary” is concurrent representation with the goal of creating or adjusting the relationship between the clients; and “joint representation” is representation with the goal of creating or adjusting the clients’ relationship with non-clients.

111. See supra note 68 and accompanying text.

112. See Model Rules, supra note 4, Rule 1.7(b)(2).


114. See id.

115. See Model Rules, supra note 4, Rule 1.9.
interests of the client terminating representation if that client consents. For example, a lawyer accepts representation of multiple family members in their efforts to accelerate distribution of an estate. Unfortunately one of the clients suffers severe financial reverses, and any distribution becoming available would be transferred immediately to creditors. The insolvent client reasonably decides that delayed distribution is in his or her best interest. If the client terminates the representation of his or her interests but consents to continued representation of the other family members who still desire immediate distribution of the estate, the attorney may continue to represent the remaining clients.

This result differs from the result required when the attorney acts as an intermediary. Rule 2.2, governing the attorney's conduct as intermediary, completely prohibits continued representation pertaining to the subject matter of the intermediation if representation of any client ceases. In contrast, Rule 1.9 controls continued representation when the representation is joint, and only prohibits continued representation when such representation is adverse to the interests of the former client in the same or a substantially related matter. And this prohibition can be waived by the former client.

Possible disadvantages of joint representation include: (1) release of the attorney's duty of confidentiality and waiver of any evidentiary privilege between clients; (2) withholding of relevant information by the attorney if an individual family member discloses information adverse to the common objective; (3) failure to consider options other than the common goal due to a misperception of unswerving commitment to a common objective; and (4) loss of independent judgment by the attorney due to fear of creating disharmony or prejudicing an individual family members.

116. See Model Rules, supra note 4, Rule 2.2(c); supra text accompanying notes 97-100.
117. See Model Rules, supra note 4, Rule 1.9(a).
118. See id.
119. See Shapiro v. Allstate Ins. Co., 44 F.R.D. 429, 431 (E.D. Pa. 1968) ("Counsel represents both [the insured and the insurance company], and, at least in the situation where the policy-holder does not have separate representation, there can be no privilege on the part of the company to require the lawyer to withhold information from his other client, the policy-holder."); Henke v. Iowa Home Mut. Casualty Co., 87 N.W.2d 920, 924 (Iowa 1958) ("It would be shocking indeed to require an attorney who had assumed such a duty to act for the mutual benefit of both or several parties to be permitted or compelled to withhold vital information affecting the rights of others because it involves the informant.").
121. Cf. Lovett v. Estate of Lovett, 593 A.2d 382 (N.J. 1991) (will contestants unsuccessfully argued that presence of testator's wife resulted in attorney limiting advice to testator).
122. See Nancy J. Moore, Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy, 61 Tex. L. Rev. 211, 219 (1982).
This listing of advantages and disadvantages reflects the difficulty in complying simultaneously with the duty to give relevant information to joint clients derived from Rules 1.4 and 2.1, while preserving client confidences in conformity with Rule 1.6. The limited case law dealing with this issue reflects a strong trend in favor of finding implied consent to disclose relevant information by virtue of the agreement to be jointly represented. This conclusion is compatible with both the law of evidence and the most sensible construction of agency law.

The relevant section of the Restatement (Third) of the Law Governing Lawyers, however, suggests that the duty to maintain an individual confidence may be superior to the duty to give information to other joint clients when the confidence contains information "clearly antagonistic to the interests of another co-client" or when the confiding client explicitly directs the attorney not to disclose the information. This position, while finding limited support in case law, appears to be the minority view and is contrary to the very rationale the authors of the Restatement give for recognizing a co-client privilege:

First, co-clients probably understand that all information is to be shared with all co-clients. . . . Second fairness between the co-clients themselves and between the lawyer and each of them precludes the lawyer from keeping information secret from any one of them, unless each affected co-client explicitly agrees that a communication is to remain secret from the consenting co-client.

Implied consent and fundamental fairness are given as the rationale for the co-client (or joint) privilege in virtually every treatise on the law of evidence. The authors of the Restatement offer no justification for recognizing a secret unilateral revocation of the implied consent, nor do they provide any authority for the proposition that a client's express or implied revocation of consent is effective on the lawyer's file. However, the law with respect to revocation of consent is not consistent and the relevant case law is not clear. The question of whether the client's revocation is effective on the lawyer's file or only on the client's file is a matter of good faith and reasonable professional behavior. The lawyer should inform the client of the possible effect of such a revocation, and the lawyer should have a record of the client's instructions. In the event that the client's revocation is effective on the lawyer's file, the lawyer should be careful to destroy all copies of the client's file.

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125. See Collett, supra note 70.
129. E.g. John W. Strong, McCormick on Evidence § 91 (4th ed. 1992). This treatise states:

In the first place the policy of encouraging disclosure [of information to attorneys] by holding out the promise of protection seems inapposite, since as between themselves neither would know whether he would be more helped or handicapped, if in any dispute between them, both could invoke the shield of secrecy. And secondly, it is said that they had obviously no intention of keeping these secrets from each other, and hence as between themselves it was not intended to be confidential.

Id.; see also Paul R. Rice, supra note 123, § 4.36 (1993); 8 John H. Wigmore, Evidence § 2312 (John T. McNaughton ed., 1961).
they provide any explanation of why the antagonistic nature of the confidence alters the claim of fundamental fairness by the non-confiding client.

Regardless of the ultimate position taken upon the substantive issue of whether, in all instances, the duty to give clients relevant information or the duty to maintain confidences controls, prospective joint clients should be advised of the conflicting duties as a part of obtaining informed consent. The existence of any ambiguity on this point is another characteristic that distinguishes joint representation from intermediation. Rule 2.2 is clear in its mandate that the clients remain fully informed or that intermediation cease, while Rules 1.4, 1.6, 1.7, and 2.1 contain only contradictory admonitions.

The distinctions between intermediation and joint representation may be less important than may first appear, however. Often it is necessary for an attorney to provide both forms of representation to clients being jointly represented. This is true because, while joint representation can only be undertaken when the clients' common goal predominates, clients' individual interests are not extinguished, nor the lawyer's duty to attend to them. As representation progresses, differences in opinion and interest emerge, often in response to the changing posture of the non-client.\(^\text{130}\) When such differences emerge, the attorney often acts as an intermediary in harmonizing the clients' positions in order to determine the next action to be undertaken in relation to non-clients.\(^\text{131}\) When the lawyer shifts from joint representation to intermediation, it seems that the lawyer should comply with the standards contained in Rule 2.2. Yet application of Rule 2.2 suggests that by seeking to reconcile emerging client differences in order to represent their collective interest effectively, the lawyer forfeits the limited freedom to continue representation if one client should terminate representation. Instead of the partial constraints of Rule 1.9, the attorney becomes subject to the “out-for-one, out-for-all” principle contained in Rule 2.2. This creates a strong disincentive for the lawyer taking an active role in assisting joint clients to resolve their differences. Whether this is the intended outcome, and more importantly whether this is the proper result, is open to serious doubt.

