The Ethical Responsibilities of Estate Planning Attorneys in the Representation of Non-Traditional Couples

*Jennifer Tulin McGrath**

TABLE OF CONTENTS

I. INTRODUCTION

In recent years, the traditional understanding of what constitutes a family has been subject to challenge. Fewer families reflect the traditional model of husband/father, wife/mother and children. Instead, many families are "nontraditional arrangements consisting of single parent units resulting from divorce and unmarried motherhood, step-families, grandparent-grandchild units, senior citizen group homes, pseudo-parent-child units, and unmarried heterosexual, lesbian and gay family units."[1] As a result, a non-traditional family is more likely today to arrive in an attorney's office seeking assistance with their estate planning. Estate planning is crucial for non-

*Adjunct Professor, Central Connecticut State University; and Court Counsel, Probate Court for the District of Bridgeport, Connecticut. J.D., University of Connecticut School of Law; M.A., Trinity College; B.A., University of Connecticut. The author expresses much gratitude to Ethan Frank for his inspiration and wisdom.

1. Lisa R. Zimmer, *Family, Marriage, and the Same-Sex Couple*, 12 CARDOZO L. REV. 681, 684 (1990).

traditional families because they do not enjoy the same legal protections as traditional family units. The burden is often on the estate planning attorney to generate legal protection and recognition of the non-traditional family. In providing these legal services, the attorney must ensure that she embraces the same high ethical standards in the representation of non-traditional families as she would in the representation of traditional families.

This Article examines an estate planning attorney's ethical responsibilities when representing one type of non-traditional family: a non-traditional couple. Currently, there are four recognized ethical theories regarding the legal representation of individuals: individual representation; joint representation; intermediary representation; and family representation. This Article explores each of these ethical theories in connection with the representation of traditional couples. These ethical theories are then applied to the representation of non-traditional couples.

Although any one of these ethical models may be utilized, this Article concludes that a modified version of family representation provides the estate planning attorney with the most appropriate ethical standard for her representation of non-traditional couples. Family representation recognizes the family as a unit with interests separate from, yet supportive of, the individual family members. The proposed modification of family representation requires a re-characterization of the relationship among the individuals who constitute the family. The interests of individual family members must be accorded equal standing, as opposed to being forced into a hierarchical framework. This modification will generate a form of family representation that will allow an attorney to provide superior estate planning services to her non-traditional couple clients.

II. THE FAMILY

A. Historical Background

The family unit has provided a fundamental building block upon which our society has organized. Not surprisingly, the development of our legal system has reflected the importance of the family. However, society's definition of "family" and the corresponding legal implications have not been static. For example, in many contexts, a family is now viewed as a collective of individuals, as opposed to a

single entity.[2] Therefore, a brief historical review will provide a context within which to understand current definitions of the family and the related impact upon attorneys' ethical responsibilities.

Historically, the family was considered the primary unit of society and societal stability was directly correlated to family stability.[3] As a result, the legal system developed in a manner which promoted and maintained the family unit. Divorce provides a good example. In England, divorce was unavailable until 1857, and in the United States, "divorce was not common even in those states (chiefly northern) which permitted juridical divorce and did not require a special act of the legislature to end a marriage."[4] Similarly, "[u]nder the entity theory of the family, the law refused to enforce contracts between family members or to permit them to sue each other."[5] These examples illustrate how the legal system promoted the stability of the family unit, even at the expense of individual family members.

Furthermore, in order for a family to engage in society, it required a spokesperson.[6] The husband/father most often enjoyed this distinction. Blackstone described this role beautifully:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing . . . . Upon this principle, of [a] union of person in husband and wife, depend almost all the legal

---

2. "[T]he trend in the law has been to move from considering the family as a unit to considering it as a collection of individuals. . . . [E]stablished legal ethics doctrine favors the individual over the family unit." Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253, 1274 (1994). In addition, there has been a shift from the perspective that "'family and marriage were the essential determinants of an individual's economic security and social standing' to the notion that the individual determines her own standing." *Id.* (quoting MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 292 (1989)).

3. Interestingly, it is not the relationships among the individuals in the family that must be stable for society's purposes, but rather, the family must be stable in the sense that it can be an active and useful participant in the greater society. Whether or not a family is stable once the front door of its home is closed is irrelevant so long as the internal instability does not impact society at large.

4. Pearce, *supra* note 2, at 1275 n.139.

5. *Id.* at 1275–76 (footnote omitted).

6. The notion that a collection of individuals, such as a family, requires a spokesperson reflects a traditional theory of leadership based upon hierarchy. However, if a family is viewed as a collective of individuals who contribute in his or her own way, an alternate approach may be more appropriate. For example, a family's spokesperson in connection with issues of education should be the family member most involved and knowledgeable in this area. This may not be the same family member who is most adept at dealing with the family's finances.

> rights, duties, and disabilities, that either of them acquire by the marriage.[7]

The legal system did not provide much redress if a husband's "protection and cover" were insufficient. A husband had virtually complete discretion to deal with the members of his family as he saw fit. For example, "criminal laws against rape and assault exempted husbands and no rules against child abuse existed until the end of the nineteenth century."[8]

Therein lays the essential flaw in suggesting that the family was the fundamental unit of society. It is more accurate to identify the unit of society as an individual, most often the dominant male family member. As definitions of the family shifted towards a collective concept of individuals, the shift was not from "family" to "individual" as the fundamental organizing unit of society. Rather, the shift was from "man" to "individual" as the fundamental organizing unit of society.

The roots of our modern understanding of "the individual" relate back to the breakdown of the feudal system in Europe.[9] "[T]he general movement against feudalism . . . was a new stress on a man's personal existence over and above his place or function in a rigid hierarchical society."[10] There was a transformation from "a society in which all the relations of Persons are summed up in the relations of Family . . . towards a phase of social order in which all these relations arise from the free agreement of Individuals."[11] As a result, political philosophies "began from individuals, who had an initial and primary existence, and laws and forms of society were derived from them: by submission, as in Hobbes; by contract or consent, or by the new version of natural law, in liberal thought."[12] Thus, a man's future was no longer inextricably linked to the family of his birth.

As alluded to earlier, the expanding definitions of the individual did not encompass all individuals. It provided a man with a means to outreach the status and position of the family into which he was born. In other words, a son's future was no longer tied to that of his father, and his father's father. A man was free to "make his own way" in the

---

7. Pearce, *supra* note 2, at 1275 n.137 (quoting 1 William Blackstone, COMMENTARIES *430 (citations omitted)).

8. *Id.* at 1275 (footnote omitted).

9. *Id.* at 1274.

10. *Id.* (footnote omitted).

11. *Id.* (quoting HENRY S. MAINE, ANCIENT LAW 422 app. (Peter Smith ed. 1970) (10th ed. 1884)).

12. *Id.* at 1274–75 (quoting RAYMOND WILLIAMS, KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY 163 (rev. ed. 1983)).

world. Alexis de Tocqueville provides an excellent illustration of this shift in the context of early nineteenth century America:

> Among nations whose laws of descent is founded upon the right of primogeniture, landed estates often pass from generation to generation without undergoing division; the consequence of this is that family feeling is to a certain degree incorporated with the estate. The family represents the estate, the estate the family, whose name, together with its origin, its glory, its power, and its virtues, is thus perpetuated in an imperishable memorial of the past and as sure pledge of the future.
>
> When the equal partition of property is established by law, the intimate connection is destroyed between family feeling and the preservation of the paternal estate; the property ceases to represent the family . . . . The sons of the great landed proprietor . . . may indeed entertain the hope for being as wealthy as their father, but not of possessing the same property that he did; their riches must be composed of other elements than his.
>
> . . . .
>
> The sons of these opulent citizens have become merchants, lawyers, or physicians . . . . The last trace of hereditary ranks and distinctions is destroyed; the law of partition has reduced all to one level.
>
> . . . .
>
> The democratic principle, on the contrary, has gained so much strength by time, by events, and by legislation, as to have become not only predominant, but all-powerful. No family or corporate authority can be perceived; very often one cannot even discover in it any very lasting individual influence.
>
> America, then, exhibits in her social state an extraordinary phenomenon. Men are there seen on a greater equality in point of fortune and intellect, or, in other words, more equal in their strength, than in any other country of the world, or in any age of which history has preserved the remembrance.[13]

It has only been in more recent times that the legal ordering in the United States has shifted to grant women nearly equal status as individuals. Evidence of this shift includes the inception of no-fault

13. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 49-53 (Phillips Bradley ed., Vintage Classics 1990) (1848).

divorce and marital rape convictions.[14] Thus, a shift has occurred from the primacy of the family to the primacy of the individual; a corresponding development has been the enlargement of the categories of persons within society's definition of the individual. This evolution has significant impact upon the estate planning attorney's ethical responsibilities in representing non-traditional couples.

B. Traditional Families: Birth (Including Adoption) and Marriage

Currently in the United States, there are two legally recognized ways in which individuals establish a traditional family relationship: (1) a child-parent relationship through birth or adoption and (2) a husband-wife relationship through a legally sanctioned marriage.

The creation of a child-parent relationship entails numerous rights and responsibilities under the law, such as inheritance rights and support obligations. Child-parent relationships established through adoption are generally accorded similar standing under the law; therefore, they are included within the definition of a traditional family.

Similarly, marriage generates numerous rights, privileges, and responsibilities under the law, including "tax benefits, employment benefits, probate designations, property rights, dissolution guidelines, and most significantly, special treatment under the United States Constitution."[15] U.S courts have consistently held that a legally recognized marriage may only occur between one man and one woman.[16]

It is ironic that the biologically determined method of establishing a family relationship, birth, is accorded greater flexibility than marriage under the law. In the United States, marriage is generally a free choice exercised by two individuals, while the circumstances of one's birth are immutable. Yet, through termination of parental rights and adoption proceedings, individuals are allowed to circumvent biological family relationships which are, literally, genetically imprinted upon each person. Through these proceedings, legal fictions are created in order to access (or remove) all of the legal rights, responsibilities, and benefits corresponding with child-parent

14. Pearce, *supra* note 2, at 1276 (footnotes omitted).

15. Zimmer, *supra* note 1, at 681 (footnotes omitted).

16. *Id.* at 683. *Cf.* Under New York law, consent is essential to a valid marriage contract; however, no mention is made of the sex of the parties to such contract. N.Y. DOM. REL. LAW § 10 (McKinney 1999). According to Zimmer, the New York law "implies that a party who is capable of entering into a contract is capable of entering into a marriage contract. On that basis, same-sex couples are just as capable of entering into consensual marriage as heterosexual couples." Zimmer, *supra* note 1, at 683 (footnote omitted).

relationships. By contrast, the law restricts the way individuals may establish a family through marriage, which is based upon a relationship stemming from a greater freedom of choice than one's own birth.

C. Non-Traditional Families: Alternatives to Marriage

By definition, the backbone of a non-traditional family is not marriage. While a traditional couple is comprised of a husband and wife, a non-traditional couple is composed of two unmarried persons in a committed relationship. For example, non-traditional couples include elder couples who do not marry, homosexual couples, or couples who are unable to divorce prior spouses because of religious affiliations. For a variety of reasons, non-traditional couples do not or cannot rely upon the institution of marriage. Therefore, a primary estate planning goal for most non-traditional couples is generating recognition and legal status for their family. Such couples must often depend upon the intelligence and creativity of their attorney to adequately provide for one another.

Some suggest that non-traditional families are "newly conceived forms of families—families that need the same sorts of protections granted to the traditional family."[17] It is misleading to refer to these relationships as "newly conceived," because alternatives to the traditional family unit have existed throughout history. Many widows of America's wars were left to raise their children as single mothers. Or, more starkly, in the era of slavery, families were routinely torn apart, forcing family members to form non-traditional family relationships.[18] It is only recently that non-traditional families have garnered greater public recognition, if not greater status under the law.

---

17. Zimmer, *supra* note 1, at 682. Similar to traditional families, "[c]ompanionship, emotional support, and economic stability . . . act as the glue that holds these new families together." *Id.*

18. Frederick Douglass provides a riveting example:

> My father was a white man. He was admitted to be such by all I ever heard speak of my parentage. The opinion was also whispered that my master was my father; but of the correctness of this opinion, I know nothing . . . . My mother and I were separated when I was but an infant—before I knew her as my mother. It is a common custom, in the part of Maryland from which I ran away, to part children from their mothers at a very early age. Frequently, before the child has reached its twelfth month, its mother is taken from it, and hired out to some farm a considerable distance off, and the child is placed under the care of an old woman, too old for field labor. For what this separation is done, I do not know, unless it be to hinder the development of the child's affection toward its mother, and to blunt and destroy the natural affection of the mother for the child. This is the inevitable result.

FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE 13 (John R. McKivigan ed., Yale University Press 2001) (1845).

III. ESTATE AND TAX PLANNING ISSUES FOR NON-TRADITIONAL COUPLES

A. Introduction

Traditional and non-traditional couples share many of the same goals of estate planning, namely: effecting dispositive wishes regarding assets, avoiding probate,[19] and minimizing tax liability.[20] In addition to these shared goals, non-traditional couples often seek to "document the very existence of their relationship" as part of their estate plan.[21] Through marriage, a traditional couple enjoys a panoply of legal rights and responsibilities.[22] By contrast, an attorney for a non-traditional couple may have to use creative methods and legal techniques in order to establish a legally recognized relationship for her clients. This is often one of the most important estate planning goals for non-traditional couples.

