



1-1-2012

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Recommended Citation

Teresa S. Collett, *And the Two Shall become as One... until the Lawyers are Done*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 101 (1993).
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AND THE TWO SHALL BECOME AS ONE . . . UNTIL THE LAWYERS ARE DONE

TERESA STANTON COLLETT*

From the first day of practice the lawyer who specializes in estate planning will be dealing with families. Drafting wills or trusts for married couples is a common task. The documents produced will affect all members of the clients' immediate family. This "family" aspect of estate planning practice distinguishes it from the other types of transactional practice, while the harmonious nature of most clients' families sets it apart from litigation practice. Yet estate planners are governed by the same ethical or disciplinary rules that limit the conduct of lawyers specializing in corporate representation or trial work. Unfortunately the unique nature of the estate planning practice is ill-served by observing the principles contained in the Model Rules of Professional Conduct.¹

This article focuses upon the current controversy concerning the appropriate course of conduct by an attorney asked to represent both spouses in planning their estates. Problems encountered in applying the Model Rules will be examined as well as the competing models for resolving those problems. Four models of representation have been proposed in the literature: (1) lawyer for the family;² (2) separate representation by separate lawyers;³ (3) separate simultaneous representation by the same lawyer;⁴ and (4) joint representation by the same law-

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1. As of Fall 1992, all or a significant portion of the Model Rules of Professional Conduct had been adopted in more than 35 states and the District of Columbia. STEPHEN GILLERS & ROY SIMON, JR., *REGULATION OF LAWYERS: STATUTES AND STANDARDS* at X (1993). While the Rules have been modified in several of these jurisdictions, the basic tenets contained in the Model Rules reflect the applicable rules in a majority of states. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § AP4:101 (1990).

2. *See infra* note 93.

3. *See infra* note 94.

4. *See infra* note 95.

yer.⁵ This article rejects the model of separate simultaneous representation of both spouses by the same lawyer, questions the viability of the model of lawyer for the family as a professional norm, and concludes that the models of separate representation of an individual spouse or joint representation of both spouses are consistent with the current professional ethos.

ESTATE PLANNING FOR COUPLES UNDER THE MODEL RULES

Estate planning for married couples routinely raises issues addressed by the Model Rules regarding conflicts of interest,⁶ confidentiality,⁷ and independence of the lawyer's judgment.⁸ The Model Rules view transactional practice as primarily assisting individual clients in structuring their affairs to maximize individual benefit through conformity with legal requirements.⁹ To the extent that the client's objectives are neither fraudulent nor criminal,¹⁰ ethical evaluation of the lawyer's conduct is based primarily on whether the lawyer maximized the legal benefits to the client.¹¹

Currently, the rules appear to classify estate planning for married couples as simultaneous representation of two individuals.¹² Thus the initial decision concerning whether such representation is proper is controlled by Rule 1.7:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after consultation.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited

5. See *infra* note 96.

6. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.8, 1.9, and 1.10 (1991) [hereinafter MODEL RULES].

7. *Id.* Rule 1.6.

8. *Id.* Rule 2.1.

9. *Id.* pmb1; see also Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, And Some Possibilities*, 4 AM. B. FOUND. RES. J. 613 (1986).

10. MODEL RULES, *supra* note 6, Rule 1.2(d) cmt. 6.

11. *Cf.* *Hodges v. Carter*, 80 S.E.2d 144 (N.C. 1954) (suit against attorney for malpractice held that attorneys bind themselves to "do whatever may be necessary in order to bring the matters to a successful conclusion, to the best of their knowledge and ability"); see also *Day v. Rosenthal*, 217 Cal. Rptr. 89 (Ct. App. 1985), *cert. denied*, 475 U.S. 1048 (1986).

12. MODEL RULES, *supra* note 6, Rule 1.7 cmt. 13.

by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

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

Representation of both husband and wife for purposes of estate planning rarely involves any matters that are directly adverse at the outset of the representation, although such adversity may develop later during representation.¹³ Thus in most cases either no rule precludes representation or the applicable standard for evaluating the attorney's conduct in representing spouses planning their estates is Rule 1.7(b) pertaining to representation subject to material limitations due to the lawyer's responsibilities to others.

In the context of a harmonious couple seeking joint representation, attempts to fit the relationship into the confines of Rule 1.7 or determine whether subsection (a) or (b) applies may prove to be searching for a distinction that ultimately makes no difference. Either the attorney is free to accept representation of both clients without any limitation, or informed consent by the clients to any potential conflicts will allow representation to be undertaken. In order for the consent to be effective under either 1.7(a) or (b), the lawyer must explain the implications of the common representation and describe both the advantages and risks inherent in sharing counsel.¹⁴ It is further incumbent upon the lawyer to discuss the impact that common representation will have on the attorney-client privilege,¹⁵ as well as whether future confidences by one spouse will

13. See hypothetical fact situation *infra* pp. 105-06.

14. MODEL RULES, *supra* note 6, Rule 1.7 cmt. 5; see also RESTATEMENT OF LAW GOVERNING LAWYERS § 202 (Tent. Draft No. 4, 1991) [hereinafter RESTATEMENT GOVERNING LAWYERS]. Some commentators indicate that the language of the Rule elaborating on what constitutes "informed consent" under 1.7(b)(2) does not define the minimum conduct under 1.7(a)(2). See HAZARD & HODES, *supra* note 1, § 1.7:305.

15. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.3.1 (1986);

be disclosed automatically to the other spouse.¹⁶ Such disclosure is permissible under the rule governing confidentiality only with client consent.¹⁷

Clients must also understand that any representation can only be successful to the extent that clients are candid about their testamentary desires. Unfortunately, some clients may be less candid in the presence of their spouses.¹⁸ On this basis, some authorities argue that clients are best served by separate representation through separate lawyers,¹⁹ or separate simultaneous representation by a single lawyer.²⁰ The advantages and disadvantages of each of these models are explored in this article, after examining the limitations of the current Model Rules of Professional Conduct.

see also RESTATEMENT OF LAW GOVERNING LAWYERS § 125 (Tent. Draft No. 2, 1989).

16. See WOLFRAM, *supra* note 15, § 6.4.8.

17. MODEL RULES, *supra* note 6, Rule 1.6(a) provides:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in Paragraphs (b) and (c).

Paragraphs (b) (permissive disclosure to prevent criminal act likely to result in imminent death or substantial bodily harm) and (c) (permissive disclosure to establish claim or defense by attorney related to representation) do not apply to these facts.

18. Evelyn Betts Thomason, *How Estate Planners Can Cope With the Increasing Risk of Malpractice Claims*, 12 EST. PLAN. 130, 134 (1985).

19. See Jackson M. Bruce, *Ethics in Estate Planning and Estate Administration*, 15 PROB. NOTES 118, 120 (1989); Committee on Significant New Developments in Probate and Trust Law Practice, *Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules of Professional Conduct*, 22 REAL PROP. PROB. & TR. J. 1, 11 (1987) [hereinafter *Committee Report*]; cf. *Klem v. Superior Court*, 142 Cal. Rptr. 509 (Ct. App. 1977) (issue determined by the court involved to what extent an attorney may represent both a husband and wife in a noncontested dissolution proceeding where written consent of both had been filed with the court. The court held that where an actual, present, and existing conflict may exist between the parties, though an informed consent had been obtained, it could not sanction dual representation where questions of fact remained concerning whether consent was given based on knowledge obtained by full disclosure by the attorney.).

20. See Jeffrey Pennell, *Professional Responsibility: Reforms Are Needed to Accommodate Estate Planning and Family Counselling*, 1991 MIAMI INST. EST. PLAN. 18-3, 18-29; cf. *In re Roberts*, 75 B.R. 402 (D. Utah 1987) (law firm's simultaneous representation of a corporation and its principals in a separate Chapter 11 proceeding did not give rise to a per se conflict of interest or appearance of impropriety as the conflicts were more theoretical than actual).

Application of the present rules will be illustrated by considering the proper course of conduct to be undertaken by Lawyer in the following hypothetical situation:

Lawyer has represented John Smith for many years. At 64, John has lived what many perceive to be a remarkably successful life. He has been married to Wanda, his first and only wife, for 42 years, has three children who are each happily married and successful in their careers, and has built a business which most recently was valued at \$5 million. From the first time he came to Lawyer and asked Lawyer's help incorporating his small retail store, until recently when Lawyer helped him obtain a favorable private letter ruling from the IRS, Lawyer has always been impressed with John's business acumen and devotion to principles. On a more personal level, Lawyer has admired John's devotion to family and community. In 1990, after meeting with John and Wanda together, Lawyer drafted both John and Wanda's wills containing mirror-image provisions; the surviving spouse was to receive everything outright. Upon the death of the surviving spouse, the children were to receive all remaining assets in equal shares. Virtually all of John and Wanda's assets were held in John's name. Lawyer recommended transferring some assets to Wanda to maximize the potential estate tax savings, but John and Wanda declined to make any transfers. Lawyer also recommended an annual gift giving program, which John and Wanda declined to implement.

Yesterday Lawyer met with John, who told Lawyer that he wanted help with some estate planning. John explained to Lawyer that he had reevaluated his priorities and his religious faith. He wants to make a \$100,000 gift to the ministry of a particular television evangelist. He seeks Lawyer's advice because the people at the ministry indicate that they have not yet received approval from the IRS for their application to be recognized as a tax-exempt organization. While he still wants to make the gift, even if it is taxable, John is willing to wait a short period if necessary to make the gift tax-free.

In addition to the gift of \$100,000, John wants to revise his will. He wants to leave his entire estate in trust for the benefit of his wife during her lifetime. Upon her death he wants all assets of the trust to be distributed unconditionally to the ministry of the television evangelist. Over the years Lawyer has been aware that John was

fairly active as a member of St. Luke's Episcopal Church. He made substantial contributions to its larger fund-raising efforts.

John was reluctant to discuss Wanda's reaction to what he called "his new found faith" although he did indicate that she was not aware of his plans to give \$100,000 to the ministry. In response to Lawyer's question, John said that he had not discussed changing his will or making the gift with anyone but Lawyer, nor did he intend to.

Lawyer ended the meeting by telling John that it would take a couple of weeks to find out whether approval of the ministry's application for tax-exempt status was likely. Lawyer promised to call John as soon as Lawyer knew anything.

The first question to be answered both under the Model Rules and in any ethical analysis is: where should the lawyer's loyalty lie?

WHAT IS LAWYER'S RELATIONSHIP WITH JOHN AND WANDA?

The facts state that Lawyer "has represented John Smith for many years." Clearly Lawyer has an attorney-client relationship with John. The facts also indicate that Lawyer met with and accepted direction from Wanda in the 1990 drafting of her will. Whether or not any formal agreement or contract exists, these facts reveal that an attorney-client relationship was established with Wanda.²¹

Establishing that the attorney-client relationship existed between Lawyer, John, and Wanda is easier than characterizing the nature of the relationship.²² There are three possible char-

21. See *Buntrock v. Buntrock*, 419 So. 2d 402 (Fla. Dist. Ct. App. 1982) (affirming denial of foreign attorneys' admission as co-counsel to husband in a divorce case where foreign attorneys had prepared will for wife in a prior year. The court rejected claim that the preparation of the wife's will was incidental to the representation of the husband, thus making the wife merely a third party beneficiary of his representation); cf. *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 448 F. Supp. 1284, 1301 (N.D. Ill. 1978) ("Recognizing the absence of express manifestation, the oil companies fall back on the accepted principle that the relation of attorney and client may be implied from the conduct of the parties. In the typical case, such conduct includes the preparation of a legally-binding document like a contract or a will. . . .") (citation omitted).