D. Representation of the Family as an Entity

Dissatisfied with the isolation resulting from individual representation, the abandonment virtually required if any client decides not to proceed with intermediation, and the false unity of interests presumed by the joint

\(^{130}\) Building upon an earlier example of joint representation, this shift in roles would necessarily occur if the family seeking to purchase a vacation home made an offer on a house, and that offer was countered by the seller. If Father wanted to make a counter-offer to the seller, and Child thinks the seller's offer should be accepted, the lawyer is acting as an intermediary in attempting to reconcile the clients' positions.

\(^{131}\) See Restatement (Third) of the Law Governing Lawyers, § 209(b) (Tentative Draft No. 4, 1991).
representation model, commentators have searched for another model of representation that would more fully serve the needs of elderly clients and their families. The most recent proposals consider the family as an entity. Advocates of representing the family as an entity have looked to Rule 1.13 of the Model Rules of Professional Conduct as an example of what a rule permitting representation of the family entity might look like.\textsuperscript{132} Rule 1.13 defines the professional duties of lawyers representing organizations.\textsuperscript{133} The existence of this rule reflects the bar's recognition of unique problems faced by lawyers representing non-human jural persons—primarily corporations.\textsuperscript{134}

The primary problem unique to such representation is that the client is unable to communicate with its lawyer. Human agents, or "constituents,"\textsuperscript{135} speak on its behalf and define the objectives of representation.\textsuperscript{136} In the normal course of events, this arrangement poses little difficulty because the agents most often act in the best interest of the entity.\textsuperscript{137} But the lawyer must decide what to do if the agent

is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization.\textsuperscript{138}

Model Rule 1.13 requires that the lawyer "proceed as is reasonably necessary in the best interest of the organization."\textsuperscript{139} In undertaking this independent course of action this rule instructs the lawyer to seek to "minimize disruption to the organization and the risk of revealing information relating to the representation to persons outside the organization."\textsuperscript{140}

Commentators have found this ability to proceed in the best interests of the entity, independent of any express directive of the constituents,

\textsuperscript{132} See Pearce, supra note 59, at ; Batt, supra note 8, at 339-41.
\textsuperscript{133} See Model Rules, supra note 4, Rule 1.13.
\textsuperscript{134} By its terms Rule 1.13 can be applied to any group of individuals that constitute an organization. Hazard and Hodes note:

While most of the debate over the entity theory and Rule 1.13 proceeded [during the process of the adoption of the Model Rules by the American Bar Association] as if only the status of corporate lawyers was at stake, it should be remembered that the same analysis applies not only to corporations but to labor unions, unincorporated associations, governmental units and other formal organizations with established chains of command.

\textsuperscript{1} Hazard & Hodes, supra note 21, \S 1.13:103.
\textsuperscript{135} Model Rules, supra note 4, Rule 1.13 cmt.
\textsuperscript{136} See 1 Hazard & Hodes, supra note 21, \S 1.13:102.
\textsuperscript{137} See id. \S 1.13:106 ("In the vast majority of cases the lawyer can safely accept direction from her co-agents, for the same concept of agency that assigns an independent role to the lawyer also assigns important roles to highly placed individuals in the organization's structure.").
\textsuperscript{138} Model Rules, supra note 4, Rule 1.13(b).
\textsuperscript{139} Id.
\textsuperscript{140} Id.
attractive when struggling with the problems of family representation. They argue that this approach accurately reflects the experience of many, if not most, clients—that family is something more than the voluntary association of individuals. Similar to corporate lawyers, these attorneys regard the family as existing beyond the sum of its individual constituents. Like a corporation, the family is unable to communicate directly with counsel and must rely upon its constituents to speak on its behalf. At any given time the family's interests may diverge from the individual interests of specific family members.

Yet, the family relationship is more fundamental than any divergence of individual interests. Within this relationship exists the potential for harmonious resolution of any potential dispute. At a minimum, advocates of family entity representation argue, attorneys should be allowed to represent families by seeking to realize the harmony rather than the discord within the family. When the human agents of the family entity direct action that amplifies the discord and mutes the harmony, these commentators propose that the lawyer "proceed as is reasonably necessary in the best interests of the family," which, by its very terms, means conducting the representation in such a way that the harmonious elements of the family representation build to a crescendo, while the dissonant elements fade into silence.

Supporters also argue that family entity representation is desirable because individuals desire such representation. Respect for client autonomy requires that lawyers be able to provide the form of representation sought by individuals, absent some compelling policy to the contrary. Assuming that the family seeks representation as an entity for lawful purposes, and assuming that the family is adequately informed of the risks and advantages of such representation, the lawyer should be able to provide such service.

Finally, commentators argue that entity representation is currently being provided by thoughtful practitioners in spite of its ambiguous stand-

141. See Batt, supra note 8, at 339-40; Pearce, supra note 59.
142. See Pearce, supra note 59; Shaffer, supra note 3, at 971.
143. The irony of suggesting that corporations, creatures of legal fiction, exist more "clearly" than families does not escape the author.
144. See Pearce, supra note 59.
145. Batt, supra note 8, at 340-41; Pearce, supra note 59. Note the difference from Rule 1.13 in the formulation of when independent action by the lawyer is justified. See supra notes 133-40 and accompanying text.
146. See Dzienkowski, supra note 11, at 748 n.38 ("It is a difficult aspect of regulating the attorney-client relationship to determine when society should override multiple clients' choice of a single counsel."); Moore, supra note 16, at 234.
147. See Model Rules, supra note 4, Rule 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.")
148. The requirement that the prospective client be advised of the risks and advantages of such representation is analogous to that imposed under 2.2 prior to acting as an intermediary between clients.
ing under the Model Rules of Professional Conduct. The existence of such a wide-spread practice, with only limited evidence of harm to individual clients' interests, suggests that, with proper safeguards, entity representation is possible and desirable.

By embracing the model of entity representation, it is contended that families will enjoy the same benefits afforded other "organizations": an advisor committed to the best interests of the entity; judicious use of information provided by individual family members in order to benefit the family entity; and continuous representation, regardless of the disagreement or departure of any individual constituent (family member, in this instance).