The traditional family unit has provided the framework within which most estate planning techniques have been developed and implemented. In the context of a traditional family, the consequences of poor estate planning are usually either financial (i.e., loss of tax savings) or administrative inconvenience (i.e., inheritances to minors subject to probate court supervision).[23] However, the laws of intestacy generally ensure that the property of a decedent passes to his or her surviving spouse and issue.[24] Non-traditional couples do not enjoy the same protections. If a non-traditional couple does not engage in any estate planning, the survivor of them will generally have no claim on

---

19. Probate avoidance is often a matter of particular concern for non-traditional couples. In the event that either or both of their respective families do not support their relationship, or if family members are unaware of the extent of the assets involved, minimizing the disclosure of asset information by avoiding probate often decreases the likelihood of challenge by family members. Merrianne E. Dean, *Estate Planning for Non-Traditional Families*, 283 PRAC. LAW INST. /Est. 905, 909 (1999).

20. *Id.*

21. Matthew R. Dubois, *Legal Planning for Gay, Lesbian, and Non-Traditional Elders*, 63 ALB. L. REV. 263, 268 (1999) (internal quotations and footnote omitted).

22. For traditional couples with limited financial resources, marriage provides an abundance of cost-free "built-in" estate and tax planning devices. For example, the unlimited marital deduction provides a tax-planning benefit that married couples may take advantage of without ever engaging an attorney. By contrast, non-traditional couples are not able to take advantage of the cost-free estate and tax planning benefits of marriage and often must pay lawyers to achieve similar benefits (if possible). *See* Dubois, *supra* note 21, at 269–71.

23. Erica Bell, *Special Issues in Estate Planning for Non-Marital Couples and Non-Traditional Families*, 283 PRAC. LAW INST. /Est. 859, 861 (1999).

24. *Id.*

any of the decedent's probate assets.[25] Therefore, non-traditional couples especially must engage in appropriate estate planning in order to ensure that their wishes are respected and carried out.

This Part provides an overview of the following estate planning issues faced by non-traditional couples: legal recognition of the couple's relationship; asset planning; estate planning; and tax planning.

B. Legal Recognition of the Non-Traditional Couple's Relationship

Often, a primary concern for non-traditional couples is the creation of a legally recognized relationship. Non-traditional couples may turn to contract law in order to establish legal recognition of their relationship. They may use tools such as domestic partnerships or other arrangements such as express pooling agreements. Another option, given appropriate circumstances, is a business partnership. Some non-traditional couples also resort to adult adoption. Each of these strategies is briefly discussed below.

1. Domestic Partnership and Other Contractual Arrangements

Many non-traditional couples who live together enter into some form of agreement, usually oral or implied, concerning the acquisition of assets and the payment of expenses. However, in certain circumstances (such as biological family members who may challenge such agreements in the future) it is appropriate for these arrangements to be express and in writing.

If properly drafted, domestic partnership agreements are enforceable contracts entered into by unmarried parties. Similar to any contract, domestic partnership agreements must include adequate consideration.[26] These agreements may accomplish the following: (1) define financial obligations to one another; (2) memorialize respective contributions towards purchase of major assets and joint bank and investment accounts; and (3) provide a procedure for dissolution of the relationship and the corresponding division of assets.[27]

---

25. *Id.* However, any property held jointly with a right of survivorship (e.g., real property, bank accounts) and any property passing by beneficiary designation (e.g., life insurance) will be distributed to the surviving member of the non-traditional couple.

26. *See* Marvin v. Marvin, 18 Cal. 3d 660, 670–72, 557 P.2d 106, 113–16 (1976) (providing that a "meretricious" relationship is not sole consideration for agreement; contract theory may govern breach of cohabitation agreement). Thus, while non-traditional couples may establish their legal rights though contract, such contracts must remove all reference to a sexual relationship. Zimmer, *supra* note 1, at 697. As a result, these contracts falsely characterize (and thus delegitimize) the relationship. *Id.* at 695–97.

27. Bell, *supra* note 23, at 862–63. *See also* Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359, 378–80 (1995). In addition, "by requiring them to identify

The benefits of domestic partnership agreements include providing evidence for purposes of housing benefits and employment benefits.[28] Such agreements also provide practical assistance in the dissolution of the relationship or the mediation/arbitration of disputes which may arise under the agreement.[29] Further, domestic partnership agreements provide an important evidentiary function in connection with guardianship matters, conservatorship proceedings, and will contest and construction actions.[30]

An express pooling agreement provides that each will share whatever income he or she may receive without any corresponding requirement to provide any service for the other.[31] There are several drawbacks to these arrangements, including: (1) inability to file joint tax returns; and (2) the money contributed by the higher income earner, to the extent it exceeds the annual exclusion amount, may constitute (and be taxed as) either a gift to or income received by the other.[32]

2. Business Partnership

As with traditional families, non-traditional couples sometimes engage in family businesses. A business partnership is sometimes used as an alternative, or supplement, to other forms of personal or domestic partnership agreements.[33] These businesses are often established as partnerships.[34] A partnership arrangement "provide[s] non-traditional partners with many benefits they would otherwise not

---

and discuss their often unexpressed assumptions and expectations, you can assist a couple in recognizing and avoiding the kinds of conflict that eventually can lead to a relationship breakup. If your client is uncomfortable contemplating or planning for the possibility of a breakup, characterizing the domestic partnership agreement in this more positive way may allow her to accept it as a useful estate planning tool." Dean, *supra* note 19, at 911.

28. Bell, *supra* note 23, at 863–64. A related opportunity offered in some communities is domestic partnership registration. *Id.* at 864. Registration provides objective criteria for determining a couple's status and also may provide additional evidence for purposes of receiving employment benefits. *Id. See also* Chase, *supra* note 27, 378–79 (footnotes omitted) (noting that registration is of limited benefit because very few municipalities offer such registration and registration does not confer any tax benefits except upon dissolution or death).

29. Bell, *supra* note 23, at 864.

30. Dubois, *supra* note 21, at 277. *See also id.* at 275–78 (discussing the benefits of partnership agreements).

31. Chase, *supra* note 27, at 374. Another alternative is an implied agreement whereby "a lesbian or gay couple that shares income and property and provides services for one another may avail themselves of judicially-enforceable property rights pursuant to implied-in-fact or implied-in-law agreements despite the absence of contractual formalities." *Id.* at 381 (footnote omitted). *See also id.* at 381–83 (providing an in-depth discussion of implied agreements).

32. *Id.* at 374–75.

33. Dubois, *supra* note 21, at 278.

34. *Id.* at 277.

enjoy, including standing in suits involving finances, an insurable interest, and a valid consideration for mutual promises."[35] An additional benefit to a business partnership involves the dissolution of the relationship.[36] The partnership assets may be distributed without the recognition of gain or loss, so long as the value of the assets received by each partner does not exceed his or her basis in the partnership.[37] As a result, assets may be distributed without adverse tax consequences (such as gift tax). In addition, partnerships may provide additional support for the non-traditional couple in the face of challenges from heirs-at-law.[38]

3. Adult Adoption

Adult adoption grants one member of a non-traditional couple parental rights and responsibilities over the other.[39] Importantly, adult adoption secures the inheritance rights of the adoptee.[40] From a tax standpoint, consideration must be made as to who is the appropriate adopter and who is the appropriate adoptee, considering factors such as respective asset levels and life expectancy.[41] There are additional income tax ramifications, such as the availability of the dependency exemption and head of household status.[42] Adult adoption poses significant problems in the context of dissolving a relationship because a termination of parental rights proceeding is required in order to terminate an adoption.[43] More significantly, and similar to most contract arrangements and partnerships, adult adoption does not properly characterize the non-traditional couple's relationship.[44]

---

35. *Id.* at 277-78 (footnote omitted).

36. *See* Chase, *supra* note 27, at 390–91.

37. *Id.* (citing Internal Revenue Code (I.R.C.) § 731(a) (2000)).

38. *See* Dubois, *supra* note 21, at 278.

39. Chase, *supra* note 27, at 386. *See also* Zimmer, *supra* note 1, at 689 (footnote omitted) (noting that "[t]he purpose of these adoptions is to create a legal status that may allow gay couples to overcome inheritance, insurance, tax, and housing restrictions, in addition to creating a legally protected family.").

40. Chase, *supra* note 27, at 388 n.155 (citations omitted).

41. *Id.* at 387–88.

42. *Id.* at 388.

43. Zimmer, *supra* note 1, at 692.

44. Adult adoption "provides neither an adequate definition for the relationship resulting from the adult adoption (which is neither marriage, nor real parenthood) nor an adequate resolution of the testamentary and dissolution problems inherent in same-sex cohabitation." *Id.* at 691 (footnote omitted).

4. Dissolution of Relationship

Dissolution Agreements (or similar provisions in express pooling agreements or domestic partnership agreements) offer non-traditional couples certain benefits similar to a prenuptial agreement, for example, division of property provisions, mediation, and arbitration.[45] As mentioned earlier, if the couple established a business partnership, the assets of the partnership may be distributed to the partners without the risk of gain recognition (except to the extent that the assets distributed exceed the partner's basis in the partnership property).[46] Support payments between non-traditional couples are not afforded the same tax treatment as those between former spouses.[47] Although the tax implications of such payments are unclear, gift tax or income tax implications are possible.[48]

C. Asset Planning

Non-traditional couples may not rely upon the laws of intestacy to ensure that their assets are distributed to the survivor. In fact, these laws often generate a result contrary to the decedent's wishes. Non-traditional couples must engage in proper asset planning to ensure that their dispositive wishes are respected.

1. Joint Ownership with Rights of Survivorship

A common strategy used by non-traditional couples (and traditional couples) is joint ownership of assets. For example, bank and investment accounts and real property may be owned jointly with rights of survivorship.[49] Some non-traditional couples embrace joint

---

45. Chase, *supra* note 27, at 389. For spouses, the division of property incident to a divorce does not result in the recognition of gain. I.R.C. § 1041 (2000). However, the manner in which partners in a non-traditional couple hold title to property and the terms of the agreement determine the tax consequences of the property division. Chase, *supra* note 27, at 390. For example, a division may result in gain (or loss) recognition if it is treated as a sale or exchange by the IRS pursuant to I.R.C. §§ 1001, 1011, 1012 (2000), and an unequal division of property would most likely result in gift tax. Chase, *supra* note 27, at 390.

46. Chase, *supra* note 27, at 390–91 (citing I.R.C. § 731(a) (2000)).

47. Chase, *supra* note 27, at 391. Spousal support payments are considered income to the recipient; however, the payor is allowed an offsetting deduction. *Id.* (citing I.R.C. §§ 71, 215 (2000)). Child support payments are not considered income and the payor is not allowed an offsetting deduction. *Id.* (citing I.R.C. § 71(c) (2000)).

48. *Id.*

49. *See* Dubois, *supra* note 21, 317–19. Or, if an account holder wishes to retain control of her account during life, she may establish a "payable-on-death" account. Such accounts pass at the death of the account holder by beneficiary designation thereby avoiding the probate process. Dean, *supra* note 19, at 910. These accounts may be savings accounts, checking accounts or money market accounts. *Id.*

tenancy as a symbol of their commitment to one another.[50] However, joint tenancy with rights of survivorship has other more practical advantages. Joint tenancy provides an asset transfer function because the surviving member of a non-traditional couple enjoys immediate ownership of the account or real property upon the decedent's death.[51] This transfer occurs outside of the decedent's will (if any) and outside of the probate court.[52] In addition, a joint ownership arrangement is often free from attack by heirs-at-law or other estranged family members claiming a right to the decedent's assets.[53]

There are several important issues to consider in connection with joint ownership. First, all jointly held assets will ultimately be distributed according to the wishes of the surviving joint owner.[54] This distribution may be contrary to the wishes of the deceased joint owner who may have originally contributed some or all of the funds. In addition, if only one joint owner contributes funds to the account, there will most likely be gift tax consequences, because an ownership interest is immediately vested in the other joint owner.[55] However, these tax considerations may be outweighed by other benefits, such as protection from challenge by heirs-at-law.[56] It should also be noted that Section 2040(a) of the Internal Revenue Code provides that the full value of any property which is owned jointly will be included in the estate of the first joint owner to die, unless contribution can be demonstrated by the surviving joint owner.[57] Thus, joint ownership is generally not a tax planning technique.

---

50. Patricia A. Cain, *A Review Essay: Tax and Financial Planning for Same-Sex Couples: Recommended Reading*, 8 LAW & SEX 613, 640 (1998).

51. *Id.*

52. *Id.*

53. *Id.* Although, in the event that a person gifts assets to her partner via joint tenancy during lifetime, such transfer may be more prone to attack. *Id.* Note, however:

> While no transfer is completely free from attack for undue influence or fraud, joint tenancy has the advantage of being viewed as a lifetime transfer in which the donee partner has a vested interest at the time of creation. That makes the transfer more difficult to attack once sufficient time has passed.

Id. (footnote omitted).

54. *Id.*

55. More specifically, the creation of a joint account does not generate tax consequences; however, when a non-depositing partner withdraws an amount deposited into the joint account, that constitutes a completed gift for tax purposes from the depositing partner to the withdrawing partner, in the amount of the withdrawal (to the extent it exceeds the annual exclusion amount). Dubois, *supra* note 21, at 318–19.

56. *See supra* note 53.

57. I.R.C. § 2040(a) (2000).

2. Retirement Accounts and Social Security

Frequently, the most significant liquid assets held by non-traditional couples are their retirement accounts. Retirement accounts usually pass by beneficiary designation; therefore, probate is avoided.[58] However, some employers restrict certain retirement benefits to traditional family members.[59] An additional problem is that non-traditional couples may choose not to take advantage of available benefits. A lesbian or gay client, "fearful of being too 'out' at their jobs, will often name someone other than their partner as beneficiary on employee benefits such as life insurance or 401(k) plans."[60] Non-traditional couples are also disadvantaged in the context of social security benefits. For example, when only one partner is a wage-earner, the other partner does not have the ability to collect social security benefits upon the wage-earner's death.[61] By contrast, a surviving spouse is entitled to social security benefits upon the death of the wage-earner spouse.

