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Family Matters: Nonwaivable Conflicts of Interest in Family Law

*Steven H. Hobbs**

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INTRODUCTION

The hypotheticals prepared for this special symposium issue ask if a lawyer can provide legal services to a family when one family member yields major decision-making authority to another family member. At stake is the disposition of significant individual and family assets. The traditional model of legal representation would require each family member to have an advocate protecting and promoting his or her individual interests while negotiating a reasonable

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accommodation of the other family members' interests. The challenge presented by the hypotheticals is whether an attorney can simultaneously represent apparent multiple interests without violating ethical provisions.

The hypotheticals assume that the family as a unit has presented itself to a lawyer seeking legal advice and assistance to accomplish a plan already agreed to by the family. Each family presents a plan conceived from the unique perspective of its philosophical, moral, and practical understanding about the nature of family.¹ It apparently believes deeply in the presented plan and could accomplish its desires without the aid of a lawyer. In fact, the probability is high that any advice contrary to its plans or the recommendation that each member individually seek separate counsel would be rejected. The question becomes: Can a lawyer ethically provide legal services in a manner which honors both the families' values and the lawyer's professional values? Stated differently, are these multiple-client-conflict-of-interest situations which the lawyer should not allow the client to waive the protection afforded clients under our professionalism rules, even if the clients consent after full disclosure and discussion of representing clients with differing interests?

Proceeding from the premise that a lawyer is contemplating offering legal services in the context of a family unit, the focus of this article is on nonwaivable conflicts of interest in the area of family law. Nonwaivability is suggested by the language in the Model Code of Professional Responsibility² (Model Code) and the Model Rules of Professional Conduct³ (Model Rules). My interest is whether the Disciplinary Rules and Ethical Considerations of the Model Code and the Model Rules and Comments offer sufficient insight for the lawyer considering multiple current client representation. As a policy matter, which conflicts arising from family representations are nonwaivable?⁴

1. The family's sense of itself is derived from its ideological frame of reference, or how it comes to hold its particular world view. Each family is different, and there may not be complete agreement among the various members about which ideological frame of reference predominates. See Steven H. Hobbs, *We Are Family: Changing Times, Changing Ideologies and Changing Law*, 14 CAPITAL U. L. REV. 511 (1985).

2. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE].

3. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES].

4. See MODEL RULES, *supra* note 3, Rule 1.8. The rule, entitled "Conflict of Interest: Prohibited Transactions," ostensibly is crafted to identify conflict situations that are nonwaivable. A lawyer shall not prepare an instrument giving the lawyer any substantial gift from a client; "make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation"; or provide financial assistance to a client in connection with pending or contemplated litigation. MODEL RULES, *supra* note 3, Rule 1.8(c), (d), (e). However, not all of the provisions under Rule 1.8

As a practical matter, when should it be obvious to a lawyer that he or she should not represent the parties jointly?⁵

The rules suggest that a lawyer should not simultaneously represent family members with differing or conflicting interests.⁶ However, this ethical protection can be waived by the clients after the lawyer has given full and adequate disclosure of the nature, extent, and risks of proceeding with a multiple representation.⁷ However, the Ethical Considerations in the Model Code and the Comments to the Model Rules advise that in some situations, the multiple representation should not proceed even with client consent—the conflict is nonwaivable.⁸

This Article will explore ways of thinking through conflict of interest questions when providing service to family members. Issues of valid consent and adequate disclosure, while extremely relevant to nonwaivability, are not addressed.⁹ My primary consideration will be

prohibit client consent to the representation or conflict situation. For example, with appropriate consent, a lawyer may "enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client" or "accept compensation for representing a client from one other than the client." MODEL RULES, *supra* note 3, Rule 1.8(a), (f).

5. The comments to Model Rule 1.7 reflect the idea that there are practical reasons for not representing multiple clients:

The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph [1.7](b) are met.

MODEL RULES, *supra* note 3, Rule 1.7 cmt. 7. This comment reflects the softness and uncertainty in the Rules as to when a multiple current client representation should be declined.

6. For example:

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise.

MODEL RULES, *supra* note 3, Rule 1.7 cmt. 13. *See also* MODEL CODE, *supra* note 2, EC 5-15.