III. A CRITIQUE OF FAMILY ENTITY REPRESENTATION

This attribution of benefits to the family-entity model disregards the experience of practitioners representing families who have adopted the formal organization of a corporation for purposes of pursuing their business interests. Both case law and commentary reflect the confusion that has resulted from reliance upon the entity theory where the organization is comprised of only family members or a small number of individuals, most of whom have strong personal interests in the day-to-day conduct of the organization. This confusion results from the reasonable per-

149. See Le Van, supra note 58, at 20; Morre & Pennell, supra note 17, ¶ 12-9; Pearce, supra note 59.

150. No commentators in favor of the entity theory have fully addressed the existence of case law originating from "family" representation in which an individual asserts harm to his or her personal interests. Cases evidencing such harm include Hotz v. Minyard, 403 S.E.2d 634, 637 (S.C. 1991) (daughter sued lawyer for breach of fiduciary duty due to lawyer's misrepresentation of the continuing validity of father's will), and Florida Bar v. Betts, 530 So. 2d 928, 929 (Fla. 1988) (disciplining lawyer for guiding comatose client's hand in signing codicil reinstating client's daughter based upon belief that client should not have excluded her).

151. This differs from the intermediary model where the lawyer must serve the best interests of the individual clients. See supra note 91 and accompanying text.

152. Cf. Hazard & Hodes, supra note 21, § 1.13:107. They state:

Information given to the lawyer by agents of the entity must be made available to the entity when it is in the best interest of the entity as a whole to know it, for part of the lawyer's duty is to keep his client (the entity) apprised of developments. By the same token, confidential entity information in the lawyer's possession normally must not be communicated to a 'constituent' (a fellow employee, for example), whose responsibilities do not require that he know the information. In other words, dissemination of confidential information, even within the entity, and even absent intramural disputation, is proper only to the extent that the entity has impliedly authorized disclosure in order to carry out the representation.

Id.

153. See supra notes 145-46 and accompanying text.

ception by the participants in a close or family corporation that the entity is merely the alter ego of the shareholders, and thus the entity's lawyer is also counsel to each shareholder.

Unlike the close or family corporation, constituents are rarely confused about the independent identity of the publicly owned corporation. Shareholders in publicly owned corporations are primarily passive investors, with little control over the corporate management. Officers, directors, and other management personnel may or may not be investors in the company. With few exceptions, management in publicly owned corporations operates the company absent any direct oversight by the other constituents.

This management by surrogates, combined with the inability of the corporation to speak on its own behalf, creates a vulnerability on the part of the organization that may justify a more activist role for counsel. Both the attorney and the organizational management are merely agents of the principal, which is the corporation. The attorney has no duty of loyalty to other agents which would supersede the duty of loyalty due to the principal. When corporate agents propose conduct that is harmful to the interests of the corporation, the attorney, by virtue of his or her own duty of loyalty, must act to protect the entity.

An important testing case is when a lawyer employed by a corporation reluctantly concludes that a high official in the corporation is working against the entity's interest. The lawyer would have great difficulty "taking sides" if that official, as well as other constituents of the organization, were equally considered to be his clients. In the face of an irreconcilable conflict of interest under the group theory [whereby the lawyer for the corporation is engaged in multiple representation of the individual constituents], the lawyer would usually be forced to cease representing any member of a constituent group, including the entity.


155. See Robert Charles Clark, Corporate Law § 1.2.4 at 22 (1986).

156. Professor Clark refers to this separation of ownership and control as "centralized management." Id. at 23.

157. Even this activist role is limited, however, within the rules of professional conduct, by requirements that counsel seek to minimize both the disruption to the organization and the risk of revealing information relating to the representation to persons outside the organization.

158. It is difficult, but important, to recall that the principal is the legal person of the corporation, not the shareholders. As Professor Clark notes:

[T]he relationship between shareholders and directors is not well described as being between principals and agents. (A principal is ordinarily understood to be one who has the power to direct the activities of his agent.) Shareholders not only may not initiate or countermand specific business decisions of the managers, but they do not, may not, and, some would say, should not determine the corporation's ultimate goal, its specific lines of business, its business strategies, or even the identity of the top officers who actually manage it.

Clark, supra note 155, at 22-23.

159. See Restatement (Second) of Agency, § 428 cmt. b (1958).
itself. By contrast, the lawyer would have no formal conflict of loyalties under the entity theory, for he was only on one "side" to begin with. He would be required to stay loyal to his only client—the entity; that, in turn might well require him to be "disloyal" to a particular individual. Although in human terms such a 'betrayal' might be very distasteful, it is a legally correct and necessary consequence of the well-established principles of agency law upon which the entity theory rests. 160

In contrast the current legal conception of family does not rest upon the principles of agency law. Family members do not act as agents of "the family." 161 Unlike a corporation, there is no broad concept of "family" as an independent legal person within American jurisprudence. While the state creates fictional legal persons, 162 families exist independent of the state. 163 Legal recognition of fictional persons rests upon the political determination that the public good is promoted by permitting individuals to conduct their affairs through a disembodied entity, 164 while legal recognition of the family rests upon the political reality that commitment to family preexists and preempts commitment to political community. 165

The significance of these distinctions becomes apparent when comparing the case law concerning the fullest personification of a legal fiction, the corporation, and the jurisprudence surrounding the family. 166 Corporations are defined by statute and are clearly distinguishable from other business associations. The legal definition of family grows more nebulous daily. 167 Corporate law presupposes that the purposes of the

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160. 1 Hazard & Hodes, supra note 21, § 1.13.104 at 393.
161. See Restatement (Second) of Agency § 22 cmt. b (1958) ("Neither husband nor wife by virtue of the relation has power to act as agent for the other."). But see R.E. Barber, Modern Status of Family Purpose Doctrine with Respect to Motor Vehicles, 8 A.L.R.3d 1191, 1201 (1966) ("Insofar as proponents of the family purpose doctrine have attempted to justify it in the light of traditional legal doctrine, they have continuously and consistently relied upon a supposed agency relationship between owner and user. . . .").

162. See Dartmouth College v. Woodward, 17 U.S. 518, 636 (4 Wheat.) (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."); see also Clark, supra note 155, § 1.2.3.


164. E.g. Dodge v. Ford Motor Co., 170 N.W. 668 (1919); Clark, supra note 155, § 1.2, ch. 16.

165. See Mary Ann Glendon, supra note 163, at 5 ("Families and marriages are prelegal institutions."). The existence of a spousal privilege supports this conclusion.

166. Other fictional legal persons exist, but vary dramatically in the degree of personification recognized by the law. See Clark, supra note 155, § 1.2.3.