3. Life Insurance

Traditional couples use life insurance to satisfy a number of needs. Some more common applications include: (1) providing a source of funds if the sole wage earner dies prematurely; and (2) providing liquidity for the payment of estate taxes upon the death of a surviving spouse.[62] If the goal is the former, a single-life insurance policy on the life of the wage earner is often used. If the goal is the later, a single-life or second-to-die life insurance policy may be appropriate.[63]

---

58. Dubois, *supra* note 21, at 288.

59. For example:

> [E]mployees may be able to designate only spouses or blood related children as beneficiaries of benefit amounts based on contributions to a plan or length of service. Similarly, spouses of married employees may be able to receive survivor's benefits and accidental death benefits in a traditional retirement plan which unmarried partners cannot receive.

Id.

60. Bell, *supra* note 23, at 884.

61. 20 C.F.R. §§ 404.345–46 (1996), (requiring a spousal relationship as prescribed by state law to be eligible for benefits). In the event that some jurisdictions legalize same-sex marriage, the Defense of Marriage Act, passed by Congress in 1996, will prohibit such spouses access to federal benefits such as Social Security because it defines "marriage" as "a legal union between one man and one woman as husband and wife" and defines "spouse" as "a person of the opposite sex who is a husband or wife." Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

62. Dubois, *supra* note 21, at 324–25 (footnotes omitted).

63. Cain, *supra* note 50, at 623–24 (footnotes omitted).

For non-traditional couples, the analysis is slightly different.[64] More precisely, the needs may be the same (i.e., (1) and (2) above), yet the manner in which life insurance is used to satisfy these needs is different. Traditional couples may utilize the unified credit and unlimited marital deduction to postpone any estate tax until the death of the surviving spouse.[65] Non-traditional couples cannot take advantage of the unlimited marital deduction. Therefore, for non-traditional couples, "the primary concern with estate taxes occurs at the death of the first to die, when the government takes a chunk out of the wealth that the surviving partner might need to maintain his or her established standard of living."[66] One insurance technique for addressing the needs of non-traditional couples is to utilize first-to-die insurance policies. First-to-die insurance policies pay out their proceeds upon the death of the first person in the couple to die. Therefore, the funds are available to provide support for the surviving member of the non-traditional couple and to pay estate taxes when they are most needed.[67] A first-to-die life insurance policy is usually significantly less expensive than two separate single life polices.[68]

There are other benefits associated with life insurance. Life insurance is distributed by beneficiary designation; therefore, it is an effective way to ensure that funds pass according to the wishes of a non-traditional couple.[69] The insurance proceeds are not subject to probate and the corresponding challenges of heirs-at-law; thus, the disposition of the proceeds is private.[70] Although there are no income tax consequences for the beneficiary of a life insurance policy, "insurance owned at death is included in the taxable estate of the insured."[71] Therefore, a successful planning technique is to establish an irrevocable life insurance trust to own the policy.[72]

---

64. *See id.* at 621.

65. *Id.* at 623 (footnotes omitted).

66. *Id.* at 624.

67. For example:

> [I]f A and B are life partners, they can use FTD [first to die] life insurance to fund the estate tax payment to the federal government on the death of the first to die in much the same was as business partners A and B use it to fund their buy-sell agreement. Their alternative plan would be to take out a term policy on A's life, payable to B, and to take out a separate term policy on B's life, payable to A.

Id.

68. *Id.* at 624–25. In addition, in order to avoid estate tax inclusion under I.R.C. § 2042, the use of an insurance trust to hold the policy is advisable. *See id.* at 628–30.

69. *See* Chase, *supra* note 27, at 388–89. *See also* Dubois, *supra* note 21, at 324–27.

70. *See* Dubois, *supra* note 21, at 325–26.

71. Cain, *supra* note 50, at 625 n.55 (citation omitted).

72. *See infra* pp. 14–15 § III.D.3.

D. Estate Planning

Estate planning is important for non-traditional couples because current legal, regulatory, and administrative presumptions will not usually produce the desired results. The following is a discussion of several common estate planning techniques and their application for non-traditional couples.

1. Intestacy

In the absence of appropriate estate planning, a decedent's probate assets are distributed pursuant to the intestacy laws of his or her state of domicile. Intestacy laws do not provide for the distribution of assets to a non-traditional partner in the absence of other non-testamentary provisions, such as a trust instrument or joint ownership of property.[73] By contrast, intestacy laws provide significant protection for traditional couples by assuring that both the surviving spouse and surviving issue receive a share of the decedent's estate.[74]

If the deceased member of a non-traditional couple never divorced a former spouse (perhaps for religious reasons) or in the event of undisclosed children from a prior marriage, such persons take under intestacy laws, to the exclusion of the surviving member of the non-traditional couple.[75] The laws of intestacy favor the traditional family members, even if they are no longer a part of the decedent's life. Although strategies such as adult adoption attempt to utilize the laws of intestacy to the advantage of the non-traditional couple, often the most effective strategy is the use of appropriate estate planning techniques to implement a non-traditional couple's wishes.

2. Wills

A Last Will and Testament adequately ensures that assets are distributed according to the decedent's wishes. However, probate is not avoided and the will itself is open to challenge by beneficiaries, heirs-at-law, and other interested parties.[76]

---

73. Chase, *supra* note 27, at 394.

74. In addition, there are a variety of other legal protections afforded to traditional family members, such as homestead, exempt property, family allowances, and elective share provisions for a spouse or children omitted from a decedent's will. *See* UNIF. PROBATE CODE art. II.

75. *See* Dubois, *supra* note 21, at 316. It is important for the estate planning attorney to verify that each client is not married. Bell, *supra* note 23, at 883. "Many clients try to convince themselves that by simply ignoring past legal ties, they can somehow cut off the rights of estranged distributees." *Id.*

76. *See* Dean, *supra* note 19, at 910. Simple techniques may be used to alleviate the "hard feelings" of biological family members. For example, the testator may specify that certain items

Similar to traditional couples, non-traditional couples often execute "mirror wills." Such wills simply provide that upon the death of the first, all of the decedent's assets pass to the survivor.[77] In the event children are involved, it is wise to direct that their inheritance be maintained in trust until an appropriate age for distribution.[78] In addition, a will is an appropriate place for a parent to name a guardian for her children.[79] Thus, she could name her partner as guardian of her children and trustee of any trusts established under her will for her children's benefit.

Unfortunately, will contest and construction actions are very real threats for many non-traditional couples.[80] There are several techniques which may be used to decrease the likelihood and success of such challenges. First, the observance of strict formalities in connection with the execution of the wills may stem any technical challenges to the documents (i.e., insufficient witnesses).[81] Separate representation by counsel for each member of a non-traditional couple may reduce challenges based upon undue influence and similar complaints.[82] Also, the execution of supplemental supporting documentation, such as domestic partnership registration and jointly engaging in a lease is helpful.[83] Finally, the use of trust instruments

---

of tangible personal property which are family heirlooms be passed along to biological family members, rather than the surviving partner who may not have close ties to the testator's family. Bell, *supra* note 23, at 865–66. If, however, the testator wishes that the surviving partner receive all other tangible personal property, it should be stated clearly in the will. *See id.* at 866. This may suppress the biological family's desire to strip the couple's residence of items arguably belonging to the testator. *Id.*

77. Upon the death of the second to die, all of the combined assets of the couple will be in the survivor's estate, to be disposed of pursuant to his or her will. Therefore, it may be appropriate to provide for disposition between the beneficiaries of both the first-to-die and second-to-die partner in the will of each member of the non-traditional couple, in order to ensure that one side is not "cut out." Bell, *supra* note 23, at 870. However, unlike establishing an irrevocable trust instrument, there is no way to ensure that the surviving partner will not modify the terms of his or her will.

78. *Id.* at 871.

79. *See* Dean, *supra* note 19, at 914. This technique will not work if the other parent is alive and participating in the child's life. *Id.* In that event, no guardianship would be necessary. It should also be noted that the nomination of a partner as guardian does not preclude the court from appointing another person it believes to be more suitable as guardian, nor does it preclude the participation and objections of biological family members in the guardianship process. *Id.* at 913.

80. Chase, *supra* note 27, at 394–95. Common bases for will contests include improper execution, mental incompetence of the testator, undue influence, duress, and fraud. *Id.* at 395. The use of a "no contest" clause often discourages will contests as it disinherits any beneficiary under the will who contests the document. *Id.* at 395–96.

81. Bell, *supra* note 23, at 874.

82. *Id.*

83. *Id.*

and other non-testamentary dispositions passing by beneficiary designation, such as life insurance, can greatly reduce the problem.[84]

Given the threat of post-mortem challenges to the validity of the document together with privacy concerns, wills alone are often not the most appropriate estate planning vehicle for non-traditional couples.[85]

3. Trusts

Trusts are often appropriate estate planning techniques for non-traditional couples. The reasons include the following:

> the desire to keep the nature and value of the estate private, the desire to retain individual control of assets or the desire to provide for more complex control of assets after death, for instance to provide for distributions to minor children, incapacitated partners, receiving public benefits or to provide for the transfer of assets to other beneficiaries once the surviving partner's life is over.[86]

The following is a brief survey of some of the more common forms of trust agreements and their application for non-traditional couples.

An *inter-vivos* (established during life) trust arrangement has many benefits for non-traditional couples. First, a trust is less contestable than a will. Unlike a will, which must be filed with the probate court, there is no public filing requirement for a trust.[87] There is no corresponding notification of heirs-at-law nor filing of any sort of public inventory of the trust's assets.[88] As a result, the nature and extent of the assets as well as the dispositive terms of the instrument remain private.[89] In addition, in the event of incapacity, the healthy

---

84. *Id.*

85. However, a will combined with appropriate joint ownership and beneficiary designation techniques may be sufficient for non-traditional couples of modest means. For example, if the largest asset is a retirement account which passes by beneficiary designation to the surviving partner, the asset will be transferred outside of probate and not subject to challenge by heirs-at-law and others (provided the plan allows for a non-traditional family member to be named as the beneficiary). *See id. See also* Chase, *supra* note 27, at 394–400.

86. Dean, *supra* note 19, at 910. *See also* Chase, *supra* note 27, at 398–400.

87. Chase, *supra* note 27, at 398 n.230 (citations omitted); Dubois, *supra* note 21, at 322.

88. *See* Chase *supra* note 27, at 398 n.230.

89. Dubois, *supra* note 21, at 322. In addition:

> There are no public records that indicate the beneficiaries or the trustee of a revocable living trust. A revocable trust could be a strategy for a gay, lesbian, or non-traditional testator to avoid the interference of biological relatives in their partner's affairs. In addition, if the trust is established and used by the grantor, well before death, there is less likelihood of a challenge to a revocable trust.

Id. (footnote omitted). For complete privacy, it is important to ensure that all assets are transferred to the trust prior to death. Bell, *supra* note 23, at 875–76.

partner may be named as co-trustee or successor trustee and assume the management of the trust assets very easily.[90] Upon the death of the settlor of the trust, her dispositive wishes are effected smoothly. The use of more sophisticated types of trust arrangements also may produce tax savings.

A joint trust is one trust, established by both members of a non-traditional couple. Such a trust may be beneficial on an emotional level as it validates the relationship of a non-traditional couple.[91] However, care must be taken to properly identify individually owned assets and provide for the separation of these assets into sub-trusts upon the death of the first partner, in order to preserve the unified credit of the first to die.[92] Individual trusts are simpler from a tax planning perspective, and they also effectively handle the possible termination of the non-traditional couple's relationship.[93]

Life insurance trusts are a common technique used to generate estate tax savings. These instruments are irrevocable; therefore, care must be taken in drafting the dispositive provisions.[94] If a current partner is named as a beneficiary and the non-traditional couple's relationship subsequently ends, there is a problem.[95] Two solutions include: (1) specifying that the beneficiary will be the current domestic partner and carefully defining "domestic partner,"[96] or (2) naming the current partner but specifying that the relationship must be in existence and, if not, providing for contingent beneficiaries. The policy could also be allowed to lapse after the relationship terminates. Although the trust technically would still exist, no assets would be available to fund it.

A Grantor Retained Interest Trust (GRIT) allows the grantor to retain an interest (for a term of years) in the trust property while ultimately transferring the property to her partner at a discounted value.[97] Therefore, GRITs are often a good tax planning strategy. Some of the drawbacks of a GRIT include the fact that it is irrevocable, the trust corpus is non-invadable and the possibility that the grantor will not outlive the term and thereby counteracting the tax planning advantages.[98] A Qualified Personal Residence Trust utilizes

90. *See* Bell, *supra* note 23, at 876.

91. Dean, *supra* note 19, at 911.

92. *Id.* The unified credit is an amount, available to every taxpayer that is sheltered from estate tax. I.R.C. § 2010 (2000).

93. Dean, *supra* note 19, at 911.

94. *See* Bell, *supra* note 23, at 878.

95. *Id.*

96. *Id.* at 878–79.

97. *See id.* at 881.

