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Professional Responsibility and Organization of the Family Business: The Lawyer as Intermediary[†]

ALYSA CHRISTMAS ROLLOCK*

I. INTRODUCTION

Lawyers are often called upon to represent multiple clients in organizing businesses. Such representation may include advice as to the appropriate form of business entity, capitalization, internal governance, and, in the case of family businesses, estate planning. In many of these situations, the parties have already reached a preliminary agreement as to the general structure of their investment in the enterprise, and they wish to minimize the legal costs associated with starting the business. Although the representation of multiple clients by a lawyer acting as an "intermediary" between or among clients with potentially conflicting interests has gained widespread acceptance in the profession,¹ the benefits of such representation to each client do not necessarily outweigh the costs to the client occasioned by the lawyer's divided loyalty. This is particularly true in the case of a family business. The existence of a familial relationship may contribute to a failure by the lawyer and/or the clients to recognize or fully appreciate the potentially conflicting interests of the family members. Moreover, current trends with respect to the creation of new forms of business entities² and the recent

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1. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1995). As of January 1, 1997, all or a significant portion of the *Model Rules of Professional Conduct* ("Model Rules") had been adopted by 40 states. See STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS 3 (1997); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15 (1980) ("[T]here are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation.").

2. Since the Internal Revenue Service ("IRS") issued its ruling in 1988 that a limited liability company organized under the laws of the State of Wyoming, see WYO. STAT. ANN. §§ 17-15-101 to -144 (Michie 1997), would be classified as a partnership for federal income tax purposes, see Rev. Rul. 88-76, 1988-2 C.B. 360, every state and the District of Columbia have enacted laws authorizing the creation of limited liability companies. For a compilation of such statutes, see 2 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN & KEATINGE ON LIMITED LIABILITY COMPANIES (1992 & Supp. 1997).

In 1991, Texas enacted the first registered limited liability partnership statute. See TEX. REV. CIV. STAT. ANN. art. 6132b-3.08 (West 1997). In 1995, applying the "Kintner regulations," see *infra* note 8, the IRS ruled that a New York limited liability partnership would be classified as

adoption by the IRS of its "check-the-box" regulations³ will require lawyers to reexamine not only the advice that they render with respect to which type of business entity is most appropriate for a given business enterprise, but also whether the attorney may ethically represent all or some of the owners in organizing that business.

Prior to adoption of the check-the-box regulations, the factors that were generally considered to be most significant in determining the parties' choice of entity were tax classification, owner liability for debts and obligations of the enterprise, management, transferability of ownership interest, and continuity of existence of the enterprise.⁴ The IRS's method of determining the tax classification of a business influenced not only the choice of entity, but also led to the creation of various entities in response to that method.⁵ Until it adopted the check-the-box regulations,⁶ the IRS applied the Kintner regulations⁷ to determine whether an unincorporated organization would be taxed as "an association taxable as a corporation" or as a "partnership" for federal income tax purposes.⁸ Under the check-the-box regulations, certain entities (primarily corporations, joint stock companies, insurance companies, banks, and publicly traded entities) are always taxed as corporations.⁹ Domestic "eligible entities" with two or more members are taxed as partnerships unless they affirmatively elect to be taxed as corporations.¹⁰ Single-owner unincorporated associations (including single-

a partnership for federal income tax purposes. *See* Rev. Rul. 95-55, 1995-35 I.R.B. 13. Today, a majority of jurisdictions have enacted legislation authorizing the creation of limited liability partnerships. For a compilation of such statutes, see ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG & RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS AND THE REVISED UNIFORM PARTNERSHIP ACT 85 tbl.2.1 (1997). A number of states, including Delaware, Texas, and Colorado, have also enacted statutes authorizing limited liability limited partnerships wherein the liability of the general partner is limited by statute.

3. *See* Treas. Reg. §§ 301.7701-1 to -3 (as amended by T.D. 8697, 1997-2 I.R.B. 11).

4. *See, e.g.*, WILLIAM L. CARY & MELVIN A. EISENBERG, CASES AND MATERIALS ON CORPORATIONS 117-20 (7th ed. 1995).

5. *See* ROBERT W. HAMILTON, BUSINESS ORGANIZATIONS 85 (1996).

6. *See* Treas. Reg. §§ 301.7701-1 to -3.

7. *See id.* § 301.7701-2 (as effective prior to T.D. 8697, 1997-2 I.R.B. 11).

8. The Kintner regulations identified six corporate characteristics: (1) the presence of associates, (2) an object to carry on business and divide the gains, (3) continuity of life, (4) centralization of management, (5) limited liability, and (6) free transferability of interests. *See id.* An unincorporated business would be taxed as a corporation if it had more corporate than noncorporate characteristics. Since the presence of associates and an object to carry on business and to divide the gains are common to both partnerships and corporations, the classification of an entity depended on the remaining characteristics. Thus, in order for an entity to be characterized as a partnership, it must have had no more than two of the following characteristics: (1) continuity of life, (2) centralization of management, (3) limited liability, and (4) free transferability of interests. Until 1988, investors were generally unable to limit the personal liability of investors who actively participated in management and obtain classification as a partnership for federal income tax purposes, thereby avoiding the "double tax" on income of an unincorporated association that is taxable as a corporation. *See id.*

9. *See id.* (as amended by T.D. 8697, 1997-2 I.R.B. 11).

10. *See id.* § 301.7701-3.

owner limited liability companies) are taxed directly to the individual owner, and the entity is ignored unless the entity elects to be taxed as a corporation.¹¹

The adoption of the check-the-box regulations reduces the importance of the characteristics of conduit-type taxation, limited liability, continuity of existence, and transferability of ownership interests in selecting a form of business entity. Owners need no longer sacrifice "corporate" characteristics, most notably limited liability and centralized management, in order to achieve conduit-type taxation at the federal level. At the same time that these characteristics assume lesser significance, the differences in the fiduciary duties owed by owners and/or managers to owners of the enterprise in the various forms of business entities assume greater significance. Although there is some debate about the precise contours of the fiduciary duties owed to members of a limited liability company¹² and to shareholders of a corporation—especially a closely held corporation¹³—it

11. See *id.* §§ 301.7701-1 to -3.

12. See generally Claire Moore Dickerson, *Equilibrium Destabilized: Fiduciary Duties Under the Uniform Limited Liability Company Act*, 25 STETSON L. REV. 417 (1995) [hereinafter Dickerson, *Equilibrium Destabilized*]; Claire Moore Dickerson, *From Behind the Looking Glass: Good Faith, Fiduciary Duty & Permitted Harm*, 22 FLA. ST. U. L. REV. 955 (1995); Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 378, 401 (1992) (predicting that the rule for limited liability companies will evolve toward general partner-type duties for members in member-managed limited liability companies and toward corporate director-type duties for managers in manager-managed limited liability companies).