167. Compare Village of Belle Terre v. Boraas, 416 U.S. 1, 7-10 (1974) (upholding zoning restriction which partially defined family as individuals related by "blood, adoption or marriage") with Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987) ("Family" as a protected relationship "presupposes 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.'") (quoting Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984)). Even more amorphous is the definition provided in McKinney v.
corporation can be generalized as seeking to maximize profits for its shareholders. Contemporary family law largely refuses to acknowledge any presupposition concerning "family purposes." To the extent that contemporary law can be said to recognize the family by imposing duties as well as granting rights, it is primarily through its recognition of individuals in marital and parental relationships. Parents are not generally liable for the torts of their children, and, with few exceptions, any parental support obligation ceases when the child attains majority. Adult children are rarely responsible for the support of their parents, and they are not liable for parental acts. Unlike a corporation which is directly liable for illegal or ill-conceived corporate conduct, but shields its individual constituents from personal liability, family members will be held personally liable for an illegal or negligent act taken on behalf of the family instead of the family entity.

Hughbanks (In re Hughbanks), 506 N.W.2d 451, 455 (Iowa Ct. App. 1993) (affirming use of statutory form of jury instruction defining family as "a group of people living in the same household under one management," against challenge that "the definition is far too broad and vague and would be inclusive of persons living under one roof, even though they were not blood related, not a dependent of another for income tax reporting, or bound to perform any duties or hold any responsibilities as a household member").

See Clark, supra note 155, ch. 16.

A discussion of the cultural context of family expectations and purposes is outside the scope of this Article. However this factor alone cautions against empowering a lawyer, most often a member of the dominant culture in a multi-cultural society, to override the expressed objectives of family members. See Cleveland v. United States, 329 U.S. 14, 26 (1946) (Murphy, J., dissenting) (criminal statutes forbidding the transport of women across state lines for immoral purposes should not be applied to Mormon family composed of husband and multiple wives because such application was an illegitimate intrusion of the state into the "cultural institution" of marriage).

See Hawk v. Hawk, 855 S.W.2d 573, 575 (Tenn. 1993) (reversing trial court order allowing grandparent visitation over parents' objections where there was no challenge to parental fitness). In the absence of stable parental relationships, courts have recognized the rights of non-parents and relatives on the basis of a family relationship. See Wade R. Habeeb, Annotation, Parents' Liability for Injury or Damage Intentionally Inflicted by Minor Child, 54 A.L.R.3d 974, 977 (1973).


E.g. Barte v. Home Owners Cooperative, 127 N.E.2d 832 (N.Y. 1955) ("The law permits the incorporation of a business for the very purpose of escaping personal liability."); see also Clark, supra note 155, § 1.2.1.

Compare King v. Smith, 392 U.S. 309, 320-28, 335-36 (1968) (Douglas, J., dissenting) (discussing disqualification of families from Aid to Families with Dependent Children program on the basis of parent's moral character) with Wright v. Ohio Dept. of Human Servs., No. 92 CA 15, 1993 WL 97791 (Ohio Ct. App. March 26, 1993) (holding that reducing future Aid to Dependent Children payments to family proper, since reduc-
While limited exceptions can be found, a unified concept of “the family” as a legal entity separate from the individual relationship is difficult to discern, while the concept of a corporation as a separate legal entity is increasingly refined.

Disregarding these distinctions and assuming arguendo that families can be properly regarded as entities separate from the relationships between individual family members, what would be the result of recognizing these entities as potential clients for purposes of representation? If a limited analogy of the family to a corporation is accepted, the corporate form most similar to the family is the close corporation, and more specifically, the family corporation. Cases and commentary concerning representation of these corporations are instructive when considering expansion of the concept of entity representation to families.

In re Banks is the seminal case in this area, and most clearly illustrates the difficulties arising from attempts to represent the family corporation as an entity independent of its constituents. In 1965 two attorneys, Banks and Thompson, began representing Mr. and Mrs. Michel, and the Michels’ corporation, United Medical Laboratories (“UML”). At the beginning of the representation all UML stock was owned exclusively by the couple, but subsequently, as part of their estate planning, Mr. and Mrs. Michel made gifts of stock to their two daughters. The business grew dramatically from 1965, when the business was largely conducted from the basement of the family home, to 1972 at which time UML employed over 1500 people.

Unfortunately this rapid growth was complicated by business problems, the most significant of which was difficulty in operating a new, expensive computer system intended to automate certain aspects of the company’s operation. These difficulties resulted in UML borrowing option was made in order to recoup previous overpayment made due to father’s failure to report additional income). Cf. Misenheimer v. Misenheimer, 325 S.E.2d 195, 198-99 n.2 (N.C. 1985) (discussing American repudiation of the common law concept of “corruption of the blood” which precluded certain felons from receiving or transmitting property by inheritance). See generally Stier, supra note 174, (arguing that the corruption-of-blood principle, in which children should not be made to pay for the sins of their parents, merits explicit recognition and consistent application).

177. The spousal relationship is treated as independent of the two spouses in a minority of jurisdictions that still recognize tenancy by the entireties, and “the community’s” interest is often referred to in states adopting community property laws as their method of regulating marital property. Surviving spouses and dependent children are protected by family allowances and homestead in many states.


180. See id.

181. 584 P.2d 284 (Or. 1978) (in banc).

182. As a result of these gifts, stock ownership ultimately was distributed 29 shares in Mr. Michel, 29 shares in Mrs. Michel, and 21 shares in each daughter. See id. at 285.
erating funds. In 1972, the company was approximately $3,000,000 in
debt to the bank, with other past due bills.

In an effort to relieve the pressure [from creditors] and to break the
logjam caused by the computer, Michel directed the computer techni-
cians to remove certain limits or safeguards from the computer which
had been set by the medical directors employed by the corporation. As
a result, 60,000 test results were spewed out, the accuracy of which
was doubted by the medical directors. As a consequence of this action,
high level employees became concerned about the moral aspect of the
accuracy of the published test results as well as their personal responsi-

ability therefor and were threatening to go to the federal agencies which
licensed and regulated medical testing laboratories. Mrs. Michel’s and
her daughters’ concerns about the removal of the computer safeguards
and about the solvency of the company and its ability to meet its debts
caused, for the first time, a confrontation between Michel and the
members of his family. For the first time his absolute control was
questioned. As a result, Michel made the tactical mistake of physically
assaulting his wife. 183

By his “tactical mistake” of assaulting his wife, Michel evidenced his
absolute identification with the corporation. Questioning a clearly bad
business decision was the functional equivalent of attacking his very per-
son. 184 Although his physical response was unjustified, it is not beyond
understanding.