98. *Id.* at 883.

the same techniques and may generate significant tax savings; however, the trust is funded with real property and certain other technical provisions must be met.[99]

4. Living Wills; Powers of Attorney; Conservators, and Guardians

Absent any specific direction to the contrary, a person does not have the right to participate in health care decision making on behalf of non-family members. Therefore, health care powers of attorney are critical for non-traditional couples to ensure that both partners will be able to act on each other's behalf in connection with health care decisions as well as be allowed complete access to information concerning an ill partner.[100]

A correlated concern is the designation of a person to act on behalf of another in the event of inability or incapacity. A financial durable power of attorney is an important tool which allows non-traditional couples to designate each other to act on their behalf. In addition to the required statutory language of the relevant jurisdiction, other provisions to consider include: "powers to conduct financial affairs; manage funds and property; employ professionals; apply for financial assistance and Medicaid; change the principal's domicile; create, amend and revoke trusts; make (or prohibit) gifts and transfers; [and] disclaim an inheritance."[101] Powers of attorney are usually effective upon execution. However, a "springing" power of attorney

---

99. Treas. Reg. § 25.2702-5 (as amended in 1997).

100. Dean, *supra* note 19, at 912. *See* Chase, *supra* note 27, at 396–98.

> Gay, lesbian, and non-traditional elders have unique health care needs. The most important surround confidentiality of treatment and health care professionals who understand and affirm the diversity of preference in sexual practice. Most elders will have a doctor with whom they are comfortable. This may be of extreme important to the gay, lesbian, or non-traditional elder. For the elder assembling a legal plan, being placed in a facility with unknown health care providers, forced to change primary care physicians, or even being examined by an unfamiliar physician are circumstances to avoid.

Dubois, *supra* note 21, at 296 (footnotes omitted). Such designations are also "particularly important for gay, lesbian, and non-traditional elders to ensure their non-traditional family is accorded appropriate rights of access, respect, and decision-making ability." *Id.* at 301 (footnote omitted). It may be appropriate to include a "priority of visitation" provision. *Id.* at 303 (footnote omitted). For example:

> This provision should state that the agent shall be the first party to visit with the client and the attending physician in the event of incapacity, and the agent has the right to limit who else may subsequently visit with the client or the attending physician. This provision is important for gay, lesbian, and non-traditional clients because it informs the physician or health care provider that the agent not only has priority over treatment and care decisions, but also has priority in your client's family structure, even over the objections of biological relatives.

Id. at 303–04 (footnotes omitted).

101. Dubois, *supra* note 21, at 292.

(i.e., one that becomes effective upon the incapacity of the principal), may be useful if a non-traditional partner is not comfortable with his or her partner having immediate access and control of assets.[102]

Related matters of particular concern for non-traditional couples are the issues of "capacity" or "undue influence" in the event of a challenge to the power of attorney.[103] An attorney should take extra care to ensure that disinterested third parties witness the document execution.[104] In addition, the non-traditional couple may consider appointing an independent agent as attorney-in-fact.[105]

In the absence of the foregoing documents, an interested person may initiate conservatorship proceedings on behalf of an incapacitated person in the appropriate judicial forum.[106] A designation of conservator may be executed prior to incapacity. It is essentially a request to the court that a certain person be appointed as conservator, in the event one must be appointed. A designation of conservator does not preclude biological family members from protesting the appointment nor does it preclude the court from appointing someone other than the designated person.[107] At the very least, a designation of conservator will guarantee non-traditional couples standing in conservatorship proceeding.[108]

E. Tax Planning for Non-Traditional Couples

Tax law has traditionally bestowed upon married couples a variety of tax benefits. Some of these benefits include: the right to file joint income tax returns, the right to "split-gifts," an unlimited marital deduction for assets transferred upon death to a surviving spouse, unlimited tax-free transfers between spouses during lifetime, and a special estate tax treatment for assets held jointly by spouses.[109] Non-traditional couples are unable to avail themselves of these benefits.

The fundamental problem in estate tax planning for non-traditional couples is their inability to take advantage of the unlimited

---

102. *See* Chase, *supra* note 27, at 397 n.225 (citations omitted).

103. Dubois, *supra* note 21, at 293.

104. *Id.*

105. *See id.*

106. *See id.* at 306–07.

107. *Id.*

108. There is an important question of whether a non-traditional partner has standing to initiate a conservatorship proceeding, absent such a designation. According to the Uniform Probate Code, an interested party includes legal spouse, biological family members, business associates and creditors. UNIF. PROBATE CODE §§ 5-301 to 5-312, 5-401 to 5-431 (amended 1997). It is questionable under the Code whether a member of a non-traditional couple has standing.

109. Chase, *supra* note 27, at 361–62.

estate tax marital deduction.[110] Unlike a married couple who generally will not incur federal estate tax upon the death of the first spouse, a non-traditional couple does not have the ability to defer payment of estate tax until the death of the survivor of them. Therefore, estate tax allocation must also be considered. In the event significant assets pass outside of the established estate plan (i.e., via beneficiary designation), consideration should be made as to the source of the payment of the associated tax, in the event that different beneficiaries receive different assets.[111]

In addition, non-traditional couples do not enjoy the same presumptions as married couples in determining how much of the property accumulated during the non-traditional couple's relationship is included in the gross estate of the first of them to die.[112] For example, property held jointly by a non-traditional couple will be considered entirely taxable in the first decedent's gross estate, unless the surviving partner can prove contribution.[113] Two tax planning techniques that may be used by non-traditional couples to transfer assets outside of the estate tax system are Qualified Personal Residence Trusts and Irrevocable Life Insurance Trusts.

Non-traditional couples must also be mindful of the gift tax implications of transfers made between them during lifetime.[114] Unlike spouses, they are unable to freely transfer assets between themselves without generating tax consequences. Nevertheless, in the event one member of the non-traditional couple enjoys significantly more resources than the other, a program of annual exclusion gifting

---

110. In 2001, the Economic Growth and Tax Relief Reconciliation Act (affectionately known as "EGTRRA") was passed by Congress and signed into law by President Bush. Pub. L. No. 107-16, 115 Stat. 138 (2001). Under EGTRRA, the federal estate tax exemption amount is steadily increased until 2010. I.R.C. § 2010(c) (West 2003). At the same time, the top marginal estate tax rate is steadily decreased. I.R.C. § 2001(c)(2)(B) (West 2003). In 2010, the federal estate tax is repealed *for that year*. I.R.C. § 2210(a) (West 2003). Unless Congress takes additional action, EGTRRA "sunsets" in 2011 and the federal estate tax and gift tax are reinstated pursuant to the law in effect prior to EGTRRA's passage. I.R.C. § 1 note (West 2003). *See* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16, 115 Stat. 138 (2001). *See also* Chase, *supra* note 27, at 391–92.

111. Careful review should be made of each partner's beneficiary designation forms to ensure that they are not outdated.

112. Chase, *supra* note 27, at 391–92; *See also* I.R.C. § 2031 (2000).

113. Chase, *supra* note 27, at 392; I.R.C. § 2040(a) (2000).

114. *See* Bell, *supra* note 23, at 887. Another important aspect of EGTRRA is its treatment of the federal gift tax system. I.R.C. § 2502(a) (West 2003). Prior to the passage of EGTRRA, the federal estate tax and federal gift tax were unified. Notwithstanding certain sophisticated estate planning techniques involving valuation discounts and other valuation techniques, a unified system generally resulted in the same tax result if an asset was gifted during life or at death. However, under EGTRRA, the federal gift tax is not repealed (unlike the estate tax and generation-skipping transfer tax). *Id.*

(gifts of smaller amounts which do not trigger a gift tax) may be appropriate.[115]

IV. THE ETHICAL RESPONSIBILITIES OF ESTATE PLANNING ATTORNEYS IN THE REPRESENTATION OF TRADITIONAL COUPLES

It is important to understand the current standards of ethical behavior imposed upon attorneys in the representation of traditional couples in order to properly assess attorneys' ethical responsibilities in representing non-traditional couples. Currently, there are four major theories of ethical behavior which apply in the estate planning context: (1) individual representation; (2) joint representation; (3) intermediary representation; and (4) family representation.

A. Individual Representation

An attorney's zealous representation of her individual client is the foundation of legal ethics. Separate representation by separate counsel is generally viewed as the simplest and easiest way to ensure zealous representation.[116] Use of the separate representation model is supported by the underlying assumptions of the attorney-client relationship:

> First, a lawyer's proper employment is by or for an individual. Second, employment by or for more than one individual is exceptional. Third, as a consequence, multiple party employment is necessarily superficial. Finally, the means for protecting the superficiality (or, if you like, the means for protecting the principle that employment is ordinarily and properly by or for individuals) is ignorance of any facts known to one of the individuals but not the other.[117]

However, there are several serious limitations connected with individual representation. Estate planning advice is limited because the attorney does not have access to full and complete information (for example, if the attorney's client stands to inherit significant assets from the client's spouse). As a result, it is extremely difficult to

115. *See* Dean, *supra* note 19, at 912.

116. 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, 124 (1993).

117. *Id.* at 125 (footnote omitted). The concern, perhaps, is that the representation of more than one client conflicts with lawyers' assumption that "the client wants us to maximize his material or tactical position in every way that is legally permissible, regardless of non-legal considerations." *Id.* at 126–27 (footnote omitted).

engage in effective tax planning for one spouse without having the ability to coordinate both spouses' estate plans.[118]

There are two types of individual representation, which are discussed in more detail below. Individual representation by separate attorneys is the cleaner form of individual representation and offers the lower risk of ethical problems. The other type of representation is separate simultaneous representation by the same attorney. This form of individual representation is questionable in its effectiveness and rife with ethical pitfalls.

1. Individual Representation by Separate Attorneys

If the goal of representation is the minimization of potential conflicts of interest, then individual representation is the most appropriate model for legal representation. Individual representation requires that an attorney represent only one spouse.[119] The interests and rights of other people, including the client's spouse and other family members, are relevant only to the extent that either the client considers them relevant or to the extent the lawyer considers them relevant to the desired goals of the client.

The representation of only one spouse greatly reduces the potential for ethical conflicts that may arise during the course of the representation. For example, an attorney is less likely to violate her ethical responsibility of confidentiality. According to Model Rule 1.6, "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ."[120] In an individual separate representation situation, an attorney has very little chance of improperly revealing information to the non-client spouse in violation of Rule 1.6.

In addition, other models of representation require that the lawyer withdraw from representation of clients when certain types of conflicts of interests arise. Often the triggering event is the development or discovery of a direct adversity between two clients

118. For example, to ensure that estate plans take full advantage of both spouses' unified credit and generation-skipping transfer tax exemption amounts, it is necessary that both spouse's estate planning documents contain complementary tax-planning provisions.

119. *See id.* at 124–25 (noting that in the context of a second marriage, separate representation may make sense, particularly when a spouse has continuing financial obligations (e.g., alimony payments) or children from the first marriage as the spouse may be reluctant to share information concerning her true testamentary intent under such a situation).

120. MODEL RULES OF PROF'L CONDUCT R. 1.6 (amended 2002), [hereinafter MODEL RULES]. As of February 2002, these Rules were adopted, usually with some modification, in 42 states as well as the District of Columbia. *See* E. NORMAN VEASEY, *Chair's Introduction, Commission on Evaluation of the Rules of Professional Conduct*, (February 2002), *available at* http://www.abanet.org/cpr/mrpc/e2k_chair_intro.html.

(i.e., the spouses).[121] This is exactly the point where a lawyer's zealous representation may be most needed by her clients.[122] Obviously, this situation rarely arises in the context of individual representation by separate attorneys because there is only one client.

Another benefit of this form of representation is that privacy is enhanced when other family members are removed from the estate planning process.[123] The client is free to consider, and the lawyer is free to communicate, the entire range of legal options. The client is not stifled by the presence of opinions of other family members. The lawyer is not inhibited by potentially conflicting duties to other clients. Thus, in the consideration of various legal options both the client and the lawyer are more free and open in the decision-making process.[124]

A drawback of this form of representation is that family members may be confused and believe that the lawyer represents their interests as well. They may hold "an unexpressed belief that neither the client nor the lawyer may intend to harm the interests or expectations of the unrepresented family member."[125] An attorney must be very clear that she does not represent these other family members or risk running afoul of Model Rule 4.3.[126]

Model Rule 1.1 requires that a lawyer "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[127] It is unclear whether an attorney may provide competent tax planning advice when she has incomplete

---

121. Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 FORDHAM L. REV. 1453, 1467–68 (1994).

122. *Id.*

123. *Id.* at 1468.

124. The negative aspects of decisional privacy result from the inherent isolation. In this unnatural state of isolation, the client may become unusually self-centered and lose sight of the "true balance of interests that prevails when returning to the more natural state of community or family." *Id.* at 1469. In addition, often the involvement of separate counsel for each family member will increase the likelihood that a shift will occur from cooperation towards a common goal to the preservation of individual interests without regard for the costs. *Id.* at 1471.

125. *Id.*

126. MODEL RULES, *supra* note 120 R. 4.3, states:

> 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 the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The Lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interest of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

127. MODEL RULES, *supra* note 120 R. 1.1.

knowledge of the assets held by her client's spouse. The ACTEC Commentaries to Rule 1.1 recognize the importance of complete factual information in connection with competent representation.

> A lawyer who is engaged by a client in an estate planning matter should inform the client of the importance of giving the lawyer complete and accurate information regarding relevant matters such as the ownership and value of assets and the state of beneficiary designations under life insurance policies and employee benefit plans. Having so cautioned a client, the lawyer is generally entitled to rely upon information supplied by the client unless the circumstances indicate that the information should be verified. The lawyer should verify the information provided by the client if the client appears to be uncertain about it or if other circumstances create doubts about its accuracy.[128]

Therefore, in the event the attorney has limited information, it is possible that an attorney does not violate her ethical duty to provide competent legal representation if she makes these uncertainties clear to the client, and then provides estate- and tax planning advice.