13. Closely held corporations are corporations with a relatively small number (generally fewer than 50) of shareholders. See, e.g., CARY & EISENBERG, *supra* note 4, at 389; Lawrence E. Mitchell, *Professional Responsibility and the Close Corporation: Toward a Realistic Ethic*, 74 CORNELL L. REV. 466, 476-77 (1989) (listing various factors used to define close corporations). Mitchell includes in his factors, either singly or in combination:

(1) a small number of shareholders, (2) restrictions on share transferability, (3) a disregard of corporate formalities, (4) the substantial personal interaction of participants, (5) a lack of significant trading of securities, (6) an election to be treated as a close corporation, (7) a substantial identity of ownership and management, (8) proportionately substantial wealth invested by each shareholder in the corporation, and (9) the illiquidity of ownership interests.

Id. (citations omitted). Compare *Galler v. Galler*, 203 N.E.2d 577, 583 (Ill. 1964) (defining a close corporation as "one in which the stock is held in a few hands, or in a few families, and wherein it is not at all, or only rarely, dealt in buying or selling"), *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 661 (Mass. 1976) (using the *Donahue* standard where it was held that stockholders in a close corporation owe each other basically the same fiduciary duty that the partners owe each other), and *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 515-16 (Mass. 1975) (stating that "[s]tockholders in close corporations must discharge their management and stockholder responsibilities in conformity with this strict good faith standard" whereas there is a "somewhat less stringent standard of fiduciary duty to which directors and stockholders of all corporations must adhere in the discharge of their corporate responsibilities"), with *Nixon v. Blackwell*, 626 A.2d 1366, 1380 (Del. 1993) (pointing out that a new subchapter of Delaware law came into effect which holds that a close corporation is defined only as one where (1) it is designated as such on its certificate of incorporation, (2) it has 30 or fewer stockholders, (3) there is no "public offering," and (4) all classes of stock have at least one restriction on their transfer), and *Sundberg v. Lampert Lumber Co.*, 390 N.W.2d 352, 356-57 (Minn. Ct. App. 1986) (stating that Minnesota's dispositive requirement of "close

is generally accepted that, in the absence of an explicit agreement to the contrary, partners (whether of a general partnership, a limited partnership, a limited liability partnership, or a limited liability limited partnership) are likely to be held to a higher standard of loyalty and care to one another than that which is imposed on members of a limited liability company or shareholders of a corporation.¹⁴ As a result of these changes in the tax law, in selecting a form of entity, organizers are, to a certain extent, also selecting the duties of care and loyalty that they will owe and be entitled to receive from one another. Furthermore, alteration of the statutory duties of loyalty and care through agreement of the parties necessarily involves the sacrifice by one or more of the clients of significant rights, rights that should not be modified without full and frank legal advice regarding the consequences of such actions. Such advice may be less than forthcoming where the lawyer acting as an intermediary has duties to the other parties to the transaction.

This Article examines the appropriate course of conduct for attorneys who are asked to provide legal advice in connection with the organization of a nonfarm family business. This Article first examines some of the features of family-owned businesses that make representation of multiple family members problematic. While this Article focuses primarily on the representation of spouses, its analysis and conclusions also apply to representation in the organization of family businesses whose investors consist of other relatives.¹⁵ The Article identifies areas of potential conflict between the interests of spouses in the organization of a business. In addition, this Article considers the guidance provided by the American Bar Association's *Model Rules*¹⁶ and the communitarian¹⁷ and contract¹⁸ models of representation in determining whether

corporation" status is that there be 35 or fewer shareholders).

14. See Dickerson, *Equilibrium Destabilized*, *supra* note 12, at 428-30; Terry A. O'Neill, *Self-Interest and Concern for Others in the Owner-Managed Firm: A Suggested Approach to Dissolution and Fiduciary Obligation in Close Corporations*, 22 SETON HALL L. REV. 646, 677-86 (1992). Compare UNIF. PARTNERSHIP ACT § 21 (1914) (requiring a partner to be accountable as a fiduciary), and *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928) ("Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."), with MODEL BUS. CORP. ACT ANN. § 8.30 (1996) (outlining general standards of conduct of directors), *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939) (holding that corporate officers and directors owe undivided and unselfish loyalty to the corporation), *Wilkes*, 353 N.E.2d 657 (deciding that shareholders in a closely held corporation owe loyalty and good faith to other shareholders), *Donahue*, 328 N.E.2d 505 (holding that in closely held corporations loyalty among shareholders is essential just as it is between partners), and *Francis v. United Jersey Bank*, 432 A.2d 814 (N.J. 1981) (stating that corporate directors must exercise reasonable supervision and care over the policies and practices of a corporation).

15. The approach will also apply to family businesses that include in-laws, as well as to nontraditional families. For discussions of nontraditional families, see, for example, Martha Albertson Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955 (1991); Kris Franklin, Note, "A Family Like Any Other Family:" *Alternative Methods of Defining Family in Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 1027 (1990-1991).

16. See *infra* Part IV.A.

17. See *infra* Part IV.B.

18. See *infra* Part IV.C.

the existence of such conflicts are so inconsistent with the lawyer's proper role and the parties' reasonable expectations that joint representation should always be avoided. Finally, this Article concludes that the failure by an attorney to appreciate and consider the separate and potentially conflicting interests of inactive or subordinated family members in the organization of a family business is incompatible with the ethical practice of law. In determining whether an attorney may ethically accept joint representation of multiple family members, the family should be viewed by the attorney neither as a unit nor as an aggregation of individuals possessing identical interests, but rather as autonomous individuals with potentially conflicting interests. Intermediation should be possible in some circumstances, but the attorney should undertake that representation only after concluding that the joint representation will benefit each of the parties and after obtaining their informed consent. If joint representation is not undertaken, the lawyer should make his or her role clear to the unrepresented party and advise such party to consider consulting with his or her own counsel regarding the transaction.