22. Compare *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978) (Counsel for a trade association was asked to represent a party in litigation against some of the association's members. The members moved for disqualification. The court expressly declined to make any

acterizations under these facts. The 1990 conduct may indicate that Lawyer represented John and Wanda as two unrelated clients who consented to the disclosure of confidences to each other.²³ Alternatively, John and Wanda could be considered two individuals seeking counsel jointly.²⁴ The third interpretation of these facts would identify John and Wanda as one family seeking Lawyer's assistance, with the "family" being treated as an independent entity for purposes of representation.²⁵ No existing Model Rule or professional standard provides definitive guidance on the proper choice among these alternatives when the clients have not clearly stated their desires concerning the form of representation.²⁶ A majority of practitioners would classify Lawyer's representation of John and Wanda as joint representation²⁷ since recommendations were given to both of them, and Lawyer accepted direction from both John and Wanda.

CONFLICTS OF INTERESTS BETWEEN PRESENT CLIENTS

Another question left unanswered in the hypothetical facts is whether Wanda is a current client of Lawyer. The answer to this question is dependent upon facts which are not provided concerning their relationship. Yet proper classification of Wanda as a former or present client determines which Model Rule controls Lawyer's actions.

generalized statement that counsel for a trade association represents every member of the association, but disqualified the law firm on the narrower ground that the association members who were sued had previously submitted confidential information to the firm in connection with legislative activities on behalf of the association).

23. Under this characterization Lawyer would be representing each spouse separately and simultaneously with consent to disclosure of confidences. The consent to disclosure of confidences distinguishes Lawyer's representation from the model of separate simultaneous representation discussed *infra* in the text accompanying notes 152-194.

24. Under this characterization Lawyer would be representing the couple jointly. See *infra* text accompanying notes 195-207.

25. Under this characterization Lawyer would be representing the family. See *infra* text accompanying notes 97-124.

26. MODEL RULES, *supra* note 6, Rule 1.7 cmt. 13 concludes with the admonition, "[t]he lawyer should make clear the relationship to the parties involved." The absence of a "default rule" defining the relationship of the parties absent an agreement is one of the major weaknesses of the Model Rules.

27. See John C. Williams, *The Case of the Unwanted Will*, *Comments from John C. Williams*, 65 A.B.A. J. 484, 486 (1979); cf. Clare H. Springs, *Advice on Representing Both Husband and Wife*, 130 TR. & EST. 21, 48 (1991).

Rule 1.7 deals with conflicts of interests which arise between present clients. In order for this rule to control Lawyer's conduct, Wanda must be a present client. The facts do not indicate that Lawyer has performed any additional legal services for Wanda since 1990. However the passage of three years may not be sufficient to assume that the attorney-client relationship that existed in 1990 has terminated,²⁸ particularly if the form of the representation suggested a continuing relationship with the "family" as a separate entity.²⁹ Comment 3 to Rule 1.3 recognizes the difficulty in determining when representation has ceased, absent a formal letter of termination of representation.³⁰ In the hypothetical case, Lawyer continues to actively represent Wanda's husband, and it may be reasonable for Wanda to believe that Lawyer continues to be "her" lawyer as well.³¹ If Wanda is a current client of Lawyer, Rule 1.7

28. See *Manoir-Electroalloys Corp. v. Amalloy Corp.*, 711 F. Supp. 188 (D.N.J. 1989). The court ruled that a client was a current client even though the law firm was not actively providing legal services and had not done so for over four years. Finding the relationship to be "sufficiently continuous," the court concluded that "the mere fortuity that [the client] did not require more extensive or frequent services than he did cannot be the escape hatch [the law firm] would have it to be." *Id.* at 194. But see *Artromick Int'l, Inc. v. Drustar, Inc.*, 134 F.R.D. 226 (S.D. Ohio 1991) (holding that it was unreasonable to continue to demand an attorney's undivided loyalty for an indefinite period of time when a final bill had been submitted and new business was given to a new attorney).

29. Lawyer continued to represent John actively. Since John is a member of the family, if Lawyer represents the family, the burden of proof would be upon Lawyer to establish that representation of the family had terminated and any subsequent representation was limited to John's individual interests. See MODEL RULES, *supra* note 6, Rule 1.3 cmt. 3 reproduced in note 30 *infra*. Wanda could convincingly argue that representation of the family continued through the representation of its member.

30. MODEL RULES, *supra* note 6, Rule 1.3 cmt. 3 provides:

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period [of time] in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

31. *Togstad v. Vesley, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980) supports the proposition that whether representation exists is dependent upon reasonable belief of client.

would be the controlling rule in determining whether Lawyer can assist John in the proposed gift and alteration of his will.

Rule 1.7(a) requires the consent of both clients to dual representation if such representation will be directly adverse to the interest of either client.³² The facts do not evidence direct adverseness when dual representation began. In 1990 when representation of Wanda was initially undertaken, the interests of John and Wanda appear to have been compatible.³³ This compatibility is ultimately evidenced by the signing of mutual wills containing mirror-image provisions. It is only during the recent meeting with John that any adverseness of their interests is suggested by the facts. If adverseness in fact exists, Rule 1.7(a) requires the lawyer obtain informed consent from both clients to continue representation³⁴ or withdraw.³⁵ One way to avoid the strictures of the Rule would be to argue that no adverseness exists. Wanda has no legally protected interest or right to receive the benefits provided under John's 1990 will,³⁶ and so the proposed modification of John's will can not be directly adverse to any legal interest. If she survives John, the law protects her from the effects of disinheritance through the state's forced heir statutes,³⁷ a system of community property,³⁸ or dower.³⁹ This interest is unaffected by the proposed testamentary change.⁴⁰ Also, since all the property is in her husband's name, absent some statute or case law to the contrary, she has no legal basis to object to the gift of \$100,000.⁴¹

32. MODEL RULES, *supra* note 6, Rule 1.7(a)(2).

33. *See* RESTATEMENT GOVERNING LAWYERS, *supra* note 14, § 211 cmt. c; *see also id.* § 201.

34. *Id.* § 202 cmt. d.

35. MODEL RULES, *supra* note 6, Rule 1.7 cmt. 2; *see also id.* Rule 1.16.

36. "The expectancy that one will inherit by intestacy or under a will from a person now living is not property; it is not land, chattel or chose in action, but rather the hope of owning such in the future." PAUL HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 80 (1987).

37. *See* THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 32, (2d ed. 1953); WILLIAM J. BOWE ET AL., PAGE ON WILLS § 3.13 (4th ed. 1960) ("Forced Heirs Defined. Those persons whom the testator or donor cannot deprive of the portion of his estate reserved for them by law, except on cases where he has a just cause to disinherit them [e.g., person's spouse].").

38. HASKELL, *supra* note 36, at 149.

39. *Id.* at 132.

40. *Compare id.* at 140. For a fascinating comparison with the laws of other times and other nations, see MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW (1989), particularly 238-51.

41. *See* Johnson v. LaGrange, 365 N.E.2d 1056 (Ill. App. 1977). For full discussion see Elias Clark, *The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 CONN. L. REV. 513 (1970). Reasonable unilateral gifts of community property are also

Under this line of analysis none of John's proposed actions are directly adverse to any *legal* right that Wanda has and the representation may be permissible.

Yet this "non-adversity" argument may fail for two reasons. First, Wanda may have a legally enforceable interest if the execution of the 1990 mutual wills containing mirror-image provisions evidences a contract to make a will.⁴² The courts are careful "to distinguish between the mere agreement to make a will and one not to revoke the same."⁴³ Even if additional facts support the conclusion that the 1990 mutual wills were executed pursuant to a contract to make a will and not revoke it, there is limited authority that suggests that such an agreement would not be enforceable by Wanda since she does not hold title to any of the couple's assets. "The great inequality of consideration moving from the two makers" would defeat any claim based on such a contract.⁴⁴ However, the majority of courts have disregarded any disparity in value of assets owned by each party to the contract in considering the issue of consideration to support a contract not to revoke a will.⁴⁵

Even if the facts do not support a determination that John and Wanda have a contract making their individual wills irrevocable, Wanda may have an independent interest in loyal representation by her lawyer. In *Hotz v. Minyard*,⁴⁶ the court recognized a claim for breach of fiduciary duty against a lawyer who told a client that a superseded will was her father's current will. The attorney had separately represented both the father and the daughter for over twenty years. The superseded will provided for equal division of the father's property between his son and a trust for the daughter. The same day the superseded will was executed, the father returned to the attorney's office

permitted in the majority of community property jurisdictions. See *Givens v. Girard Life Ins. Co.*, 480 S.W.2d 421, 425 (Tex. Ct. Civ. App. 1972).

42. See ATKINSON, *supra* note 37, § 49 ("Frequently joint or mutual wills are made in pursuance of an agreement or compact not to revoke them."); see also BOWE ET AL., *supra* note 37, § 10.48 ("Direct evidence of the contract [to make a will] including evidence of an oral agreement, supplemented by the execution of a will in accordance with such an agreement may be sufficient to establish a contract."). See generally Annotation, *Establishment and Effect, After Death of One of the Makers of Joint, Mutual or Reciprocal Will, of Agreement Not to Revoke Will*, 17 A.L.R. 4th 167 (1982); W.S. Anderson, Annotation, *Joint, Mutual and Reciprocal Wills*, 169 A.L.R. 9 (1947).

43. ATKINSON, *supra* note 37, § 49.

44. *Levis v. Hammond*, 100 N.W.2d 638, 643 (Iowa 1960). But see *In re Chapman's Estate*, 239 N.W.2d 869 (Iowa 1976).

45. WILLIAM M. MCGOVERN, JR. ET AL., *WILLS, TRUSTS AND ESTATES* 390 (1988).

46. 403 S.E.2d 634 (S.C. 1991).

and executed a second will diminishing the gift to the daughter. The father specifically instructed the lawyer not to disclose the existence of the second will to his daughter. The daughter subsequently requested a copy of the will her father had signed on the morning of October 24, 1984. At the father's direction, "or at least with his express permission," the attorney showed the daughter the first will and discussed it with her in detail.⁴⁷ Eventually the father died, the daughter discovered the perfidy and sued the lawyer.⁴⁸

Nothing in the hypothetical facts concerning John and Wanda approaches the level of active misrepresentation undertaken by the lawyer in the *Hotz* case. However, the court emphasized the relationship between the lawyer and daughter, opining:

Although Dobson represented Mr. Minyard and not Judy regarding her father's will, Dobson did have an ongoing attorney/client relationship with Judy and there is evidence she had 'a special confidence' in him. While Dobson had no duty to disclose the existence of the second will against his client's (Mr. Minyard's) wishes, he owed Judy the duty to deal with her in good faith and not actively misrepresent the first will.⁴⁹

It is not difficult to imagine a scenario where Lawyer is faced with the same choice that the lawyer in *Hotz* faced if Lawyer represents John and Wanda separately. If John utilizes Lawyer's services to change his will, upon a proper inquiry by Wanda, Lawyer must either (1) reveal the fact that John changed his will, ignoring John's implied direction that the changes be kept confidential,⁵⁰ thereby breaching the duty to John to maintain client confidences;⁵¹ (2) misrepresent the true state of John's testamentary plan, thus breaching the fiduciary

47. *Id.* at 636.

48. *Id.*

49. *Id.* at 637.

50. *See supra* p. 106. "In response to Lawyer's question, John said that he had not discussed changing his will or making the gift to anyone but Lawyer, nor did he intend to."