Mr. Michel then sought to insure his control of the UML, by obtaining
his wife’s stock. Mrs. Michel agreed to assign the stock to him, but that
same day “slipped away from her husband” and went to the home of one
of their daughters. 185 Upon discovering her location, Mr. Michel went to
the daughter’s home where another confrontation occurred, this time re-
resulting in Mr. Michel’s assaulting his daughter. 186

Mr. Michel returned to his home where he found Thompson, the fam-
ily/corporate attorney, awaiting him. Thompson was directed to go to
the daughter’s home “to see what was going on.” 187 What was going on
was a consultation by the daughters and Mrs. Michel with another attor-
ney concerning how to curb Mr. Michel’s control of the corporation,

183. Id. at 286. The opinion earlier characterized Mr. Michel as “a completely domi-
nating force” in UML, running the business “as his private fief.” Id. at 285.
184. Gerald Le Van has noted this identification of person and corporation as typical
in the entrepreneurial personality. See Gerald Le Van, Passing the Family Business to the
Next Generation Handling Conflict, 1988 Inst. on Est. Plan. 14-1. “In one sense his busi-
ness is the founder’s alter ego, his self-image. He may have trouble distinguishing his self-
image from the business. If his children make good faith suggestions for changes in the
business, he may take them as personal criticism.” Id. at 14-9.
185. In re Banks, 584 P.2d at 286.
186. See id. At this point the reader might well wonder about the nature of the “as-
saults”—whether they were simply “secondary violence” such as attempts to roughly
push past a person blocking Mr. Michel’s intended path where the primary motivation is
something other than to do violence to the person, or whether they were aggressive physi-
cal attacks for the primary purpose of inflicting physical harm on the victim.
187. Id.
while isolating themselves “from constant confrontation with him, since they did not feel they could emotionally withstand such confrontation.”

Ultimately the daughters and wife decided to place their stock in a voting trust, the trustees of which voted to elect a new board of directors, all of whom were unrelated to the stockholders, with the exception of Mr. Michel who retained his seat on the board. The new board allowed Mr. Michel to retain his position as president of the corporation, but attempted to exercise control over him by creating a system of internal checks. Thompson, continuing in his role as corporate counsel, advised Mr. Michel as UML’s executive officer and provided reports to the board regarding the problems of the corporation. By the end of the first month of this new regime, it was clear that Mr. Michel was unwilling to observe the balance of power that the board had attempted to create.

The final conflict between the board and Mr. Michel as executive officer erupted when Mr. Michel refused to subordinate the interest of a related corporation he controlled to the interests of UML’s bank in order to secure UML’s indebtedness further. At the request of the board of directors, Thompson rendered an opinion that this refusal violated Mr. Michel’s employment agreement with UML. Based upon this opinion the board placed Mr. Michel on a leave of absence.

Shortly after this event Mr. and Mrs. Michel reconciled, and Mrs. Michel decided she had made a mistake in transferring her stock to the voting trust. She retained counsel on this matter, and she ultimately brought suit challenging the legality of the voting trust and the election of the new board of directors. Defendants included the daughters, the trustees of the voting trust, and the new board of directors. UML was not a defendant. Thompson's partner Banks agreed to defend the lawsuit. The case was never litigated because the parties agreed that Mr. Michel should attempt to sell the business.

He was successful in selling it for $10,000,000. The new owners retained Mr. Michel to operate the company, whereupon he “cleaned house,” firing all those he perceived as having been disloyal to him during the corporate battle. These firings included the law firm in which both Thompson and Banks were partners.

The fired law firm then undertook legal representation of the discharged employees of UML in setting up a competing business. Banks and Thomas personally became investors in the new business venture as well. Whatever defense of the prior conduct by Thompson and Banks could be constructed upon the concept of loyalty to the family and corporate entity is completely undermined by their agreement to engage in this subsequent behavior. Oblivious to the disloyalty inherent in their
actions, Banks even went so far as to render a legal opinion concerning the enforceability of the no-compete agreements with UML entered into by the prior employees.  

Disciplinary proceedings were commenced; however, the trial board and the Disciplinary Review Board determined that the lawyers had not engaged in unethical conduct. The Supreme Court of Oregon disagreed. In determining that the attorneys had engaged in unethical multiple representation of conflicting interests the court observed:

At the time of the drawing of the contract Michel was the corporation. As he expressed himself when, at the beginning of the difficulty, he was asked to resign by an employee, “I told him that I had made the company and that I would destroy the company.” The stock had been distributed among the members of the family, but, for practical purposes, it was his corporation. He was in absolute control and substantially all the immediate benefits of the business could be made to flow to him through his contract for compensation. Nor can we differentiate between Michel and his wife. He was the completely dominant marital partner at the time the contract was drawn. Until the events which precipitated the confrontation, the participation of the other members of the family in corporate activities was whatever Michel wanted it to be. It is a small wonder that as a layman Michel was completely outraged when he found that the attorneys he thought he had hired to protect his interest, both personal and corporate, which interests were substantially identical, were opposing him in a dispute calling into question the application of the legal work he had hired them to do.

Five years later a California appellate court was confronted with a similar situation in which a wife asserted that the attorney for the family corporation represented her personal interests. In Woods v. Superior Court of Tulare County, counsel represented the family corporation for approximately eight years prior to wife filing suit for divorce. During that time, the lawyer also had represented husband and wife individually in a number of related matters. When the husband sought to have corporate counsel represent him individually in the divorce proceedings, the wife objected. As evidence of her personal trust in the lawyer, the wife alleged “that after she learned her husband was having an extramarital affair, she met with Mr. Kralowec [the attorney for the corporation] in his office with no one else present and exposed some of her most inner feelings regarding her personal relationship with her husband.” The attorney denied the meeting ever occurred.

The attorney argued that representation of the husband in the divorce proceeding was proper because all prior representation had been in his capacity as counsel to the corporation. Any actions not formally taken in the corporation’s name were still motivated by representation of the

192. See id. at 287-88.
193. Id. at 290-91 (emphasis added in part and original in part).
194. 149 Cal App. 3d 931 (Ct. App. 1983).
195. Id. at 933.
corporation, and thus should be considered a part of the corporate representation.\textsuperscript{196} The actions not taken in the corporation's name included the drafting of the wife's will and representation of her individually in litigation where she was the named defendant. Accepting the attorney's construction of the prior representation, the court held that representation of a family corporation necessarily encompasses individual representation of the shareholders.\textsuperscript{197} Subsequent California case law retains this holding as to family corporations but refuses to extend it to other close corporations where the shareholders are unrelated.\textsuperscript{198}

Professor Lawrence Mitchell is one of the few commentators to consider the ethical problems experienced by counsel to a close corporation.\textsuperscript{199} Focusing upon the close corporation where most, if not all, shareholders are active in corporate management, Professor Mitchell suggests that the difficulty in applying the entity theory to close corporations lies in its fundamental misconception of the organization.