II. REPRESENTING A FAMILY BUSINESS

A. Types of Family Businesses

Ownership of a business by a family may be either explicit or implicit. Explicit ownership exists where both spouses (or family members) possess legal and/or beneficial ownership interest in the business. Such interests may be owned individually or jointly. In some circumstances, both spouses will exercise management and control of the business and/or the family's investment therein. In other cases, as when individual or joint ownership is selected for estate planning purposes, one of the spouses may not be active in the management and control of the business and/or the family's investment in the business.

Implicit family ownership, on the other hand, exists in the absence of legal or beneficial ownership of (or a community property interest in) a business enterprise by both spouses (or family members) where (1) marital (or family) assets have been used to acquire the ownership interest of the spouse (or family member) who does possess title, or (2) the non-title-holding spouse (or family member) provides various financial commitments to the business. These financial commitments may take the form of personal guarantees of the enterprise's debt or mortgaging of property to secure financing by third parties. Ownership should be considered implicit because the spouse who invests in the business without receiving legal or beneficial ownership of an interest in the business does so in large measure because of that party's expectation that the economic benefits derived by the other spouse are family assets and because that party's economic welfare depends, at least in part, on the other spouse's wealth. Although a spouse whose ownership is implicit may be involved in the management or control of the business or the family's investment therein, in most circumstances, an implicit owner will not be actively involved in the management or control of the business and will not direct the family's investment therein. Whatever the nature of the

spouses' ownership interests, each spouse will be affected by the advice the lawyer renders with respect to the organization of the business.

B. Failure to Recognize Diverging Interests

Attorneys and clients often fail to fully appreciate the diverging and potentially conflicting interests of spouses. Such failure may be attributed to a number of factors. The attorney and the client(s) may place too great an emphasis on the unity of interest that society ascribes to married persons and relatives. Individuals in a marriage (or family) relationship are often perceived as parts of a larger whole. Indeed, it is common to refer to the act of marriage as a uniting of two individuals.¹⁹ By focusing on their status as a single entity, attorneys and spouses have a tendency to emphasize the commonality of interest of the spouses over the separate, and often diverging interests of each individual. Such a view presupposes that whatever advances the economic or other interests of one spouse must necessarily also advance those of the other spouse.²⁰ Such views of marriage and the participants therein overlook other conceptions of marriage and/or family relationships in which spouses retain greater individual autonomy or in which marriage is not regarded as a permanent status.²¹

In the case of implicit ownership, the parties often fail to perceive the economic interest of the spouse whose ownership interest is implicit. Since the ownership is not obvious, indeed the second spouse may not attend any meetings with the lawyer, the parties may simply overlook the separate interests of the second spouse. Furthermore, because of the parties' notions of the marriage relationship and/or the existence of a subordinated spouse (typically the wife) or family member, the financial commitments made by such spouse or family member (such as mortgages and guarantees of the business's debts) are viewed not as indicia of an economic interest, as they would be if made by unrelated third parties, but rather as gratuities. Pursuant to this view, the implicit owner executes the mortgage or guaranty as an act of altruism to benefit the spouse who will be the explicit owner. Such a view fails to take into account the possibility that the spouse, who will be an implicit owner, may act in a self-interested manner and may have economic motives as well. The implicit owner may well expect to share in the financial benefits that are expected to accrue as a result of the use of family assets or the making of financial commitments.

Finally, whether ownership is explicit or implicit, the attorney and the spouses may fail to consider that the marriage will not continue indefinitely. One of the spouses may die prior to the termination of the business. In addition, current divorce rates suggest that there is a significant chance that any marriage will end

19. See *Genesis* 2:24 (King James) ("Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh.").

20. Such a view is typified by the expression, "What's mine is yours and what's yours is mine."

21. See *supra* note 15 and accompanying text.

in divorce.²² Although the spouses may not contemplate such an unhappy end to their relationship, the lawyer should be expected not only to consider such a possibility, but also to render advice that either takes into account the possibilities of death and/or divorce, or that, at the express direction of the client(s), consciously discounts or ignores such possibilities.

III. POTENTIALLY CONFLICTING INTERESTS

Before examining some areas of potentially conflicting interests between spouses in the organization of a family business,²³ it is helpful to identify some of the areas in which an attorney is called upon to render advice in connection with the organization of a business. These areas include, but are not limited to, choice of entity, internal firm governance, finance, dispute resolution, and exit strategy. The resolution of many of these issues may require negotiation among the organizers. In reaching an agreement with respect to these matters, both the organizers and the attorney expect that the attorney will evaluate and discuss the implications of proposed resolutions and the factual assumptions underlying them.²⁴ For the lawyer to simply await client direction as to the resolution of these issues would reduce the lawyer's role to that of a mere scrivener.²⁵ On the contrary, the role of counsel to the organizers of a business is more often that of "an initiator, a planner, and an advisor."²⁶ Potential conflicts between the

22. The number of individuals obtaining divorce decrees quadrupled during the period from 1950 to 1992. This rate translates into more than one million divorces annually. See Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775, 778 & nn.22-23 (1997) (citing U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1994, at 75, 103 (114th ed. 1994)).

23. For treatments of the dual representation of spouses in the estate planning area, see Teresa Stanton Collett, *And the Two Shall Become as One . . . Until the Lawyers Are Done*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 101 (1993) [hereinafter Collett, *And the Two Shall Become as One*]; Teresa Stanton Collett, *Disclosure, Discretion, or Deception: The Estate Planner's Ethical Dilemma from a Unilateral Confidence*, 28 REAL PROP. PROB. & TR. J. 684 (1994); Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253 (1994); *Report of the Special Study Committee on Professional Responsibility: Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife*, 28 REAL PROP. PROB. & TR. J. 765 (1994); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987).

