Dependency and Delegation: The Ethics of Marital Representation

*Naomi Cahn and Robert Tuttle**

I. INTRODUCTION

The two hypotheticals for this symposium concern a lawyer who is asked to represent a married couple in which one spouse would like to cede decision-making authority to the other. As we have examined the lawyer's ethical responsibilities, we have identified two distinct, but conceptually related, issues of legal ethics.[1] The first, a threshold question, deals with the nature of marital representation: May a lawyer simultaneously represent both husband and wife? And if so, how should the representation be structured? The second adds an additional layer of complexity: If a lawyer represents both husband and wife, may the lawyer accept one spouse's delegation of decision-

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* The authors are Associate Professors of Law at the George Washington University Law School. We would like to thank the participants at a GW Faculty Workshop and Teresa Collett, Peter Margulies, and Russell Pearce for their comments, as well as Aliza Milner for her research assistance.

1. In this Essay, we use the phrases "professional obligation" and "moral obligation" interchangeably. We focus here on the American Bar Association's Model Rules of Professional Conduct. While we do not claim that the rules of professional ethics exhaust a lawyer's moral duties in representing a client, the rules do provide useful guides for understanding the ethical implications of a particular problem. We also recognize that professional rules are designed as bases for disciplinary action by bar authorities, and we recognize that ethical dilemmas of the kind discussed in this paper will rarely reach the level or type of misconduct that leads to professional sanctions. However, despite their own protestations to the contrary (*see* MODEL RULES OF PROFESSIONAL CONDUCT, Scope (1983)), the professional standards serve as touchstones for determining other types of sanctions for attorney misconduct. *See* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 14.4 (4th ed. 1996). For misconduct in the type of cases discussed in this essay, professional malpractice liability is the most likely sanction. *See, e.g.*, Fickett v. Superior Ct., 558 P.2d 988 (Az. 1976) (attorney may be liable to a third party if attorney knows or should have known guardian acting adverse to ward's interests). *See generally* Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15 (1987); Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who Is the Client?*, 62 FORDHAM L. REV. 1319 (1994); Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889 (exploring closely analogous cases, discussing implications for professional liability).

making authority to the other within the representation? And if so, what are the parameters of the delegation?[2]

These questions are complicated because they ask us to deviate from the typical structure of legal representation in which a lawyer (or firm) represents one and only one person. In the "typical" representation, the lawyer zealously advances his client's interests, within the bounds of law, and treats all others as strangers—as those who are at least potential foes of the client. The lawyer sees only two kinds of people: clients, to whom the lawyer owes duties of professional care and loyalty; and nonclients, to whom the lawyer owes nothing more than any one random person owes to another.[3] These questions are complicated because they ask us to think about the similarities and differences between commercial and marital relationships to determine whether representation in both involves the same set of standards. We believe that any representation involving multiple parties causes problems for the typical account of representation and that marital representation brings its own peculiar difficulties because of the intimacy and dependency that characterize marriage.

Nonetheless, we believe that a lawyer may simultaneously represent both husband and wife[4] and that the lawyer can accept one spouse's delegation of authority to the other. In such a situation, however, we would require informed consent to the delegation at the outset, and we would propose that the lawyer be obligated to revisit the delegation in certain contexts. We would also establish four requirements that must define the context of delegation in marital representation where the same lawyer represents both spouses.

First, before a lawyer accepts such a delegation, she must ensure that both spouses understand the powers that will be delegated and the consequences of delegation. Second, the spouses must understand the lawyer's duties within the relationship, including the lawyer's

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2. The first hypothetical, involving Ruth and Bob, introduces a third element, religion, in addition to the issues of marital representation and delegated decision-making that we deal with in this paper. Though we understand that the reason for Ruth's delegation may be important to her, and that the lawyer should be sensitive to a client's faith-based decision-making, we fail to see how the religious nature of Ruth's judgment affects the lawyer's ultimate response. Spouses elect to delegate authority to their mates for a wide variety of reasons, nearly all of them worthy of the lawyer's respect.

3. *See* John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 CORNELL L. REV. 825, 825-30 (1992); *see also* Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992).

4. This Article focuses on married couples and, thus, generally refers to spouses as husbands and wives. Our analysis applies, however, regardless of the sex of the spouses. *See* WILLIAM N. ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE (1996).

obligation to consult with both spouses. Third, the spouses must understand that the consent to delegation may be withdrawn. Finally, the spouses must understand that the consent to delegation will be revisited when the delegated spouse takes an action that may "substantially harm" the delegating spouse.

In this Essay, we attempt to provide an explanation of why we believe that marital representation involves special requirements and a justification for the requirements that we have developed. In Section II, we begin by examining various problems presented by multiple representation. The third section briefly looks at the nature of delegation in commercial relationships. The fourth section turns to a discussion of the special character of the marital relationship; we try to understand the nature of delegated authority within that relationship. The last section uses a series of hypothetical questions to explore the implications of our account.

II. MULTIPLE REPRESENTATION

The law of lawyering tries to minimize any ethical problems that might arise when a lawyer represents more than one client by analogizing multiparty representations as closely as possible to the "unitary" model in two different settings. First, Model Rule 1.13, "Organization as Client," allows the lawyer to represent an organizational entity—a single, fictive person. Consequently, the lawyer is not required to negotiate between the diverse interested parties within organizations (shareholders, directors, management, and other employees).[5] Second, Model Rule 2.2, "Intermediary," allows the lawyer to represent diverse parties whose unity comes from a shared objective, such as the drafting of an agreement.[6] As with corporate entity representation, the lawyer represents the unity, not the individual parties.

The Model Rules permit representation of multiple clients, however, even when such representation fails to conform to the "one lawyer for one client" ideal. As long as there is no conflict—no

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5. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1983) [hereinafter MODEL RULES]. *See also* RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS § 155 (tentative draft Mar. 21, 1997). *See generally* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.13.102 (1998 Supplement).

6. MODEL RULES, *supra* note 5, Rule 2.2; RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS § 211 (proposed Final Draft No. 1 Mar. 29, 1996); John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741.

likelihood that the lawyer's representation of one party will materially limit her representation of the other—the lawyer may represent multiple parties simultaneously.[7] This is obviously true, since few lawyers would survive financially if they represented only one client at a time. The real issue, of course, is representing multiple parties in the same matter. If there is no conflict, and none is likely to occur, the lawyer may simply accept the multiple parties. Even if the parties have conflicting interests in this matter, the lawyer may still represent the parties if she assures herself that she can provide "independent representation" to each, fully informs the parties of the nature of the conflict, and gains their consent to continue the representation notwithstanding the conflict.[8] Under the Model Rules, few representations raise unwaivable conflicts; typically only those involving simultaneous representation of adverse parties in litigation are presumed unwaivable.[9]

The ethical analysis of multiple representation, then, usually turns on questions of informed consent. Did the clients receive sufficient information about the conflict? Was the clients' consent freely given? Has the lawyer continued to provide the clients with information relating to the conflict, especially where the information materially changes the extent or nature of the conflict?[10]

Marital representation tracks the general ethical analysis of multiparty representation. Courts and bar associations have been somewhat reluctant to permit joint representation of spouses in divorce,[11] though many jurisdictions do allow one lawyer to represent both spouses in an uncontested divorce (assuming, of course, fully informed consent).[12] In other contexts, such as a married couple's

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7. MODEL RULES, *supra* note 5, Rule 1.7. *See also* RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS §§ 201-202 (proposed Final Draft No. 1 March 29, 1996).

8. MODEL RULES, *supra* note 5, Rule 1.7(b).

9. HAZARD & HODES, *supra* note 5, §§ 1.7:206-207.

10. *See* RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS § 202 (proposed Final Draft No. 1 Mar. 29, 1996).

11. *See* Blum v. Blum, 477 A.2d 289 (Md. Ct. Spec. App. 1984); *In re* Breen, 552 A.2d 105 (NJ 1989). Oregon State Bar Ethics Op. 515 (Jan. 1988) (found in ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, ETHICS OPINIONS 1986-1990 901:7103) (regarding *per se* conflict of interest); Connecticut Bar Ass'n, Formal Op. 33 (1982) (found in ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, ETHICS OPINIONS 1980-1985 801:2001); New Hampshire Bar Ass'n Ethics Op. 1986-7/2 (1986) (found in ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT, ETHICS OPINIONS 1986-1990 901:5702) (noting the very limited possibility for joint representation in divorce).

12. *See* Klemm v. Super. Ct. of Fresno County, 142 Cal. Rptr. 509 (Cal. Ct. App. 1977); Perry v. Perry, 64 A.D.2d 625 (N.Y. App. Div. 1978). *See also* Colorado Bar Ass'n, Ethics Op. 68 (1985) (found in ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT, ETHICS OPINIONS 1980-1985 801:1905); District of Columbia Bar Legal Ethics Comm., Op. 143 (1984) (found in

purchase of a home, joint representation seems perfectly normal. Indeed, one would hardly think of suggesting a different form of representation where the spouses' interests are so closely aligned. Between these two polar contexts of complete dissolution or perfect harmony, a lawyer approached for representation by a married couple has four options: a separate lawyer for each spouse, the same lawyer representing each spouse individually, joint representation, and entity representation.[13]

One possibility, of course, is that the lawyer can refuse simultaneous representation of spouses and request that one spouse, or both, seek another lawyer. This possibility fits perfectly into the "one lawyer for each client" ideal and may be appropriate where the spouses' interests are in conflict (*e.g.*, the spouses have a serious disagreement about estate planning involving one spouse's children from a prior marriage, or a man and woman who intend to marry want to execute a prenuptial agreement).[14]

Apart from such conflicts, the "separate attorneys" model leaves much to be desired. Separate lawyers means additional expense for the clients even though the additional protection is often unnecessary.[15] In addition, separate representation may actually be counterproductive.

ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT, ETHICS OPINIONS 1980-1985 801:2312) (*but see* District of Columbia Bar Legal Ethics Comm., Op. 243 (1991)) (found in ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT, ETHICS OPINIONS 1991-1995 1001:2305).

13. 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, 119 (1993) [hereinafter *And the Two Shall Become as One*].

A fifth option would involve the lawyer representing one spouse, and the other spouse acting *pro se*. While this model may be economically efficient, it may result in a set of additional problems in which the unrepresented spouse does not understand the lawyer's role. *Cf.*, Alysa Christmas Rollock, *Professional Responsibility and Organization of the Family Business: The Lawyer as Intermediary*, 73 IND. L.J. 567, 584-86 (1998); Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 122-30 (1997).

14. Separate representation is not necessarily required for purposes of a prenuptial agreement. For example, the Minnesota Supreme Court held that "we have never held, nor are we prepared to do so now, that an attorney should never represent both parties seeking an antenuptial agreement." McKee-Johnson v. Johnson, 444 N.W.2d 259, 266 (Minn. 1989). The Uniform Premarital Agreement Act does not require separate representation. UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 371, 376 (1987).

15. Report of the Special Study Committee on Professional Responsibility, *Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife*, 28 REAL PROP., PROB. & TR. J. 765, 776-77 (1994) [hereinafter Special Study Committee].