There has been a significant re-evaluation and recasting of the [substantive] laws governing close corporations during the last forty years. The most significant result has been the general recognition that the shareholders of a close corporation are considered partners in their dealings with one another and that the corporation is an entity only with respect to the rest of the world. Certainly that is the objective of the participants. Consequently, application of the entity theory, with its underlying concepts of corporate democracy, is ill-suited to the economic and human behavior of these shareholders and to their expectations.\textsuperscript{200}

Just as "underlying concepts of corporate democracy" are ill-suited to close corporations, they do not reflect family decision making. It is repugnant to think that a decision such as the one described in Hypothetical 2,\textsuperscript{201} concerning institutionalization of an elderly family member, should be controlled exclusively by majority vote.\textsuperscript{202} This excludes all consideration of the fact that the institutionalized family member will bear the greatest burden of complying with the decision. Only when there is an equality of interests should majoritarian principles control. When decisions impose greater harm or burdens upon identifiable persons, those people should have greater control over the decision-making process.\textsuperscript{203}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{196} See id. at 935-36.
  \item \textsuperscript{197} See id. at 936.
  \item \textsuperscript{198} See Responsible Citizens v. Superior Court, 20 Cal. Rptr. 2d 756 (Ct. App. 1993).
  \item \textsuperscript{199} See Lawrence E. Mitchell, Professional Responsibility and the Close Corporation: Toward a Realistic Ethic, 74 Cornell L. Rev. 466, 467 (1989).
  \item \textsuperscript{200} Id. at 468-69 (footnotes omitted).
  \item \textsuperscript{201} See supra note 13 and accompanying text.
  \item \textsuperscript{202} But see Batt, supra note 8, at 340 ("Like the organization's attorney, the elder lawyer should represent the 'best interests' of the family as determined by the objectives set out by the majority of family members.").
  \item \textsuperscript{203} Cf. David Luban, Lawyers and Justice: An Ethical Study 344 (1988) (describing the "own-mistakes" principle requiring that groups be allowed to make their own mis-
\end{itemize}
\end{footnotesize}
It is not a sufficient answer to this objection to allow the clients to define the decision-making process for the entity at the outset; thus binding the attorney to honor this decision-making process by virtue of his acceptance of representation.\textsuperscript{204} Such an answer requires clients to articulate prospectively a decision-making process to be employed by the family in making such diverse decisions as whether to purchase a new home or withdraw the respirator from Grandma. This is both unrealistic and unfair.

Additionally, advance binding description of the decision-making process presumes a rigidity that is non-existent. Behavior patterns change over time, and family members enter and leave the decision-making group. To require clients constantly to assess whether the attorney should be notified of new decision-making processes in order to confirm his or her willingness to continue the representation is undesirable and unworkable.

In addition to the problems in defining a mechanism for decision making, Professor Mitchell notes several other problems when using the entity theory to define the responsibilities of the close corporation's lawyer:

The Codes [the Code of Professional Responsibility and the Model Rules of Professional Conduct] purport to tell her [the lawyer] who her client is, but their failure to account for the impact of the substantive law on this problem renders their dictates meaningless. Based upon the traditional adversary model of the lawyer's role, the Codes allow counsel to represent multiple parties when the lawyer's duties of undivided care and attention and undivided loyalty will not be compromised. This approach presents a much less significant problem in the case of the public corporation, for the MRPC (and to a lesser degree the CPR) is predicated explicitly upon the entity theory of the corporation, a theory which retains vitality in the public context. Modern law, however, has largely stripped the close corporation of its entity mask with respect to intracorporate relations, so that counsel to a close corporation will no longer have an entity interposed between her and the ultimate owners of the business.\textsuperscript{205}

Expansion of the entity theory to include family representation would suffer from this difficulty also. In the absence of a coherent jurisprudence recognizing the family entity as separate from the aggregate interests of the individual members, the lawyer attempting to represent the family will have no universally recognized legal entity interposed between counsel and individual family members. Unlike Rule 1.13, which emerged as a response to the well-developed substantive law concerning the legal

\textsuperscript{204} But see Pearce, supra note 59, at 205. Mitchell, supra note 199, at 471-72.
personality of the corporation, a rule recognizing family entity representation would have no coherent legal foundation upon which to build.

This lack of foundation in the substantive law would result in a lack of guidance in identifying or prioritizing conflicting interests articulated by individual constituents. Hypothetical 2 demonstrates the ambiguity of such representation. What weight should the lawyer afford Husband's articulated interest in remaining at home, Wife's interests in preserving her own health, or A's and B's interests in preserving their parents' estate to enhance their inheritance? Is the lawyer free to identify and serve interests that are not articulated by the family members, for example the interests of enhanced marital unity which might be more fully realized if Husband and Wife remain in daily contact through Husband's continued care at home?

It is the personal effect that any resolution of Hypothetical 2 has upon each individual that makes advising the family as an entity so difficult. Similarly Professor Mitchell notes that the impact that the corporate decisions will have upon the personal interests of the shareholders renders entity representation of close corporations unrealistic:

Because counsel's conduct will thus directly affect each of these shareholders, it should be recognized that counsel owes duty to each of them. The behavior of these shareholders toward one another will be regulated by their fiduciary duties, a legal concept which clients can evaluate only upon advice from counsel. Since each shareholder will seek to maximize his own welfare, sole counsel to a close corporation and its shareholders will always, to a greater or less extent, be compromised in duties of care and loyalty.

Professor Mitchell's analysis overtly relies upon a concept of undiluted self-interest. Temper that with recognition that in many family matters individuals often seek to promote the interests of others, and family entity representation presents questions even more complex than those encountered in representation of close corporations. This complexity cautions against acceptance of the model.

Consider the situation of the lawyer in Hypothetical 1 where Child re-
quests information about transferring decision-making authority from Father.211 Child openly tells Lawyer that part of the concern about Father's mental capacity arises from Father's obstruction of Child's goals for the corporation. To what degree should Lawyer consider the effects of Father's conduct upon the corporation in advising the family entity? To whom is that advice given? Child? Father? Mother?

In advising the corporation, Lawyer need not give significant consideration to Child's mixed motives in questioning Father's competence because that issue is only relevant to the corporation to the extent that Father's competency must exist in order for any corporate acts he takes to be effective. While Father, as majority shareholder, still wields significant power in the corporation potentially, it does not appear that he has been active in the day-to-day management since Lawyer's last contact two years ago. Thus Lawyer's duty to the corporation is much easier to discern, at least when viewed independently of Lawyer's representation of Father, Mother, and Child.