24. See Mitchell, *supra* note 13, at 482-84.

25. See *id.*

26. *Id.* at 483. Professor Mitchell goes on to state:

[The lawyer] will be an initiator in that she will suggest economic, legal, and practical considerations and possible courses of action which have not been considered or fully appreciated by the parties. She will be a planner in that she will lay out the organizational model and assist in the allocation of rights and responsibilities between the parties. And she will be an advisor in that she will counsel each of the parties with respect to the course of action which is likely to be most profitable to each of them based upon their individual circumstances and desires.

interests of the spouses become apparent when the attorney explores issues relating to each of these areas with the clients.

A. Choice of Entity

As discussed previously, an entity's tax classification for federal and state income tax purposes and the standard of loyalty and care imposed on owners and managers of a business to the fellow owners of that enterprise are among the most significant factors for the parties in determining the form of their business entity.²⁷ In the case of the majority of spouses who file joint tax returns and would therefore have similar interests with respect to the tax treatment of their investment in the business, differences in the nature of the fiduciary duties imposed on owners and managers of the various forms of business entities have particular significance. For example, if one of the spouses will not be active in the management of the business, he or she may be better served by an entity that imposes more stringent standards of loyalty and care upon owner-managers of the business. On the other hand, a spouse who will be active in the management of the business may be better served by the selection of a business entity that limits his or her exposure to claims by fellow owners relating to breaches of fiduciary duties²⁸ or, if possible, by altering such duties by contract.

B. Internal Firm Governance

The allocation of rights and responsibilities among the owners and managers of a business will depend upon, among other things, the relative ownership interest of the parties, the extent to which each owner expects to participate in the management of the business, and the extent to which each owner may be subject to liability for the conduct of the business. For example, if only one of the spouses is to participate in the management of the business, that spouse may, by virtue of his or her broader exposure to liability (both with respect to third-party tort claims and to coowner fiduciary-duty claims), wish to obtain correspondingly broader discretion to manage the business. A nonmanaging spouse may be better served by a governance structure that provides for relatively greater access to information regarding the business and rights to approve major transactions or changes in the business. Likewise the interests of the spouses will differ if one or both is to be employed by the business. If one or both contemplates that all or a substantial portion of their investment return in the business will take the form of compensation, such expectation might be better protected through the execution of an employment agreement.

Id. (citation omitted).

27. *See supra* notes 2-11 and accompanying text.

28. Variations among the standards of loyalty and care may not be as significant if the choice is between a partnership and a close corporation. In many jurisdictions, courts impose partnership-like fiduciary duties on shareholders in close corporations. *See* sources cited *supra* note 12. For example, Dickerson, *Equilibrium Destabilized*, *supra* note 12, at 442, highlights several close corporation cases which recognize a heightened fiduciary duty for a partner who manages the business and who is also the controlling shareholder.

C. Finance

Organizers of a business must make many decisions regarding the financing of their business. At the onset, the parties must determine the amount of their investment and the form in which it will take. While creditors generally have first claim to the assets of the business upon liquidation, creditors must, in the absence of insolvency, rely upon contractually negotiated provisions with respect to any rights in the business.²⁹ Thus, investors must decide whether and to what extent their investment in the business will be an equity one. To the extent that the business will obtain financing from third parties, the owners may be required to guaranty and/or pledge assets to secure such a debt.³⁰ The desirability of contribution and/or indemnification agreements by and among the business, its equity owners, and its guarantors will vary depending upon, among other things, the personal assets and degree of participation in the management of the business of each spouse. The conflict between the interests of the spouses intensifies if one of the spouses is to be an implicit owner. The implicit owner has no legal claim on the assets of the business and no right to share in its proceeds. To the extent that a court would distribute an ownership interest in, or include the explicit owners' interest in calculating the parties' marital assets for division and distribution upon divorce, the spouse who is the implicit owner is at a distinct disadvantage in accurately valuing the business. In addition, decisions made during the marriage with respect to compensation of the spouse who is active in managing the business may be less desirable from the perspective of the nonactive spouse should the parties divorce. Thus, a spouse who will be an implicit owner or who does not anticipate actively participating in the management of the business has a much greater interest in anticipating divorce than does the spouse who is an explicit owner or who will be active in the management of the business.

D. Dispute Resolution

Attorneys representing the organizers of a business will often suggest that the parties consider a number of mechanisms to resolve disputes that may arise in the future. Among the mechanisms that the parties may adopt are agreements to submit disputes to arbitration, the granting of rights to approve or veto specified firm transactions or changes, various purchase and sale arrangements, and rights to or restrictions on the ability of a party to cause the liquidation of the business. As is the case with issues surrounding the financing of the business, the parties'

29. See, e.g., *Metropolitan Life Ins. Co. v. RJR Nabisco, Inc.*, 716 F. Supp. 1504 (S.D.N.Y. 1989); *Pittleman v. Pearce*, 8 Cal. Rptr. 2d 359 (Ct. App. 1992); *Simons v. Cogan*, 549 A.2d 300 (Del. 1988); *Katz v. Oak Indus. Inc.*, 508 A.2d 873 (Del. Ch. 1986); see also, e.g., Bruce A. Markell, *The Folly of Representing Insolvent Corporations: Examining Lawyer Liability and Ethical Issues Involved in Extending Fiduciary Duties to Creditors*, 6 J. BANKR. L. & PRAC. 403 (1997) (explaining that the corporation and directors may owe a fiduciary duty to the creditors upon insolvency).

30. See ROBERT C. CLARK, *CORPORATE LAW* § 1.3, at 25 (1986).

interests with respect to a particular method of dispute resolution may differ depending upon the level of their participation in the management of the business and the nature of his or her ownership interest.

E. Exit Strategy

Prudent organizers of a business and their counsel will also consider the manner in which the owners may terminate their investment and/or participation in the business. The parties may have differing preferences as to whether they wish to continue their investment and participation in the business with a new owner or manager. As a result, the parties may wish to consider either selecting a form of business entity that restricts the transfer of ownership interests by statute or adopting contractual restrictions on such transfers. Depending on factors such as age or health, estate tax issues may also be a factor in the parties' interests not only with respect to adopting mechanisms to value the business and each owner's respective interest therein upon death, but also with respect to the desirability of mandatory or optional purchase and sale provisions designed to provide liquidity to the estate of the deceased owner. The parties may also have differing interests with respect to the possible adoption of purchase and sale provisions to be triggered upon divorce. To the extent that one party is not active in the management of the business, this party will be at a disadvantage in valuing the business in the event that its value will be included in the calculation of marital assets, in detecting misappropriation of funds, and in objecting to levels of compensation that, while not objectionable when applied to the family's total income, is excessive when the spouses are no longer sharing that compensation.