A final drawback is that legal costs are usually increased by using separate counsel in the estate planning context.[129] At the margin, these increased costs may serve as a barrier to access to legal services for clients with limited resources.[130]

2. Separate Simultaneous Representation by the Same Attorney

Separate simultaneous representation by the same attorney is an alternate form of representation, which attempts to address several of the deficiencies of individual representation by separate counsel. The Model Rules do not preclude separate simultaneous representation by the same attorney, so long as the requirements of Model Rule 1.7 are met.[131] The ACTEC Commentaries provide additional support to the Model Rules. The Commentaries suggest that with the proper disclosure and consent, separate simultaneous representation is acceptable.[132] Accordingly, the Commentaries note that "some

---

128. THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL, ACTEC COMMENTARIES ON THE MODEL RULES OF PROF'L CONDUCT 17 R. 1.1 (1995) [hereinafter ACTEC].

129. Collett, *supra* note 116, at 1470.

130. *Id.*

131. *See infra* pp. 23-24 § IV.B.1.

132. The Commentary to Model Rule 1.7 offers the following example:

> Lawyer (*L*) was asked to represent Husband (*H*) and Wife (*W*) in connection with estate planning matters. *L* had previously not represented either *H* or *W*. At the outset *L* should discuss with *H* and *W* the terms upon which *L* would represent them. Many lawyers believe that it is only appropriate to represent a husband and wife as

experienced estate planners regularly represent husbands and wives as separate clients. . . . Such representation should only be undertaken with the consent of the clients after full disclosure of the implications of the separate representation."[133] However, full disclosure may not be possible without a violation of Model Rule 1.6's duty of confidentiality.[134] Benefits of this form of representation include: (1) unrestricted choice of attorney; (2) potential cost savings in connection with legal services; and (3) better legal service because more complete information is provided to the attorney.

The negative aspects of this form of representation include: (1) numerous opportunities for inadvertent disclosure by the attorney of confidential or privileged information because of frequent contact with each spouse; and (2) confusion as to where the attorney's loyalties lay.[135] These problems are "cured" by the informed consent of the clients.[136] When clients provide informed consent, they are generally not waiving their rights to sue the attorney for breach of fiduciary duty.[137] However, "[b]y adopting a standard that permits separate simultaneous representation, ACTEC essentially condones attempts by lawyers to build a Chinese Wall within their minds. Many courts

---

> joint clients, between whom the lawyer could not maintain the confidentiality of any information relevant to the representation. However, some experienced estate planners believe that it is appropriate to represent a husband and wife as separate clients, each of whom is entitled to presume the confidentiality of information disclosed to the lawyer in connection with the representation. If permitted by the jurisdiction in which the lawyer practices, the lawyer may properly represent a husband and wife as separate clients. Whether the lawyer represents the husband and wife jointly or separately, the lawyer should do so only with their consent after disclosure of the implications of doing so. The same requirements apply to the representation of other family members, business associates, etc.

ACTEC, *supra* note 128, at 88 R. 1.7.

133. *Id.* at 87.

134. *See* MODEL RULES, *supra* note 120 R. 1.6.

135. Collett, *supra* note 116, at 131–32.

136. *Id.* at 132. In connection with separate simultaneous representation, one author has noted:

> [D]efining the nature of the consent that would be sufficiently informed is daunting. While a lawyer might present stereotypical scenarios to the clients in an attempt to illustrate the problems that could develop in the course of separate simultaneous representation, the diversity of human experience renders it unlikely that the lawyer will describe the exact dilemma that may emerge in representing these particular clients. Absent accurate prognostication by the lawyer, the enforceability of the client's consent becomes tenuous, rendering equally tenuous any defense to claims of breach of fiduciary duty.

Id. (footnotes omitted). However, the author does not explain why this critique does not equally apply to the joint representation context or other forms of representation where informed consent is required prior to engaging in the representation. Presumably, it would be equally difficult to obtain informed consent in all these different contexts.

137. *See id.* at 132–33.

question the viability of such a feat within a firm. To demand it of an individual lawyer is both unrealistic and dangerous—for the clients and the lawyer."[138] For these reasons, separate simultaneous representation by the same attorney may be the less desirable form of individual representation.

B. Joint Representation

It is standard practice for an attorney to represent a husband and wife jointly in connection with their estate planning matters. Joint representation is often viewed as the "norm" with regard to the representation of spouses. In fact, "[t]he widespread practice of joint representation may reflect the reality of many clients and lawyers' concluding that the accumulation and passage of property are 'family' matters and thus better served by joint representation."[139] There is a presumption in society, which is reflected in the law, that the interests of a traditional couple are sufficiently similar for one attorney to provide adequate representation.[140]

1. Standard for Joint Representation

Model Rule 1.7 establishes the standard for determining whether joint representation is possible:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.
>
> A concurrent conflict of interest exists if:

---

138. *Id.* at 135 (footnotes omitted).

139. *Id.* at 140. Furthermore:

> Separate representation by separate counsel may reflect a contrary conclusion,that wealth is accumulated individually, and should be controlled individually. Under the separate representation model, the continuation of the decedent's lifework through the passage of property is best promoted by solitary reflection by the client and separate representation by the lawyer. Under the joint representation model, the continuation of the decedent's lifework is seen as merely a continuation of the relationships of the client through the passage of property.

Id.

140. Dubois, *supra* note 21, at 282. Furthermore:

> Unless a specific conflict is present, and as long as the two individual members of the married couple consent to the joint representation, the attorney can assume their interests are one and the same. . . . This demonstrates one important purpose of marriage; social confirmation of the relationship such that it carries an independent legal status and that the interests of the component individuals are treated as the same.

Id.

> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.[141]

This rule requires the attorney to assess whether she may adequately represent the interests of all of the parties. The attorney must reasonably believe that the potentially conflicting interests of the individuals are subordinate to their common objectives. In addition, the potential clients must provide informed consent, after they are each advised of the possible advantages and disadvantages of joint representation.[142] The more significant advantages of joint representation include better representation (including coordination of estate, tax and asset planning) because of greater access to information and reduced transactions costs because only one attorney is retained.[143]

---

141. MODEL RULES, *supra* note 120 R. 1.7.

142. The attorney may choose to transition between joint representation and intermediary representation as she helps clients harmonize their individual positions as it relates to their common goals. *See* Collett, *supra* note 121, at 1481; *See also infra* pp.26-30 § IV.C (discussing intermediary representation).

143. Collett, *supra* note 121, at 1478. Other advantages of joint representation include: a presumption of harmonious objectives upon determination that common objective predominates; pooling of information and resources; coordination of legal positions; reduced legal fees; and limited right to continued representation in the event one member of the group terminates representation. *Id.* Possible disadvantages of joint representation include: release of duty of confidentiality and waiver of evidentiary privilege between clients; information withheld if adverse to common objective and disclosed by one of the clients; failure to consider options other

2. Confidential Information

One of the trickiest issues surrounding joint representation is attorney-client privilege. There is potential conflict between an attorney's duty to share relevant information to joint clients[144] and an attorney's duty to preserve client confidences.[145] The limited case law on this issue suggests a trend towards finding implied consent to the disclosure of information by virtue of the initial agreement for joint representation.[146] However, the Restatement (Third) of the Law Governing Lawyers suggests that the client's confidentiality rights are superior to the duty to disclose when the information involved is "clearly antagonistic to the interests of another co-client" or when the attorney has been specifically directed to maintain the confidences.[147] The Restatement reflects a minority view on the issue.[148] Thus, the nature of the privilege enjoyed by jointly represented clients is ambiguous. At the very least, potential joint clients should be informed of these potentially conflicting duties of their attorney.

In addition, in the event one spouse has a secret that is relevant to the couple's estate planning, it is not certain that other forms of representation would generate a better result for the clients. However, another form of representation may generate a better result for the attorney. Consider the following examples:

Scenario One: A and B are married. A has a child (C) of whom B is not aware. A and B seek estate planning services from one attorney and the terms of the engagement letter state that the attorney will represent them jointly. A does not inform the attorney of the existence of C (therein lies Professor Pennell's concern). The attorney prepares mirror wills for A and B which leave everything to each other and upon the death of the survivor everything to their children. From an estate planning perspective, the risk of A's secret is that C may bring a will contest or construction action upon A's death, seeking to inherit. However, from an ethics perspective, the attorney has behaved appropriately insofar as the attorney acted upon the information provided by A and B and had no knowledge of C.

---

than the common objective; and, lessening of attorney's independent judgment because of fear of creating disharmony prejudicing one family member. *Id.* at 1479.

144. MODEL RULES, *supra* note 120 R. 1.4, R. 2.1.

145. *Id.* R. 1.6.

146. Collett, *supra* note 121, at 1480.

147. *Id.* (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. l (2000)).

148. *Id.* at 1480.

Scenario Two: Consider the same facts as Scenario One above, except that A informs the attorney of C, with the direction not to tell B. This information is clearly relevant to B's interests as a beneficiary of A's estate because of the potential will contest. This information is clearly relevant to B's estate planning because with this information B may be less likely to direct that assets be left to A outright (because some of these assets may ultimately wind up with C, as opposed to B's children). If the attorney keeps the secret and drafts mirror wills, the risks for the clients are the same as Scenario One. However, the attorney has breached her duty of loyalty to B in violation of Model Rule 1.7. If the attorney informs B of C, the attorney has breached her duty of confidentiality in violation of Model Rule 1.6.

Scenario Three: A and B are married. A has a child (C) of whom B is unaware. A and B seek estate planning services from separate attorneys. A does not inform A's attorney of C. A's attorney prepares a will leaving everything to B, if living, and if not to their children. B's attorney prepares a similar will for B, which B executes. Upon A's death, the risk remains that C may bring a will contest or construction action. A's attorney has not made any ethical violations because A's attorney does not represent B.

Scenario Four: Consider the same facts as Scenario Three above, except A informs A's attorney of the existence of C. A does not want this information revealed to B. A's attorney prepares the same will and clearly explains the possibility of a will contest and the associated risks. A executes the will as drafted. The estate planning risks remain; however, A's attorney has not breached her ethical responsibilities to her client or to B.

Under all of the above scenarios, the estate planning results for B are bad: (1) if B survives A, B may have to suffer through a will contest or construction proceeding; (2) if A survives B, upon A's death, in the event of a successful will contest or construction action by C, a portion of B's assets (which had passed to A upon B's death) will be distributed to C. Thus, none of these scenarios protect B's interests.

However, separate representation clearly protects the attorney's interests. Under separate representation, the attorney does not breach her ethical duties, whether or not she knows about C. Furthermore, the spouse who has a "relevant secret" who is determined to keep such secret from his/her spouse actually appears to receive adequate legal

representation under all of the above scenarios. The attorney, however, should clearly prefer separate representation. The other spouse faces the greatest risks, unless the attorney subscribes to the belief that her duty of loyalty supersedes her duty of confidentiality and informs the spouse of the relevant information she has learned from the other spouse.

Joint representation of spouses is only successful to the extent that each spouse is willing to be candid about their testamentary desires. Sometimes, a client is less candid in the presence of her or his spouse.[149] As a result, the criticism goes, "this approach discourages each spouse from approaching the attorney with secrets that might be relevant to the couple's planning, which means that the attorney will do a less than complete job of best representing a spouse who has a relevant secret."[150] However, joint representation demands that the attorney keep both clients informed and allows the attorney to deliver candid advice as required by Model Rule 2.1, and allows clients to consider such advice with full knowledge of pertinent facts.[151]

3. Termination Rules

Model Rule 1.9 provides fairly liberal termination provisions under joint representation. According to the Rule, when one joint client terminates an attorney's representation of him or her, an attorney may not continue representation of the remaining joint clients "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."[152] An attorney may continue representation of remaining clients because the objective of the representation is not adverse to the interests of the client terminating representation, or because such terminating client consents to the attorney's continued representation of the remaining clients.[153]

C. Intermediary Representation

In the event that clients have actual or potentially conflicting interests, yet also have overriding common goals, it may be appropriate for them to engage an attorney to represent them as an

149. Collett, *supra* note 116, at 104.

150. *Id.* at 138 (internal quotes omitted) (citing Jeffery Pennell, *Professional Responsibility: Reforms Are Needed to Accommodate Estate Planning and Family Counselling*, 1991 MIAMI INST. EST. PLAN. 18-3, 18–29).

151. Collett, *supra* note 116, at 140–41.

152. MODEL RULES, *supra* note 120 R. 1.9(b).

153. Collett, *supra* note 121, at 1478.

intermediary, as opposed to joint representation.[154] For example, intermediary representation may be appropriate in the context of business succession planning or trust administration.[155]

The former Model Rule 2.2. provided the standard for intermediary representation adopted by most states. According to the former Rule 2.2:

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

---

154. *See* John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741 (1992). Professor Dzienkowski provides an excellent review of the historical basis for the lawyer as intermediary. The following is a portion of the history:

> The nomination of Louis Dembitz Brandeis to the U.S. Supreme Court in 1916 created an outcry of opposition from the legal profession. The opponents, including the current president and seven former presidents of the American Bar Association, argued that during his law practice Brandeis had violated several norms of ethical behavior. In one of the first public examinations of the legal career of a prominent individual, the Senate and its committee on nominations carefully considered twelve charges of unethical behavior. Although a majority of the senators eventually rejected these charges, one aspect of the allegations highlights a role of the lawyer that is fraught with ethical problems.
>
> In several of the charges, Brandeis was accused of representing multiple clients with opposing interests. In one of these representations, he represented one client against former clients in an attempt to resolve a matter in which he formerly represented all of the clients. In response to the charge that he represented clients with conflicting interests, Brandeis was quoted as claiming that he acted as 'counsel for the situation,' mediating among the various conflicting interests. In other words, he represented no individual client, just the transaction or situation in which the parties were involved; thus, he could subsequently represent any one of the clients whose interests corresponded with the intent of the original situation or transaction.