Dueling lawyers may convert an otherwise harmonious process into an adversarial conflict.[16]

A second possibility is separate representation by the same lawyer such that the same lawyer establishes two attorney-client relationships—one with each spouse. The Special Study Committee of the American Bar Association's Real Property Section accepts this model as one alternative for marital representation, provided that the relationship is established by express agreement of both spouses.[17] In contrast to separate representation by separate lawyers, the Committee believes that separate representation by the same lawyer provides greater coordination of the spouses' mutual interests—especially important in estate planning—while still permitting each spouse the advantages of "independent" advice and confidentiality.[18] However, separate representation by the same lawyer presents serious conflicts of interest that informed consent often cannot reliably cure.[19] Since it would be extremely difficult even for the lawyer to describe the nature of possible conflicts that might arise between the spouses, the spouses will rarely be able to give sufficiently informed consent to this representation.

Third, the lawyer could represent the spouses as joint clients. Both the Special Study Committee and Professor Teresa Collett approve of this model, but they seem to have quite different understandings of what the choice entails. For Professor Collett, joint representation means that the clients share control of the representation, and the lawyer shares all confidences with both clients. Both of these features distinguish the joint clients approach from separate representation by the same lawyer. While separately represented clients interact with the lawyer in isolation from each other, jointly represented clients work in concert with the lawyer, promoting the common development of their interests. The clients' isolation from one another, and the lawyer's potential possession of confidences from one spouse that are adverse to the other's interests, may lead the separate representation model into unavoidable conflicts. The joint

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16. *See* Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 982 (1987).

17. Special Study Committee, *supra* note 15, at 794-96.

18. *Id. See also* Jeffrey N. Pennell, *Professional Responsibility: Reforms are Needed to Accommodate Estate Planning and Family Counseling*, 1991 U. MIAMI INST. EST. PLAN. 18-3, 18-29. The American College of Trust & Estate Counsel (ACTEC) also permit separate simultaneous representation of husband and wife. *See* ACTEC Commentaries on the Model Rules of Professional Conduct 88-89 (2d ed. 1995).

19. Collett, *And the Two Shall Become as One*, *supra* note 13, at 132-33.

representation model, however, obviates these concerns through its policy of full disclosure between the lawyer and client-spouses. Because clients need to understand the risks involved in full disclosure—that the lawyer must share all confidences with both clients, regardless of the disclosing client's preferences—the lawyer needs to obtain the spouses' informed consent before undertaking this form of representation.[20]

The Special Study Committee, on the other hand, sees joint representation as the default model—the form spousal representation takes in the absence of express consent by the parties.[21] As the parties have not consented, however, the mutual disclosure envisioned by the joint representation model becomes problematic.[22] Full sharing of confidences depends on prior notice to the joint clients. Absent such notice, the lawyer should assume that "[m]ost confidences would not be imparted if the client were mindful of the lawyer's competing duty to the other spouse."[23] Thus, the lawyer often should not disclose adverse consequences to the other spouse, but instead withdraw from the joint representation if failure to disclose would materially limit the lawyer's ability to represent both spouses.[24] The Special Study Committee's strained analysis of disclosure may simply reflect the potential ethical pitfalls in any marital representation, but more likely it indicates the Committee's inadequate treatment of the problem. If joint representation can raise troublesome conflicts with respect to client confidences, then why not require the lawyer to clarify the nature of the relationship, including the duty of full and mutual disclosure, at the outset of the representation?[25]

The fourth model, the family as an entity, differs from the other approaches. Instead of representing the clients as individuals with shared interests and objectives, the entity model returns us to a "single client." This approach draws on the corporate client image of Model

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20. *Id.* at 137-38.

21. Special Study Committee, *supra* note 15, at 778-79.

22. See the discussion of a similar concern in § 112 of the Restatement of the Law Governing Lawyers. RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS (proposed Final Draft No. 1 Mar. 29, 1996).

23. Special Study Committee, *supra* note 15, at 788.

24. *Id.* at 790-92.

25. *See* Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253, 1289-90 (1994). Pearce characterizes the Special Study Committee's approach as "Don't Ask, Don't Tell": so long as neither client discloses to the lawyer facts indicating the presence of a conflict, the lawyer has no obligation to ask questions that might uncover a conflict. *Id.* at 1285-89.

Rule 1.13, with the client as "the family unit."[26] The lawyer represents the parties in and through their unity as husband and wife. As Professor Thomas Shaffer indicates, the entity model has the advantage of reflecting many spouses' self-understanding, *i.e.*, that "families are prior to individuals."[27] The marital relationship constitutes the spouses' identity in a way that other roles, such as being one among several partners or shareholders, do not. Because the lawyer represents and pursues the good of the family taken as a whole, the desires of individual members may sometimes stand in tension with the group's vision. Rather than taking such conflict as a reason for withdrawing and abandoning the representation, the lawyer for the marital entity has an obligation to seek a deeper reconciliation within the family.[28]

As Professor Collett recognizes, however, the entity approach seems counterintuitive given both the paradigmatic form of entity representation—the corporation—and our contemporary understanding of marriage.[29] First, a lawyer representing a corporate client can usually distinguish between the corporation as a legal person and the corporation's constituents. A marriage or family may have its identity, but, for reasons we will develop in the next section, this identity is much more bound up with the individual identities of the spouses. Second, and closely related to the first observation, a strong account of marital unity may have been more plausible in an era of "entireties," of status relations rather than contract, when the family spoke and acted as one invariably through the husband's voice alone.[30] That said, nothing prohibits the parties from adopting the entity model as an alternative option for spousal representation, so long as it is established by express agreement of the lawyer and clients.[31]

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26. Patricia M. Batt, Note, *The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 GEO. J. LEGAL ETHICS 319, 338-41 (1992). We are using "family" and "marital" interchangeably, even though we recognize that families often include others than a husband and wife.

27. Shaffer, *supra* note 16, at 974. Shaffer develops his entity model through Model Rule 2.2 rather than Model Rule 1.13, but he intends the same end: that *"the client is the family." Id.* at 976.

28. *See, e.g.*, Shaffer, *supra* note 16, at 977-79 (pursuing deeper unity in the face of apparent conflict). *But see* Batt, *supra* note 26, at 340 (majoritarian solution to conflict). Russell Pearce also seems to be leaning toward a theory of entity representation, but his focus on exit as a readily available option gives the relationship a very different cast than Shaffer or Batt. *See* Pearce, *supra* note 25, at 1299-1300.

29. Collett, *And the Two Shall Become as One*, *supra* note 13.

30. Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 FORDHAM L. REV. 1453 (1994). *See also* Collett, *And the Two Shall Become as One*, *supra* note 13, at 123-24.

31. Collett, *And the Two Shall Become as One*, *supra* note 13, at 124.

The first two models, separate representation by separate lawyers or by the same lawyer, provide some potential benefits, but they also pose significant difficulties in operation—expense and disruption in the former and unavoidable conflicts in the latter.[32] In contrast, the third and fourth models, joint and entity, seem to offer more constructive options for marital representation, especially when one spouse seeks to delegate decision-making authority to the other.[33] Both these models recognize the importance of marriage as a shared project, although to differing degrees. Joint and entity representation respond to the realities of most marriages, such as cooperative and collaborative estate planning. Finally, assuming that mutual consent is required before entering the representation, each model also recognizes that the spouses are not totally subsumed within the marital relationship.[34]

In this Essay, we ask whether consent provides sufficient protection when one spouse has delegated his or her decision-making authority to the other spouse. While the entity and joint clients models provide useful starting points for our analysis of this issue, they do not answer the difficult questions surrounding the delegation issue in the context of marriage. For example, may the lawyer allow one client, or the constituent of a client, to speak for or bind the other? Is such a delegation limited by norms that protect the nonspeaking client, or must the lawyer accept the speaking client's direction? If the delegation is limited, where are these norms found? The next section examines these difficult issues of delegation within the commercial context.

III. DELEGATION

While the two hypotheticals suggest that delegation is unusual in marital representation, it is certainly a normal feature in the ordinary context of entity or joint representation in commercial relationships.[35]

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32. Especially when one spouse is delegating responsibility to the other, these models seem inappropriate because there is no need for separate representation. Separate representation of the wife would not provide her with any of the benefits offered by these two models.

33. Both the joint representation and the entity representation models offer a sufficient structure within which the lawyer can afford the protections that this article contemplates.

34. Nor do we question the necessity of informed consent as a basis for entering into, and for sustaining, an attorney-client relationship within the marital context.

It is not clear whether Professor Shaffer would recognize consent to the representation as a necessary precondition, but his reliance on Model Rule 2.2 (even if it is a grudging reliance) suggests that he would recognize such consent. *See* Shaffer, *supra* note 16, at 972-74.

35. As our analysis will suggest, we disagree with the hypotheticals' implicit assumption that delegation is an unusual feature in marital representation. Few courts, bar committees, or commentators may discuss delegated decision-making in this context, but we have no reason to

The corporate client itself has no voice, so it must speak to its lawyer through its agents.[36] Likewise, in partnerships, the lawyer will often take direction from one partner who is empowered to act in the name of the others, even when the lawyer represents the partners individually rather than the partnership as an entity.[37] As we discuss below, the law has developed useful mechanisms for structuring these commercial relationships and protecting those made vulnerable by delegations of authority. First, the fiduciary nature of the delegation provides its own protections; second, the lawyer's professional obligations in representing these commercial relationships provide an additional layer of protection.

A. The Nature of the Delegation

In form, delegation in the marital and commercial contexts appear to be indistinguishable. One person, the principal, grants to another, the agent, discretionary powers to act or decide matters on the principal's behalf.[38] Whether it is a limited partner's grant to the general partner, a settlor's grant to a trustee (on behalf of a beneficiary), or, as in Hypothetical II, Ruth's grant to her husband, all involve discretionary entrustments. In form, the harm arising out of this entrustment is also the same. By giving another the power to act in her place, the principal accepts some risk of betrayal; this risk is magnified, however, when the agent's power includes significant discretion to make decisions based on his best judgment. When the details of the agent's conduct cannot be specified in advance, *i.e.*, reduced to contract terms, the law has traditionally turned to fiduciary

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believe that spouses do not regularly entrust each other with this sort of authority in dealing with an attorney or other agent.

In addition, by describing partnerships and corporations as "commercial," we do not mean to imply that they cease to be fiduciary relationships. Within commercial delegations, the parties do not operate at arm's length. However, it is still useful to contrast commercial and marital delegations because the nature of the fiduciary relationships differ in significant ways. As we describe below, the vulnerability accepted in both commercial and marital delegations can be described as "instrumental," but the marital relationship also has a vulnerability that is intrinsic.

36. Under 1.13(e), the agents can be co-clients as well. MODEL RULES, *supra* note 5, Rule 1.13(e).

37. ALAN R. BROMBERG & LARRY E. RIBSTEIN, ON PARTNERSHIP §§ 5.7, 5.9 (1978).

38. Although Professor Collett does not share this assumption, we assume that the delegating spouse would not participate actively in the attorney-client relationship. Thus, in the first hypothetical, once the initial consultations established the form of the relationship (*i.e.*, the delegation), the lawyer would meet only with Bob, and Ruth would not participate or even be present at these meetings. As we discuss in Section 4, we would allow the lawyer to contact Ruth directly and would inform Ruth that she is free to contact the lawyer if she so desires.

obligations to provide the relationship's structure. In broad outlines, the agent owes the principal fiduciary duties of care and loyalty.[39]

The formal similarity between marital and commercial delegation masks two distinctions between them relating to the justification for and the scope of the delegation. In both marital and commercial relationships, delegation of decision-making authority creates, or exacerbates, the delegator's vulnerability to the delegatee. The specific differences between marital and commercial delegation stem from differences in the nature of this vulnerability. In a commercial relationship, the vulnerability is limited by the scope of the commercial enterprise and is justified by its instrumental value, *i.e.*, its necessity for achieving the goals of the enterprise. In a marital relationship, however, the vulnerability comes from the spouses' intimacy and mutual dependence. As such, vulnerability is intrinsic to the relationship. In addition, spouses' vulnerability to one another is not bound by any preordained scope of the relationship: it extends to the full breadth of their shared lives. In this section we discuss the specific character of vulnerability in commercial representation, and the protections afforded by principles and rules of legal ethics. In the next section we address the unlimited, constitutive vulnerability of the marital relationship.