IV. INTERMEDIATION

The *Model Rules* and the communitarian and contract models of representation offer guidance to attorneys in determining whether they may ethically represent both spouses in the formation of a business. However, each of these sources fails to take sufficient account of the reasonable expectations of each spouse (especially in the case of implicit ownership) while providing clear standards for attorneys.

A. The Model Rules

The *Model Rules* contemplate that a lawyer may represent multiple clients in a single matter under certain circumstances.³¹ Such representation is governed by Model Rules 1.7 and 2.2. Model Rule 1.7 sets forth the circumstances when a lawyer is generally prohibited from undertaking simultaneous representation of two clients, while Model Rule 2.2 identifies the circumstances under which a lawyer may act as an intermediary between clients. Model Rule 1.7 provides:

31. For a comprehensive treatment of the representation of multiple clients under the *Model Rules*, see John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741.

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

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

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

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.³²

Since the representation of investors in the organization of a business generally does not involve matters that are directly adverse at the outset of the representation (although such adversity may develop later and require withdrawal or informed consent), Model Rule 1.7(b) provides the initial standard for determining whether such representation is permitted. Thus the lawyer must first determine that the representation of each client will not be adversely affected by the joint representation. If the lawyer determines that such representation will not be adversely affected, the lawyer must explain to each client the implications of the common representation and the risks and benefits to each of the common representation. This explanation must also include a discussion of the effect on the attorney-client privilege and the lawyer's role should a dispute arise between or among the clients. Finally, the lawyer must obtain each client's informed consent.

If the lawyer is not prohibited from representing the parties under Model Rule 1.7 and has obtained the parties' consent to the common representation, the lawyer must also comply with the provisions of Model Rule 2.2. Recognizing a "subtle distinction between representing clients with distinct interests . . . and representing clients who, though adverse in their respective positions, share a more compelling interest in reaching agreement as a group,"³³ the drafters of the *Model Rules* chose to treat the role of the lawyer as intermediary in a separate rule rather than as a subsection of Model Rule 1.7(b).³⁴

The concept of a lawyer as intermediary has its origins in Justice Louis Brandeis's concept of service as a "counsel for the situation."³⁵ In hearings

32. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1995).

33. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 2.2:101, at 512 (Supp. 1993).

34. *See id.*

35. *See* GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 58-68 (1978); A.L. TODD, *JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS* 118 (1964); Dzienkowski, *supra* note 31, at 748-57; John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 *STAN. L. REV.*

before the Senate Judiciary Committee relating to his nomination to the Supreme Court, several of Brandeis's opponents, including the then current president and seven former presidents of the American Bar Association, accused Brandeis of numerous violations of the legal profession's norms of ethical conduct.³⁶ Several of these charges related to his representation of multiple clients with conflicting interests.³⁷ In response, Brandeis was reported to have asserted that in those circumstances he was acting as "counsel for the situation," and attempting to balance the rights and obligations of each party in order to arrive at a solution which would be equitable to each party.³⁸ Although there was disagreement over whether an attorney could ethically act as "counsel for the situation," the Senate eventually rejected these charges and confirmed his nomination.³⁹ In 1983, in large part due to the efforts of Geoffrey Hazard, Reporter to the Kutak Commission, which was responsible for drafting the *Model Rules*, the American Bar Association incorporated Brandeis's concept of "lawyer for the situation" into Model Rule 2.2.⁴⁰

683, 702 (1965).

36. See Dzienkowski, *supra* note 31, at 742.

37. Professor Hazard describes the following charges as raising the "lawyer for the situation" concept:

First, Brandeis had at one time represented one party in a transaction, [and then] later represented someone else in a way that impinged on that transaction. Second, he acted in situations where those he served had conflicting interests, for example by putting together the bargain between parties to a business deal. Third, he acted for a family business and continued so to act after a falling out among the family required reorganization of the business arrangement. Fourth, over the course of several years he had mediated and adjusted interests of the owners and creditors of a business in such a way as to keep the business from foundering.

HAZARD, *supra* note 35, at 60.

38. See Dzienkowski, *supra* note 31, at 743.

39. See *id.*

40. See *id.* at 744. In writing on the benefits of and risks associated with lawyers serving as counsel for the situation, Professor Hazard noted that such a lawyer

is no one's partisan and, at least up to a point, everyone's confidant. He can be the only person who knows the whole situation. He is an analyst of the relationship between the clients, in that he undertakes to discern the needs, fears, and expectations of each and to discover the concordances among them. He is an interpreter, translating inarticulate or exaggerated claims and forewarnings into temperate and mutually intelligible terms of communication. He can contribute historical perspective, objectivity, and foresight into the parties' assessment of the situation. He can discourage escalation of conflict and recruitment of outside allies. He can articulate general principles and common custom as standards by which the parties can examine their respective claims. He is advocate, mediator, entrepreneur, and judge, all in one. He could be said to be playing God.

Playing God is a tricky business. It requires skill, nerve, detachment, compassion, ingenuity, and the capacity to sustain confidence. When mishandled it generates the bitterness and recrimination that results when a deep trust has been betrayed. Perhaps above all, it requires good judgement as to when such intercession can be carried off without unfairly subordinating the interests of one of the parties or having later to abort the mission.

When a relationship between clients is amenable to "situation" treatment,

Model Rule 2.2 provides:

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes 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; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.⁴¹

As the comment to Model Rule 2.2 indicates, the rule contemplates that the formation of a business will be a circumstance when a lawyer may properly act as an intermediary for multiple clients. The comment states that 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."⁴² Such contemplation may contribute to lawyers minimizing the significance of potential conflicts of interest between the clients.