Family entity representation should not be rejected merely because its application is difficult or complex, if the model proves sound otherwise.212 But complex application is not the major flaw in family entity representation.

The most serious objection to the family entity model of representation is related to, but distinct from, the objections arising from failure to recognize the fluidity in the processes of healthy family decision making; its lack of foundation in substantive law; and its complexity in application. The most serious objection is that the family entity model allows the lawyer to disregard the expressed objectives of individual family members, and substitute objectives created from the lawyer's perception of the best interest of the family. Nowhere else are lawyers permitted such broad-ranging discretion in defining the objectives of representation. Even organizational counsel are permitted to disregard the directions of constituents only when those constituents propose to engage in conduct that violates the constituents' legal obligations to the entity or the community.213

The legitimacy of this objection is evidenced by the attorney's conduct in Florida Bar v. Betts:214

[R]espondent was retained to prepare the will of his client, Claude

211. See supra note 12 and accompanying text.
212. See Shaffer, supra note 3, at 984. Shaffer states:
   It is also possible that what is uncomfortable, in the family perspective on cases like The Case of the Unwanted Will, is the realization that the issues we identify as we discuss the morals of lawyers are sticky and uncertain. It is much easier for a lawyer to behave as if he were a clerk in a driver's-license office than to behave as someone who invites trust from families and then charges by the hour for accepting it.
   Id.
213. See Model Rules, supra note 4, Rule 1.13(b).
214. 530 So.2d 928 (Fla. 1988).
Fairfield. Subsequently, two codicils were prepared during a time when Fairfield was in a rapidly deteriorating physical and mental state. In the first codicil, Fairfield removed his daughter and son-in-law as beneficiaries. Respondent spoke with his client on several occasions in an effort to persuade him to reinstate his daughter.

Subsequently, respondent prepared the second codicil to reach this result. However, when the codicil was presented to Fairfield, he was in a comatose state. In his findings, the referee determined that the second codicil was not read to Fairfield, that Fairfield made no verbal response when respondent presented the codicil to him, and that the codicil was executed by an X that respondent marked on the document with a pen he placed and guided in Fairfield’s hand.215

In publicly reprimanding the attorney the Florida Supreme Court observed, “It is undisputed that respondent did not benefit by his action and was merely acting out of his belief that the client’s family should not be disinherited. Nevertheless, a lawyer’s responsibility is to execute his client’s wishes, not his own.”216

How would this case have been decided if Florida recognized family entity representation and the testator had agreed at the beginning of the representation that the attorney should act in the family’s best interest? While it seems unlikely that such a general grant of authority would extend to executing a codicil on the client’s behalf, the court seems sympathetic to the argument that the lawyer was well-intentioned and did not personally profit from the act. This sympathy is evidenced not only by the language quoted above but also by the fact that the lawyer received only a public reprimand for what is clearly a fraudulent act.

Ultimately the court recognized that the client must define the objectives of the representation, and the attorney must be bound by them.217 Any other conclusion would threaten to convert representation into domination. Unfortunately, if family entity representation were permissible, such domination would not always take so crude a form as guiding a comatose client’s hand in the execution of a codicil. Instead it could take a far more subtle form. For example, consider the attorney’s conduct in the following hypothetical fact pattern based upon the common practice of encouraging the use of prenuptial agreements to protect family assets in the event a marriage fails:

Parents began a retail business in the early 1970s. It was a tremendous success, and by 1988, the business was worth $15 million. In 1990, Child joined the company as an entry-level manager. Unlike other managers, part of Child’s compensation was stock in the company.

215. Id. at 928-29.
216. Id. at 929.
217. Cf. Model Rules, supra note 4, Rule 1.2 (allocating to clients the decisions concerning the objectives of representation, while permitting lawyers to decide on tactics).
Recently, Child announced an intention to marry. Parents were delighted, and like Child's prospective spouse very much. At a meeting with Lawyer, Child's engagement was mentioned merely in passing. There was no request of any analysis of the legal implications of Child's marriage. Lawyer inquired whether Child had discussed the need for a prenuptial agreement with the prospective spouse. Child and Parents expressed their disapproval of such agreements. They believed that prenuptial agreements evidenced less than a complete commitment to a life-long marriage, and often were used to evade a fair division of a couple's property in the event the marriage ended in divorce.

Lawyer was astonished by what he or she perceived to be the family's naivete, and set about to persuade them that a prenuptial agreement was a necessary precondition to Child's marriage. As part of Lawyer's efforts to persuade, vivid word pictures of bitter divorces were painted. References to the "ease" and "certainty" of divorce were ongoing. The prospect of Child's premature death was developed in such detail that Parents eventually demanded that Lawyer not speak of it again. Ultimately Lawyer's efforts to "protect the family's best interest" prevailed, and Child reluctantly presented the proposed prenuptial agreement to prospective spouse. The terms of the agreement were very aggressive waiving all spousal statutory rights arising due to death or divorce. It was signed by both Child and prospective spouse, but neither Child nor Parents were pleased with the intrusion of legalistic protectionism into what they considered a sacred life-long union.

Should this result be applauded? Clearly Lawyer maximized the protection of the family's economic and legal interests. But the family had other interests that it believed to be more important—unity, faithfulness, and commitment. By elevating legal and economic interests over the relational aspects of the union, the lawyer has denied the family's understanding of its best interest, and imposed the lawyer's counterfeit.

Domination, whether by the lawyer or an individual family member, is more likely to occur in family entity representation, not only because the lawyer ultimately defines what is in the family's best interest, but also because the lawyer exercises limited control over family members' access to information. This is true because the entity's lawyer is under no obligation to disclose all relevant information to all constituents of the entity. Rather the lawyer has a duty to promote the best interests of the entity through selective disclosure of information, often upon the basis of which constituents need to know.

Skarbrevik v. Cohen England & Whitfield illustrates the harsh po-

218. The inaccuracy of this characterization of divorce is evidenced by the fact that in 1989 two-thirds of Americans were married to their first spouse, and "a little more than four-fifths of those who are married have or have had only one spouse—the difference being those who have divorced and not remarried." Andrew M. Greely, Faithful Attraction 35 (1991).