In a commercial relationship, the principal's entrustment is instrumental. Because a principal lacks the time, resources, or expertise to achieve her goals without the help of others, the principal agrees to accede power over some aspect of her life to a fiduciary. Thus, as I have neither the time nor the ability to study financial information, I can entrust my stockbroker with care of my investments. I can give her discretionary authority to buy or sell stocks on my behalf based on her professional judgment. I trust her not to pick stocks at random, and I trust her not to invest my money in her husband's start-up business. My vulnerability to my broker is a risk that I take in order to achieve other goals. The vulnerability is a negative feature of the relationship; if I could eliminate the vulnerability while retaining the benefits of the delegation—expert management with little investment of my time—I would do so, but I cannot.

Along with its instrumental justification, delegation in the commercial context is also distinguished by its limited nature. My broker exercises authority over a small part of my life. She does not

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39. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 882; Tamar Frankel, *Fiduciary Law*, 71 Cal. L. Rev. 795, 829-32 (1983); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 4-9 (1990).

have the power to decide where my children will go to school, how my salary will be spent, or where my family will vacation this summer. A trustee may have wide-ranging authority to act in a beneficiary's interest, such as buying, selling, and leasing property, or determining the beneficiary's specific needs for trust funds. The trustee's powers are, however, bound by the trust corpus. The trustee has no power to deal with assets of the beneficiary that have not been placed in the trust.[40]

Partnerships test this "limited" characterization, of course, because partners will often have unlimited personal liability for partnership debts. One partner's careless or disloyal acts may result in grave personal financial injury to his fellow partners, including loss of their homes and other family assets. It seems implausible to describe this as a limited-purpose relationship. But partners' authority is limited: partners' apparent authority to bind the partnership extends only to acts in the ordinary course of the partnership's business.[41] For example, absent unusual circumstances, a partner in a law firm could not use the law firm's money to purchase an amusement park without the other partners' consent.[42] Nor could one partner mortgage another partner's home.

Indeed, most nonfamilial fiduciary relations make sense to us only because of their limited and instrumental character. We impose relatively stringent burdens on fiduciaries, especially in the duty of loyalty. At least traditionally, a trustee who loans himself trust funds in order to make an investment is liable to the trust not only for the monies borrowed from the trust, but also for any profits earned from the investment.[43] These almost altruistic obligations would seem extreme apart from their limited contexts: we expect selflessness in particular matters, not in general. Thus, a partner's duty of loyalty extends no further than the partnership business.[44]

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40. *See* RESTATEMENT (SECOND) OF TRUSTS § 186 (1957).

41. REV. UNIF. PARTNERSHIP ACT § 301(1); BROMBERG & RIBSTEIN, *supra* note 37, at § 4.01.

42. However, a law partner could purchase law books without the firm's consent, and this purchase would bind the partnership. BROMBERG & RIBSTEIN, *supra* note 37, at § 4.02(b)(3).

43. RESTATEMENT (SECOND) OF TRUSTS §§ 205-06 (1959); E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1354-60 (1985).

44. *See* BROMBERG & RIBSTEIN, *supra* note 37, at § 6.07(a). This is generally true, but may be misleading. A partner's obligation extends beyond the partnership's existing business in two important ways. First, a partner may not take advantage of a "partnership opportunity," *e.g.*, by individually purchasing a piece of property while knowing that the property is needed for the partnership's use, without first offering the opportunity to the partnership. *See id.* at § 6.07(d). Second, and closely related to the partnership opportunity doctrine, is the partner's duty not to

B. Protection in Representation

The protections offered by the fiduciary nature of commercial delegations are reinforced by the lawyer's own professional responsibilities in representing a fiduciary-delegatee. Through the mechanism of informed consent, coupled with the background fiduciary structure of the delegation, the Model Rules of Professional Conduct adequately guide a lawyer who works within the limited, instrumental context of commercial delegation. Three "moments" of consent frame the lawyer's ethical role in representing the fiduciary delegatee.

The first moment of consent typically precedes the creation of the attorney-client relationship. It occurs when the underlying commercial relationship itself is formed. In addition to the fact that without the consent to form the commercial venture the lawyer would have no client, this first moment of consent is important because it establishes the governance structure of the venture. The governance structure, in turn, is especially important for our delegation question. The governance structure, *e.g.*, a partnership agreement, or corporate charter and by-laws, determines the existence and scope of the authority of the venture's agents or those who speak for the venture.

The second moment of consent occurs at the outset of the attorney-client relationship. Of course, this consent must look back to the first moment, when the identity and powers of the agent are fixed. Unless the agent has the authority to bind the venture, no relationship between the lawyer and the entity can be created.[45] But once the agent establishes her authority to form the attorney-client relationship, the Model Rules step in to provide a default structure for the relationship. By treating the client as the corporate entity, Rule 1.13 maintains a harmony between the lawyer and the (other) agents of the corporation. All duties, the lawyer's and the other agents', run in the same direction, *i.e.*, to the corporation.[46] Any departure from this norm of entity representation, such as joint representation of the agents and the corporate entity, requires additional informed consent.[47]

The second "moment" of consent in a corporate representation is paralleled in other commercial delegations. Consider a lawyer engaged to represent a business partnership. Whether the lawyer speaks to one

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compete with the partnership. *See id.* at § 6.07(e).

45. RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS § 26 cmt. f (proposed Final Draft No. 1 Mar. 29, 1996).

46. MODEL RULES, *supra* note 5, Rule 1.13(a).

47. *Id.*; RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS § 212 (proposed Final Draft No. 1 Mar. 29, 1996).

or all partners at the outset of the representation, the attorney-client relationship must be constituted through consent. If all partners are present, the moment of consent is obvious. The lawyer can discuss with the partners the form that the relationship will take (joint clients or entity representation) and the relative capacity of the several partners to direct the representation.

Unlike the first two, the third moment of consent may never occur, but the lawyer should inform the client (and its agents) of its possibility.[48] While the first two moments provide the terms that constitute the relationship, the third moment comes when the representation (at least from the lawyer's perspective) reaches a crisis. We can illustrate this moment using a corporate client as an example. The lawyer takes her direction from one (or more) agents of the client. But how can the lawyer know to rely on those directions? In large part, a combination of the first two consents answers the question: the agent's role is created through the corporation's internal norms, perhaps further described in the agreement that establishes the attorney-client relationship. So long as the agent functions within the limits of this role, the lawyer is free to take the agent's direction. But, if it appears to the lawyer that the agent is acting in a manner that is inconsistent with the delegation (or against the law), Rule 1.13(b) permits the lawyer to seek reconsideration of the matter by a higher authority in the corporation.[49] In short, the lawyer who perceives that the agent is acting in a manner contrary to the client's best interests goes behind the delegation to ask for further consent from someone who may speak more reliably for the client.

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48. Because this third moment of consent implies the possibility that the lawyer will have to disclose confidences of the client-agent to the client-principal—confidences that may be adverse to the agent's interests—the agent should have advance notice that the usual assumptions about attorney-client confidentiality do not hold in this case. *See* RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS § 26 (proposed Final Draft No. 1 Mar. 29, 1996), *and especially* cmt. f.

49. Model Rule 1.13(b) applies in limited situations to permit the attorney to consult with a higher authority: when an agent "is engag[ing] in action, intends to act or refuses to act in a matter related to the representation" in a way that violates a "legal obligation to the organization . . . and [that] is likely to result in substantial injury to the organization." MODEL RULES, *supra* note 5, Rule 1.13(b). The remedial measures include:

(1) asking 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.

Id. See also RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS § 155 (2), (3).

If a partnership chooses the entity model for its representation, then the protections under 1.13(b) would guide the lawyer in handling questionable conduct by a partner. If it selects a joint representation model, the structure for this third consent is not as formalized, but it is no less significant. As in nearly all joint representation, we start with the lawyer's duty to keep all clients fully informed.[50] Even if some partners have delegated their decision-making authority to another partner, the lawyer's continuing duties to the "silent partners" require that when the lawyer perceives that the speaking partner is violating the trust that was delegated to her, the lawyer should return to the silent partners for their consent before carrying out the speaking partner's instructions.

IV. DEPENDENCY

Within a commercial relationship, the legal structure of delegation (the agent-principal relationship), coupled with the attorney's professional obligations, protects the nonspeaking delegators from misconduct by their agents. Delegation within marriage could, presumably, follow these same principles. Indeed, given the formal similarities between delegation in commercial and marital relationships, we are left with the question of whether there is any justification for treating the two types of delegation differently. A more general version of this question has posed immense difficulties for scholars struggling to develop theories about the contemporary family[51] and for courts faced with the array of problems presented when marriage is no longer a legal construct that bars members from suing or contracting with each other.

We argue that notwithstanding the similarities in form, delegation in marriage needs to be distinguished from that in commercial relationships because of differences in the underlying values and expectations of marriage. Even without delegation, spouses' intimacy

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50. MODEL RULES, *supra* note 5, Rule 1.4(a), 2.2(b); RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS § 112 (proposed Final Draft No. 1 Mar. 29, 1996).

51. *E.g.*, Margaret F. Brinig, *Status, Contract and Covenant*, 79 CORNELL L. REV. 1573 (1994) (reviewing MILTON C. REAGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY (1993)); Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual* Freedom, 132 U. PA. L. REV. 1399 (1984); Sally Burnett Sharp, *Semantics as Jurisprudence: The Elevation of Form Over Substance in the Treatment of Separation Agreements in North Carolina*, 69 N.C. L. REV. 319, 326 (1991) (explaining that separation agreements differ from other contracts and, consequently, the state has an interest in ensuring that these agreements are fair and reasonable); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 207 (1982); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993).

and mutual dependence make them vulnerable to one another; delegation of decision-making authority only serves to increase this vulnerability. But while commercial partners' vulnerability is limited and instrumental, spouses' vulnerability is constitutive of their relationship and (relatively) unlimited. As we discuss below, this vulnerability within the family has both positive and negative aspects with respect to marital representation.

The goal of unlimited vulnerability in marriage favors, on the one hand, delegation without question. If we assume that both spouses share and act on their unlimited trust in each other, then each is likely to do nothing that could harm the other and delegation should be entirely appropriate.[52] When each spouse acts in the best interests of the other and of the marital entity, there is no need for an attorney to provide any additional protections. One might even view the ethical protections for delegation within partnerships or corporations as an unnecessary intrusion within the family.