7. *See* Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 WASH. L. REV. 823, 846-48 (1986). *See also* *United States v. Garcia*, 517 F.2d 272, 276-77 (5th Cir. 1975) (holding that the right to conflict-free counsel can be waived if waiver is voluntary, knowing, and intelligent); *United States v. Rico*, 51 F.3d 495, 510 (5th Cir. 1995) (finding that defendant validly waived her right to conflict-free counsel after magistrate repeatedly advised her of her constitutional right to separate counsel and warned her of potential risks).

8. *See, e.g., United States v. Vaquero*, 997 F.2d 78, 90 (5th Cir. 1993), *cert. denied*, 510 U.S. 1016 (1993) (holding that even with consent, representation is nonwaivable if the client conflict would result in an inherently unfair trial). *See also Kelley's Case*, 627 A.2d 597, 600 (N.H. 1993) (stating that "there are situations in which, even [with client consent], a lawyer should decline to represent that client.").

9. For a general discussion of those areas, see Lee E. Hejmanowski, *An Ethical Treatment of Attorneys' Personal Conflicts of Interest*, 66 S. CAL. L. REV. 881, 907, 937 (1993).

on how the language of the ethical rules guides the lawyer in making the decision. While some would argue for a bright-line rule to determine nonwaivability, I recommend a subjective approach to solving the nonwaivability dilemma:¹⁰ each lawyer should assess his or her ability to provide legal services to multiple family members that are consistent with the doctrinal principles of loyalty and zealousness.

The Article begins with a discussion of the unique challenges of providing legal services to multiple family members. In Section II, the Article moves to an examination of the doctrinal themes that structure conflicts of interest analysis. Particular attention is paid to the descriptive language of the rules. The Article then presents, in Section III, an analytical framework for thoughtfully working through conflict issues to determine if the conflict is nonwaivable. Finally, Section IV concludes by considering the hypothetical problems in terms of the analytical framework developed in Section III and informed by the doctrinal themes presented in Section II.

I. REPRESENTING FAMILIES

In an earlier work, I presented the following definition of family:

A working, formal law-based definition of the family could be: “[A] fundamental [legal] relationship established by birth, adoption or choice in which persons are responsible to each other for basic intellectual, emotional, physical, social[,] and spiritual nurture.” This relationship creates a unique species of legal rights and obligations. A legal, domestic relationship is generally classified as a status. Husband-wife, parent-child, and guardian-ward are the universal status relationships that are domestic or familial in nature. These status relationships are created, ordered, and protected by the state. The concept can be expanded to include alternative forms of family relationships, such as cohabitating heterosexual or homosexual couples and surrogate parenting arrangements, which have been given consideration in law.¹¹

There are times when a lawyer is called upon to represent the interests of a family unit or to provide legal advice to two or more family members who may have differing interests in the outcome of the representation. For instance, one lawyer can assist a couple who seeks

10. See Peter R. Jarvis and Bradley F. Tellam, *Nonwaivable Multiple Current Client Conflicts*, THE PROF. LAWYER 51 (1995).

11. Steven H. Hobbs, *In Search of Family Value: Constructing a Framework for Jurisprudential Discourse*, 75 MARQ. L. R. 529, 534-35 (1992) (internal citations omitted).

to draft an antenuptial agreement.¹² In certain limited circumstances, one lawyer can handle a no-fault divorce on behalf of a couple.¹³ Family members injured in a common accident might sue the alleged tortfeasor in one united action, even if one of the family members might be partially responsible for the accident.¹⁴ Finally, there are cases involving parallel proceedings on different matters, such as a personal injury case brought on behalf of the family and handled by the same lawyer who is representing one family member in a divorce.¹⁵ Thus, the term "family representation" is used broadly to describe not only the law of domestic relations (marriage, divorce, adoption, etc.), but also legal issues based on the familial relationship of the parties.¹⁶ In such instances of multiple representation when the relationships between the parties are familial in nature, the parties'

12. See *Kosik v. George*, 452 P.2d 560 (Or. 1969); *Lutz v. Schneider*, 563 N.W.2d 90 (N.D. 1997).

13. See *Klemm v. Superior Court of Fresno County*, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977).

14. See *State Farm Mutual Auto. Ins. Co. v. K.A.W.*, 575 So. 2d 630 (Fla. 1991).

15. See, e.g., *In re Colestock*, 461 N.E.2d 137 (Ind. 1984); *In re Hockett*, 734 P.2d 877 (Or. 1986); *Comm. on Legal Ethics v. Frame*, 433 S.E.2d 579 (W. Va. 1993).