51. MODEL RULES, *supra* note 6, Rule 1.6.

duty owed to Wanda;⁵² or (3) decline to answer, effectively "waiving the red flag" while not "blowing the whistle."⁵³

The *Hotz* decision seems to limit attorneys engaged in separate representation to the third option only, rejecting any affirmative duty to disclose confidential information that is detrimental to another client.⁵⁴ Implicit in the *Hotz* opinion is a determination that the duty to maintain the confidences of the father was superior to the duty to give information to the daughter.⁵⁵ Only when the lawyer made affirmative misrepresentations to the daughter did he breach the duty of fair dealing he owed to her.⁵⁶

This analysis disregards the growing body of case law requiring lawyers to volunteer information under certain circumstances.⁵⁷ Informing the daughter of the true status of the

52. Civil liability for the tort of fraud or deceit can attach when a lawyer misrepresents factual information to a client. See RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 8.8 (3d ed. 1989); see also *Colorado v. Blanck*, 713 P.2d 832 (Colo. 1985) (counsel disbarred in a disciplinary proceeding resulting from his misrepresentation to an unidentified couple that a dissolution of marriage had been granted. Counsel had falsified a decree issued to another couple and presented it to his clients); *In re Barry*, 447 A.2d 923 (N.J. 1982) (attorney fabricated an ongoing proceeding to a client when no suit had even been filed. Attorney went so far as to have the client travel to the courthouse on two occasions to attend trial proceedings which were purely fictitious).

The duty of truthfulness to clients can be inferred from several provisions contained in the Model Rules. MODEL RULES, *supra* note 6, Rule 1.4 requires the lawyer "explain a matter to the extent reasonably necessary to permit the client to make informed decisions." MODEL RULES, *supra* note 6, Rule 2.1 requires that a lawyer render "candid advice."

53. See generally Ronald D. Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waiving the Red Flag*, 63 OR. L. REV. 455 (1984).

54. This result is consistent with one interpretation of the law of agency as reflected in RESTATEMENT (SECOND) OF AGENCY § 381 (1957) [hereinafter RESTATEMENT OF AGENCY]:

Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person.

55. If Dobson had represented only Mr. Hotz, or if the representation had been joint from the outset, Dobson would have no conflicting duties. In the first case, Dobson's duties run only to Mr. Hotz. In the second case, the duty of maintaining confidences between the two clients would have been waived, leaving only the duty to give information. See *infra* text accompanying notes 195-207.

56. 403 S.E.2d at 637.

57. See *Nebraska State Bar v. Addison*, 412 N.W.2d 855 (Neb. 1987) (lawyer disciplined for failing to voluntarily disclose existence of insurance

father's will would not have limited his ability to achieve his legitimate goal — unequal distribution of his estate.⁵⁸ Maintaining the confidences of the father did limit the ability of the daughter to make informed decisions concerning her future course of conduct.⁵⁹ Balancing the potential injury to each party, it seems that where both parties are present clients of the lawyer and there is no express agreement on this issue, the duty to give information necessary for one client to exercise his or her legal rights ought to trump the duty to maintain confidences, at least where disclosure would create no legal barrier to the exercise of legal rights by the other client.⁶⁰ Under this

policies in negotiations concerning payment of hospital bill). See generally Gary Tobias Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411 (1988).

58. It would have eliminated his ability to mislead his daughter concerning the contents of his will, but in the context of the *Hotz* case this interest of the father does not weigh very heavily. However, it is possible to posit a different set of facts where the father's desire for informational privacy would seem more compelling. For example, a lawyer assisting both a parent and child with their individual estate plans might find it more desirable to maintain the parent's secret that he or she is terminally ill than to disclose this information to the child over the parent's objection, even if the size of the parent's estate is sufficiently large that the child should modify his or her plan to accommodate the increase in assets which Lawyer knows will occur sooner than the child anticipates.

59. The daughter was induced to abandon her plans to file a lawsuit concerning her brother's management of the family business in exchange for reinstatement in her father's will, the terms of which she had been misled about. 403 S.E.2d at 636.

60. Compare RESTATEMENT (SECOND) OF TORTS § 551 (1977):

- (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
- (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
 - (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and
 - ...
 - (c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and
 - ...
 - (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of

analysis, in the hypothetical case of John and Wanda, if both are current clients represented separately, yet simultaneously, by Lawyer, Lawyer should decline to modify John's will, resulting in Lawyer having no definitive information concerning changes to give to Wanda,⁶¹ or if Lawyer makes the changes, Lawyer should be under an affirmative obligation to disclose that changes were made in order to afford Wanda an opportunity to modify her will accordingly.⁶²

Even absent an inquiry by Wanda, there is some authority in other contexts that an affirmative duty of disclosure exists when the lawyer undertakes dual representation.⁶³

CONFLICTS OF INTERESTS INVOLVING FORMER CLIENTS

But it may be that Rule 1.7 is not applicable. If sufficient facts are established to warrant the conclusion that representation of Wanda ended in 1990, Rule 1.9 may be the more appropriate rule to apply when considering whether to undertake the representation John has requested. This Rule governs conflicts of interests between former clients and current clients.⁶⁴ Rule 1.9 provides greater leniency in many situations concerning the representation.⁶⁵ While an attorney may not represent two current clients simultaneously when their interests are "directly adverse" absent client consent,⁶⁶ the attorney's limitation con-

the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

61. This resolution contains much of the moral ambiguity identified by authorities attempting to answer the question of "what does the lawyer really know." See MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* app. B (1990); see also Marvin Frankel, *Partisan Justice: A Brief Revisit*, A.B.A. LITIG., Summer 1989, at 43.

62. See generally Gerald P. Johnston, *Legal Malpractice in Estate Planning — Perilous Times Ahead for the Practitioner*, 67 IOWA L. REV. 629, 654-58 (1982).

63. See *People v. Bollinger*, 681 P.2d 950 (Colo. 1984) (lawyer disciplined for failing to keep buyers/clients advised of problems that developed in transaction involving land offered for sale by seller/client); *Crest Inv. Trust, Inc. v. Comstock*, 327 A.2d 891 (Md. Ct. Spec. App. 1974) (lawyer representing both sides of a transaction under a common law duty to disclose relevant information to both sides).

64. The pertinent part of Rule 1.9 provides:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which the person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

65. MALLEN & SMITH, *supra* note 52, at 753.

66. MODEL RULES, *supra* note 6, Rule 1.7(a).

cerning conflicts of interests with former clients is only as to matters which are "the same or substantially related."⁶⁷

Modification of John's will is "the same matter" as the estate planning that occurred in 1990 if "matter" is defined as a continuous planning process. Such a definition may require the lawyer to advise the client of relevant changes that affect the current plan.⁶⁸ Alternatively "matter" may be defined as the limited task of drafting and overseeing the execution of the 1990 wills, in which case the proposed modification is not "the same matter." However, it seems disingenuous to suggest that it is not a "substantially related matter."

The more difficult question is whether John's interest in modifying his will is "materially adverse" to an interest of Wanda's that should be recognized under the Rules.⁶⁹ As a current client, Wanda is entitled to new information Lawyer receives that could reasonably be anticipated to affect her estate planning.⁷⁰ However, Lawyer's duty to Wanda as a former client diminishes, although it does not disappear entirely.⁷¹

The duty to maintain confidences survives the drafting of the wills,⁷² as does the duty to refrain from seeking on behalf of a new client to undo what was done on behalf of a former client.⁷³ Neither of these duties is implicated by the hypothetical facts. Assisting John with the modification of his will does not require that Lawyer use or disclose confidential information from Wanda,⁷⁴ nor is John attempting to undo what was done on behalf of Wanda.

The justification for forbidding representation of John, absent consent by Wanda, lies in the agreement that was evidenced by the execution of mutual wills and the risk of Wanda's misguided but continuing reliance on that agreement. While most courts have not allowed the mere execution of mutual wills to render unilateral revocation of either will

67. *Id.* Rule 1.9(a).

68. *Cf. Lama Holding Co. v. Shearman & Sterling*, 758 F. Supp. 159 (S.D.N.Y. 1991) (firm subjected to malpractice liability for failure to advise clients of changes in the tax law after specific assurance that notification of change would be given).

69. *See supra* text accompanying notes 36-48.

70. *See* MODEL RULES, *supra* note 6, Rule 1.3 cmt. 3; *see also* RESTATEMENT OF AGENCY, *supra* note 54, § 381.

71. *See* WOLFRAM, *supra* note 15, § 7.4.1.

72. *See* MODEL RULES, *supra* note 6, Rule 1.6 cmt. 15 & 21.

73. *See id.* Rule 1.9 cmt. 1; *see also* RESTATEMENT OF AGENCY, *supra* note 54, § 213.

74. *See* MODEL RULES, *supra* note 6, Rule 1.6 cmt. 21.

impossible,⁷⁵ the competing concerns are fundamentally different. To prohibit Lawyer from representing John in the modification of his will, absent Wanda's consent, does not render John unable to change his testamentary plan. It simply requires John to obtain the services of another attorney. This inconvenience does not impose burdens upon John comparable to a rule of law that would conclusively presume that the execution of mutual wills evidences a contract not to revoke the wills without all parties' consent.⁷⁶ In this case, John's interest in an unfettered selection of counsel is outweighed by Wanda's interest in not having the effect of her estate plan altered by her lawyer (past or present) without her knowledge. Because John seeks to modify unilaterally an estate plan that was initially the product of joint planning by John and Wanda, the alteration is materially adverse to the interest of Wanda in having her estate plan integrate effectively with John's, and in having an accurate understanding of the anticipated operation of her plan.

While there is some room for differing conclusions concerning its applicability, Rule 1.9, if applicable, requires Lawyer either to obtain Wanda's consent to the dual representation or to decline to represent John in this matter.⁷⁷ In order for the consent to be effective, Wanda must be informed of the nature of the representation. At a minimum, this means informing her of John's intention to change his will. This disclosure can only be made with John's permission,⁷⁸ which the facts indicate is not forthcoming.⁷⁹ Absent Wanda's consent, the only option left to Lawyer is to decline to assist John in this matter.⁸⁰

CONFLICTS OF INTERESTS BETWEEN CLIENTS FOR THE INTERMEDIARY LAWYER

Rule 2.2 is often referred to in attempts to find some authority for the lawyer acting as counsel to both husband and wife in an estate planning matter.⁸¹ This may not be an appro-

75. HASKELL, *supra* note 36, at 52.

76. See MCGOVERN ET AL., *supra* note 45, at 385.

77. See *Guidelines for Estate Planners*, 13 PROB. NOTES 8 (1987); cf. HAZARD & HODES, *supra* note 1, § 1.2:403.

78. See *supra* note 17.

79. See *supra* p. 106. "In response to Lawyer's question, John said that he had not discussed changing his will or making the gift with anyone but Lawyer, nor did he intend to."

80. See Mercer D. Tate, *Handling Conflicts of Interest that may occur in an Estate Planning Practice*, EST. PLAN., Jan./Feb. 1989, at 32, 36.

81. Professor Shaffer suggests that "representation of the family" (see *infra* text accompanying notes 97-124) may be permissible under Model Rule 2.2, discussing a lawyer's responsibilities when acting as an "intermediary."

priate reference. The Comment after the Rule defines the situations in which a lawyer is acting as an intermediary:

A lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances.⁸²

A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients.⁸³

The Rule's recognition of the "joint representation" or "lawyer for the family" models may be contained in the language "to establish or adjust a relationship between clients on an amicable and mutually advantageous basis."⁸⁴ As lawyer for the family, the lawyer helps the client fully recognize its purposes and desires. Recognition of the family's purposes is a form of adjustment, and thus may be encompassed by Rule 2.2.⁸⁵ During joint representation the lawyer seeks to assist clients provide for the disposition of their property on an amicable and mutually advantageous basis.