On the other hand, not only do few marriages approach this ideal (even when they try), but there is an enormous potential for abuse of each partner's vulnerability. Obviously, where spouses have agreed (either tacitly or explicitly) to limit their vulnerability to each other, their marriage resembles a partnership and may not need protection beyond that accorded to commercial delegations. The structure of the relationship will ensure that both spouses are protected.[53] Most marriages, however, involve no such agreements; indeed, many would find such agreements to be antithetical to true marital intimacy. But this intimacy itself, coupled with traditional gender-based inequalities within marriage, may also make the spouses especially vulnerable to harm from each other. The depth of intimacy and trust brings both richness and risks to marriage.

We turn first to explore the positive side of vulnerability within the family, the justifications for delegation without question, and then to the risks inherent in this dependency.

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52. Tuttle believes this is so. Cahn believes that, even with "complete" interdependence and trust, respect for the autonomy of each member precludes absolute delegation. On the other hand, she also believes that, if delegation is ever going to be appropriate, this is the type of marriage in which it should occur.

53. This vulnerability may be limited through prenuptial agreements or through custom. *See* Milton C. Regan, Jr., *Special Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045 (1995).

A. Constitutive Dependency

One might think of a marriage as a particular form of partnership. Like the commercial forms with which we are familiar, marriages involve the sharing of risks and rewards in a cooperative activity, and significant, perhaps even unlimited, personal liability for each other's failures. Partners, like spouses, are vulnerable to one another. Because their partner or spouse anticipates trustworthiness, the unfaithful partner or spouse can inflict significantly greater harm than if the parties were dealing at arm's length.

But commercial partnerships and marriages can, and should, be distinguished by the respective place that trust and vulnerability play in each. Business partnerships have a specific purpose, and partners write their partnership agreements to limit their liability to one another while they pursue this shared goal. Their interdependence is instrumental and occurs within a context that is self-limited. For the partners, their vulnerability to one another is a necessary evil to be endured for the sake of the ultimate goals of the enterprise.

In contrast, marriage is not a shared project, but a shared life or, more properly, two shared lives.[54] When most people marry, they expect emotional intimacy, companionship, and sexual fulfillment with their partner.[55] They envision a "companionate marriage—the belief that husband and wife should be each other's closest companion."[56] Spouses entrust each other with discrete tasks, such as ensuring that bills are paid or a child is picked up in time, and therefore one could describe this entrustment as instrumental. Each of these tasks takes place and receives its ultimate character within a broader relationship. Mutual interdependence in marriage is not something to be endured in order to achieve the goals of marriage. Instead, such interdependence and its attendant vulnerability should be counted among the constitutive goods of marriage. Marital intimacy exists in and through the spouses' mutual interdependence.

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54. Marriage is a "special relationship" in which people assume "special responsibilities for each other . . . because of the commitments that grow out of a shared life." Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. REV. 197, 257 (article critiquing Ira Ellman's theory of alimony).

55. *See* CATHERINE KOHLER RIESSMAN, DIVORCE TALK: WOMEN AND MEN MAKE SENSE OF PERSONAL RELATIONSHIPS 212 (1990); *see also* Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439 (1993).

56. RIESSMAN, *supra* note 55, at 214.

This does not mean, however, that marriage erases the separate personhood of either spouse. Marriage is a sharing of two lives; it depends on the consent of two who agree to be bound to one another. One of the few studies of successful marriages found that a critical task for creating a good marriage was for the couple to build togetherness based on mutual identification and shared intimacy, while at the same time respecting the autonomy of each spouse.[57] The study concludes that "every strong marriage contains three elements: husband, wife and the marriage itself."[58] Professor Milton Regan put it this way: "[a] person who is married typically has a sense of herself both as a person distinct from the marriage and as someone whose identity is defined in part by it."[59]

Spouses who seek to continue as autonomous selves during marriage and to avoid or even minimize vulnerability to each other are missing a critical element inherent in our concept of marriage. Concepts of autonomy for either spouse must be mediated by the marriage. Indeed, when spouses view marriage solely as a vehicle for self-fulfillment, they are more dissatisfied with the resulting relationship than are spouses with an alternative view.[60] Similarly, those who seek to quantify this vulnerability in economic terms are unable to account for important constitutive elements of family relationships.[61]

On the other hand, not all families share this same image of marital intimacy. Many scholars have suggested that the increase in the divorce rate over the past three decades indicates that the public has a very different view of contemporary marriage: that it is nothing more than a contract for self-fulfillment.[62] As a result of an increas-

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57. JUDITH WALLERSTEIN & SANDRA BLAKESLEE, THE GOOD MARRIAGE: HOW AND WHY LOVE LASTS (1995).

58. Joseph P. Kahn, *Happily Ever After - Psychologist Judith Wallerstein's New Book Explains What Couples Can Do After They Say "I Do,"* BOSTON GLOBE, May 29, 1995, at 31.

59. Regan, *supra* note 53, at 2066. He distinguishes between two different approaches to marriage: "an 'external' stance . . . that represents an individual's capacity to reflect critically upon, rather than simply [to] identify with, her commitments and attachments . . . [and an] internal stance . . . [in which] marriage appears as a universe of shared meaning that serves as the taken-for-granted background for individual conduct." *Id.* at 2049.

60. *Id.* at 2081 (citing studies).

61. For a sympathetic critique of the application of law and economics to the family, see Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989 (1995) (noting that law and economics brings attention to the value of work performed in the household, but that its focus on finances may denigrate the significance of interconnection); Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423 (1994).

62. Barbara Whitehead, for example, blames the high divorce rate on individuals' desire for self-fulfillment at the expense of commitment and nurturing. BARBARA WHITEHEAD, THE DIVORCE CULTURE (1997); *see* Carl E. Schneider, *Marriage, Morals, and the Law: No-Fault*

ing societal emphasis on personal psychological happiness, these scholars believe that the focus in marriage is no longer on others, but on the individual's own self-fulfillment.[63] The new ideology of families celebrates, in the words of one critic, the "Love Family,"[64] which is based on choice and voluntary affiliation with another adult, rather than on the commitment traditionally associated with marriage. Instead of living within an ethic that celebrates relationships and obligations to others, this new ethic celebrates obligations only to oneself. Vulnerability and dependence (and marriage itself) are useful only when they further individual happiness. For example, while many parents used to believe it was important to stay together for the children, this is no longer true.[65]

Even if many couples believe that marriage is merely an opportunity for personal satisfaction, the cultural ideal of unlimited intimacy and interconnection retains its resonance.[66] As Professor Jane Rutherford notes, it is simply an important myth that "families are mere aggregates of separate earners who are not mutually interdependent" rather than a collective entity in which everyone engages in sharing behavior.[67] Most couples continue to romantically view marriage as a lifelong commitment to one another.[68] In a study that examined how recent marriage license applicants perceived the

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Divorce and Moral Discourse, 1994 UTAH L. REV. 503; *see generally* Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225 (1997) (book review).

63. WHITEHEAD, *supra* note 62, at 54. Professor Regan points out that there is "doubt that there is any genuine consensus about what marriage is and what its moral obligations ought to be." Milton C. Regan, Jr., *Market Discourse and Moral Neutrality in Divorce Law*, 1994 UTAH L. REV. 605, 608. There is even doubt that marriage should connote a special status. MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995). Regardless of the future of marriage, it does carry with it certain privileges and images; this article is based on the existing institution of marriage.

64. WHITEHEAD, *supra* note 62, at 144, 152.

65. Whitehead cites a study that asked women in 1962 whether they believed that parents who did not get along with each other should stay together for the children; 49% believed this was appropriate. By 1977, only 20% thought staying was appropriate. *Id.* at 82.

Studies of why people divorce affirm Whitehead's conclusions with respect to the changing reasons for divorce. According to several studies, failure of communication or not feeling loved are the most frequent reasons given for divorce. *See* RIESSMAN, *supra* note 55; Lynn Gigy & Joan B. Kelly, *Reason for Divorce: Perspectives of Divorcing Men and Women*, 18 J. DIVORCE & REMARRIAGE 169, 186 (1992).

66. Professor Regan explores the embarrassment felt by one fictional character who has entered into an autonomy-based marriage and suggests that readers share this embarrassment. Regan, *supra* note 53, at 2080.

67. Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 564 (1990).

68. Margaret Talbot, *Love, American Style: What the Alarmists About Divorce Don't Get About Idealism in America*, NEW REPUB., Apr. 14, 1997, at 30.

probability that they would divorce, Lynn Baker and Robert Emery found that the applicants accurately estimated that approximately 50% of all marriages end in divorce. Conversely, their "*median* response. . . was 0% when assessing the likelihood that they personally would divorce."[69] Thus, when entering into marriage most couples incorrectly perceive their own likelihood to divorce. At that time, couples expect to make, and live within, a lifelong commitment to each other. The goal of unlimited intimacy describes a cultural ideal and normative vision of what marriage should be. It is, perhaps, a naive vision; yet this romantic vision inspires many people to marry.

B. Dangerous Dependency

The intimacy of marriage seems antithetical to the legalistic procedures of informed consent and the other protections that are afforded in commercial relationships. Such protections assume that betrayal is not only a possibility but a real threat. When spouses need to consciously guard against each other's unfaithfulness, this leads to a pathological rather than a normal marriage. Such suspicion is necessarily distancing and destroys the kind of loving trust that intimacy entails.[70] Thus, as we noted earlier, intimacy implies that delegation between spouses should be accepted without question.

Even though we should not expect spouses to betray each other's trust, professionals who deal with marriages and families cannot ignore the sad reality that people who are intimate cause significant harm to one another. Just as marital intimacy opens the possibility for some of life's richest experiences, it also leaves spouses vulnerable to some of life's most devastating emotional, and even physical, injuries. When one spouse delegates to the other her decision-making authority, the lawyer must account for the possibility that the delegation either arises out of, or creates the opportunity for, a misuse of the delegating spouse's trust.

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69. Baker & Emery, *supra* note 55, at 443. Baker and Emery carefully screened out couples who had previously been married. Because it appears that couples entering subsequent marriages are more likely to sign prenuptial agreements, and because these couples already know that marriage may not be forever, inclusion of such couples might have changed the results. On the other hand, given the romanticization of marriage in our culture, there may have been no difference. *See* RIESSMAN, *supra* note 55, at 212-17 (suggesting most divorced individuals remarry because marriage is so important in our culture; second marriages may differ from first marriages in areas such as gender roles).

70. On the place of rights, claims, and legal procedures in marriage, see Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights*, 11 HARV. J.L. & PUB. POL'Y 625, 627-28 (1988).

The psychological complexities of marital intimacy make the delegation problem even more difficult.[71] When the delegating spouse consents to give her partner this authority, it is presumed that she does so "rationally, . . . coldly, calculatingly, and looking out for [herself] . . . . While emotional involvement may not cause the parties to behave entirely irrationally, it surely alters the range of what they consider reasonable."[72] Spouses act romantically in viewing their relationship. For example, based on their unrealistic assessments of the length of their marriage, we can infer that many spouses are unlikely to protect their own financial interests. They are certainly less likely to do so than an investor or partner in a commercial venture.

The underlying vulnerability created by marital intimacy is further complicated by the traditional gender roles expected within marriage. As an institution, marriage has, historically, fostered inequality. Laws regulating the family have preserved and reinforced the husband's authority over the marital community. Until the mid-nineteenth century, the husband was entitled to all of the wife's earnings during the marriage.[73] While women were "protected" by laws that required their husbands to support them, these laws were rarely effective during the marriage.[74] Under the guise of the family as community, domestic relations laws supported autonomy for husbands and subordination

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71. *E.g.*, MAGGIE SCARF, INTIMATE PARTNERS: PATTERNS IN LOVE AND MARRIAGE (1987).