Model Rule 2.2's preconditions to a determination by an attorney that he or she may represent some or all of the organizers of a business as an intermediary mirrors those under Model Rule 1.7. They do, however, provide slightly greater guidance regarding the content of the consultation required with each client prior

giving it that treatment is perhaps the best service a lawyer can render to anyone. It approximates the ideal forms of intercession suggested by the models of wise parent or village elder. It provides adjustment of difference upon a holistic view of the situation rather than bilaterally opposing ones. It rests on implicit principles of decision that express commonly shared ideals in behavior rather than strict legal right. The basis of decision is mutual assent and not external compulsion. The orientation in time tends to be a hopeful view of the future rather than an angry view of the past. It avoids the loss of personal autonomy that results when each side commits his cause to his own advocate. It is the opposite of "going to law."

HAZARD, *supra* note 35, at 64-65.

41. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1995).

42. *Id.* Rule 2.2 cmt. 3.

to obtaining consent to the common representation, and regarding the factors to be considered by the lawyer in arriving at a reasonable belief that such representation will not harm any of the clients.

On their face, the *Model Rules* permit an attorney to represent both spouses (or multiple family members) in the organization of a family business if the lawyer reasonably believes such representation will not harm any of the clients, and if the lawyer consults with and obtains informed consent from each of the clients to the common representation. However, application of the *Model Rules* to the circumstances surrounding the organization of a typical business suggests that dual representation and intermediation should be less common if the attorney takes seriously the potentially conflicting interests of spouses. Furthermore, as John Dzienkowski has noted, Model Rule 2.2 still leaves a number of questions unresolved that are of particular significance in the context of a lawyer serving as intermediary in the organization of a business.⁴³ Dzienkowski believes the rule is deficient in areas such as the identification of the client (whether the individual, the group, or the situation), the specific tasks to be performed by the lawyer during the intermediation, the degree of the lawyer's involvement, and whether the lawyer must judge the fairness of any proposed solution.⁴⁴ These areas are also important to lawyers serving as intermediaries in the formation of businesses.

In addition to the problems identified by Dzienkowski, Model Rule 1.7 and Model Rule 2.2 do not adequately address the situation of the spouse or family member whose ownership interest is implicit or who does not expressly retain the lawyer to represent him or her. Because the *Model Rules* adopt a consensual view of the attorney-client relationship,⁴⁵ the consideration given to potential conflicts and the costs and benefits of the representation extends only to those who have requested that the lawyer represent them. The very fact that a person's ownership is implicit rather than explicit may evidence such person's lack of knowledge and sophistication with respect to legal matters.

B. Communitarian Model of Representation

In contrast to the *Model Rules*'s approach to representation of multiple clients that takes as its starting point an analysis of the separate interests of each party and then asks whether the representation of one will harm the interests of another, the communitarian model of representation takes as its starting point an examination of the relationship of the parties to be represented. It sees individuals as members of groups or communities and recognizes the effects of such membership on human motivations. Scholars and practitioners in the area of estate planning have debated the application of this model as it applies to families.⁴⁶ In particular they have attempted to resolve the question of whether,

43. See Dzienkowski, *supra* note 31, at 745.

44. See *id.* at 745-46.

45. See *Scope of MODEL RULES OF PROFESSIONAL CONDUCT* para. 3 ("Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so.").

46. See 1 HAZARD & HODES, *supra* note 33, § 2.2:102, at 514.1 (Supp. 1997).

and under what circumstances, a lawyer may ethically represent both spouses in the preparation and execution of wills.⁴⁷ Like the drafters of the *Model Rules*, they generally conclude that such representation is possible, although they differ as to the precise nature of the representation and as to whether the lawyer may or must disclose the confidences of one spouse to the other.⁴⁸

Few scholars articulate the communitarian model of representation more forcefully than Professor Thomas Shaffer.⁴⁹ Professor Shaffer criticizes society's and the legal profession's emphasis on the individual as a collection of interests and rights, which he terms "radical individualism,"⁵⁰ and the failure to accord moral and ethical significance to "organic communities."⁵¹ In analyzing a hypothetical case of a lawyer who drafts mutual wills for a married couple following a joint interview, and who—in a conversation with the wife immediately following execution of her husband's will and prior to execution of her will—elicits from the wife her desire to change her will if she may do so without the knowledge of her husband,⁵² Shaffer urges that the family, rather than the individual spouses, should be treated as the client. According to Shaffer, the description offered by "the legal ethics of radical individualism" incorrectly views the relationship between the husband and wife as "a product of individuality(!), of contract and consent, of promises and the keeping of promises—all the consensual connections that lonely individuals use when they want circumstantial harmony."⁵³ Such a view is, according to Shaffer, "sad, corrupting, and untruthful."⁵⁴ The "truthful" description of the relationship in the hypothetical is that the "lawyer's employer is the family."⁵⁵ The family, Shaffer asserts, is an "organic community" that is "prior in life and in culture to individuals."⁵⁶ A lawyer for the family should facilitate a dialogue between the spouses regarding the wife's desires rather than withdraw from representation altogether. According to Shaffer,

the most *irresponsible* thing a lawyer could do is to send either of these people to another lawyer, or both of them to two other lawyers. If that is the command of our professional's ethics, or even the easiest available "solution" to the case from our regulatory rules, then our ethics and our rules are

47. See sources cited *supra* note 23.

48. For an excellent summary of the various positions, see Collett, *And the Two Shall Become as One*, *supra* note 23 (discussing four models suggested in the literature: "(1) lawyer for the family; (2) separate representation by separate lawyers; (3) separate simultaneous representation by the same lawyer; and (4) joint representation by the same lawyer") (citations omitted).

49. See Shaffer, *supra* note 23.

50. *Id.* at 970.

51. *Id.* at 965. Shaffer believes that families are organic communities that are "created, sustained, and redeemed by God." *Id.* at 965 n.8, 972 n.35.

52. See *id.* at 968. The hypothetical is based upon facts presented by Stanley A. Kaplan, *The Case of the Unwanted Will*, 65 A.B.A. J. 484, 486 (1979) (comments from John C. Williams).