These interpretations ignore the absence of any reference to families or couples in the Rule, which uses only business relationships or similar transactions as exemplars.⁸⁶ While particular estate plans may require "adjusting the relationship" of the husband and wife to certain pieces of property (for exam-

However, he notes that this analysis finds greater support in the commentary than it does in the text of the Rule. Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 974 (1987) [hereinafter Shaffer, *Legal Ethics*]. A shorter version of the same article can be found as Thomas L. Shaffer, *The Family as a Client — Conflict or Community*, 34 RES GESTAE 62 (1990) [hereinafter Shaffer, *Family as a Client*]; see also Gerald Le Van, *Lawyers, Families and Feelings: Representing the Family Relationship*, PROB. & PROP., Jan./Feb. 1990, at 20.

82. MODEL RULES, *supra* note 6, Rule 2.2 cmt. 1.

83. *Id.* cmt. 3.

84. See Shaffer, *Legal Ethics*, *supra* note 81, at 974.

85. *Id.*

86. *Id.*

ple, severing or creating joint tenancies, intrafamily gifts and transfers, etc.), this type of adjustment is not usually the primary purpose of the representation.⁸⁷ Instead the primary purpose of the representation is not to establish or adjust the relationship between the clients, but rather to establish or adjust the relationship of the clients with others whom the lawyer may or may not represent — children, creditors, the taxing authorities.

Additionally, joint representation or representation of the family for estate planning is not primarily concerned with creating mutual advantages for the husband and wife. "I'll leave all my property to you if you'll leave all your property to me, and when we are both dead, the children will get the property," does not reflect the typical statement between spouses heard by estate planners. Such an understanding reduces estate planning by couples to a process of bargaining for personal benefits. While a small number of clients perceive estate planning in this manner, the vast majority of clients do not. A statement more likely to be overheard is "We want to make sure whoever dies last is taken care of while the survivor is alive, and the kids get whatever is left." The clients are more focused on caring for their families after their death.⁸⁸

The express consideration of estate planning in the comments to Rule 1.7, and the absence of any such consideration in the text of or comments to Rule 2.2, lend further support for the conclusion that Rule 2.2 was not intended to encompass conduct such as estate planning for both spouses. For these reasons, Rule 2.2 does not seem to be controlling in an analysis of the hypothetical facts.

Assuming *arguendo* that Rule 2.2 is applicable, the options available to Lawyer in the hypothetical situation are no greater than those under Rule 1.7⁸⁹ or 1.9.⁹⁰ Rule 2.2 requires that the lawyer "consult with each client concerning the decisions to be made"⁹¹ or withdraw if the lawyer comes to reasonably believe

87. Other examples include where clients wish to "guarantee reciprocity or binding mirror-image wills or conclude an agreement exchanging or modifying spousal rights." AMERICAN BAR ASS'N SECTION OF REAL PROPERTY, PROBATE AND TRUST, SPECIAL STUDY COMM. ON PROFESSIONAL RESPONSIBILITY, COMMENTS AND RECOMMENDATIONS ON THE LAWYER'S DUTIES IN REPRESENTING HUSBAND AND WIFE 11 (Preliminary Draft No. 3, Mar. 3, 1992).

88. THOMAS L. SHAFFER, DEATH, PROPERTY AND LAW 3-10 (1970).

89. See *supra* text accompanying notes 35-36.

90. See *supra* text accompanying note 77.

91. MODEL RULES, *supra* note 6, Rule 2.2(b).

that the common representation can no longer be undertaken impartially.⁹² Thus Lawyer must either obtain John's permission to disclose enough information to Wanda to consult with her concerning John's intention to make a gift and change his will, or decline to represent John in the modification of his will.

FOUR MODELS OF REPRESENTATION

The hypothetical problem of John and Wanda illustrates some of the difficulties that are inherent in representing both spouses for estate planning. The initial identification of the client and the type of representation may have dramatic consequences as the representation proceeds. Recognition of this fact has led to the current debate about the proper response when asked to represent both spouses. Four possible responses have emerged: (1) lawyer for the family;⁹³ (2) separate representation by separate lawyers;⁹⁴ (3) separate simultaneous representation by the same lawyer;⁹⁵ and (4) joint representation by the same lawyer.⁹⁶ Each of these responses is supported by strong arguments concerning the morality and autonomy of both lawyer and client.

LAWYER FOR THE FAMILY

Professor Thomas L. Shaffer urges estate planning lawyers to define their relationships with clients as "lawyers of the family,"⁹⁷ rather than lawyers involved in joint representation of two amicable individuals. Having the family as client is premised upon a recognition that the "family" is distinct from the sum of consensual points of contact between the husband and wife.⁹⁸ Instead the family is an "organic community" that

92. *Id.* Rule 2.2 (c).

93. Under this model of representation, the client is identified as the "family" instead of the individuals within the family. This model is discussed in the text accompanying notes 97-124.

94. This model of representation requires that the husband and wife are represented independently by separate lawyers. This model of representation is discussed in the text accompanying notes 125-51.

95. This model of representation requires that the clients meet with the lawyer individually and agree that the lawyer will not disclose confidences obtained during those individual meetings to the other spouse. This model of representation is discussed in the text accompanying notes 152-94.

96. This model of representation requires that the clients agree that all confidences will be shared with both spouses, who are both identified as clients of the attorney. This model of representation is discussed in the text accompanying notes 195-207.

97. Shaffer, *Legal Ethics*, *supra* note 81, at 970.

98. *Id.* at 970 n.26.

exists before, during, and after the existence of the individual.⁹⁹ It is the complex of relationships in which the client lives. This differs from the alternative contemporary conception of "family," which is a relationship that an individual is "in." By the characterization of the person being "in" a family, the person is seen as independent of and totally separable from the family.

While Professor Shaffer argues that his vision is grounded in moral reality, it finds support in common law as well. The basis for recognition of tenancy by the entirety is unity of husband and wife.¹⁰⁰ At common law any property held in tenancy by the entirety was considered the property of the couple, as a single entity¹⁰¹ — thus giving practical affect to the biblical observation "the two shall become one."¹⁰² Property held by the entirety was subject to the debts of the husband as head of the family, but could not be partitioned.¹⁰³ In most jurisdictions, unilateral partition is still forbidden.¹⁰⁴ However, with the passage of the Married Women's Property Acts, many jurisdictions decided that creditors' claims against property held in tenancy by the entirety could only be founded upon joint obligations of both husband and wife.¹⁰⁵ This change was due

99. *Id.* at 965.

100. See *United States v. Jacobs*, 306 U.S. 363 (1939). For a more contemporary discussion of the origins and characteristics of the tenancy by the entirety, see *Spessard v. Spessard*, 494 A.2d 701 (Md. Ct. Spec. App. 1985).

101. See *In re Morris' Estate*, 177 N.W. 266 (Mich. 1920) (tenancy by the entirety grows out of the unity of husband and wife, which is unlike joint tenants, who are seized of an undivided moiety. Rather, the husband and the wife do not hold by moieties, but "take as one person, taking as a corporation would take.").

102. "For this reason a man will leave his father and mother and be united to his wife, and they will become one flesh." *Genesis* 2:24 (NIV Bible).

103. See *Masonry Products, Inc. v. Tees*, 280 F. Supp. 654, 656 (D.V.I. 1968) (holding that the interest of a husband in property held by the entirety, in his own right and *jure uxoris*, was subject to the satisfaction of his individual debts, subject to the contingency that if the wife survived him she would be entitled to the whole estate).

104. *Id.* at 657 ("It is the view of the great majority of American jurisdictions which recognize the estate by the entirety that since the enactment of the Married Women's Property Act this unity of estate is indestructible by the unilateral act of either spouse so long as the marriage subsists.").

105. Cf. *City Fin. Co. v. Kloostra*, 209 N.W.2d 498 (Mich. App. 1973) (A married woman co-signed a promissory note with her husband. Judgment on the note could only be satisfied out of property held jointly with her husband. Wife's separate property was not liable for the debt unless consideration from the note passed directly to her separate estate).

to the Act's recognition of wives' equality with their husbands in the control of the marital estate, converting the common law unity of unequals into a unity of equals.¹⁰⁶ Thus the unity remained a legally recognized relationship with rights and duties greater than those afforded to individuals joined in ownership through joint tenancy.¹⁰⁷

Shaffer's vision of family as greater than the two individuals seeking representation is also validated by the various statutory schemes of inheritance for individuals dying intestate. The uniform statutory preference for family over other potential recipients¹⁰⁸ recognizes the human desire to perpetuate self beyond death through the transmission of property to those identified as family.¹⁰⁹ People want to establish and transmit those things that they value deeply. "[T]o ourselves and our posterity. . ."¹¹⁰ is not limited to political liberties and institutions. Put more colloquially, "[t]his business of making wills should strengthen the family now, and give it a source of strength for later, when these two people are dead and their children are fighting over the pickle crock."¹¹¹

As lawyer to the family, Lawyer would be required to act in the family's interest, which may include acting as a catalyst for a dialogue between John and Wanda concerning John's present and future gifts to the ministry.¹¹² In describing the proper course of conduct for a hypothetical attorney in a situation¹¹³ similar to that of Lawyer's, Shaffer writes:

[T]he most irresponsible thing a lawyer could do is to send either of these people to another lawyer, or both of them to two other lawyers. If that is the command of our professional ethics, or even the easiest available "solution" to the case from our regulatory rules, then our ethics and our rules are corrupting. They corrupt the family

106. See *Otto F. Stifel's Union Brewing Co. v. Saxy*, 201 S.W. 67 (Mo. 1918); *Lang v. Commissioner*, 289 U.S. 109 (1933).

107. See *Sawada v. Endo*, 561 P.2d 1291 (Haw. 1977); *Michigan v. Wallace*, 434 N.W.2d 422 (Mich. App. 1988).

108. See HASKELL, *supra* note 36, at 10.

109. See Shaffer, *Legal Ethics*, *supra* note 81, at 936; see also SHAFER, *supra* note 88, at 8.

110. U.S. CONST. pmbl.

111. Shaffer, *Family as a Client*, *supra* note 81, at 62.

112. See Shaffer, *Legal Ethics*, *supra* note 81, at 989.

113. Professor Shaffer analyzes the hypothetical facts contained in Williams, *supra* note 27, at 484; a lawyer who drafted wills for a couple on the basis of joint interviews, immediately after the husband executes his will but prior to the wife executing hers, is privately told by the wife that her will does not reflect her testamentary desires.

in general, and *this* family in particular. A lawyer following the rules is irresponsible because in fact, the family is the lawyer's client. The lawyer who sends the family away is not able to respond to his client. He is disabled by a false ethic and, in trying to protect himself, he harms his client.¹¹⁴

The goal of a lawyer engaged in estate planning for the family should be to render a truthful description of the family and their property through the language of the law.¹¹⁵ In the case of John and Wanda, this can only be done if Lawyer exerts moral suasion in convincing John to reveal to Wanda his intentions to make a gift and alter his will.

This result is different from the answer reached under the more traditional model of joint representation by the same lawyer. Joint representation would require Lawyer either to disclose the proposed course of action to Wanda and obtain her consent prior to assisting John with the changes¹¹⁶ or to withdraw from representing John in estate planning matters.¹¹⁷

While the lawyer operating within either the "lawyer for the family" model or the "joint representation" model may facilitate disclosure of John's intentions to Wanda, the purposes the lawyer seeks to achieve are fundamentally different. As lawyer for the family, Lawyer's interest in disclosure to Wanda is in having the family "learn how to take John's purposes into account, because John is in the family."¹¹⁸ "Being a family means taking purposes and secrets into account, because being in a family means primarily that a person is known, even before she knows."¹¹⁹

As a lawyer engaged in joint representation, Lawyer's interest in disclosure to Wanda is in having Wanda agree to the use of Lawyer's skills in altering documents drafted for and controlled by another individual. This approach presumes John's exercise of individual autonomy in making the gift and changing the will is morally permissible, only requiring disclosure in order to insure that Lawyer can assist John despite Lawyer's present or prior representation of Wanda. The interest of the family in understanding the desires of John is not a consideration.