219. See 1 Hazard & Hodes, supra note 21, § 1.13.107.

tential of permitting selective disclosure. Plaintiff was one of four shareholders who equally owned all stock in an insurance brokerage company. During 1983, he became dissatisfied and requested the other shareholders to buy his stock from him. After some negotiations an agreement was reached to do so, and plaintiff resigned his position as director and officer of the corporation. After the plaintiff resigned, however, the other shareholders decided not to repurchase his stock. Instead they asked corporate counsel to advise them on how to go about diluting plaintiff's interest without having to compensate him. Eventually a plan was devised and actions taken that effectively reduced plaintiff's percentage ownership from twenty-five per cent to less than five per cent. The corporate lawyer facilitated these acts either through ignorance of certain restrictions in the corporation's governing documents or through complicity.

Upon discovering his loss, the plaintiff sued the corporation, the other shareholders, the lawyer and the law firm representing the corporation. His claims were based upon conspiracy to defraud and professional negligence. All defendants other than the lawyer and the law firm settled prior to trial. After hearing the case the jury awarded the plaintiff approximately $1 million in damages. On appeal, the California Court of Appeal reversed, finding the attorney's duty ran strictly to the corporation. Thus no award premised upon professional negligence could stand. Also, while the court did not condone the lawyer's conduct in facilitating the fraud practiced upon the plaintiff, in the absence of a personal attorney-client relationship, the lawyer had no independent duty to disclose the wrongful conduct to the plaintiff. Therefore, the appellate court reversed the judgment of the trial court.

Imagine a comparable scenario in the context of family entity representation. The family determines that it is in the family's best interest that Elderly Parent's assets be transferred to the children in order to facilitate eligibility for Medicaid assistance when he or she might seek admission to a nursing home. With the knowledge, if not active participation, of the family lawyer they begin surreptitiously transferring funds to other family accounts. Prior to Parent's discovery of the misconduct, the money is spent for family purposes (e.g. grandchildren's college educations), although none of it directly benefits Parent. Upon discovery, Parent sues the family entity, individual family members, and the family lawyer, only to learn that the court will dismiss the lawyer as a defendant because the lawyer had no duty running to Parent as an individual.

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221. See id. at 710.
222. See id. at 631.
223. See id. at 639.
224. Professors Hazard and Hodes suggest that, even adhering to the entity model, the lawyer could disclose to other stake-holders while the lawyer acts for the entity. See 1 Hazard & Hodes, supra note 21, § 1.13.403. However, as their citation to case authority suggests, the most common route for the courts to take in authorizing disclosure is to find
Such a result would be impossible under the individual, joint, or intermediary models of representation where the lawyer remains accountable to each person he accepts as a client.\textsuperscript{225}

In addition to claims that the family entity model is beneficial because the family is represented by an attorney committed to the best interests of the family, rather than the individuals, and the attorney is authorized to disclose or reveal information provided by family members judiciously in order to benefit the family entity, proponents claim that family entity representation is desirable because it will allow continuous representation of the family entity, regardless of the disagreement or departure of any individual constituent (family member, in this instance). This power of continued representation is much broader than that afforded under any other model of representation, and it reflects the dominating influence of the corporate entity in the drafting of Rule 1.13.

Publicly held corporations differ from other business forms largely due to four characteristics: (1) limited liability for investors; (2) free transferability of investor interests; (3) legal personality; and (4) centralized management.\textsuperscript{226} The second characteristic explains the breadth of the continuous representation aspect of Rule 1.13. Corporate lawyers simply cannot be held to have maintained an attorney-client relationship with every shareholder or member of upper management in a corporation. The mutability of the clients' identity is too immense. Nor does this rule generally result in acts of disloyalty or breaches of personal confidences when such a change in identity occurs in publicly held corporations.

Close corporations, on the other hand, do not have this fluidity of ownership and management. Courts have recognized this fact and have therefore treated close corporations accordingly—as partnerships for internal disputes, and corporations for disputes with others.

Family relationships, as traditionally defined,\textsuperscript{227} are even more permanent. Even if the prodigal son never returns, a blood bond will be created with the next generation. Individuals can not easily divest themselves of their interests in this spouse and replace them with interests in another. In short, family members are not fungible. Each occupies a unique and permanent place in the family. While any individual family member can terminate any attorney-client relationship with the "family lawyer," relationships with the family are not so easily destroyed. Continued repre-
sentation of multiple family members as the "family entity" after others have terminated the attorney-client relationship is undesirable. It gives the lawyer and only a few members of the family the right to define family interests in a manner more exclusive than blood ties and lifetime commitments would permit. This is wrong.

Proponents of family entity representation are motivated by an understanding of family that is profoundly different from the contemporary legal understanding. This understanding defies attempts to reduce the fullness of family relationships to some legalistic formula of rights and duties. Rather, family is recognized as the lived experience of a small community of people who are inextricably bound by blood ties, deep emotional bonds, and common experience. This understanding is true. It is not the basis for the ultimate failure of the model of family entity representation.

Family entity representation fails because it elevates the lawyer to the status of a family member. Yet the attorney-client relationship is not the product of blood ties, deep emotions, or common experience. It is the product of a voluntary association between the client who needs help and the lawyer who has the skill to help.228 Empowering lawyers to determine the best interest of the family denies the inherent limitations on lawyers' understanding of the families they serve. These limitations are unavoidable because the lawyer does not share the family's blood relationship, emotional ties, or common experience. Discretionary withholding of information by the lawyer disables family members in their attempts to relate to each other and make sound decisions that affect the family. Continuous representation of the family after the termination of representation of individual family members denies clients the right to choose their own counsel, and it is dishonest to the extent that the lawyer purports to represent the family, when in fact only one part of the family remains as the client.

Intermediation and joint representation are currently available to families seeking mutual legal assistance. Permitting the family to be represented as an entity adds few benefits and poses substantial dangers.

CONCLUSION

Representation of families is both rewarding and frustrating. It is rewarding because attorneys often see a generosity and caring in and for their clients that is rarely evidenced in other types of representation. It is frustrating because family relationships necessarily involve individuals who have different desires, needs, and expectations. The current models of legal representation recognize both the individual and communal aspects of families. Through individual representation, the lawyer offers clients a refuge from the pressures that other family members exert and

the opportunity to be represented by someone who has no higher duty than to serve the individual client. As an intermediary, the lawyer and clients acknowledge the conflicting individual desires that arise in families, but commit from the outset to create harmony from their discord and strength from their differences. In joint representation, clients may present a united front to those outside the family, whether friend or foe. In each of these models every individual gives assent to the purposes of representation and commands equal loyalty from the lawyer. Only in family entity representation is the individual subsumed by the family and therein lies its dangerous appeal. Yet the best interests of the family cannot be served by denial of the individuality of each member. Entity representation, by its very nature, demands this denial, and therefore can never safely accomplish that which is not already possible within the three existing models.