53. Shaffer, *supra* note 23, at 970.

54. *Id.*

55. *Id.*

56. *Id.* at 965-67.

corrupting. They corrupt the family in general, and *this* family in particular. A lawyer following the rules is irresponsible because in fact, the family is the lawyer's client. The lawyer who sends the family away is not able to respond to his client. He is disabled by a false ethic and, in trying to protect himself, he harms his client.⁵⁷

Shaffer's concept of a "lawyer for the family" correctly asks the legal profession to consider the communal nature of human existence. An individual is not merely a "nexus" of contracts and commitments to and with other persons. People exist in relationships. They are part of groups that share common values and interests. Shaffer's analysis supports the proposition underlying the profession's general acceptance of the concept of a lawyer as an intermediary, that individuals may share common goals and interests that make joint representation desirable. However, Shaffer's description of the family may not accurately fit the family in the hypothetical or families in general.⁵⁸ In addition, Shaffer's conception ignores possible changes in relationships. Because he considers marriage and family to be transcendent states that exist before, during, and after the relationship, Shaffer does not address divorce or remarriage and the changes they may bring. Although he acknowledges the paternalism inherent in the model of the lawyer for the family, he discounts its danger by suggesting that paternalism in a theological sense is not a bad concept and that "[r]adical individualism is the philosophy of an adolescent who wishes he had no parents."⁵⁹ Shaffer's lawyer for the family may thus have a tendency to substitute the lawyer's judgment of what is best for the family for the family members' judgment. In the hypothetical, Shaffer suggests the lawyer should get the wife to express her feelings to her husband. However, from the facts given, it is possible that the wife may not wish to discuss the matter. She informed the lawyer that she desired to change her will only if she could do so without the knowledge of her husband. Moreover, although Shaffer states that a lawyer for the family will actively seek out the views of all of the family members, there may be a tendency to give greater voice to, and to listen more attentively to, the dominant spouse or family member. Finally, and perhaps most importantly, Shaffer's model provides no guidance to the lawyer in determining whether multiple representation should be undertaken in a specific case or how the lawyer is to act in the event of disagreement among spouses or family members. Unlike an association with bylaws or regulations for governance, or a business entity with clearly identifiable decisionmakers and mechanisms for resolving disputes, spouses generally have equal legal authority to make decisions regarding the family but with limitations on the power to bind each other.

57. *Id.* at 982 (emphasis in original).

58. See MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 3-4 (1981) (characterizing the "new family" by "increasing fluidity, detachability and interchangeability of family relationships"); Collett, *And the Two Shall Become as One*, *supra* note 23, at 123 (arguing that the prevailing view is that marriage is a "consensual arrangement . . . that can be dissolved when the consent no longer exists"); Fineman, *supra* note 15; Gregg Temple, *Freedom of Contract and Intimate Relationships*, 8 HARV. J.L. & PUB. POL'Y 121, 150 (1985); Franklin, *supra* note 15.

59. Shaffer, *supra* note 23, at 987.

Russell Pearce offers an approach that seeks to address some of the criticisms of Shaffer's approach.⁶⁰ Pearce proposes that family members be allowed to choose which type of representation, individual or group, they prefer. Like Shaffer, Pearce believes that legal ethics rules tend to restrict lawyers to viewing families as collections of individuals rather than as groups. Pearce urges that legal ethics codes be changed to permit "optional family representation" in which the lawyer offers his or her services to families as communities rather than as individuals. Pearce believes his proposal overcomes many of the criticisms of Shaffer's approach by allowing families, not lawyers, to decide on the form of representation and by "requiring the existence of a bona fide family group and continual disclosure of relevant information to afford family members the opportunity to withdraw if they so choose."⁶¹

Like Shaffer's model, Pearce's model fails to adequately identify the decisionmaking mechanism within the family.⁶² Establishing such a mechanism may not only divert energies from resolving the matter for which the family originally sought legal advice, but may impose greater burdens on the family than the benefits to be realized by family representation.

C. Contract Model of Representation

The contract model of representation embodies the law's standard conception of the attorney-client relationship as being fundamentally contractual in nature.⁶³ Under this theory, the law looks to the actual intentions of the parties, whether express or implied.⁶⁴ Typically the client must request representation and the lawyer must consent to provide such service. Under contract law's objective theory of assent, in determining whether the lawyer has agreed to the representation, the courts look to whether the lawyer's actions, judged by a standard of reasonableness, evidence an agreement to be bound.⁶⁵ The subjective state of the attorney's intentions is irrelevant. The American Law Institute's *Restatement (Third) of Law Governing Lawyers* reflects this position.⁶⁶ An

60. See Pearce, *supra* note 23.

61. *Id.* at 1318.

62. See 1 HAZARD & HODES, *supra* note 33, § 2.2:102, at 514.2 (Supp. 1997).

63. See *id.* § 1.13:106, at 75.

64. See Nancy J. Moore, *Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. REV. 659, 664 (1994).

65. See E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.6, at 119 (2d ed. 1990); see also Moore, *supra* note 64, at 680.

66. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 26 (Proposed Final Draft No. 1, 1996) provides that an attorney-client relationship arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with power to do so appoints the lawyer to provide the services.

attorney-client relationship will be established if a person demonstrates an intent to have the lawyer provide services, and the lawyer either manifests an intent to provide the service or fails to manifest an intent not to provide the service where the lawyer knows or reasonably should know that the person is relying on the lawyer to provide such service.

While the contract model affords some protection to spouses (or family members) who reasonably believe the lawyer is representing them, such persons must nevertheless manifest an intention that the lawyer represent them. Manifesting such intention may be problematic for spouses (or family members) who are implicit owners. They may have no contact with the lawyer, but may nonetheless reasonably believe that the lawyer is protecting their interests. For example, the attorney may review guaranty and mortgage agreements for a spouse or family member, who is an explicit owner, that will also be executed by the implicit owner or that are identical to documents that will be executed by such party. The implicit owner may reasonably rely on the advice given to the explicit owner with respect to these documents. Although the reliance by the implicit owner may be foreseeable by the attorney, no attorney-client relationship would be formed under the contract model unless the implicit owner manifests an intent to have the lawyer render legal services.