16. Examples of the latter include estate planning and administration and torts committed against family members or criminal charges, such as domestic violence, that affect the family relationships. Also, lawyers have been known to represent family members charged with committing crimes as a family unit. Although not explored in this article, examples can also be found in such areas as corporate law, where parent corporations and subsidiaries are referred to as business families, or in businesses that are owned by families. See *Arizona v. Padilla*, 859 P.2d 191 (Ariz. Ct. App. 1993), where a criminal defendant sought post-conviction relief for ineffective assistance of counsel because the defendant's lawyer represented family members in a drug case and did not zealously or loyally represent each member. Defendant contended that:

[H]is lawyer, Albert Freeman, had a conflict of interest. Freeman, without obtaining a waiver, represented defendant's wife, his brother, and his sister-in-law at a package rate on drug charges stemming from the same investigation and involving the same informant. Defendant argue[d] that this conflict prevented Freeman from pursuing a better plea bargain by offering to have defendant testify against one or more of his relatives, and from seeking a more favorable sentence by arguing at sentencing that defendant had played a minor role in the family drug business, especially in relation to his brother. Defendant also argue[d] that Freeman indirectly disparaged defendant at his wife's sentencing, which immediately preceded his own, adversely affecting the sentence in defendant's case.

Id. at 192. See also *State v. Davis*, 514 P.2d 1025 (Ariz. 1973) (remanding for new trial when single attorney represented two brothers, both were convicted, and one appealed because his defense conflicted with his brother's defense.) See ABA Comm. on Ethics and Prof'l Responsibility, Formal Opinion 390 (1995) (discussing conflicts of interest in the corporate family context). See also *Comm. on Legal Ethics v. Frame*, 433 S.E.2d 579 (holding that firm's representation of personal injury suit is "directly adverse" to its representation of another client where the client will be cross-examined in the personal injury suit, even though she is not named as a defendant). See also *In re Hockett*, 734 P.2d 877 (Or. 1986) (attorney attempted to handle the business interests of two business partners while representing their respective wives in divorce proceedings).

legal interests are generally thought to be united; and yet, the parties have interests that do, or can, become conflicting.¹⁷

Recent scholarship reflects a trend in the expanding and changing nature of family law practice. Thomas Shaffer often urges that the family is a civic community,¹⁸ and that a lawyer can provide legal services in pursuit of what is in the best interest of the family.¹⁹ Gerald LeVan calls upon lawyers to consider preservation of familial relationships as a vital focus of legal representations.²⁰ Patricia M. Batt has argued for using an entity theory in representing families, much like we use for representing a business.²¹ Russell Pearce proposes offering families an "option" of deciding whether to obtain representation as a family or as a collection of individuals.²²

On the other hand, Teresa Stanton Collett vigorously opposes treating the family as a unit and recommends against such an engagement.²³ Part of her objection is that she does not see where the law recognizes the family as a unit in the same sense that the law gives a legal existence to a business association.²⁴

17. See Virginia Bar Legal Ethics Opinion 1013 (Dec. 10, 1987) (permitting lawyer to represent a widow and four of her six children in selling a farm left to the widow for life with a remainder interest to the children as long as everyone sought the same result).

18. All of the deep sources of morals in our culture argue for the proposition that estate-planning clients are *not* radically alone. Human relationships may be nurtured, nourished, esteemed, and represented. The Hebraic family ethics of Moses, which are also the ethics of Jesus, put created human beings in families and in families of families. This is true in the Torah and Talmud, in the New Testament, in Aquinas' *Summa Theologica*, in the ethics of the Fathers of the Reformation, and in modern Jewish and Christian ethics.

The aspirations of the first American legal craftsmen, both Puritan and Jeffersonian, were communal—republican—aspirations: a civil covenant, a civic community in which individuals give of their time and substance for the common good—and a body of law that encouraged and sustained family and communal effort. We Americans are not alone.