114. Shaffer, *Legal Ethics*, *supra* note 81, at 982.

115. *Id.* at 968-70.

116. MODEL RULES, *supra* note 6, Rule 1.7(a).

117. *Id.* Rule 1.6 cmt. 2.

118. *Cf.* Shaffer, *Legal Ethics*, *supra* note 81, at 976.

119. *Id.* at 982.

The Rules do not encompass the moral reality about which Professor Shaffer writes. The model of lawyer for the family requires recognition that marriage and family relationships are grounded in covenant and status,¹²⁰ rather than consent and contract.¹²¹ This is not the dominant view of marriage embodied in American law today.¹²² To the extent that law is representative of our public mores,¹²³ the widespread availability of no-fault divorce seems to reflect a belief that marriage is simply a consensual arrangement between two adults that can be dissolved when the consent no longer exists.¹²⁴ If the majority of Americans believe marriage is a contractual matter rather than

120. *Id.* at 970-71; see also INSTITUTE IN BASIC YOUTH CONFLICTS, *THE TRUE SIGNIFICANCE OF THE WEDDING COVENANT* 7-9 (1985). "The traditions of a Christian wedding grow out of God's covenant relationship with Israel and Christ's relationship with the believer. The covenant differs from a contract in that it is based on trust between parties, based on unlimited responsibility, and cannot be broken if new circumstances occur." *Id.* at 6; *Malachi* 2:14 ("[S]he is thy companion and the wife of thy covenant.").

121. See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 85-112 (1986). "If love and marriage are seen primarily in terms of psychological gratification, they may fail to fulfill their older social function of providing people with stable, committed relationships that tie them into the larger society." *Id.* at 85; see also ANDREW M. GREELEY, *FAITHFUL ATTRACTION: DISCOVERING INTIMACY, LOVE AND FIDELITY IN AMERICAN MARRIAGE* (1991):

The marriage bond between a man and a woman is more than a legal contract, though it may begin with a contract and involve the continuation of a contract through the life together. It is a union of minds and bodies, not union in the romantic or ideal sense, but rather as that which occurs in the hard reality of everyday life. A man and woman come together to share life and contract a union which at times seems to be more powerful than the consent that either of them has brought to it. The bond can be broken, though not as easily as it is entered, but it has, as the data in this study show, remarkable durability.

Id. at 240-41.

122. See generally MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* (1981). The author speaks of the "new family" as:

[A] convenient way of referring to that group of changes that characterizes 20th century Western marriages and family behavior, such as increasing fluidity, detachability and interchangeability of family relationships The new family is a concept that represents a variety of co-existing family types.

Id. at 3-4.

123. See Gregg Temple, *Freedom of Contract and Intimate Relationships*, 8 HARV. J.L. & PUB. POL'Y 121, 150 (1985) ("Where marriage once served a variety of institutional functions, the current marriage is a vehicle for personal happiness and fulfillment.").

124. *Id.* at 151. ("[T]raditional goal of permanence no longer represents the norm [for marriages] . . . the high divorce rate reflects personal fulfillment function of marriage.").

one of covenant or permanent status, the model of lawyer for the family is inconsistent with this view. This inconsistency is not sufficient grounds for prohibiting an agreement to act as "lawyer for the family" between lawyer and clients who share this understanding of the relationship. However, such an inconsistency does preclude this form of representation being the required norm for representation pertaining to estate planning for spouses.

SEPARATE REPRESENTATION BY SEPARATE LAWYERS

Based on a premise that spouses are more properly viewed as independent individuals, many commentators recommend that the lawyer advise spouses that separate representation may be in their long-term best interest when the lawyer is approached by a couple asking for representation in order to plan their estates.¹²⁵ This is particularly true if either spouse has children from a prior relationship,¹²⁶ or any other ongoing individual commitment that involves both financial support and emotional involvement. In those circumstances the lawyer should be sensitive to the very real possibility that either spouse may be reluctant to share information concerning his or her true testamentary desires in the presence of the other. This reluctance can arise for many reasons. It may be a means of avoiding conflict over the "fairness" of the client's desires,¹²⁷ an attempt to avoid hurting the other spouse's feelings by disclosing a candid evaluation of the relationship with the children or step-children,¹²⁸ or simply a refusal publicly to affirm those actions that the client wants to engage in privately.¹²⁹

Separate representation by separate counsel is perceived as maximizing individual client autonomy while minimizing the possibility that counsel will be faced with a difficult moral

125. See RESTATEMENT GOVERNING LAWYERS, *supra* note 14, § 201; see also Williams, *supra* note 27, at 486.

126. See Jackson M. Bruce, *Ethics in Estate Planning and Estate Administration*, 15 PROB. NOTES 118, 120 (1989); see also Ronald C. Link et al., *Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules for Professional Conduct*, 22 REAL PROP. PROB. & TR. J. 1, 11 (1987).

127. See Williams, *supra* note 27, at 484; see also Pennell, *supra* note 20, at 18-7.

128. See Bruce, *supra* note 19, at 120; see also *Committee Report*, *supra* note 19, at 11.

129. See *Committee Report*, *supra* note 19; see also Jeffrey N. Pennell, *Ethics in Estate Planning and Fiduciary Administration: The Inadequacy of the Model Rules and the Model Code*, 45 THE RECORD (A.B.C.N.Y.) 715, 740 (1990).

dilemma.¹³⁰ This form of representation is clearly within the Model Rules and is consistent with the overall vision of transactional practice embodied in them.¹³¹

The current draft of the Restatement of the Law Governing Lawyers contains an illustration similar to the circumstances surrounding John and Wanda's 1990 consultation with Lawyer:

Husband and Wife consulted Lawyer for estate planning advice and drafting of reciprocal wills. One spouse told Lawyer their common preferences, and the other concurred. At the outset of the representation, Lawyer explained that separate counsel could assure both Husband and Wife that each would receive independent advice and that, if desired, each client's communications would be privileged from each other if they were separately represented. If Husband and Wife gave informed and uncoerced consent, Lawyer may undertake the representation.¹³²

This example evidences a clear bias toward separate representation, although the commentary on the example cautions lawyers from assuming conflict when none exists.¹³³ The underlying assumptions about the attorney-client relationship seem to be:

First, a lawyer's proper employment is by or for an individual. Second, employment by or for more than one individual is exceptional. Third, as a consequence, multiple party employment is necessarily superficial. Finally, the means for protecting the superficiality (or, if you like, the means for protecting the principle that employment is ordinarily and properly by or for individuals) is ignorance of any facts known to one of the individuals but not to the other.¹³⁴

130. This perception is not impervious to criticism however. Adherents to contemporary theories of determinism might challenge the underlying premise that individual autonomy exists, thus rendering nonsensical the conclusion that separate representation is valuable because it enhances autonomy. Alternatively, this perception can be challenged by the more pragmatic observation that isolating the individual from his or her spouse automatically limits the client's choices to those that do not require certainty concerning the actions of the spouse.

131. See *supra* text accompanying notes 9-11.

132. RESTATEMENT GOVERNING LAWYERS, *supra* note 14, § 211(c) illus. 1.

133. *Id.*

134. These assumptions are identified by Professor Shaffer in his analysis of the resolutions offered to the dilemma posed in Williams, *supra*

The advantages to clients of separate representation are identified as "independent advice" and "communications that would be privileged from each other."¹³⁵ No definition of "independent advice" is offered by the authors of the Restatement, nor does the Restatement cite any authority for its implication that independent advice is available only through separate counsel. Model Rule 2.1 states that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice."¹³⁶ Nowhere in the text or commentary of the Rules is there any indication that the lawyer's obligation under this Rule is excused when the lawyer undertakes joint representation.¹³⁷ In the estate planning literature, the duty to exercise "independent judgment" is discussed in the context of conflicting interests of the attorney who is asked to serve as a fiduciary of the estate,¹³⁸ but that is clearly not the meaning that the authors of the Restatement intend to communicate with the use of the phrase "independent advice."

The context of the phrase "independent advice" suggests that advice given during joint representation will somehow be "dependent advice." But what will it be "dependent" upon—the candor of the clients in describing their desires in joint conferences? Certainly the advice given will be directly related to the clients' wishes as they are communicated. To suppose anything else is to suppose advice which would be irrelevant or misleading.

Perhaps the authors unconsciously fell victim to the very trap they warn the lawyer to avoid: "trying to suggest discord when none exists."¹³⁹ Or perhaps the example is premised upon a belief that the lawyer, counseling two clients jointly, will give advice which is the result of some type of subconscious alignment with the interests of one or the other party. Alternatively, the implied limitation upon independent advice may be an unwitting recognition that as lawyers "we assume that the

note 27, at 484. See Shaffer, *Legal Ethics*, *supra* note 81, at 969. He does not comment upon the example in the Restatement.

135. *Id.*

136. MODEL RULES, *supra* note 6, Rule 2.1.

137. Some support for this position might be gleaned by the requirement of impartiality imposed upon the attorney seeking to act as an intermediary under Model Rule 2.2, but impartiality and independence are distinct obligations that may or may not be totally congruent in any given case.

138. See Pennell, *supra* note 20, at 18-20 to 18-26.

139. RESTATEMENT GOVERNING LAWYERS, *supra* note 14, § 211. See *supra* text accompanying notes 132-33.

client wants us to maximize his material or tactical position in every way that is legally permissible, regardless of non-legal considerations."¹⁴⁰ In joint representation such an unspoken and thus unauthorized assumption becomes untenable.

Whatever the underlying premise, the authors of the Restatement should state it in order to allow critical examination of the premise on the basis of its reflection of practical reality and its logical appeal. Absent some justification in either experience or logic, it is wrong to suggest that the lawyer undertaking joint representation will render less "independent advice."

However separate representation may hold other professional advantages¹⁴¹ for lawyers and thus for their clients that are not clearly identified in the Restatement. The Restatement refers to "separate counsel" indicating that separate representation be undertaken by two independent lawyers.¹⁴² Separate representation frees the lawyer from concerns about divided loyalties, although it does not completely eliminate the possibility that counsel will be faced with difficult moral questions in the course of representing the individual client.¹⁴³ As lawyer to

140. FREEDMAN, *supra* note 61, at 51.

141. By use of the phrase "professional advantages" I mean to distinguish those advantages that reflect the nature of a profession dedicated to public service, from the advantages that reflect the commercial aspect of practice that is shared with any other trade or lawful means of making money. Clearly an ethical rule that required separate representation by separate counsel in all estate planning matters would result in a short term increase in fees generated by estate planning for couples who were sophisticated enough to recognize that resort to laymen's guides to will drafting would not satisfy their needs.

142. Separate representation by separate counsel should be chosen by the clients prior to any in-depth discussion of their estate planning needs, in order to avoid creating a conflict of interest that would preclude the lawyer consulted initially from representing either spouse. *Cf. Hughes v. Paine, Webber, Jackson and Curtis, Inc.*, 565 F. Supp. 663 (N.D. Ill. 1983) (preliminary interview to discuss possible representation may be sufficient to create attorney-client relationship for purposes of conflict of interests rules).