Responding to the limitations of the contract model, courts have recently expanded attorney duties to nonclients. In so doing, courts have applied doctrines relating to third-party beneficiaries, negligent representation, gratuitous undertaking, and the "balance of factors" test in negligence.⁶⁷ Although providing some protection to third parties, attorney duties to third parties are generally limited to competence.⁶⁸

V. REASONABLE-EXPECTATIONS APPROACH

The legal profession's attempt to clarify the circumstances in which a lawyer may ethically represent both spouses (or multiple family members) in the organization of a family business is a useful first step in protecting the interests of clients. However, the legal profession should adopt standards of conduct to better protect unrepresented parties who reasonably, but mistakenly, believe the lawyer is acting in their best interests.⁶⁹ Since lay persons are unfamiliar with the law in general, and attorney standards of ethics in particular, the burden should be on lawyers to clarify their roles. Although the *Model Rules* prohibit lawyers from stating or implying to unrepresented persons that they are disinterested when they are acting on behalf of a client, and require attorneys to take

67. See Moore, *supra* note 64, at 659-60.

68. See *id.* at 698.

69. For other calls for a reasonable-expectations approach to client identification, 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 (1982); Note, *An Expectations Approach to Client Identity*, 106 HARV. L. REV. 687 (1993) (discussing client identification in limited partnerships and close corporations).

reasonable steps to correct a party's misunderstanding of the lawyer's role,⁷⁰ they do not go far enough. Lawyers should assume in all instances that lay persons do not understand the lawyer's role.⁷¹ Furthermore, attorneys should be required to take affirmative steps to advise unrepresented persons of their role.

I propose that, in the event an attorney determines that he or she may not ethically represent both spouses (or all family members) or clarifies that he or she will not be retained to represent both spouses, the lawyer must, at the earliest opportunity, advise the unrepresented spouse (or family members) in writing that the lawyer is not acting on such party's behalf. Such written notice might be modeled upon the standard of disclosure proposed by the American Academy of Matrimonial Lawyers in the litigation context⁷² and might provide as follows:

1. I am your spouse's (family member's) lawyer.
2. I do not and will not represent you.
3. I will at all times look out for your spouse's (family member's) interests, not your interests.
4. Any statements that I make to you about the proposed transaction, including but not limited to, any advice that I might give to your spouse (family member) about the execution of any agreements or instruments to which you might also be a signatory, should be understood by you to be

70. Model Rule 4.3 provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When a lawyer knows or should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3 (1995).

71. Louisiana's version of Model Rule 4.3 provides:

A lawyer shall assume that an unrepresented person does not understand the lawyer's role in a matter and the lawyer shall carefully explain to the unrepresented person the lawyer's role in the matter.

During the course of a lawyer's representation of a client, the lawyer should not give advice to a non-represented person other than the advice to obtain counsel.

LA. R.P.C. 4.3.

72. BOUNDS OF ADVOCACY: AMERICAN ACADEMY OF MATRIMONIAL LAWYERS STANDARDS OF CONDUCT Standard 2.21 cmt. (1991) (footnotes omitted), provides:

Once it becomes apparent that an opposing party intends to proceed without a lawyer, the attorney should, at the earliest opportunity, inform the opposing party in writing as follows:

1. I am your spouse's lawyer.
2. I do not and will not represent you.
3. I will at all times look out for your spouse's interests, not yours.
4. Any statements I make to you about this case should be taken by you as negotiation or argument on behalf of your spouse and not as advice to you as to your best interest.
5. I urge you to obtain your own lawyer.

made or given on behalf of your spouse (or family member) and not as advice to you as to your best interest.

5. I urge you to obtain your own lawyer.

Failure to provide such disclosure should subject the lawyer to appropriate sanctions by disciplinary authorities relating to violations of standards of professional responsibility. In the event that a party reasonably expects that a lawyer who failed to clarify his or her role represents such party, the party should be deemed a client for the purposes of determining malpractice, including malpractice based upon an impermissible conflict of interest with the represented spouse (or family member). As Professor Nancy Moore observes, basing liability upon the attorney-client relationship and not third-party liability serves to limit attorney liability to third parties in general and to ensure that the duties owed by the attorney to the party include those of loyalty and confidentiality as well as competence.⁷³

Although the mandatory written disclosure that I propose will not guarantee that all parties will be represented by counsel, it should alert both the client and the unrepresented party to the fact that the unrepresented party has rights that may need protection. In addition, having been alerted to the potentially conflicting interests of his or her spouse (or family member), the client may well seek advice from the attorney regarding ways in which such interests may be protected or advanced by the client.

VI. CONCLUSION

In determining whether to act as an intermediary in the formation of a family business, an attorney should treat spouses and family members as autonomous individuals with potentially conflicting interests as well as common goals. Although the proliferation of new forms of business entities and recent changes in the federal income tax laws heighten the conflicts among investors and between managers and investors in a business, intermediation by an attorney should be ethically possible in many circumstances after obtaining the clients' informed consent.

The attorney must, however, be mindful of the parties' expectations regarding the attorney's role in the transaction. In the event that the attorney performs services under circumstances in which an unrepresented spouse or family member might reasonably expect that the lawyer is acting to protect that party's legal interests, the lawyer should inform the unrepresented party in writing that the lawyer is not in fact representing that party and advise that party to seek other counsel. In the event that the attorney does not clarify his or her role and the unrepresented party reasonably expects the attorney to be representing him or her, the attorney should be deemed to have in fact represented such party and be liable to such party for damages for any resultant malpractice as well as be

73. See Moore, *supra* note 64, at 698; cf. Markell, *supra* note 29, at 417-18 (noting that "beneficiaries are owed some consideration by lawyers for their fiduciaries").

subject to appropriate sanctions relating to representation of multiple clients in contravention of Model Rules 1.7 and 2.2. Although a seemingly harsh result, such an ethical standard imposes the duty to prevent the harm on the party most knowledgeable about and best able to prevent the harm.

Acknowledging and considering the separate and potentially conflicting interests of spouses and family members will also assist the attorney in providing competent counsel to his or her client(s). Discussion of these interests should result in better planning with respect to the structure of the business and each client's investment therein. Although tax considerations are often principal factors in the choice of business entity and the decisions relating to capital contributions and distributions, an awareness of the separate interests of each of the investors may alter the attorney's advice and the decisions of the client(s) with respect to these tax issues and with respect to internal firm governance, dispute resolution, and exit strategies.

Finally, taking seriously the separate and potentially conflicting interests of spouses and family members gives voice to the needs and desires of each with respect to their shared assets. Paradoxically, the recognition of the autonomy of spouses and family members may serve to strengthen the family's cohesiveness because such recognition acknowledges the contributions and claims of each to the family and its shared resources.