72. LAWRENCE E. MITCHELL, STACKED DECK: A STORY OF SELFISHNESS IN AMERICA 59 (1998).

73. *See* Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1082-83 (1994); Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1982).

74. For example, the doctrine of "necessaries" required the husband to support the wife during marriage at the level to which she had become accustomed; not only was it used extremely infrequently, but it served to protect creditors, rather than married women. *See, e.g.*, Note, *The Unnecessary Doctrine of Necessaries*, 82 MICH. L. REV. 1767 (1984).

Even after couples divorced, awards of alimony were rare. *See* Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1221 (1981); *see generally* IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 264-65 (2d ed. 1991). The concept of fault provided some protection at the time of divorce, so long as it was assumed that the man was at fault. Barbara Bennett Woodhouse notes:

> The traditional fault paradigm, still dominant in some states, reflected an obsession with controlling women and their sexuality. It had the virtue, however, of protecting (at least in theory) those conventionally "virtuous" spouses who worked hard and kept the promises that their partner failed to keep.

Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2526 (1994).

for wives. The rhetoric was based on "family," but protected the rights of men.[75]

Notwithstanding changes in the rhetoric and law surrounding marriage, roles remain gendered within the family. As Robin West explains, "[w]omen, more than men, are expected to be and to some degree are more 'altruistic' than men in their private and intimate lives: women, more than men, are inclined to subordinate their own interests, desires, and pleasures to those of persons with whom they are intimate."[76]

The socialization that supports these roles begins very early, and affects women's choices with respect to both work and family.[77] In marriage, wives are less likely to express their own needs and more likely to defer to their husbands' to avoid creating any problems within the relationship. Women still earn significantly less than men, and marriage only exacerbates the disparity since married women earn less than single women.[78] The division of labor within marriage, wherein women are still expected to be, and in fact still are, the primary caretakers, makes women particularly vulnerable.[79] During marriage, spouses also evaluate their contributions to the marriage differently. For example, men and women assign different values to the homemak-

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75. While family law has moved from an image of the husband as patriarch to husband and wife as co-equal partners, whether this has fundamentally changed the structure of marriage is questionable. *See* FINEMAN, *supra* note 63, at 230; Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2140-49 (1994).

76. ROBIN WEST, CARING FOR JUSTICE 109 (1997). The very reality of Shaffer's famous estate planning hypothetical, where it is the wife who is somewhat unhappy with the estate plan but does not want to create discord, is an excellent illustration of how wives subordinate their own needs. *See* Shaffer, *supra* note 16.

77. *See* RHONA MAHONEY, KIDDING OURSELVES (1995); SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 142-46 (1989).

78. *See* DAPHNE SPAIN & SUZANNE M. BIANCHI, BALANCING ACT: MOTHERHOOD, MARRIAGE, AND EMPLOYMENT AMONG AMERICAN WOMEN 156 (1996) (including chart showing that married women work approximately 80% of the hours worked by unmarried women, and are paid slightly less per hour).

79. *See* OKIN, *supra* note 77, at 138-39 ("contemporary women in our society are *made* vulnerable by marriage itself. . . . They are disadvantaged at work by the fact that the world of wage work, including the professions, is still largely structured around the assumption that 'workers' have wives at home."); ARLIE HOCHSCHILD, THE SECOND SHIFT (1989) (discussing women's presumed responsibilities for both work and home); Susan B. Apel, *Communitarianism and Feminism: The Case Against the Preference for the Two-Parent Family*, 10 WIS. WOMEN'S L.J. 1, 23 (1995) (citing Pepper Schwartz and Arlie Hochschild to suggest that "through cultural and other forces, [married women] are not able to bargain on an equal footing with their partners"); Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 130 (1993).

ing that occurs during marriage.[80] This may lead the higher-earning spouse, who is generally the man, to believe that his contributions to the marriage deserve a higher return than do those of the homemaking spouse. In addition, the existence of domestic violence only increases women's vulnerability.[81]

While the cultural view of marriage suggests the appropriateness of either entity or joint representation, it also suggests the vulnerability of one family member to another. If there is a power imbalance in the relationship (and there often is),[82] that affects the voluntariness of intrafamily interactions. The law does recognize different forms of overreaching such as unconscionability of terms, mental capacity, and duress. In the context of estate planning[83] in an intimate relationship, voluntariness may be affected by other factors as well, including men and women's different earning abilities[84] and women's socialization toward intimacy and marriage. Legal representation must take into account these internal dynamics of any marriage lest it perpetuate potential subordination.

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80. *E.g.*, Betsy Morris Lixandra Urresta, *It's Her Job Too: Lorna Wendt's $20 Million Divorce Case is the Shot Heard "Round the Water Cooler,"* FORTUNE, Feb. 2, 1998, at 64 (including poll showing that 57% of women, and 41% of men agree that a woman's "managing the household and child rearing are extremely important to a husband's success"; and that 51% of women, and 28% of men, agree that "a corporate wife who also must travel, entertain, and act as a sounding board is extremely important to the success of a high-level business executive.").

81. *See, e.g.*, Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991). Approximately four million women are battered each year and are subjected to the power and control of their intimate partners. *See Development in the Law - Legal Response to Domestic Violence: III, New State and Federal Responses to Domestic Violence*, 106 HARV. L. REV. 1528, 1529 (1993).

82. *See also* Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lesson from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 263 (1993) (reporting on studies showing that "in any given setting," men are given more credibility than are women); *but see* Charles B. Craver, *The Impact of Gender on Clinical Negotiating Achievement*, 6 OHIO ST. J. ON DISP. RES. 1, 2 (1990) (reporting that in negotiation class, gender has no discernible impact on outcome). Notwithstanding his experiences, Professor Craver does cite to studies showing that men speak more than women and feel more able to influence people negotiating on their behalf. *Id.* at 3, nn.10-15.

83. *See generally*, JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES, ch. 3 (2d ed. 1996). *See also* RESTATEMENT (SECOND) OF CONTRACTS §§ 15 ("Mental Illness or Defect") 178 ("When a Term is Unenforceable on Grounds of Public Policy") (1981). As Milton Regan points out, "contract law generally is inadequate to deal with" the dynamics inherent in a (formerly) intimate relationship. MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 151 (1993).

84. Indeed, many theorists who have used law and economics to develop a theory of alimony have relied on this differential to show the benefits of gender-specific behaviors during marriage. *See* GARY STANLEY BECKER, A TREATISE ON THE FAMILY (revised ed. 1991). For a critique, see Singer, *supra* note 61.

Unlike the well-developed protections for those made vulnerable within commercial relationships, the law has been ambivalent about affording protection for marital vulnerabilities. In part, this can be explained by a salutary respect for the distinct nature of marital intimacy; we expect the law to step in to marriages only in the case of emergencies, when the relationship has broken down. Intimacy, as we suggested earlier, seems antithetical to legal ordering. But the law's ambivalence can also be explained by a traditional separation of public and private spheres. The household belongs to a different and traditionally paternal ordering—a "separate sphere" that is immune to the public law's governance.[85]

Courts in community property jurisdictions have imposed fiduciary duties on spouses handling property belonging to the marital community, but otherwise courts have generally refused to imply any legal obligations between spouses in an ongoing marriage.[86] The law steps in and establishes minimal conditions to protect a vulnerable spouse only at dissolution of the marriage through divorce or the death of a spouse.[87] Even in tort lawsuits between spouses, the husband and wife are held to different standards than are strangers.[88] The law is a very blunt instrument for enforcing interspousal obligations.

In light of the vulnerabilities of marital intimacy and the relative absence of ongoing legal structure, it is particularly easy for one spouse, generally the one who maintains financial control,[89] to abuse

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85. *See, e.g.*, Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 117, 118-27 (Kairys D., ed., 1982).

86. For community property jurisdictions, *see, e.g.*, CAL. FAM. CODE § 721 (West 1992) (establishing fiduciary duties for interspousal transactions); LA. CIV. CODE ANN. art. 2354 (West 1979); WIS. STAT. ANN. § 766.15 (West 1983) ("Each spouse shall act in good faith with respect to the other spouse in matters involving marital property or other property of the other spouse. This obligation may not be varied by a marital property agreement."). *See also* Roselli v. Rio Communities Serv. Station Inc., 787 P.2d 428, 432 (N.M. 1990) (establishing fiduciary duty of spouse managing marital property). Such obligations are rarely recognized outside community property jurisdictions. *See* Bell v. Bell, 379 A.2d 419, 421 (Md. Ct. Spec. App. 1977) (holding that Maryland does not "presume the existence of a confidential relationship in transactions between husband and wife"). *But see* Christian v. Christian, 365 N.E.2d 849, 855 (1977) (holding that "[a]greements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith.").

87. *See, e.g.*, McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953); PETER SWISHER ET AL., FAMILY LAW: CASES, MATERIALS, AND PROBLEMS ch. 2 (forthcoming 1998). The elective share protections are discussed *infra*, text and nn.115-16.

88. Courts are extremely reluctant to allow tort suits based on negligence to proceed, although they now generally accept intentional tort lawsuits. SWISHER ET AL., *supra* note 87, ch. 6.

89. The economically dominant position in the family has traditionally been assumed by men (although the second hypothetical shows that the woman may be the more powerful spouse).

the trust of the other. This misappropriation may or may not be intentional. In the second hypothetical, the wife may be acting in the parties' short-term interests without considering long-term consequences for each party individually. For example, she might want to remain a member of the practice without thinking about the possibility of her dying first, and leaving Joe without any claims to her share of the medical practice. Alternatively, if she is at the early stages of considering a separation or divorce from Joe, but has not yet told him, then she will intentionally prevent him from having any claims to the assets of the practice.

Whether the breach is intentional or unintentional, the lawyer cannot ignore the possibility that the delegating spouse will be substantially harmed by her mate. In the next section, we offer a constructive account of the lawyer's professional obligation in handling the risk that the delegating spouse's trust has been betrayed.

V. MARITAL REPRESENTATION

How, then, in light of the special nature of marriage, should the legal ethics of marital representation protect the spouse who delegates her decision-making authority to her mate? We start with a threshold claim: intra-family representation deserves at least the same structure of protection as do other multiparty representations. As we discussed earlier, lawyers who represent multiple clients in the same matter need each party's informed consent at the outset of the representation.[90] In our hypothetical problems, informed consent principally serves to protect the interests of the nonspeaking spouse, though it also ensures that the speaking spouse understands her obligations within the relationship.

The breadwinner position is "gendered male," even if it is the woman who occupies that role. For a discussion of the differences between gender and sex, see Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 12-13 (1995).

90. This is technically true only when the representation involves the possibility of conflicts between the clients' interests. However, Model Rule 1.7(b)(2) may be read to suggest a broader requirement of informed consent, one that would affect any joint representation: "When representation of multiple clients in [the same] matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved." MODEL RULES, *supra* note 5, Rule 1.7(b)(2). Because delegation by one client to another of decision-making authority within the relationship creates a risk of harm to the nonspeaking client (and a self-limitation on her ability to control the attorney-client relationship), it would seem to present a "material limitation" under the terms of Model Rule 1.7(b). Under Model Rule 2.2, the consultation requirement is peremptory; it does not depend on a prior judgment that a conflict is likely. See MODEL RULES, *supra* note 5, Rule 2.2(a)(1).