143. An example of a moral dilemma that could arise in the course of separate representation by separate counsel is presented by the following fact pattern modified from a problem presented in JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 360 (2d ed. 1988):

Husband and wife live in Ohio, and have been married for 30 years. From Husband's earnings during marriage Husband accumulates personal property worth \$500,000. Under Ohio law, Wife has, at Husband's death, an elective share of one-half of Husband's property. After retirement, Husband and Wife move to a community property state. Under the law of the community property state, Husband's personal property comes in as separate property. There is no provision to recognize quasi-community

only one spouse, the risk is minimized that the lawyer will be faced with conflicting duties to preserve client confidences¹⁴⁴ and to give information to another client.¹⁴⁵ Absent such conflict, the lawyer need not determine which duty is superior,¹⁴⁶ nor is there any danger of inadvertent disclosure of confidential information due to the internal conflict of the lawyer.¹⁴⁷ It is through both the absence of conflicting duties and the professional mandate to maintain confidences that the client receives a full measure of secrecy, which is the second advantage of separate representation identified in the Restatement.¹⁴⁸

When secrecy is desired by the client, this form of representation is best, and should be available. Subject to the inherent limitations in solitary planning,¹⁴⁹ this option provides clients both the maximum attorney loyalty to their interests as the clients individually define them at the time of representation, as well as the greatest protection of confidences. It is consistent with the present dominant cultural view of marriage as a

property during probate, nor to apply the law of the domicile where title to the property was acquired. Husband comes to Lawyer and asks that Lawyer draft a will leaving all of his property to Bubbles La Rue. Lawyer explains that this would effectively leave Wife with nothing, yet Husband persists in his request that the will leave nothing to Wife.

Should Lawyer assist Husband in this exercise of his "autonomy"? The moral issue of whether to facilitate the husband's disinheritance of his wife is intertwined with the jurisprudential questions concerning the law governing the husband's acts. None of the states where the couple resided intended to permit complete disinheritance of a spouse, yet because of the varied statutory schemes applicable at varied times, that result may occur. Is the content of the law controlled by its letter or its spirit? For a similar dilemma in the area of family law and its resolution see American Academy of Matrimonial Lawyers, *The Bounds of Advocacy*, provisions 2.10 & 2.26 and accompanying commentary, reprinted in GILLERS & SIMON, *supra* note 1, at 62-63.

Failure to struggle with such questions when they are presented validates Professor Shaffer's conclusion that "[i]t is much easier for a lawyer to behave as if he were a clerk in a driver's-license office than to behave as someone who invites trust from families and then charges by the hour for accepting it." Shaffer, *Legal Ethics*, *supra* note 81, at 984.

144. MODEL RULES, *supra* note 6, Rule 1.6 (reproduced in note 17); *cf.* RESTATEMENT OF AGENCY, *supra* note 54, § 395.

145. *Cf.* RESTATEMENT OF AGENCY, *supra* note 54, § 381 (reproduced in note 54).

146. *See supra* text accompanying note 54.

147. *See* Pennell, *supra* note 20, at 18-29.

148. RESTATEMENT GOVERNING LAWYERS, *supra* note 14, § 211. "Each client's communications would be privileged from each other. . . ."

149. *See supra* text accompanying notes 139-40.

consensual arrangement,¹⁵⁰ and is most consistent with the assumptions about the attorney-client relationship underlying the Model Rules of Professional Conduct.¹⁵¹

SEPARATE SIMULTANEOUS REPRESENTATION BY THE SAME LAWYER

In an attempt to obtain the advantages of separate representation by separate counsel while minimizing the adverse impact of the inherent limitations in a solitary planning process, a third model of representation has emerged, that of separate simultaneous representation by the same lawyer. Professor Jeffrey N. Pennell has provided the most extensive written commentary on this form of representation.¹⁵² He argues that it is a viable option that should be permitted if the clients are made aware of the various models of representation and select separate simultaneous representation by the attorney.¹⁵³ This position is contrary to the original position proposed by the Professional Standards Committee of the American College of Probate Counsel:¹⁵⁴

An ACPC Fellow ordinarily should not represent both husband and wife separately, i.e., where the plans and confidences of each spouse are intended to remain confidential as to the other spouse. The Fellow who does undertake to represent a husband and wife, separately should advise them, preferably in writing, that:

- (A) the confidences of each spouse will not be shared with the other spouse and
- (B) the Fellow may be giving advice and taking action for the benefit of one spouse that may be detrimental to the interests of the other spouse.¹⁵⁵

150. See *supra* text accompanying notes 120-24.

151. See *supra* notes 6-17 and accompanying text.

152. See Pennell, *supra* note 20; see also Pennell, *supra* note 129.

153. Pennell, *supra* note 20, at 18-29.

154. The American College of Probate Counsel (ACPC) is the predecessor to the American College of Trust and Estate Counsel (ACTEC). These organizations were formed to provide a forum for the discussion of issues arising in a probate and trust practice. Membership in the organization is by invitation, and is limited to attorneys who have practiced for ten or more years, with a substantial amount of their practice devoted to representation relating to probate, trust or estate planning.

155. American College of Probate Counsel, *Professional Standards Committee Guideline: Representation of Husband and Wife in Estate Planning*, 15 PROB. NOTES 199 (1989) [hereinafter *Representation of Husband and Wife*].

Separate simultaneous representation had been considered by the Committee and rejected as "practically unworkable."¹⁵⁶ Only after "very substantial comments at the Board of Regents meeting"¹⁵⁷ following the report of the Committee was the proposal withdrawn. The comments appear to have been raising two independent concerns: 1) promulgation of any standards in addition to the state bar rules simply provides malpractice lawyers with a ready-made standard of care and adds little to the professionalism of the estate planning bar;¹⁵⁸ and 2) limiting or prohibiting separate simultaneous representation precludes a desirable form of representation without adequate justification.¹⁵⁹

The first concern seems to be resolved in favor of promulgating professional standards independent of local or state bar rules.¹⁶⁰ The second concern has been accommodated by modification of the proposed standard permitting separate simultaneous representation as an alternative to the more traditional joint representation.¹⁶¹ But is this modification the best course of action? Is separate simultaneous representation a valid model of representation, thus warranting express affirmation in a professional standard? Is the model entitled to presumptive validity, or must it be shown to further the profession's interest in providing competent and loyal service to the public? Proponents of inclusion argue that the model is entitled to presumptive validity.¹⁶² They also assert that separate simultaneous representation can be shown to have advantages for clients that are unavailable in the traditional models of joint representation or separate representation by separate lawyers.¹⁶³

Separate simultaneous representation has been undertaken by some respected members of the bar without any

156. Bruce, *supra* note 19, at 121; see also Jackson M. Bruce, *Estate Planning Ethics: Clarification of Outline*, 15 PROB. NOTES 198 (1989).

157. *Husband and Wife Representation Guideline Withdrawn; Project to Continue*, 15 PROB. NOTES 302 (1990).

158. See Professional Standards Committee of the American College of Trusts and Estates Counsel, *Report on ACTEC Fall Seminar — The Debate: Should the College Adopt Standards and Guidelines on Risks of Malpractice and Conflicts of Interest?*, 17 ACTEC NOTES 171 (Winter 1991) [hereinafter *The Debate*].

159. See Springs, *supra* note 27, at 48.

160. See Thomas P. Sweeney, *President's Message*, 18 ACTEC NOTES 1, 5 (Summer 1992).

161. *Id.*

162. See Springs, *supra* note 27, at 48.

163. Pennell, *supra* note 20, at 18-29.

intractable problems. Therefore, it is argued that the practice is entitled to presumptive validity.¹⁶⁴ This argument is not persuasive when drafting professional regulations. Such an argument misperceives the test for regulation as whether any lawyer can engage in the conduct without undue adverse consequences.¹⁶⁵ The experience of these members of the bar is helpful in knowing how frequently anticipated ill effects actually occur, but no systematic collection of this information has been publicly undertaken. Instead individual experience often forms the basis of an argument cast in terms of toleration, extolling the virtues of diversity in models of representations. Yet carried to its logical extreme, "toleration" in the area of professional regulation would result in no regulation at all.

Assuming that separate simultaneous representation must be proven to be valid, the primary benefit of this model is that, while individual confidentiality is maintained by agreement,¹⁶⁶ both clients are permitted an unrestricted choice of counsel. Individual confidentiality is not unique to this model of representation. It is also available through the model of separate representation by separate lawyers. Separate counsel insures that attorney contact with the non-client spouse is minimized. Thus opportunities for inadvertent or intentional disclosure of confidential information are minimized.¹⁶⁷ Also minimized is any confusion as to who is entitled to the loyalty of the attor-

164. See Springs, *supra* note 27, at 48.

165. There is little doubt that many lawyers could safeguard client funds without the strict requirements surrounding client trust accounts contained in Model Rule 1.15, yet the risk of and harm from misappropriation of client funds is sufficiently compelling that every state requires separate accounts. A number of states impose additional accounting requirements beyond those contained in the text of the Model Rule. A partial collection of the state modifications appears in GILLERS & SIMON, *supra* note 1, at 127-29.

Arguing that a practice should remain unregulated because some members of the bar engage in it also renders advocates for regulation vulnerable to charges that positions contrary to the current practices of any respected member of the bar are disguised *ad hominem* attacks on those practitioners. Thus, too often what should be a dispassionate examination of the merits of a practice become a battle of honor, with each side seeking to justify either personal practice or opposition for reasons independent of the best interests of the public and the profession.

166. See Pennell, *supra* note 20, at 18-29.

167. RESTATEMENT GOVERNING LAWYERS, *supra* note 14, § 201 cmt. b ("Preventing use of confidential client information against interests of the client, either for the lawyer's personal interest or in aid of some other client, would be more difficult in the absence of conflicts rules that reduce the opportunity for such use.").

ney. The attorney should be loyal to the client.¹⁶⁸ The model of separate simultaneous representation does not afford these advantages. Contact with both clients will be extensive thus creating numerous opportunities for inadvertent or intentional disclosures, and no guidance is given to the lawyer concerning where his or her ultimate loyalty should lie if a conflict develops between the interests of the two clients.

According to the proponents of this method of representation, both of these flaws are cured by the clients' informed consent.¹⁶⁹ Yet defining the nature of the consent that would be sufficiently informed is daunting. While a lawyer might present stereotypical scenarios to the clients in an attempt to illustrate the problems that could develop in the course of separate simultaneous representation,¹⁷⁰ the diversity of human experience renders it unlikely that the lawyer will describe the exact dilemma that may emerge in representing these particular clients.¹⁷¹ Absent accurate prognostication by the lawyer, the enforceability of the client's consent becomes tenuous, rendering equally tenuous any defense to claims of breach of fiduciary duty.¹⁷²

By requiring the lawyer to maintain individual confidences, the clients are not necessarily waiving any objection to the lawyer's actions taken pursuant to instructions received during those individual meetings.¹⁷³ Indeed, such a waiver may contradict Rule 1.8 of the Model Rules forbidding waiver of pro-

168. See [Model Standards: Conflicts of Interest] LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 51:104 (1990) ("[L]oyalty is an indispensable element of a lawyer's relationship with a client.") (quoting ABA Comm. on Professional Responsibility, Informal Op. 1495 (1982)).

169. See ABA Special Study Comm. on Professional Responsibility, *Comments and Recommendations on The Lawyer's Duties in Representing Husband and Wife*, Preliminary Draft (Mar. 13, 1992) at 20-21; see also Pennell, *supra* note 20, at 18-32, 18-33.

170. See, e.g., Pennell, *supra* note 20, at 18-27.

171. This is particularly true when considered in conjunction with the likely timing for obtaining such consent (most typically at the very beginning of representation when the lawyer has very few facts from which to create relevant hypothetical fact patterns). Should the attorney be unlucky enough to describe with any accuracy the fact pattern that is the basis for the clients requesting separate representation, client reaction may be sufficiently strong that any further relationship with the client is difficult if not impossible.