Id. at 742-43 (footnotes omitted).

155. ACTEC, *supra* note 128, at 143 R. 2.2. An attorney representing her clients as an intermediary is not performing the same function as an attorney who represents her clients as a mediator. The difference has been adeptly described as follows.

> Mediation is a process by which a third party intervenes in a dispute in order to facilitate an agreement. In the last two decades, alternative dispute resolution scholars have debated the role of lawyers in mediation. Central to this debate is the issue of whether a lawyer-mediator should represent the parties. Initially, lawyers were viewed as representing all of the parties to the mediation, and the debate involved the framing of the proper safeguards to allow such representations. Several ethics opinions, however, endorsed the view that lawyers should not represent any of the parties in the mediation because of the problems that such representations engender. Depending upon the role adopted by the lawyer in a mediation, the lawyer may or may not be acting as an intermediary. If a lawyer does not represent the interests of any of the parties and makes this role clear to all of the individuals in a mediation, the lawyer is not acting as an intermediary. If, however, the lawyer purports to represent the interests of the parties in a mediation, the lawyer is acting as an intermediary and must satisfy the requirements of Model Rule 2.2 as well as the other requirements that may apply to mediation.

Dzienkowski, *supra* note 154, at 775–77 (footnotes omitted).

> (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 interest, 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.[156]

The most recent version of the Model Rules, adopted in February 2002, deleted Rule 2.2 altogether and incorporated the intermediation concept into the Rule 1.7 Comment. The Ethics 2002 Commission, which was charged with reviewing the Model Rules and recommending changes, cited the harsh termination rules as a reason for this change. The Commission stated:

> The Commission is convinced that neither the concept of "intermediation" (as distinct from either "representation" or "mediation") nor the relationship between Rules 2.2 and 1.7 has been well understood. Prior to the adoption of the Model Rules, there was more resistance to the idea of lawyers helping multiple clients to resolve their difference through common representation; thus, the original idea behind Rule 2.2 was to permit common representation when the circumstances were such that the potential benefits for the clients outweighed the

156. MODEL RULES OF PROF'L CONDUCT R. 2.2 (1999) (amended 2002, deleting rule).

> potential risks. Rule 2.2., however, contains some limitations not present in Rule 1.7; for example, a flat prohibition on a lawyer continuing to represent one client and not the other if intermediation fails, even if neither client objects. As a result, lawyers not wishing to be bound by such limitations may choose to consider the representation as falling under Rule 1.7 rather than Rule 2.2, and there is nothing in the Rules themselves that clearly dictates a contrary result.
>
> Rather than amending Rule 2.2, the Commission believes that the ideas expressed therein are better dealt with in the Comment to Rule 1.7. There is much in Rule 2.2 and its Comment that applies to all examples of common representation and ought to appear in Rule 1.7. Moreover, there is less resistance to common representation today than there was in 1983; thus, there is no longer any particular need to establish the propriety of common representation through a separate Rule.[157]

Although it is premature to speculate to what extent individual states may embrace these revisions to the Model Rules, the former Rule 2.2 (or a modified version of the former Rule 2.2) remains the law in 38 states.[158] As a result, intermediary representation is alive and well in a vast majority of the states.

Before an attorney may be engaged as an intermediary, the attorney must discuss with the clients the implications of intermediary representation and obtain the clients' consent to the terms of the representation.[159] Intermediary representation recognizes the differences between the interests of each client at the beginning of the representation and requires the assessment, by both the clients and the lawyer, of whether there is a realistic prospect of the differences being reconciled.[160] Such representation may be hindered in the event that the attorney has a history of representing one of the clients, but not the

---

157. Model Rule 2.2, Reporter's Explanation of Changes, *available at* http://www.abanet.org/cpr/e2k-rule22rem.html (last visited July 25, 2003.).

158. *See e.g,*. Rule 2.2, Intermediary, Official 2003 Connecticut Practice Book; Rule 2.2., Intermediary, Appendix A. Rules of Professional Conduct, Rules Governing the District of Columbia Bar; Rule 2.2, Intermediary, Michigan Rules of Professional Conduct; Rule 2.2., Intermediary, Indiana Rules of Professional Conduct; Rule 2.2, Intermediary, Washington Rules of Professional Conduct. *C.f.*, Rule 2.2 Lawyer Serving as an Intermediary Between Clients, Ch. 2 The Lawyer as Counselor, Intermediary, and Dispute Resolution Neutral, Rule 8. Rules of Professional Conduct, Rules of the Tennessee Supreme Court; Rule 1.07 Conflict of Interest: Intermediary, Part I Client-Lawyer Relationship, Section 9. Texas Disciplinary Rules of Professional Conduct, Article X. Discipline and Suspension of Members, State Bar Rules; Rule 2.2, Intermediary, Ch. 13 Rules of Professional Conduct, Part 1 Judicial Council Rules of Judicial Administration, Utah Code of Judicial Administration.

159. ACTEC, *supra* note 128, at 144 R. 2.2.

160. Collett, *supra* note 121, at 1474.

other.[161] However, so long as the attorney reasonably believes that the matter may be resolved to the benefit of both clients and in the event that the intermediation fails, neither client will be materially prejudiced; the attorney may represent both clients, regardless of the prior representation of the one of such clients.[162]

The benefits of intermediary representation include better representation because of greater access to information and reduced transactions costs because only one attorney is retained.[163] These benefits are similar to the benefits of joint representation. In addition, similar to joint representation, the attorney is better able to coordinate her clients' estate plans and to fully maximize tax benefits.

A major drawback of intermediary representation is the harsh termination rules. Intermediary representation must terminate in the event either client withdraws from the representation, or if the attorney determines that any of the preconditions discussed above are no longer met.[164] Representation must be terminated as to both clients, regardless of whether the client terminating the representation consents to the continued representation of the remaining client.[165] By contrast, joint representation does not involve such strict termination rules.[166]

Another disadvantage of intermediation is the lack of any check upon the fairness of the result and the possibility that individual interests are compromised in a way that would not have occurred if each client had retained separate counsel.[167] In addition, confidentiality rights and attorney-client privilege must be waived

---

161. ACTEC, *supra* note 128, at 144–45 R. 2.2.

162. *Id.* at 145 R. 2.2.

163. Collett, *supra* note 121, at 1474.

164. *Id.*; *See also* ACTEC, *supra* note 128, at 145 R. 2.2.

165. Collett, *supra* note 121, at 1475. However, an attorney may continue to represent one of the clients in an unrelated matter. ACTEC, *supra* note 128, at 145 R. 2.2. The following example provided by the ACTEC Commentaries illustrates this point:

> Example 2.2-1. Lawyer (L), who had previously represented A in connection with her retail business, properly undertook to act as an intermediary for clients A and B, informally arbitrating their interests in the estate of a deceased relative. Before the arbitration was completed, B became dissatisfied with L's representation and asked L to withdraw. Under MRPC 2.2(c) L is required to withdraw from the intermediation at B's request but may continue to represent A with respect to her retail business or other of her legal affairs. L could have withdrawn as intermediary at any time that L believed the intermediation could not be continued impartially or without improper effect on L's other responsibilities to A. If B requests that L withdraw from the joint representation regarding their interests in the estate, L may not continue to represent A with respect to her interest in the estate.

Id. at 145–46 R. 2.2.

166. *See supra* p. 26 § IV.B.3.

167. Collett, *supra* note 121, at 1475.

among clients involved in the intermediation.[168] These disadvantages often exist in the context of joint representation as well. Furthermore, in the event intermediation fails, each client must obtain new counsel, requiring additional resources and potentially disrupting long-standing attorney-client relationships.[169]

D. Family Representation

Attorneys have embraced Model Rule 1.13, which defines the ethical responsibilities of an attorney representing an organization, as justification for family representation.[170] Rule 1.13 states:

> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
>
> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a manner 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, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the persons involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:
>
> (1) asking for reconsideration of the matter;
>
> (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
>
> (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

168. *Id.*
169. *Id.* at 1475–76.
170. *Id.* at 1482.

> (c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.
>
> (d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interest are adverse to those of the constituents with whom the lawyer is dealing.
>
> (e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.[171]

Most frequently, the organization is a corporation; however, the Rule applies equally to unincorporated associations.[172] Thus, the application of Rule 1.13 to the family is not specifically precluded by its terms. Supporters of this approach assert that there are enough parallels between a family unit and a corporation to justify the application of Rule 1.13 to the representation of families.

First, communication is often an impediment to the representation of both corporations and families. A corporation is unable to communicate for itself. Instead, it must communicate through its duly authorized constituents. The Comment to Rule 1.13 explains that "[a]n organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client."[173] This "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."[174] A family is also unable to communicate for itself and must rely upon family members to communicate on its

171. MODEL RULES, *supra* note 120 R. 1.13.
172. *Id.* R. 1.13, cmt. 1.
173. *Id.*
174. Collett, *supra* note 121, at 1485 (footnote omitted).

behalf.[175] The Comment to Rule 1.13 defines "other constituents" in the context of non-corporation clients as "the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations."[176] Thus, in the family context, the individual family members constitute the duly authorized constituents of the family.

Second, a corporation is more than a group of shareholders, officers, directors, and employees. Corporations enjoy an existence distinct from these individuals. For example, a corporation does not cease to exist when a shareholder sells his or her shares of the corporation's stock to another individual. Similarly, a family is more than a collective of individual family members.[177] A family does not cease to exist when one of its members dies or when a new family member is born. According to Professor Schaffer:

> [T]he family is an "organic community" that exists before, during, and after the existence of the individual. It is the complex of relationships in which the client lives. This differs from the alternative contemporary conception of "family," which is a relationship that an individual is "in." By the characterization of the person being "in" a family, the person is seen as independent of and totally separable from the family.[178]

Supporters of family representation insist "attorneys should be allowed to represent families by seeking to realize the harmony rather than the discord within the family."[179] Since some families want this type of representation, client autonomy is enhanced if attorneys provide this form of representation.[180] And, in any event, some note that this type of representation is already being provided by some practitioners, with success, which suggests that family representation is both desirable and possible.[181] However, potential conflicts arise if one family member seeks a course of action contrary to the best interests of the family.[182] In the event an individual family member

---

175. *Id.* at 1483.

176. MODEL RULES, *supra* note 120 R. 1.13 cmt. 1.

177. *See* Collett, *supra* note 121, at 1483. Common law provides some support for the concept of the family as a unit distinct from its members. Collett, *supra* note 116, at 120. For example, the underlying justification for "tenancy in the entirety" is the unity of wife and husband. *Id.* (footnote omitted). Thus, at common law, any property held in tenancy in the entirety was property held by the couple, as a single entity. *Id.* at 120–21.

178. Collett, *supra* note 116, at 119-20 (footnotes omitted).

179. Collett, *supra* note 121, at 1483 (footnote omitted).

180. *Id.*

181. *Id.* at 1483–84.

182. *See id.* at 1479, 1482.

directs action that feeds discord within the family, the attorney should proceed in a manner that is in the best interests of the family.[183]

V. APPLICATION OF ETHICAL RULES TO THE REPRESENTATION OF NON-TRADITIONAL COUPLES

Estate planning attorneys face unique ethical challenges when representing non-traditional couples. Individual representation, joint representation, intermediary representation and family representation all provide workable standards of ethical behavior for an attorney to utilize in her representation of non-traditional couples. However, non-traditional couples do not enjoy the same privileges under the law because they are not (or cannot be) married. Because of this reality, a modified version of family representation provides estate planning attorneys and their non-traditional clients with the best standard for ethical representation.

A. Individual Representation

The application of the principals of individual representation to the representation of non-traditional couples is relatively straightforward. As discussed earlier, there are two forms of individual representation: (1) individual representation by separate attorneys; and (2) separate simultaneous representation by one attorney. Each is explored in turn below.

1. Individual Representation by Separate Attorneys

If an attorney is engaged by only one member of a non-traditional couple, the analysis of the attorney's ethical responsibilities is fairly routine.

Individual representation in connection with estate planning by separate attorneys essentially ensures that a conflict of interest, as defined by Model Rule 1.7, will not occur. Model Rule 1.7 states "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client . . . ." Under this scenario, the threshold requirement for a Rule 1.7 violation is not met because the attorney does not represent the other member of the non-traditional couple.

Model Rule 1.7 also states that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by

183. *Id.* at 1482–83. "The goal of a lawyer engaged in estate planning for the family should be to render a truthful description of the family and their property through the language of the law." Collett, *supra* note 116, at 122 (footnote omitted).

the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest . . . ." Therefore, a conflict of interest may occur if the attorney has some responsibility towards the other member of the relationship as a "third party." If such a relationship exists, then the attorney would have to meet all of the requirements of Model Rule 1.7 in order to avoid an unethical conflict of interest. Whether a lawyer's own interests may conflict with her client's is an analysis which has no special bearing on the representation of non-traditional couples. However, if such a situation exists, the attorney would again have to meet all of the requirements of Model Rule 1.7 in order to be engaged by her client.