A. Ensuring Informed Consent

Informed consent within this context should have four main components.

1. Both spouses must understand the powers that will be delegated and the consequences of that delegation.

The moral quality of the delegation depends, in large part, on the extent to which the delegating spouse understands what she is giving her spouse. A spouse who says that her mate will "make all the decisions" may not necessarily comprehend the meaning of "all the decisions." Especially when the delegation is coupled with a general power of attorney, the lawyer must ensure that the delegating spouse understands the extent of her present rights. This includes not only the property that she now holds, but her existing legal rights, such as elective share protections upon death or equitable distribution provisions upon divorce. This would be particularly important in the second hypothetical where Joe, the delegating spouse, may not understand the extent of his rights in assets that his wife has acquired during marriage, even if the assets are separately titled.[91]

If the speaking spouse objects to the range of information that the lawyer seeks to discuss with the nonspeaking spouse, the lawyer should approach the representation with extreme caution. Using the second hypothetical, what should the lawyer do if Susan objects to the lawyer's full discussion of Joe's rights in equitable dissolution? In this relationship, and in many other multiparty representations, full disclosure of a co-client's rights is an absolute prerequisite to that client's informed consent to the common representation.[92] The mechanics of "full sharing" may differ somewhat, based on the extent of the lawyer's concerns about the nonspeaking spouse's vulnerability. Though it may be acceptable in some circumstances for the lawyer to discuss the representation with both spouses present, in other circumstances, the lawyer may want to gain informed consent from

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91. Under the laws of virtually all states, both common law title and community property assets acquired during the course of the marriage, regardless of who holds title, are subject to distribution upon divorce. In some states, separate assets, including those acquired before the marriage, may also be subject to distribution. *See, e.g.*, LESLIE J. HARRIS ET AL., FAMILY LAW 329-31 (1996).

92. RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS § 202 (proposed Final Draft No. 1 Mar. 29, 1996) ("Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.").

each spouse alone. Particularly when the lawyer senses some reluctance on the part of one (or both) spouses, separate consultations may provide a greater degree of confidence that the delegation is both knowing and voluntary.

2. The spouses must understand the lawyer's duties within the relationship, including the lawyer's continuing duty to consult with both spouses.

While the first component of informed consent simply ensures that the spouses understand the choices they have made, the second and third components represent constraints on the delegation. Although the clients may desire it, the lawyer should not agree to a representation in which the lawyer is forbidden to communicate directly with the nonspeaking spouse (and that spouse with the lawyer) outside the presence of the other spouse. While such consultation may not be needed, the lawyer should always hold open its possibility. The delegation grants the speaking spouse power to act on his mate's behalf, but, absent extreme circumstances, it does not give him the power to isolate her.[93]

In addition to protecting the nonspeaking spouse, this component also provides important advance notice to the speaking spouse. The lawyer's continuing duty to consult with both spouses will typically mean that the lawyer has no independent duty to keep the confidences of one spouse separate from the other.[94] Where spouses particularly wish the lawyer keep separate confidences, the lawyer should question the feasibility of the joint representation.

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93. There may be some circumstances in which the isolation was required. One can imagine a religious community in which married women are barred from speaking with men outside their family. In such circumstances, the lawyer might agree to the joint representation only if the delegation is accompanied by substantial fiduciary obligations. The woman's silence may be regarded as a form of incapacity, and she should be protected as stringently as the law protects others who are incapable of protecting themselves, either through a guardianship or conservatorship.

94. The comments to § 112 of the Restatement of the Law Governing Lawyers suggest an appropriate solution to the dilemma posed by an absolute duty to share with both spouses any confidences obtained from one spouse. The comments ask what a lawyer should do when one joint client discloses information that he or she would find embarrassing or harmful if conveyed to the other spouse/joint client. The Restatement asserts that a lawyer may not continue representation without full disclosure, but concludes that a lawyer in such circumstances should have the discretion to withdraw rather than share the information. RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS § 112, cmts. (proposed Final Draft No. 1 Mar. 29, 1996).

3. The spouses must understand that the delegation is revocable.

This third component provides an additional constraint on the delegation. The delegating spouse must understand that she may withdraw her consent at any time. The nonspeaking spouse retains ultimate authority over her life and possessions at all times, even if her mate has the temporary legal authority to act on her behalf. This will always be true with respect to the delegating spouse's decision about her personal rights, but may be complicated by certain property arrangements. If, as part of the representation, the spouses elect to put their assets in an irrevocable trust that will be administered by the speaking spouse, the nonspeaking spouse will have permanently alienated her property interests. For that reason, a lawyer should take extreme caution when drafting irrevocable trusts that do not provide both spouses (or an impartial person) with continuing authority to manage their assets.[95]

Many commentators would object to our heavy reliance on informed consent, especially in the context of marital representation. Professor Shaffer, for example, links consent-based models with an underlying philosophy of atomistic individualism.[96] As a proxy for individual choice, consent, according to Shaffer, denies the organic nature of family relationships: consent implies that we choose our relationships, that we choose the duties we have to one another, and, more importantly, that these relationships have moral significance precisely (and only) because we choose them. While we believe that Professor Shaffer captures and critiques a central element of the professional codes, we do not believe that respect for individual consent must entail a denial of the constitutive role of families and other relationships. We are not selves apart from our relationships.

However, while our relationships are always relations between persons who exist in and through relations, they are between persons nevertheless. Although relations give us our identities, they can also destroy us. We know this from the sad facts of child abuse and

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95. An irrevocable gift presents a somewhat different question than does an irrevocable trust (where the settlor remains a beneficiary). In the case of a gift, it is relatively easy for the lawyer to explain to the client the implications of the transfer: once the gift is made, the client-donor should have no expectation of continuing control or benefit from the transfer. An irrevocable trust, where the settlor is a beneficiary of the trust, is different because in such cases the client-settlor does have continuing expectations of benefit and control. When the trust is drafted in a way that creates maximum discretion for the trustee, who is the client-settlor's spouse, the client may anticipate protections that the law does not provide.

96. Shaffer, *supra* note 16, at 974-75.

spousal abuse, although vulnerability persists even without physical abuse. Consent need not be seen as the affirmation of the Kantian self, detached from and prior to relationships. It can also be seen as recognition of human frailty, a recognition of our need for protection even within constitutive relations.

Feminists and postmodernists have criticized the notion of choice for failing to recognize the constructed nature of "autonomy" and "consent." In particular, they have explored the structuring of women's choices.[97] Their general claim is that the liberal rhetoric of choice diverts attention from "the constraints within which an individual's choice occurs onto the act of choice itself."[98] That is, instead of looking at what is chosen, we need to examine the parameters in which choice occurs and the ideologies that structure any particular "choice." Yet, at the same time, there is debate over whether an acknowledgment of that ideology implies that individuals have no control over their lives.[99] The problem with consent, it is argued, is that all choice is limited by the context in which it is made and by the contexts that surround and affect the decisionmaker.[100] Consequently, although there can be no such thing as unfettered choice or autonomy, individuals are, nonetheless, semiautonomous beings who have a limited freedom to make choices within social constraints.

We agree that a consent to full delegation is not unproblematic given the social context in which such consents are given. In the two hypotheticals, the delegating spouses may be ceding too much power without fully recognizing what they are doing, even after the lawyer has patiently explained the meaning and scope of the delegation. Their consents result from various inequalities that are beyond their

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97. *See* Nancy Ehrenreich, *Surrogacy or Resistance? The Misplaced Focus on Choice in the Surrogacy and Abortion Funding Contexts*, 41 DEPAUL L. REV. 1369 (1992) (book review); Vicki Schultz, *Telling Stories About Women and Work; Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1988); *see also* CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 217 (1987) (exploring issues of false consciousness).

98. Williams, *supra* note 97, at 1564; Martha Minow, *Choices and Constraints: For Justice Thurgood Marshall*, 80 GEO. L.J. 2093 (1992). Catharine MacKinnon adopts an even more radical perspective, arguing that there is no such thing as "choice" for women. MACKINNON, *supra* note 97.

99. *See* Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761, 795 (1990); Judith Greenberg, Introduction, to MARY JOE FRUG, POSTMODERN LEGAL FEMINISM ix, xxix (1992).

100. There is a rich feminist literature on agency and victimization. *See, e.g.*, Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995); *see also* Schultz, *supra* note 97 (noting conflicting stories of women's "choices").

individual control and, thus, are not the acts of fully autonomous individuals.[101]

Nonetheless, while consent at the beginning of the delegation is not determinative, it is a preliminary step that must be put into the context that we will discuss later. Obviously, without full and informed consent, there can be no delegation. Where there has been full and informed consent, this consent provides a helpful tool for allowing the representation to proceed. But consent is not equivalent to a complete and total abrogation of the lawyer's responsibility; it does not, and cannot, prevent further discussion with the delegating spouse about matters within the scope of the delegation.

4. The spouses must understand that the consent obtained at the beginning of the representation will be revisited when the delegated spouse takes action that may "substantially injure" the delegating spouse.

If the delegating spouse seeks to relinquish all power to the other spouse, the lawyer should still have various obligations to prevent actions that may "substantially injure"[102] the delegating spouse. These obligations stem from the lawyer's professional obligations.[103] When actions may "substantially injure" the other spouse, the lawyer must (literally) revisit the nonspeaking spouse to ensure consent to this further course of action. Even where the potential action otherwise appears to be well within the scope of the written delegation (and most likely would not be the basis for a malpractice action), we would place an obligation on the attorney to contact the nonspeaking spouse. The attorney must actually speak with, or obtain written consent from, the nonspeaking spouse; using the speaking spouse as an intermediary is insufficient.[104]

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101. The question of whether anyone is a "fully autonomous individual" we leave for others. There are, however, people who operate with more or less autonomy, depending on the context.

102. *See* MODEL RULES, *supra* note 5, Rule 1.13.

103. Professor Collett believes that the delegating spouse must participate in the process of arriving at a decision. Collett, *Love Among the Ruins: The Ethics of Counseling Happily Married Couples*, 22 SEATTLE U. L. REV. 139 (1998). Such participation appears to be contrary to the full delegation sought by Ruth in Hypothetical I. Like Professor Collett, we believe that the delegating spouse's participation is important; when that spouse has indicated that she seeks complete delegation, however, we impose some minimal obligation on the lawyer to protect her interests.

104. In one case, a court was unwilling to find malpractice when a lawyer sought to obtain a wife's consent to a certain course of action by sending her letters; the lawyer never actually communicated with her. *See* Barth v. Reagan, 564 N.E.2d 1196 (Ill. 1990). The actions taken by the lawyer in *Barth* are, under our model, inadequate as a matter of law. The lawyer must

The "substantially injure" standard is drawn from Rule 1.13(b) of the Model Rules of Professional Conduct.[105] As discussed earlier, the rules allow the lawyer representing an organization to consult with someone other than the agent when the agent's action both violates a "legal obligation to the organization" and becomes "likely to result in substantial injury to the organization."[106] Unlike within the organizational context, the "legal obligations" between spouses provide an inadequate basis for an ethical rule; the marital rule focuses on the "substantially injure" prong of the inquiry. Commercial entities operate against a background of long-standing, well-established, and relatively specific legal obligations that affect the ongoing nature of their enterprises. In the family, however, there is no such legal background. Outside of a few exceptions, the traditional "veil of privacy" has shielded the ongoing family from the development of detailed regulations setting out one family member's legal obligations to another.[107]

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actually communicate with the delegating spouse, and may even need to obtain a written consent to the proposed action. Any other procedure should result in malpractice.