172. See RESTATEMENT GOVERNING LAWYERS, *supra* note 14, § 202 cmt. c; see also RESTATEMENT OF AGENCY, *supra* note 54, § 392 cmt. b (providing that where an agent has confidential information that can not be disclosed and that is of such a nature that fair advice can not be given to one of two known principals, the agent cannot properly continue to act as adviser).

173. MODEL RULES, *supra* note 6, Rule 1.8(h).

spective liability for malpractice unless the client obtains independent counsel concerning the waiver.¹⁷⁴ While the rule uses the general term "malpractice," the specific cause of action that seems most likely to arise during separate simultaneous representation is breach of fiduciary duty.¹⁷⁵

It is easy to imagine a hypothetical fact pattern giving rise to such a claim. Lawyer agrees to undertake separate simultaneous representation of Charles and Diane,¹⁷⁶ a couple that appears to be happily married. After a careful explanation by Lawyer of the four alternative models of representation and the benefits and risks inherent in each, Charles tells Lawyer that they would like to be represented separately, with private disclosures to the attorney kept between the lawyer and client only. Diane nods her approval of this arrangement and Lawyer schedules individual meetings with both. During the initial meetings Lawyer learns that almost all assets are held in Charles' name. The size of the joint estate leads Lawyer to mention the possibility of transferring assets to Diane in order to equalize their estates, minimizing their aggregate estate taxes. Charles seems open to this possibility and Lawyer prepares various hypothetical fact patterns to illustrate the tax consequences of the transfers. Charles agrees to the transfers, and Lawyer prepares all the necessary documents. During this time Lawyer continues to meet with Charles and Diane individually incident to preparing their wills. Only after all transfer documents have been prepared, and drafts sent to Charles, does Diane mention to Lawyer how unhappy she has been during her marriage. She discloses that she is considering leaving Charles after assets have been transferred to her, insuring her ability to live independently. What does Lawyer do?

Lawyer could explain to Diane the duty of Lawyer to give information to Charles. The fact that such a duty can be subordinate to another duty must also be explained, with Lawyer's duty to maintain Diane's confidences arguably being the superior duty. Lawyer might then request Diane's consent to disclose her intentions to Charles prior to the transfers, but the chances of obtaining such consent seem small.

174. *Id.*

175. See [Model Standards: Malpractice] LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 301:114-15 (1984).

176. Assuming a physical manifestation of consent would be sufficient for purposes of obtaining valid consent. Many commentators suggest that written consent is the proper manner in which to handle this situation in the event of any future dispute.

Lawyer could elect to tell Charles of Diane's plan, while impressing upon him the need to keep the disclosure secret. By such conduct Lawyer has created two claims in Diane: 1) breach of fiduciary duty through the unauthorized disclosure of confidential information,¹⁷⁷ and 2) fraud or deceit if the "secret" is successful for any period of time.¹⁷⁸

Alternatively, Lawyer could do nothing, literally, in the hopes that by procrastination the transfers would be stopped without any unauthorized disclosure of confidential information. This course of action, while perhaps the most likely,¹⁷⁹ could result in liability for negligence if Charles dies prior to making desired transfers due to Lawyer's inertia.

Assuming Lawyer unflinchingly participates as counsel during the transfers, Lawyer may be sued by Charles for breach of fiduciary duty. The most likely claim would be that Lawyer had failed to give pertinent information to Charles.¹⁸⁰ Lawyer would then raise Charles' consent to withholding information as an affirmative defense.¹⁸¹ Charles is apt to respond that Lawyer had exceeded the terms of the consent to withhold information,¹⁸² or that the particular consequences of the consent were not identified at the time consent was obtained.¹⁸³ Regardless of the ultimate outcome of the hypothetical litigation, Lawyer has become embroiled in controversy that is easily avoided by declining to represent more than one spouse separately.

Probably it was this sort of parade of horrors that the Professional Standards Committee hoped to avoid in originally proposing a standard that disfavored, but did not completely prohibit, separate simultaneous representation. It may be true that for every couple like Diane and Charles, several other

177. See generally MALLEN & SMITH, *supra* note 52, § 11.5.

178. See generally *id.* § 8.8

179. "The most common form of a legal malpractice action is for negligence." *Id.* at 425.

180. Compare *Deadwyler v. Volkswagen of Am.*, 134 F.R.D. 128 (W.D.N.C. 1991), *aff'd without op.*, *Moore v. Volkswagen of Am.*, 966 F.2d 1443 (4th Cir. 1992). The court imposed sanctions on attorneys who failed to communicate, effectively and accurately, settlement offers, stating: "No type of misbehavior by an attorney is more universally and categorically condemned, and is therefore more inherently in 'bad faith,' than the failure to communicate offers of settlement." *Id.* at 140.

181. See MALLEN & SMITH, *supra* note 52, § 13.27.

182. See [Model Standards: Confidentiality] LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 55:503 (1984).

183. This point is more fully developed *infra* in notes 186-90 and the accompanying text.

couples seek separate simultaneous representation only to insure personal privacy and technical expertise concerning the nature and extent of their estate or their estate plan.¹⁸⁴ Also it may be true that the plans those clients implement in private may contain gifts that meet or exceed their spouse's expectations. However, there is a substantial risk that a conflict will develop that materially impairs the ability of the lawyer to give complete and competent advice to both clients. By adopting a standard that permits separate simultaneous representation, ACTEC essentially condones attempts by lawyers to build a Chinese Wall within their minds. Many courts question the viability of such a feat within a firm.¹⁸⁵ To demand it of an individual lawyer is both unrealistic and dangerous — for the clients and the lawyer.

Informed consent does not cure all ills. A client and lawyer cannot contract to the lawyer's participation in the frustration of the client's objectives.¹⁸⁶ Nor should a client and a lawyer be able to contract to the withholding of relevant information while the lawyer continues to advise the client.¹⁸⁷ To allow such contracts redefines the essence of the attorney-client relationship in a way that is inconsistent with the profession's

184. Consider the possibility that unbeknownst to Lawyer two of his current clients marry and ask Lawyer to assist with their estate planning, but only if separate simultaneous representation can be undertaken. Both have been previously married, and have sizable estates. Both volunteer that they have no expectations of receiving any property from the estate of the other. As current clients, both repose trust in this particular lawyer. While the prior representation of both clients individually as well as the absence of any expectations of inheritance may make the situation sufficiently unique to allow separate simultaneous representation under the original proposed standard, it is at least arguable that such representation is prohibited without additional facts that make Lawyer's services more unique (i.e. Lawyer is the only lawyer in an isolated town who understands the provisions concerning generation skipping tax).

185. See [Model Standards: Conflict of Interest] LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 51:106 (1984):

It is one thing to build a wall around an incoming lawyer so that his representation of a client of his former firm is not imputed to the remainder of the new firm. It is quite another to try and segregate members within a firm working for different clients with adverse interests.

186. See RESTATEMENT GOVERNING LAWYERS, *supra* note 14, § 202 cmt.

g.

187. See RESTATEMENT OF AGENCY, *supra* note 54, § 381(a).

ethos as reflected in its traditions¹⁸⁸ and the rules of professional conduct.¹⁸⁹

Separate simultaneous representation supposes the lawyer merely to be the instrument of achieving the goals of the client, rather than an independent actor with separate moral accountability for his or her own actions. While the lawyer must respect the freedom of the client to choose wrongly, that respect does not include a requirement that clients be assisted in executing their wrongful purpose.¹⁹⁰ To require active assistance by the lawyer would be to require that the lawyer be corrupted in his or her own struggle to be good.

Under the hypothetical facts that are the subject of this article, Lawyer must decline to alter the estate plan surreptitiously, but may not create absolute barriers to John's exercise of freedom. John remains free to obtain the services of another lawyer in making the changes. It is only when John is unable to act except through the use of *Lawyer's* skills, that the lawyer must choose between the client's need to be free and the lawyer's need to be good.¹⁹¹ The hypothetical facts do not present

188. The often cited statement of an advocate's duty to the client made by Lord Brougham in his defense of Queen Caroline against George IV's bill for divorce:

An advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save that client at all expedient means — to protect that client at all hazards and costs to all others, and among others to himself — is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other.

Deborah L. Rhode, *An Adversarial Exchange on Adversarial Ethics: Text, Subtext, and Content*, 41 J. LEGAL EDUC. 29, 29 (1991); see also RESTATEMENT OF THE LAW GOVERNING LAWYERS § 28 cmt. c (Tent. Draft No. 5, 1992). *But see id.* § 30 cmt. d.

189. The primary task of legal ethics is in answering two questions: 1) Can a good person be a good lawyer? and 2) if so, how? See Charles Fried, *The Lawyer as Friend: the Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976). The universal answer of lawyers (and law professors to the extent that we have surrendered our claim to being "real" lawyers) is that it is possible to be a good person and a good lawyer.

It is the second question that divides those who speak (or write) publicly on the issue. The division seems to surround the question of whether it is more important for the good lawyer to help the client be free or be good. The best illustration of this debate is contained in the responsive essays of Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319 (1987), and Monroe H. Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U. L. REV. 331 (1987).

190. See MODEL RULES, *supra* note 6, Rules 1.2 and 3.3.

191. While a full discussion of this issue is beyond the scope of this article, the author believes that voluntariness (or free will) is a precondition

such a dilemma, nor is that the dilemma faced in the routine practice of estate planning. The initial recommendation of the Standards Committee for the ACPC recognized the rare occurrence of such cases and seemed to endorse the lawyer's obligation to assist the client in exercising his or her freedom. However, because of the inherent problems in this model of representation, the committee articulated strict protections necessary to insure ethical conduct by counsel forced to undertake separate simultaneous representation of spouses.¹⁹²

It is not a sufficient answer to these objections that the current Rules compel withdrawal if what is only a potential conflict at the beginning of representation later ripens into an actual conflict. The very act of withdrawing may compromise the secrecy which the client seeking secret assistance wants maintained (regardless of how convincing and innocuous the reasons given to the spouse at risk of being harmed).¹⁹³ Additionally, withdrawal does nothing to assist the client who remains ignorant of relevant information to his or her planning process. In short, withdrawal satisfies no one, except perhaps the lawyer who can wash his or her hands, saying as Pontius Pilate did, "Look to it yourselves."¹⁹⁴

JOINT REPRESENTATION BY COUNSEL

Both customary practice and case law support joint representation of spouses by an individual lawyer.¹⁹⁵ The original standard proposed by the Professional Standards Committee of the American College of Probate Counsel recognized joint representation as the norm in professional conduct, and articulated the necessary "disclosures" to ensure that such representation was consistent with the desires of the clients.

In most cases, an ACPC [American College of Probate Counsel] Fellow appropriately may represent both

to moral goodness. Absent an ability to change the will, John's maintaining the original content of his will has no intrinsic moral character of the type we define as "good" or "evil."

192. See *supra* notes 88-90 and accompanying text.

193. While Rule 1.16 permits withdrawal "if a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent," it is permissible only if withdrawal does not have a "material adverse effect" on the client.

194. *Matthew* 27:24 (New American Bible).

195. See *Forbush v. Forbush*, 485 N.Y.S.2d 898 (1985) ("family attorney" for husband and wife who had amongst other services drafted their wills was precluded from representing husband separately in divorce action against wife); *Le Van*, *supra* note 81, at 20; see also *Committee Report*, *supra* note 19, at 10.

husband and wife with respect to estate planning. If the husband and wife are the "common" or "joint" clients of the Fellow, the most important consequence is that the confidences of the clients, although confidential as to others, will not be confidential as between themselves. An ACPC Fellow should attempt to resolve any conflicts that arise between husband and wife clients in a manner consistent with the applicable rules of professional conduct.