The conflict of interest analysis under Model Rule 1.7 should generate a clear result as to whether a potential or actual conflict of interest exists. The types of conflicts of interests which may occur (i.e., the attorney has a responsibility to the other member of the relationship) are easily identifiable. Therefore, if the attorney determines that a potential or actual conflict of interest is not involved, the attorney should be comforted that she can be engaged in the representation with little risk of this type of ethical violation.

Similarly, the risk of violating her duty of confidentiality to her client is greatly limited through individual representation by separate attorneys. According to Model Rule 1.6, "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ."[184] An attorney has very little chance of improperly revealing information to the non-client partner in violation of her ethical duties and Model Rule 1.6 in an individual separate representation situation. For example, the non-client partner would most likely not participate in meetings with the client, thereby greatly limiting the potential for breaches of confidentiality. As a result, individual representation by separate attorneys provides the estate planning attorney with significant protection against breaching her duty of confidentiality.

In the event the other member of the non-traditional couple does not seek representation of his or her own, there is a risk that he or she may be confused and believe that the lawyer represents his or her interests as well, or at least may hold "an unexpressed belief that neither the client nor the lawyer may intend to harm [his or her] interests or expectations."[185] Although the likelihood for this type of misunderstanding may be the same for both traditional and non-traditional couples, the analysis of the attorney's ethical

184. MODEL RULES, *supra* note 120 R. 1.6.

185. Collett, *supra* note 121, at 1471.

responsibilities is slightly different. In either case, an attorney must be very clear that she does not represent these other family members or risk running afoul of Model Rule 4.3. That Model Rule states:

> 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 the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.[186]

In the case of a non-traditional couple, the potential results are much harsher. If a spouse mistakenly believes that an attorney is representing her as well as her husband, the law provides certain protections for her if she never obtains her own counsel. For example, upon her husband's death, she may be able to take advantage of elective share statutes if she is not provided for by her husband's estate planning.[187] Also, if she has not engaged her own counsel because she mistakenly believed that her husband's attorney has "taken care of" her assets as well, upon her death, intestacy statutes will provide for her spouse and children, without the need for a will. By contrast, non-traditional couples do not enjoy any of these protections. In the first example, if the surviving partner is not provided for, there are no elective share statutes to turn to. Similarly, if one partner does not execute a will, the surviving partner will not take under the laws of intestacy.[188]

Thus, the risks for non-traditional couples are much greater in connection with this type of misunderstanding. The risks for the estate planning attorney are also greater. There are two ways to consider the risk. First, it is reasonable to argue that since the risks are much greater for non-traditional couples, the attorney has a greater duty to ensure that the non-represented member of the couple understands that she or he is not represented by the attorney. However, Model Rule 4.3 does not increase the attorney's responsibilities in proportion to the potential risks faced by the non-represented person.

Theoretically, the analysis of an estate planning attorney's ethical responsibilities would appear to be the same for traditional and non-

186. MODEL RULES, *supra* note 120 R. 4.3.

187. Elective share statutes allow a surviving spouse to "elect against the will" of the decedent's estate. Therefore, a surviving spouse cannot be "cut out" of his or her share of the decedent's probate assets.

188. If the surviving partner has a child (biological or adoptive) which the deceased partner considered his or her own, but never formally adopted, in the absence of adequate estate planning, this child would similarly be left with no recourse. *See supra* p. 16.

traditional couples. However, the alternate way to analyze the attorney's ethical responsibilities focuses on the "real-world" implications of this increased risk for non-traditional couples. Namely, this potentially harsher result for the non-represented member of a non-traditional couple possibly translates into a greater risk of lawsuit against the attorney. Therefore, as a practical matter, the estate planning attorney would be well advised to be especially clear in the context of representing one member of a non-traditional couple that she does not represent the other member of the couple.[189]

An estate planning attorney must provide competent legal representation to her client. Model Rule 1.1 states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." It is unclear whether an attorney provides competent estate- and tax planning advice (within the meaning of Rule 1.1) if she has incomplete knowledge of the other partner's assets and estate plan. It may be sufficient to clearly communicate these uncertainties to the client, and then provide tax planning advice. It may be that these concerns are not as relevant for non-traditional couples. Tax planning for traditional couples often focuses upon the coordination of their estate plans in order to fully utilize the marital deduction and the unified credit amounts. The marital deduction is not available to non-traditional couples. Thus, that entire aspect of tax planning is not relevant. Furthermore, under EGTRRA, the estate tax will ultimately be repealed.[190] If this occurs, the advantage of the unlimited marital deduction is removed. There will be no estate tax. Whether or not a person is married will no longer be relevant to this aspect of tax planning.

Asset allocation between spouses is also an important aspect of estate planning. Asset allocation is much more problematic for non-traditional couples because lifetime transfers between unmarried couples are subject to gift tax. By contrast, a married couple has an ability to freely transfer assets to one another without gift tax consequences. Under EGTRRA, the gift tax is not repealed and the gift tax will still be an issue for non-traditional couples. Tax planning for non-traditional couples often focuses upon issues of gifting, rather

189. Practical techniques the estate planning attorney could utilize include: (1) clarity in the engagement letter that only the one partner is being represented and not the other partner; (2) affirmatively stating that the client may not include his or her partner in meetings with the attorney; and (3) including additional references that the other partner is not represented by the attorney in correspondence enclosing drafts or final versions of estate planning documents.

190. *See supra* note 110 (providing a brief explanation of EGTRRA estate tax schedule).

than taking advantage of the marital deduction (obviously). Techniques such as the use of qualified personal residence trusts to transfer real property to the other partner at a discounted value can be used to leverage unified credit amounts and decrease estate tax exposure. If the estate tax is repealed, the tax advantage of this type of technique will obviously disappear.

Since tax planning for non-traditional couples involves less coordination between estate plans as does current tax planning for traditional couples, the limited knowledge an attorney may have of the non-client partner's assets has less impact than in the context of the representation of traditional couples. Therefore, under some circumstances, the estate planning attorney may be able to provide competent tax planning services to her client in satisfaction of Model Rule 1.1.

2. Separate Simultaneous Representation by the Same Attorney

If an estate planning attorney engages in separate simultaneous representation of a non-traditional couple, she represents each client individually. The estate planning attorney must be extremely careful to satisfy the conflict of interest requirements. The Model Rules do not preclude separate simultaneous representation by the same attorney, so long as the requirements of Model Rule 1.7 are met. According to Model Rule 1.7, an attorney may not represent a client if such representation will be directly adverse to the representation of 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."[191] After discussions with each member of a non-traditional couple, an attorney can most likely be reasonably assured whether the representation of one partner would adversely affect the relationship with the other partner. The consultation and consent requirements are more problematic. In order to provide the level of disclosure to each client sufficient to generate informed consent, the attorney may breach her duty of confidentiality. Therefore, the attorney should be very clear that in order to establish separate simultaneous representation, disclosure will be required.

In the event that the standards of Model Rule 1.7 are met and the attorney is engaged to separately represent each member of a non-traditional couple, additional care must be taken by the estate planning attorney to avoid potential ethical violations. The biggest

191. MODEL RULES, *supra* note 120 R. 1.7.

risks involve possible breaches of the attorney's duty of confidentiality. According to Model Rule 1.6:

> A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . . [192]

There are several different contexts within which breaches may occur in the duty of confidentiality. First, there will be numerous opportunities for inadvertent disclosure by the attorney of confidential or privileged information because of frequent contact with each partner. A second potential confidentiality pitfall is overlapped with issues of competent service. As discussed earlier, Model Rule 1.1 requires that an attorney provide her client competent legal service. It has been claimed by some that separate simultaneous representation allows the attorney to provide better legal service because she has access to more complete information. However, consider the following:

> (1) If the attorney learns information from one partner that is beneficial to the other partner the attorney may not use this information without breaching her duty of confidentiality (unless the first partner consents). If the first partner does not consent, there may be a conflict of interest which requires the attorney to withdraw from representation of both clients.
>
> (2) If the attorney learns information which is detrimental to the other partner, a conflict of interest requiring withdrawal may also be generated.

It does not appear that an attorney's ability to provide competent service is enhanced by this form of representation. Rather, the attorney's ability to provide competent service within the meaning of Model Rule 1.1 is actually hindered by the possible conflicts of interest and violations of confidentiality which are fostered by this form of representation. This result is somewhat mitigated if the clients consent to full disclosure. However, if the clients consent to full disclosure, query why they would engage in separate simultaneous representation. Under this circumstance, the attorney most likely should have encouraged joint representation.

In addition, the tax planning analysis in the preceding section dealing with individual representation by separate attorneys applies

192. *Id.* R. 1.6.

equally well to the context of separate simultaneous representation by the same attorney.

Thus, the analysis of separate simultaneous representation by the same attorney in the context of non-traditional couples is essentially the same as that for traditional couples. Given the risks and possibility for ethical violations, this is an unattractive option for non-traditional couples and their attorney.

B. Joint Representation

It is standard practice for an attorney to represent a husband and wife jointly in connection with estate planning matters. Rule 1.7 requires the attorney to assess whether she may adequately represent the interests of all of the parties. The attorney must reasonably believe that the potentially conflicting interests of the individuals are subordinate to their common objectives. In addition, the potential clients must provide informed consent, after they are each advised of the possible advantages and disadvantages of joint representation.[193]

The law and society presumes a sufficiently similar set of interests for a traditional couple such that they meet Rule 1.7 criteria. However, so long as they satisfy Rule 1.7, an estate planning attorney may also jointly represent a non-traditional couple. A non-traditional couple may evidence their common interests by means such as contractual arrangements (i.e., domestic partnerships or express pooling agreements) or by their common adoption of a child, for example.

As earlier explained, there is potential conflict between an attorney's duty to give relevant information to joint clients[194] and her duty to preserve client confidences.[195] The trend in the law is to favor exposing relevant information to a joint client over keeping secrets from a joint client.[196] While the true extent of the confidentiality privilege enjoyed by joint clients is ambiguous, potential joint clients

193. Possible advantages include: a presumption of harmonious objectives upon determination that common objective predominates; pooling of information and resources; coordination of legal positions; reduced legal fees; and limited right to continued representation in the event one member of the group terminates representation. Collett, *supra* note 121, at 1478 (footnotes omitted). Possible disadvantages include: release of duty of confidentiality and waiver of evidentiary privilege between clients; information withheld if adverse to common objective and disclosed by one of the clients; failure to consider options other than the common objective; and, lessening of attorney's independent judgment because of fear of creating disharmony and prejudicing one family member. *Id.* at 1479.

194. MODEL RULES, *supra* note 120 R. 1.4, R. 2.1.

195. *Id.* R. 1.6.

196. Collett, *supra* note 121, at 1480.

should at least be informed of the potential conflict in their attorney's ethical responsibilities.

According to Rule 1.9, when one joint client terminates an attorney's representation, the attorney may not continue to represent the remaining joint clients "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."[197] An attorney may continue representation of remaining clients if the objective of the representation is not adverse to the interests of the client terminating representation, or if the terminating client consents to the attorney's continued representation of the remaining clients.[198]

Joint representation provides significant benefits for both an estate planning attorney and non-traditional couples. As mentioned earlier, an important estate planning goal for non-traditional couples is establishing legal recognition for their relationship. Therefore, this form of representation is beneficial in that it clearly represents their intention to validate their relationship. This is a tremendous psychological benefit to non-traditional clients and, therefore, an important service that an attorney provides for her clients. In other words, the mere fact that the clients and their attorney agree to joint representation serves as additional validation of the clients' relationship.

Further, with a common understanding and consent to the free flow of information among the attorney and her clients, the attorney's risk of violating her duty of confidentiality is greatly limited. According to Rule 1.6, "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ."[199] An attorney has no chance of improperly revealing information to either client in violation of Rule 1.6. Therefore, joint representation provides the estate planning attorney with significant protection against breaching her duty of confidentiality.

Similarly, there is no risk of the attorney running afoul of Model Rule 4.3 with respect to either member of the non-traditional couple. The Rule requires:

> 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 the lawyer knows or reasonably

197. MODEL RULES, *supra* note 120 R. 1.9.
198. *Id.*; Collett, *supra* note 121, at 1478.
199. MODEL RULES, *supra* note 120 R. 1.6.

> should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.[200]

There is no risk because the attorney represents both clients jointly.

Joint representation also promotes competent representation of clients, a basic requirement of the Model Rules. Rule 1.1 requires that a lawyer "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[201] Since the attorney represents both clients jointly, she will have access to the necessary information to provide appropriate estate and tax planning advice. She will also be able to provide corresponding asset allocation recommendations.

Joint representation is superior to both forms of individual representation. Joint representation is clearly superior to separate simultaneous representation by one attorney. Both forms of representation require the attorney to satisfy a Rule 1.7 analysis prior to accepting the non-traditional couple as clients. However, under separate simultaneous representation, there is not a free flow of information among the parties. There is tremendous risk that the attorney will violate her duty of confidentiality under Rule 1.6 as well as violate her duty under Rule 1.1 to provide competent legal services, because she is not able to utilize information received from one client to benefit the other. By contrast, joint representation provides the attorney with a similar amount of information, which can then be used for the benefit of both clients and without a risk of violating Rules 1.7 and 1.1. Finally, separate simultaneous representation does not provide the clients with any additional validation of their relationship. As a result, the clients are better served and the attorney is well protected from ethical violations through joint representation.