105. MODEL RULES, *supra* note 5, Rule 1.13(b).

106. *Id.* The Restatement provides that:

> [When the] lawyer representing an organization knows of circumstances indicating that a constituent of the organization has engaged in action . . . that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization and thus [is] likely to result in substantial injury to it, the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization.

RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS § 155(2) (tentative Draft No. 8 Mar. 21, 1997). The comments indicate that a lawyer must intervene not just in the situation contemplated by the Model Rules of Professional Conduct, but also must "tak[e] steps to prevent reasonably foreseeable harm to a client." *Id.* cmt. e. The Restatement approach differs from that of the Model Rules because it mandates, rather than permits, the lawyer to act.

107. While the "veil of privacy" has served to legitimate power imbalances within the family, it has also (simultaneously and almost paradoxically) served to preserve the family as a place of intimacy and vulnerability.

It remains important to preserve the dependency that occurs in familial relationships. Nonetheless, is also important to delegitimate the power imbalances, as recognized by some of the exceptions to this lack of regulation of the ongoing family. These exceptions include the area of domestic violence, in which advocacy organizations have struggled against the concept of marital privacy to develop protections for battered women. *But see* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178-87 (1996) (arguing that while changes in discourse concerning domestic violence have helped battered women, the old laws have been "preserv[ed] through transformation.").

With respect to economic interests, community property states have imposed fiduciary obligations on spouses in their dealings with marital property. *See supra* note 86. Outside of community property states, however, it is difficult to find examples of when states have imposed fiduciary obligations on one spouse with respect to the other. In the cases of spouses' elective shares and intestacy, which provide mandatory shares for the surviving spouse, the states are creating default rules; the decedent has no obligation (fiduciary or otherwise) to provide for the

Accordingly, we rely on lawyers not to participate in an action that causes "substantial injury" when representing the marital entity.[108] The meaning of "substantially injure" will, necessarily, be context-specific and will have both objective and subjective elements that focus on the fairness of the proposed action.

The lawyer must make a two-fold inquiry: would this proposed action substantially injure any client, and would the action substantially injure this particular client? As a general guide, in making the objective inquiry, the lawyer should determine whether a proposed action could result in severe *financial* harm to the consenting spouse. In making the subjective inquiry, the lawyer should examine whether the action could inflict substantial *emotional or other noneconomic* harm on this particular spouse.

When the delegated spouse wants to hold the action confidential, that should send up a red flag for the attorney, at least on a subjective level, that the action might substantially injure the other spouse. (It may also be a violation of the delegation itself—as we discussed above, the delegation should assume that the nonspeaking spouse will, at all times, have access to any desired information about the representation.) If the delegated spouse wishes to take an action that would pose unreasonable economic risks to the family entity, that too suggests the need to revisit the delegation, from an objective perspective. Similarly, if the delegated spouse seeks to alienate a significant amount of marital resources to a third person, particularly one who is not a close family member, we believe that that might require the lawyer to inform the delegating spouse of the consequences of proceeding based on both objective and subjective perceptions of potential harm.

If the delegating spouse consents to these actions, then the lawyer has fulfilled her ethical obligations and need make no further response. Of course, if the lawyer feels that continuing the representation forces her to "pursu[e] an objective that the lawyer considers repugnant or imprudent," then the lawyer *may* withdraw.[109] Withdrawal is a possibility at any time during the representation, so long as it does not have a "material adverse effect" on the client's interests.[110]

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surviving spouse.

By not developing rules for the ongoing family, the state ratifies the status quo. *See* Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985).

108. This approach appears similar to the Restatement's requirements for lawyers representing organizations.

109. MODEL RULES, *supra* note 5, Rule 1.16(b)(3) (1983). The rule also allows for withdrawal when there is other good cause.

110. *Id.*

The implications of the four requirements become more concrete as we apply the model to various hypotheticals based on Hypotheticals I and II.[111]

B. Informed Consent in Context: Hypothetical I

1. Imagine that Bob wants Ruth to transfer all of her assets to him to help in his business.

He discloses that he is about to lose his ownership of the local Internet access provider to a competitor and his commercial enterprise will become even more risky. This presents, to us, a relatively easy case. This situation seems to involve risks that a business person would ordinarily foresee and undertake; risks that are not "unreasonable." By marrying Bob, and depending on him to support her, Ruth has already agreed to share in the economic downturns of Bob's business. This is especially true if Ruth expressly delegates to Bob the authority to use her assets to further his business ventures.

Two different scenarios might lead us to consider the risk unreasonable, however. First, if Bob were to place only Ruth's assets at risk, and not his own, we would be more likely to scrutinize the transaction. But here, the risk is shared; Bob's own assets are just as much at risk as Ruth's. Second, although we would not impose a "prudent investor" rule[112] on Bob, the lawyer would be obliged to ask Bob to reconsider reckless investments—such as using the money to purchase a large number of lottery tickets.

2. As part of the estate plan, Bob would like a will that provides that, if he dies first, all of the assets will be left to their children.

Bob tells the lawyer that he does not believe that Ruth will have the financial acumen to manage their assets, and that he is certain the children will honor their obligations to their mother and support her. He also wants Ruth to relinquish any rights to an elective share under state statutes.

This clearly has the potential to "substantially injure" Ruth. Ruth will hold no assets in her own name nor jointly with Bob. If Bob dies first, and this is statistically likely, then Ruth will have no means of supporting herself and will be completely dependent on their chil-

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111. For the text of hypotheticals, see 22 SEATTLE U. L. REV. 1, app. at 14 (1998).

112. *See* RESTATEMENT (SECOND) OF TRUSTS § 227 (1959).

dren.[113] As a subjective matter, it may be possible to assume that Ruth believes that her children will take care of her and that Bob will not take any actions to harm her, and, thus, would consent. Nevertheless, the lawyer must step back and apply an objective approach. Objectively, Bob's proposal may substantially harm Ruth if he dies first, leaving her without any of her own resources and at the mercy of the children's discretion.[114]

Moreover, his request that she relinquish her elective share is also injurious. Elective share statutes allow the surviving spouse to choose to take under the will or to elect an amount that is typically one-third of the estate.[115] Although a spouse can waive her right to an elective share, so long as it is in writing, states typically require fair disclosure before the waiver is effective. The Uniform Probate Code prevents the enforcement of waivers that were not executed voluntarily, or that were both unconscionable when executed and executed in the absence of disclosure of the property at issue.[116]

To ensure the validity of the waiver, the attorney must therefore consult with Ruth. The lawyer must inform Ruth of the consequences of this course of action before acceding to Bob's request to leave all assets to their children. There should be an actual conversation between Ruth and the lawyer. Ideally, this should be done face-to-face rather than on the telephone.

The lawyer must display sensitivity to, and respect for, Bob and Ruth's marriage. One way to do this is to explain that Ruth is being contacted just to ensure her understanding of the course of action. The lawyer should explain the estate plan to Ruth in detail, reviewing not only the legalities of the will, but also its consequences. The

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113. If the couple were to divorce, Ruth would at least be entitled to an equitable distribution of assets acquired during the marriage. We are not concerned about divorce because we are assuming that Ruth's and Bob's religious beliefs preclude divorce. Bob could require Ruth to execute an agreement concerning divorce if this were a serious concern.

114. For the typical estate plan, Bob's death would leave Ruth at least a life estate in his assets, and studies show that most people want their entire estate to go to their spouse. *See, e.g.*, Mary Louise Fellows, et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 348-364. If Bob died intestate, the Uniform Probate Code provides that, if there are no descendants, then the surviving spouse is entitled to the entire intestate estate. UNIF. PROBATE CODE § 2-102 (amended 1993), 8 U.L.A. (Supp. 1995).

115. DUKEMINIER & JOHANSON, *supra* note 83, at 400. The Uniform Probate Code provides for an elective share based on the amount of time the spouses were married. UNIF. PROBATE CODE, *supra* note 114, at § 2-102.

116. UNIF. PROBATE CODE *supra* note 114, at § 2-213. This is a similar standard for judging the validity of prenuptial agreements. *See* DUKEMINIER & JOHANSON, *supra* note 83, at 534-35.

lawyer should explore various scenarios that might result if Bob were to die first. For example, while the lawyer could assume that Ruth's children would treat her with great respect, what if the children were to die first, leaving their spouses who did not treat Ruth with the same respect?

If Ruth consents, which seems likely under the facts of the hypothetical, then the lawyer may proceed to draft the appropriate documents, including the waiver. While we, as the lawyers involved, might try to withdraw because of our strong disapproval of Bob's plan, we have no obligation to do so; the clients' interests remain in harmony, and the notion of client consent carries significant moral weight.

3. Imagine that, unknown to Ruth, Bob's customers are gambling casinos, adult video stores, or other commercial operations that, for many traditional religions, raise questions of morality.

As part of Ruth's agreement to give him access to all of her assets, Bob wants to use the money to better promote his business. His goal remains to ensure the economic comfort of his family.

The question is whether that rises to the level of harm necessary to revisit the delegation. Objectively, the business does not involve any particular economic risk or speculation. There is, however, a significant potential for subjective harm in this case—the harm of possible embarrassment and scandal if Ruth did not know the nature of the business of her husband's clients, but subsequently discovers that she has been subsidizing them. We find this situation extremely difficult because it involves the kind of trust that married people place in each other: Ruth has trusted Bob to pursue their shared interests, and Bob has drawn them into activities that Ruth would, without doubt, consider sinful. Here, Ruth's religious beliefs become directly relevant to the lawyer's assessment of the situation. While Ruth's beliefs have led her to delegate her authority, they also may lead her to suffer great harm if Bob continues in this enterprise. Because Ruth's assets are involved, she may feel that she, too, is implicated in what she deems sinful.

Considering her faith commitments, we would find that Bob's acts amount to "substantial injury" to Ruth and, thus, we would impose certain obligations on the lawyer. If Bob were to ask the lawyer about the advisability of the investment in this business, the lawyer should address the concerns about Ruth's likely reaction to any disclosure of the investments and counsel Bob to discuss the investment with Ruth. If Bob refuses to do so, and asks the lawyer to draft documents

facilitating a transfer of Ruth's assets into this business, then the lawyer should object and decline to perform the tasks. After explaining to Bob the reason for this refusal, the lawyer should inform Bob of his right to seek the assistance of a different attorney.

But should the attorney disclose this information to Ruth? Assuming that the lawyer made clear her professional responsibilities to both clients at the outset of the investigation, Bob would have no basis for complaining about any such disclosure. However, we do not believe that such disclosure is mandated in this case. The lawyer should recommend to Bob that he disclose (or divest), but the lawyer should recognize that disclosure itself could be harmful to Ruth by destroying her trust in Bob. On balance, given that the investments are not likely to cause long-term objective harm to Ruth, we would give the lawyer discretion to decide whether or not to disclose Bob's investments to Ruth.[117]

4. Imagine that Bob has worked for several years, quite closely, with a secretary.

a. What if Bob wants to leave part of the estate to his "trusted" secretary?