Before undertaking to represent both a husband and wife with respect to estate planning, an ACPC Fellow shall, preferably in writing,

- (A) inform them of the absence of confidentiality as between them insofar as the object of the representation is concerned; and
- (B) obtain their consent to the disclosure of one of them of relevant information communicated to the Fellow by the other of them.¹⁹⁶

While controversy surrounded the disapproval of the practice of separate simultaneous representation,¹⁹⁷ criticism of the joint representation standard seems to have focused, not upon the propriety of such representation, but rather upon the need for a professional standard articulating what is such a common practice.¹⁹⁸

Academic criticism of joint representation for estate planning purposes has focused upon the perceived limitations such representation poses to the individual client's exercise of testamentary autonomy.¹⁹⁹ Characterizing joint representation as the "show and tell" approach, Professor Pennell warns that "this approach discourages each spouse from approaching the attorney with secrets that might be relevant to the couple's planning, which means that the attorney will do a less than complete job of best representing a spouse who has a relevant secret."²⁰⁰

There are instances where clients have secrets from their spouses that are relevant to the plan for disposition of their

196. *Representation of Husband and Wife*, *supra* note 155, at 199. The remaining text of the proposed standard contained specific disapproval of separate representation simultaneously undertaken by a single lawyer, except in extraordinary circumstances. This aspect of the standard is discussed *supra* in notes 154-59 and accompanying text.

197. *See Springs*, *supra* note 27, at 21.

198. *See The Debate*, *supra* note 158.

199. *See Pennell*, *supra* note 20.

200. *Id.* at 18-29.

estate, and yet they come to lawyers seeking joint representation with their spouse. However, the stories of lawyers who have dealt with such clients evidence that such cases are the exception rather than the rule in their practices.

At the conclusion of a presentation on the subject of this article, the author was approached by an estate planner who had been in practice more than twenty years. The lawyer recounted his experience of meeting with a husband and wife initially, and agreeing to represent them jointly. During the initial meeting the lawyer explained the state law requirements of specific disinheritance of any child that the testator intended to exclude. The day after the initial meeting the husband called the lawyer and asked if the pretermitted heir requirement applied to children born in a foreign country. The lawyer assured the husband that it did, only to have him disclose that although he had been married for thirty years to his wife, prior to his marriage he had fathered a child in France during World War II. His wife did not know this. When the lawyer replied that it would be necessary to include a recital concerning the child in order to insure that the child did not take under the will, the husband responded that he did not mind the inclusion of such a recital or his wife learning he had another child. He simply was reluctant to tell her himself; therefore he reasoned it was the lawyer's obligation to tell her as part of the representation. The lawyer managed to persuade the husband to tell the wife himself, and ultimately the "unknown son" was introduced into the family and at last report routinely visited his father annually.²⁰¹ This sort of reconciliation is exactly what Professor Shaffer argues is possible when lawyers accept and are faithful to the trust given in estate planning for the family.²⁰²

The lawyer's story and others similar to it provide at least anecdotal evidence that even some clients with secrets, who

201. Interview with author (Oct., 1991).

202. Shaffer states:

Collective isolation probably is not good politically, nor is it an adequate premise for a professional ethic that ignores the realities of the communities that we, in our communal isolations, have. These communities are what we present to our lawyers. Lawyers who are invited into such (to use Brandeis' word) situations are invited into sacred places. They are all the more sacred to the extent that these human harmonies somehow survive in a commonwealth of strangers. The moral principle, if we still need a principle after we see the reality, is that lawyers should endeavor in such places not to make things worse.

Shaffer, *Legal Ethics*, *supra* note 81, at 983.

seek joint representation, are better served by the models of joint representation or representation of the family. These stories must be afforded some weight in assessing the implicit decision by the client in coming to the lawyer with his or her spouse. The widespread practice of joint representation may reflect the reality of many clients and lawyers' concluding that the accumulation and passage of property are "family" matters and thus better served by joint representation. Separate representation by separate counsel may reflect a contrary conclusion, that wealth is accumulated individually, and should be controlled individually. Under the separate representation model, the continuation of the decedent's lifework through the passage of property is best promoted by solitary reflection by the client and separate representation by the lawyer. Under the joint representation model, the continuation of the decedent's lifework is seen as merely a continuation of the relationships of the client through the passage of property.

Professor Pennell asserts that the widespread practice of joint representation may be "for the protection of the attorney" rather than because it is in the client's best interest.²⁰³ He identifies the protection afforded the attorney through joint representation as

the attorney escapes being in the middle of a terrible situation and essentially puts the monkey on the back of the spouse with the secret; if revelation of the secret is important to adequate representation, presumably the holder of the secret will go to another attorney, which takes care of the mutual representation problem in the right manner: the client decides what is best.²⁰⁴

While this is an obvious caricature of the motivation of the attorneys engaged in joint representation, there is some truth in it. Joint representation with its corollary duty of disclosure between spouses does eliminate any conflicting duties that might arise between the duty to give information and the duty to maintain confidences. Agreeing to joint representation establishes a clear hierarchy of duties, which can be realistically fulfilled by the attorney. Unlike separate simultaneous representation that may require the lawyer to stand silent while one client relies upon assumptions known to be false by the attorney, joint representation requires both clients have all information given to the attorney. This allows the attorney to give

203. Pennell, *supra* note 20, at 18-30.

204. *Id.* at 18-29.

candid advice in accordance with Rule 2.1, and allows the clients more accurately to assess the value of that advice.

The final objection raised to joint representation is the difficulty the attorney experiences in determining when representation ends for purposes of subsequently representing one of the spouses in unilaterally modifying his or her estate plan created through the joint representation.²⁰⁵ This problem contains two issues within it: 1) identifying the client, and 2) defining the scope of representation. Both of these can be dealt with at the outset of representation. Under joint representation, the clients are both spouses. The scope of representation can be limited under the current Rules,²⁰⁶ and in this instance should be clearly established with the clients — representation jointly only as to estate planning matters. If representation pertaining to other matters is undertaken, it should be undertaken by separate agreement, maintaining a clear line between those matters that are joint and those matters that are individual to each client.

The historical experience of the practicing bar suggests that joint representation is both proper and realistic for clients approaching the lawyer together in order to obtain assistance with estate planning. Efforts to discourage such representation seem premised upon a view of marriage that is not the reality most clients are experiencing when they ask for joint representation. The attorney engaged in joint representation is required to do no more and no less than attorneys engaged in separate representation of only one spouse — gather all relevant information, counsel the clients concerning the legal requirements to accomplish their objectives, and assist them in implementing whatever plan they ultimately choose.

CONCLUSION

In many ways the life of the lawyer (and the life of the law) would be simpler if individuals were truly solitary in all matters that concern them deeply. Law could be based almost exclusively upon principles of autonomy and consent. Lawyers could serve, with undivided loyalty, every client asking for representation, but neither clients nor lawyers are solitary. And nowhere is that more readily apparent than in the representation of a married couple for estate planning purposes.

When couples seeking representation present themselves to the lawyer as a family or a couple, they are affirming their

205. *Id.*

206. MODEL RULES, *supra* note 6, Rule 1.2

implicit conclusion that the interests of the husband and the wife are shared interests. Whether consciously or unconsciously they are representing to the lawyer that their common desires are greater than whatever individual desires or tensions and cross purposes may exist. Lawyers should be allowed to affirm this vision of unity through offering joint or family representation.

When individuals, who are married, seek representation alone they are implicitly communicating their conclusions that individual desires determine their course of action, or that the tensions and cross purposes within their marital relationship outweigh the common desires. Lawyers should be allowed to affirm these conclusions by offering separate representation to the individual seeking assistance.

The models of lawyer for the family, joint representation, and separate representation by separate lawyers accommodate all possible relationships that can exist between spouses seeking to become clients for estate planning purposes. Adopting a professional standard that encompasses these three models recognizes that only the couple can weigh their shared desires against individual desires or tensions and cross purposes within the relationship. The addition of separate simultaneous representation as a legitimate model of representation adds nothing to this recognition.

Instead the model of separate simultaneous representation concerns itself with defining the nature of the relationship of the clients with the lawyer. The traditions and laws governing the profession have always reserved the power to define an attorney-client relationship to the profession and the courts. Lawyers may not represent both sides of a matter in litigation,²⁰⁷ although many clients might consent to such representation,²⁰⁸ because the profession recognizes that such representation has ramifications beyond the particular resolution of the particular claims by the particular clients.²⁰⁹ Separate simultaneous rep-

207. *Id.* Rule 1.7.

208. *See, e.g.,* Klem v. Superior Court, 142 Cal. Rptr. 509 (Ct. App. 1977) (A single attorney represented husband and wife in a divorce proceeding to confirm child-support agreement. The Court found the primary representation to be negotiating a property settlement, although one step involved a judicial proceeding. The parties may not waive conflict in contested litigations, but they may do so in an uncontested dissolution.).

209. *See* RESTATEMENT GOVERNING LAWYERS, *supra* note 14, § 209 cmt. c. "Although a single lawyer may sometimes represent both husband and wife in negotiating a property settlement prior to marital dissolution (*see* § 211, cmt. d), a single lawyer may not do so when the matter comes before a tribunal, even when the issues are uncontested." *Id.*

resentation has ramifications beyond the particular representation of the particular individuals who are married.

The worst possible scenario is where the lawyer has relevant (but confidential) information that the client does not have and the lawyer facilitates actions by the client that would not be undertaken but for the client's ignorance. Permitting separate simultaneous representation excuses the disloyalty inherent in the lawyer's actions in this case on the basis that the client consented. This excuse is invalid for two reasons: 1) the client's ignorance evidences an absence of "informed" consent to the withholding of information, which is a necessary predicate to separate simultaneous representation; and 2) independent of the existence or non-existence of consent, such disloyalty is antithetical to the attorney-client relationship. While some acts of "disloyalty" are the necessary result of lawyers having obligations beyond serving the individual client,²¹⁰ the acts of disloyalty in the context of estate planning are neither unforeseeable nor inherent in our system of private counsel. In the worst case scenario, the disloyalty arises because the lawyer undertook the impossible — the faithful serving of two clients whose lives were intertwined by marriage, but whose goals were separate and distinct. No lawyer can serve two masters, for the lawyer will either love the first (preserving the client's confidences), and hate the second (betraying the other client's trust), or hate the first (disclosing the client's confidences), and love the second (protecting the other client's ability to make informed decisions).²¹¹ This inherent conflict compels the rejection of separate simultaneous representation as a professional norm. As reflected by the initial recommendation of the Professional Standards Committee of the American College of Probate Counsel, this model of representation should be permitted only on the rare occasions when exceptional circumstances require the heroic effort of building and maintaining a Chinese Wall within the lawyer's mind.

210. See, e.g., *Pieron v. Missouri*, 793 S.W.2d 618 (Mo. Ct. App. 1990) (Movant claimed attorney had breached his duty of confidentiality and that attorney's performance was deficient due to failure to call particular witnesses. Court found that attorney was "on the horns of an ethical dilemma" when it became apparent that movant wanted witnesses called who the attorney believed would perjure themselves. Attorney found to have done more than an adequate job of dealing with "a difficult, manipulative client" by exercising his judgment in eliminating the distortions by not calling the witnesses within the scope of Model Rule 3.3.)

211. Cf. *Brook v. Zebre*, 792 P.2d 196, 200 (Wyo. 1992) (quoting *Luke* 16:13).