Joint representation is often superior to individual representation by separate attorneys as well. First, unlike individual representation, joint representation provides the attorney with access to all the information necessary to coordinate her clients' estate and tax planning for their mutual benefit, in full compliance with Rule 1.1. The cost of these legal services will likely be decreased because only one attorney is retained. Second, although individual representation lowers the risk of violating Rule 1.6's confidentiality requirement as compared to separate simultaneous representation, the risk of

200. *Id.* R. 4.3.
201. *Id.* R. 1.1.

breaching Rule 1.6 is dramatically decreased in joint representation. As stated above, so long as there is a common understanding and consent to the free flow of information among the attorney and her clients, the attorney's risk of violating her duty of confidentiality is virtually nonexistent. Finally, similar to separate simultaneous representation, individual representation does not provide the clients with any additional validation of their relationship. For these reasons, joint representation is usually superior to individual representation for both estate planning attorneys and non-traditional couples.

C. Intermediary Representation

An attorney may wish to consider intermediary representation in her representation of non-traditional couples when her clients have actual or potential conflicting interests, yet also have overriding common goals. For example, intermediary representation may be appropriate if the clients have entered into a domestic partnership agreement or other contractual arrangement, or if they are considering an adult adoption. Under these circumstances, the clients have clear common goals and equally clear potentially conflicting interests (i.e., as parties to a contract with one another).

Before an attorney may be engaged as an intermediary, she must discuss with the clients the implications of intermediary representation and obtain the clients' consent.[202] Potential or actual differences between each client's interests must be identified at the start of the representation and both the clients and the lawyer must assess whether there is a realistic prospect of these actual and potential differences being reconciled.[203] If the attorney reasonably believes that the matter may be resolved to the benefit of both clients and in the event that the intermediation fails, neither client will be materially prejudiced, the attorney may represent both clients.[204]

For non-traditional couples, there are several benefits to intermediary representation. First, their attorney is provided all of the necessary information in order to offer the most effective estate and tax planning options. The attorney is better able to coordinate her clients' estate and tax planning. Further, so long as no conflict develops requiring the attorney to withdraw, the cost of the legal services will most likely be less than retaining two separate attorneys.[205]

---

202. *See supra* note 156; ACTEC, *supra* note 128, at 144–45 R. 2.2.
203. Collett, *supra* note 121, at 1474.
204. ACTEC, *supra* note 128, at 145 R. 2.2.
205. Collett, *supra* note 121, at 1474.

The benefits of intermediary representation are tempered by the harsh termination rules. An attorney must terminate her intermediary representation at the request of either client, or if the attorney determines that any of the preconditions of intermediary representation are no longer satisfied.[206] If a client makes such a request or if an attorney decides that termination is required, the attorney must terminate representation of all clients involved. The result is the same even if the client requesting termination consents to the attorney representing other clients.[207]

There is a significant psychological disadvantage to intermediary representation for non-traditional couples. As discussed earlier, because non-traditional couples are generally unable or unwilling to marry, they often utilize other legal tools to replicate a marriage relationship. Methods such as contractual arrangements and registration systems are used. While these options do not provide couples with the wide range of advantages that marriage offers, they are often the only means available for non-traditional couples to formalize and validate their relationship. Intermediary representation requires that the attorney and the potential clients characterize these relationships in terms of each client's individual interests. This is clearly opposed to the purpose of these contractual and other relationships. By focusing on the possible conflicts, intermediary representation focuses on the individual client's interests and then determines whether their other relationships fit into their individual interests. However, often a significant purpose for non-traditional couples' estate planning is the construction of a legally recognized relationship. Intermediary representation requires analysis which, from the start, undercuts and devalues the very relationship non-traditional couples are seeking to establish through their estate and tax planning.[208]

Despite these significant drawbacks, intermediary representation may offer non-traditional couples better service than independent representation. There is a psychological benefit to intermediary representation for non-traditional couples because, unlike independent

206. *Id. See also* ACTEC, *supra* note 128, at 145 R. 2.2.

207. Collett, *supra* note 121, at 1475; MODEL RULES, *supra* note 156.

208. In fact, traditional couples face even greater potential conflicting interests which are often ignored because of their marriage relationship. Since marriage is legally recognized, a dissolution of marriage (divorce) often has more severe consequences for the spouses because the termination of their relationship is supervised and enforced by the law. However, wrongly or not, these possible conflicts are not even addressed if the traditional couple presents itself to their attorney as "happily married." By contrast, a "happy" non-traditional couple seeking intermediary representation must submit themselves to a brutal analysis of their potential conflicts!

representation, it recognizes that such couples have common goals with respect to their lives together. Any benefit in recognizing these goals is often undercut by the additional analysis focusing on the clients' conflicting interests. Given the other benefits of cost savings and better coordination of estate and tax planning, intermediary representation is probably a moderately better alternative for non-traditional couples than individual representation.

Intermediary representation may be a better alternative than individual representation for estate planning attorneys as well. When an attorney does not have complete access to all of the relevant data there is an increased risk of injury to members of a non-traditional couple and a possible corresponding increased risk of lawsuit against such attorney. Intermediary representation provides an attorney with greater protection because the attorney has greater access to the relevant information.

The attorney's analysis with regard to the possible conflicting interests of the non-traditional couple in connection with intermediary representation is not necessary in the context of individual representation by two separate attorneys. Similar analysis is necessary in the context of separate simultaneous representation. An attorney must weigh these considerations together with the strict termination rules of intermediary representation against the benefit of greater protection from lawsuits and less of a chance of violating duties of confidentiality in determining which type of representation is more appropriate. The estate planning attorney may determine that intermediary representation is a moderately better approach than individual representation.

However, joint representation offers superior benefits to both individual representation and intermediary representation. First, unlike individual representation, joint representation offers the same benefits of intermediary representation: (1) greater access to necessary information; (2) coordination of estate and tax planning; (3) lower cost; (4) recognition of the non-traditional couple's relationship; and (5) lower chance of violating confidentiality requirements.

Joint representation also offers benefits to the non-traditional couple that intermediary representation does not. Intermediary representation is framed by the possible conflicts of interest of the clients; by contrast, joint representation starts from a place that validates the non-traditional couple's relationship. In addition, joint representation does not involve the strict termination rules of intermediary representation.[209] All of these factors are a benefit to

209. *See* MODEL RULES, *supra* note 120 R. 1.7 (joint representation termination rules).

both the estate planning attorney and her non-traditional clients. Therefore, while intermediary representation may be a better approach than individual representation, joint representation is clearly a more appropriate approach than intermediary representation.

D. Family Representation

With certain modifications, family representation offers the most appropriate standard of ethical behavior for estate planning attorneys representing non-traditional couples. Rule 1.13, which defines the ethical responsibilities of an attorney representing a corporation, provides the justification for family representation of estate planning clients. The most important section of this Rule for purposes of family representation states that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[210]

1. The Current Form of Family Representation

It has been previously demonstrated that joint representation generally provides a better alternative than independent representation and intermediary representation for an estate planning attorney representing a non-traditional couple. Family representation provides all of the same benefits of joint representation to both estate planning attorneys and their non-traditional clients, namely: (1) greater access to information; (2) coordinated estate and tax planning; (3) coordinated asset allocation strategies; (4) lower costs; (5) validation of the non-traditional couple's relationship; and (6) less risk of violating duties of confidentiality and adequate representation. Given the similarities to joint representation, the following question arises: is family representation superior?

A look back at traditional couples will start to provide the answer to this question. In a traditional relationship, it is common for one spouse to be dominant. Many times, one spouse has accumulated the wealth and dictates its disposition. The dominant spouse frequently wants to maintain "control" of these assets after death. As a result, estate plans for such clients who are represented jointly by their attorney often include trust arrangements which ensure that the non-dominant surviving spouse enjoys the benefit of the assets, but retains no control over these assets. Many times, similar restrictions are not

210. *Id.* R. 1.13. The balance of the sections of this rule outline the attorney's responsibilities when the constituents violate the law, circumstances under which the attorney may resign, conflicts of interest between the organization and its constituents as well as circumstances under which an attorney may represent both the organization and its constituents.

included in the non-dominant spouse's estate planning documents. If the non-dominant spouse dies first, his or her assets will be in the control of the surviving dominant spouse. The non-dominant spouse usually willingly "consents" to such an arrangement. In this context, joint representation supports one individual's control of the family's assets even though such actions are presumably in the best interest of both spouses.

The current form of family representation does not ameliorate this result. In the event an individual family member directs action that feeds discord within the family, family representation dictates that the attorney must proceed in a manner which is in the best interests of the family.[211] Who, however, determines what course of action is in the best interest of the family? A family is unable to communicate for itself and at any time the interests of the family may diverge from those of any individual family member.[212] In traditional families, the dominant spouse identifies the "family's" goals and instructs the attorney accordingly. The result is the same as if the couple was represented jointly. Thus, family representation does not necessarily provide a better alternative to joint representation.

2. A Modified Form of Family Representation

The greatest drawback of the current model of family representation for non-traditional couples is that it is based upon traditional notions of what constitutes "a family." Therefore, the definition of "a family" must be modified in order for family representation to provide the best standard for the representation of non-traditional couples.

Family representation harkens back to the time when the family was viewed as the fundamental building block of society. Family representation "requires recognition that marriage and family relationships are grounded in covenant and status, rather than consent and contract."[213] Current law, however, views marriage as a consensual contractual arrangement (i.e., no-fault divorce).[214] The concept of lawyer for the family is inconsistent with the notion that a family consists of two people who have entered into a contractual relationship.[215]

---

211. Collett, *supra* note 121, at 1483 (1994) (providing analogy to legal representation of a corporation).

212. *Id.*

213. Collett, *supra* note 116, at 123 (footnotes omitted).

214. *See Id.*

215. *Id.* at 124.

Yet, the idea that the family unit was ever the fundamental unit of society is a historical construct. In reality, an individual, usually the ranking male member of the family, was the unit of society, not the entire family. Therefore, the fact that marriage is currently viewed as a consensual contractual arrangement between equals has tremendous implications. If a marriage is a contract between equals, each party to the contract has the same importance in society and standing under the law. This characterization of individuals as equals can be applied to "the family." As a result, a new definition of the family is generated. The family is still greater than the sum of its parts, but its parts now consist of equal members. With this new concept of the family, non-traditional couples can maintain their status as functional and independent members of society, while at the same time embracing the full importance of their family unit.

With a different definition of a family, a modified concept of family representation develops, which generates a much different result. First, an attorney who embraces an egalitarian concept of families and their members would be cautious to take direction from only one member of a couple. Instead, the attorney would seek out the opinions of both members of the couple to determine the full range of issues to be dealt with. The attorney would then facilitate the couple's discovery of its common goal. The onus is on the couple to reach this discovery, not on the attorney. The resulting goals would more genuinely reflect those of the couple, not merely one of its members.

Modified family representation ensures that each member of a non-traditional couple is allowed equal standing as a participant in the estate planning process. By contrast, joint representation focuses upon balancing different aspects of an essentially adversarial relationship: (1) the individual interests of the clients; and (2) their common goals (which are merely the overlapping of individual interests). Often, the dominant member of the family wins this struggle. By contrast, family representation focuses on blending the individual interests with the family interests.

An example will help illustrate a tangible benefit of this form of representation for non-traditional couples. Modified family representation would provide greater protections in the event of a will contest based upon undue influence. A claim of undue influence depends upon finding that someone has dominated or controlled the testator. As a result, the testator executed a will that did not reflect the testator's true testamentary wishes. An example is easy to imagine:

Scenario: A and B have been in a committed, monogamous relationship for 25 years, although they were never married. Despite their happy life together, A's family never accepted the relationship. When A dies, A's will bequeaths all of A's assets to B. A's family challenges the admission of the will to probate claiming *inter alia* that B unduly influenced A in the execution of A's will. If A's family successfully challenges A's will, it will not be admitted to probate and A's family will inherit all of A's assets under the state's intestacy statutes.

If an estate planning attorney utilizes modified family representation in representing a non-traditional couple, the surviving client will have a greater chance of successfully defending a claim of undue influence. As part of the modified family representation process, the non-traditional couple determines their family interests and goals in an egalitarian fashion. This fact argues squarely against undue influence or the domination of one client over the other. The process will likely have been documented by correspondence, memoranda, as well as meetings and notes. These items provide evidence of the testator's true intentions and desire to provide for the other member of the non-traditional couple. Furthermore, the clients' decision to instruct their estate planning attorney to use modified family representation demonstrates the clients' endorsement of their family unit, and at the same time, supports the egalitarian nature of this relationship. These factors also argue strongly against undue influence. Thus, in the above example, modified family representation will have generated significant proof to assist B in fighting the undue influence challenge and allowing A's will to be admitted for probate.

As stated so frequently in this Article, a primary goal of most non-traditional couples in seeking estate planning assistance is the generation of legal recognition for their relationship. Joint representation, with its emphasis on the individuals, merely reinforces the separations between the couple's members. By contrast, with its emphasis on the generation of family goals by equal family members, modified family representation affirms the importance of each member of a non-traditional couple while also reinforcing the existence of the family unit. For non-traditional clients who have so little formal and legal recognition of their relationship, this is often the most significant and important benefit of the estate planning process.

VI. CONCLUSION

In the representation of a non-traditional couple, an estate planning attorney must be careful to abide by the same standards of ethical behavior as in the representation of a traditional couple. Attorneys would be well served to consider a modified form of family representation when undertaking the representation of non-traditional couples in connection with their estate planning matters. This modified ethical model treats the family as an egalitarian unit with interests separate from, yet supportive of, the individual family members. Non-traditional couples often desperately need estate planning services because of the lack of legal protections for their relationships. Often, their estate planning attorney is the one person able to construct a minimum of legal protection and validation of their relationship. Utilizing a modified version of family representation will allow the attorney to more accurately reflect the realities of a non-traditional family and thus greatly enhance the services the attorney is able to provide. The benefits to the attorney and her clients are overwhelming.