As discussed earlier, spouses typically expect an estate to stay within the family. Nonetheless, an aspect of one spouse delegating authority to the other must be an expectation that the other spouse may take some actions that would be contrary to assumptions concerning who would normally be a beneficiary. Bob leaving some assets to the secretary would not be economically harmful to Ruth on an objective basis. Subjectively, this would not substantially damage her, given her faith and trust in him.

On the other hand, a large gift to someone outside of the family is contrary to the expectations of most married people. If Bob were to leave a significant portion of his estate to someone outside the family, this would involve objective harm to Ruth. This should, in turn, trigger the lawyer's obligation to disclose Bob's intended disposition to Ruth. But, if we assume that Bob leaves sufficient money to Ruth, then she is not, objectively, harmed by a gift to someone outside the family. Subjectively, so long as the gift really is to someone who is simply a trusted secretary, then Ruth would presumably not be harmed by this gift. Such a gift would appear to be well within the scope of

117. *See* RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS § 112 and illus. 2, 3 (proposed Final Draft No. 1 Mar. 29, 1996) (confronting similar disclosure questions).

delegation. Ruth trusts her husband, which is why she has delegated authority to him, and his making a moderate gift to his secretary would not appear to be outside the scope of his delegated authority. As a final protection, Ruth will sign her own will, and will have the opportunity to review its provisions then.

b. What if Bob discloses a sexual relationship with this secretary?

This hypothetical returns us to a problem addressed in the example above, in which Bob has invested in a business that Ruth would find morally objectionable. Let us assume, first, that the bequest to the secretary would consume most of the assets in Bob's estate. Where Ruth's interests are objectively harmed, we feel that the answer is relatively clear: the lawyer must tell Bob that if he wishes to provide for his secretary in his will, which is part of a unified estate plan with Ruth's, he must disclose the bequest to Ruth.

If we assume, however, that the bequest would be relatively minor, then the answer to this question turns (almost) solely on the subjective harm to Ruth. Here we return to the analysis from the above example. If, after consulting with the lawyer, Bob refuses to discuss the matter with Ruth, should the lawyer disclose to Ruth the existence of the minor bequest (and perhaps even Bob's justification for it)? Here, Bob's wrongdoing goes to the core of the marital interdependence that justifies the delegation in the first place. The subjective harm to Ruth in this instance seems even greater than Bob's "wrongful" investments.

We recognize that the lawyer's disclosure of the bequest, and certainly a disclosure of Bob's infidelity, would bring Ruth pain, but the ultimate cause of the pain is not the disclosure, but Bob's infidelity. The Restatement (Third) of the Law Governing Lawyers would grant the lawyer discretion not to disclose the co-client spouse's confidences in a very similar case (where the co-client wants to leave money to an undisclosed, illegitimate child).[118] While we would agree with this grant of discretion, we disagree with the Restatement's conclusion that the lawyer could draft the bequest, fail to disclose, and then continue to represent both spouses. If the bequest, because of Bob's relationship with the secretary, would be expected to cause such subjective harm to Ruth, we believe that the lawyer may not draft the bequest. The lawyer may have discretion not to disclose Bob's relationship with his

118. *Id.*

secretary, but the lawyer must withdraw if Bob refuses to disclose the relationship.

C. Informed Consent in Context: Hypothetical II

1. What if, under Hypothetical II, Joe, upon full disclosure of his spousal rights on death or divorce, nonetheless agrees to forego any interest in his wife's medical practice?

Joe's relinquishment of his rights in the second hypothetical is less problematic under the model set out above. First, his waiver is far more discrete than the one proposed by Ruth. Joe is only giving up any rights he might have with respect to his wife's practice; his waiver does not affect any claims he might have to any other asset that might be owned by his wife. Second, his waiver is time-bound. It will expire if his wife leaves the medical practice. The limited nature of his waiver thus requires less protection than the unlimited delegation of decision-making power over all estate planning envisioned under the first hypothetical.

In Joe's case, the four requirements are satisfied quite easily because, by explaining the nature of the delegation and its consequences, the lawyer is ensuring consent and also discussing the possibility of "substantial harm."

2. What if Joe is Josefina, and Susan is Sam: does changing the sex of the parties change the amount of protection we would accord?

No. Joe, or Josefina, has assumed the role that is gendered female within marriage. Historically, although it has been women who have given up their jobs and stayed home with children, we are concerned about the dependency associated with this role, not with the sex of its occupant. The four different requirements of delegation are sufficient to ensure that the more apparently dependent spouse is protected.[119]

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119. In Hypothetical I, if Ruth wanted complete delegation and had no assets, the four ethical requirements of a lawyer in a delegating situation should serve to protect her as well. We have developed the requirements to protect against an abuse of the vulnerability in marriage. While women have historically needed this protection, the requirements apply regardless of the sex of the spouse who appears more dependent.

D. Objections to the Requirements of Informed Consent

In suggesting a more interventionist approach[120] to marital representation, we may be accused of paternalism,[121] of reinforcing stereotypes about wives, of providing safeguards within the family that differentiate it too much from commercial entities, and of not respecting client voice. On the other hand, we may be accused of not providing enough protection.

First, the requirements for delegation within marital representation might appear too protective of the delegating spouse by not allowing her to make her own choice with respect to granting authority to her spouse. This "paternalism" does not deny choice within the relationship; we are ensuring that there is adequate information to reinforce the preliminary choice made, as well as adequate protection to ensure the integrity of that choice.

Moreover, the purpose of this Article is to argue that we must treat the family differently from commercial entities because of the nature of intrafamilial obligations and because of the inequalities that currently exist within the structure of the family. Ultimately, we are trying to provide enough of a check so that representation is consistent with, and preserves, our cultural notions of marriage. When spouses assume equal participatory roles, there is much less need for protection. But, it is also important that spouses "who undertake more traditional domestic roles are protected from the risks they presently incur."[122] Accordingly, because of the inequality that is almost inherent in contemporary marriage, we believe that it is appropriate to require special scrutiny of marital representation.

Requiring the lawyer to revisit the delegation when the delegated spouse takes action that might "substantially injure" the delegating spouse may have the appearance of overriding client voice. We may be accused of not allowing clients to speak. Within legal ethics, a critique of paternalism has developed suggesting that, particularly in the poverty law context, lawyers routinely usurp client control and

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120. We want to note that "intervention" and "nonintervention" are confused concepts; by not "intervening," the state encourages the continuation of status quo inequalities. Olsen, *supra* note 107.

121. Brian Bix states "attempts to protect often have unintended negative consequences (beyond the mere withdrawal of choice)." Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Love* 57 (unpublished manuscript) (copy on file with the *Seattle University Law Review*).

122. OKIN, *supra* note 77, at 183.

power.[123] The client-centered critique argues that it is up to clients to make their own legal decisions.[124] The client-centered model is skeptical about the traditional legal ethics approach. It argues that the traditional approach is designed to encourage clients to cede authority to their lawyers, and that the traditional approach incorrectly assumes that lawyers provide effective, competent, and professional representation so that clients need not be concerned with abuse of authority.[125] Rather than giving clients advice as to the appropriate course of actions, lawyers should, under this model, seek to foster and respect client voice and decision-making.[126] A lawyer who did not allow the

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123. One group of scholars concerned with client-centeredness has examined its potential for working with excluded and/or impoverished communities, arguing that client-centered representation can lead to empowerment for the client. *E.g.*, Anthony V. Alfieri, *The Antimonies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 665 (1987-88) (discussing poverty law); Binny Miller, *Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994) (discussing criminal defense). Professor Gerald Lopez seeks to articulate a "rebellious" form of lawyering, in which lawyers "work with, not just on behalf of, subordinated people." *See* Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaberation*, 77 GEO. L.J. 1603, 1608 (1989); *see also* Gerald P. Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989) (suggesting changes in legal education to prepare students to engage in this rebellious style of lawyering); Gerald P. Lopez, *The Work We Know So Little About*, 42 STAN. L. REV. 1 (1985) (pointing out that modern legal education does not seek to address, much less understand, the concerns of low-income women of color). Tony Alfieri suggests strategies that allow the lawyer to reinterpret client stories to break out of client stereotypes. Anthony V. Alfieri, *Reconstructive Poverty Law: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991). And Lucie White and Clark Cunningham focus us on how lawyers shape their clients' stories. Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990); Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989). In her "Story of Mrs. G.," Professor White traces the different influences on how her client's stories were constructed, including language, poverty, race, and gender. She also discusses how the lawyer, working with the client, constructed one story; at the actual hearing, the client told her own, somewhat different story, and the lawyer suddenly felt on the outside.

124. *See* Robert D. Dinerstein, *Clinical Texts and Contexts*, 39 UCLA L. REV. 697, 714 (1991) (book review) (setting out the potential conflict between client-centered decision-making and the lawyer's moral autonomy). For discussion of the client-centered approach, see BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991), and see Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1128-29 (1992) (summarizing client-centered approach).

125. *See* Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 506 (1990). Dinerstein also notes that the client-centered approach may be incompatible with the professional responsibility rules because the rules are so vague with respect to the appropriate allocation of authority between lawyer and client. *Id.* at 534-35.

126. *See* Dinerstein, *supra* note 125, at 587 (suggesting that lawyers should be able to give their advice in at least some situations, and that clients should be able to opt out of this model).

complete delegation requested by Ruth (or Joe) would be violating client voice.

While there is an illusion that the extra requirements might not be according sufficient weight to client voice, there is an alternative interpretation which suggests that adequate information, disclosure, and consent maximize (empower) client voice. Only by ensuring that the delegating spouse fully understands the implications of the delegation can the client's voice be respected. The client needs to understand the implications of her own voice before she can silence it.

On the other side of the paternalism observation, there is a fear that the "substantially injure" standard is too low because it does not provide adequate protection to the delegating spouse. Why not impose a standard that requires the lawyer to warn the delegating spouse when the delegated spouse takes actions that are not in the best interest of the marital relationship?

We hope that spouses understand this to be their obligation to one another. We are reluctant, however, to impose this as the level of review that the lawyer must undertake. First, the law of husband and wife does not require such a high standard of care between spouses.[127] Second, we want to accord some respect to the delegation itself. Third, a lawyer's review of when a client fails to take actions in the "best interest" of a marital entity will, necessarily, be arbitrary. Determining the "best interests" is very difficult for judges; imposing this level of review upon lawyers would probably force most lawyers to walk away from the representation because of a well-grounded fear of malpractice.

VI. CONCLUSION

We believe that one spouse can delegate decision-making authority to another spouse in legal representation. We would, however, impose requirements that respect both the delegation itself and the underlying relationship. The primary requirement is one common to both marital and commercial representation: a lawyer representing multiple parties can do so only with the informed consent of each client. Such informed consent would ensure that the spouses understand the nature and extent of the delegation. We would also impose additional requirements based on the recognition that marriage involves special vulnerabilities and inequalities that do not characterize

127. *See supra* nn.86-87 (contrasting fiduciary duties for interspousal transactions in community property states with the relative lack of standards in noncommunity property jurisdictions).

commercial relationships. First, we would place limits on the clients' ability to define the lawyer's relationship with the nonspeaking spouse: specifically, the nonspeaking client must be able to speak directly with the lawyer and, if she so decides, withdraw the delegation. Second, we would require that the lawyer revisit the delegation when an action would "substantially injure" the nonspeaking spouse.

These protections take into account the differences between representing a commercial entity and a family. By adapting the standards set out in the Model Rules, these protections also protect the lawyer from malpractice. And, finally, they serve to support dependency and intimacy within marriage.