Thomas L. Shaffer, *The Family as a Client—Conflict or Community?*, 34 RES GESTAE 62, 64 (Aug. 1990).

19. See Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEXAS L. REV. 963 (1987).

20. See Gerald Le Van, *Lawyers, Families and Feeling: Representing the Family Relationship*, 5 PROB. & PROP. 19, 20 (Jan/Feb. 1991).

21. Patricia M. Batt, *The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 GEO. J. LEGAL ETHICS 319 (1992). See also MODEL RULES, *supra* note 3, Rule 1.13.

22. See Russell Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1256, 1294 (1994).

23. See Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 FORDHAM L. REV. 1453 (1994).

24. For example, she states:

In the absence of a coherent jurisprudence recognizing the family entity as separate from the aggregate interests of the individual members, the lawyer attempting to represent the family will have no universally recognized legal entity interposed between counsel

Expanding on the notion of family as an entity or unit, other scholars see families as a series of interrelated systems from which a family draws resources to solve problems and address family needs.²⁵

The concept of systems is used to refer to a group of people who interact as a functional whole. Neither people nor their problems exist in a vacuum. Both are inextricably interwoven with broader interactional systems, the most fundamental of which is the family. The family is the primary and, except in rare instances, the most powerful system to which a person ever belongs The physical, social[,] and emotional functioning of family members is profoundly interdependent, with changes in one part of the system reverberating in other parts of the system.²⁶

A system might include a spouse, a child, extended family members, or a social agency that provides services and problem-solving resources for families. For example, an individual seeking a divorce might call upon his parents for financial support during the divorce.²⁷ Or an individual might turn to her parents to assume custody of her children because the grandparents are in a better situation to meet the needs of the children. These multiple systems create a web of interpersonal, interdependent relationships through which individuals manage their daily lives.²⁸

I have used this approach in previous work exploring the ethical management of assets for elder clients.²⁹ My focus was on the counseling role the lawyer plays in helping an elder client and his or her family manage his or her assets at the end of life's journey.³⁰ The

and individual family members.

Id. at 1493.

25. See NANCY BOYD-FRANKLIN, *BLACK FAMILIES IN THERAPY: A MULTISYSTEMS APPROACH* (1989).

26. MONICA MCGOLDRICK & RANDY GERSON, *GENOGRAMS IN FAMILY ASSESSMENT* 4-5 (1985).

27. See Virginia Bar Legal Ethics Opinion 1631 (Feb. 7, 1995).

28. See Virginia Bar Legal Ethics Opinion 1626 (Feb. 17, 1995). The ethics committee found that it was permissible for an attorney who served as guardian ad litem for the children in a termination of parents' rights case to subsequently represent the Dept. of Social Service in an appeal of the case.

29. See Steven H. Hobbs and Fay Wilson Hobbs, *The Ethical Management of Assets for Elder Clients: A Context, Role, and Law Approach*, 62 *FORDHAM L. REV.* 1411 (1994); DIRK R. DREUX IV & JOE M. GOODMAN, *BUSINESS SUCCESSION PLANNING AND BEYOND: A MULTIDISCIPLINARY APPROACH TO REPRESENTING FAMILY-OWNED BUSINESSES* (1997).

30. While the lawyer has the elder person's interests as the ultimate concern of the representation, part of the client's interest is care and concern for his or her family.

A contextual focus on the nature of the issues an elder client brings to the office and the values implicit in elder law necessarily suggest a unique role for the attorney. The attorney is truly a counselor who offers sage advice within the context of familial

lawyer must recognize the multiple family systems context of the legal problem and utilize those systems to facilitate the client's desires.³¹ This is a useful tool for planning how to deliver legal services to a family.³² The lawyer can also better understand the legal and nonlegal aspects of the family problem and identify resources for solving the problem.³³

Necessarily, serving the legal needs of families increases the potential for ethical dilemmas.³⁴ If a lawyer represents the family as a unit or a system, how does the lawyer represent all of the individual interests adequately?³⁵ Does the representation promote the greater good of the family while sacrificing some of the individual members' legitimate interests?³⁶ The challenge is to determine if one can help

relationships. The primary focus is on empowering the elder person's navigation of the last passage of life's journey.

Hobbs & Hobbs, *supra* note 29, at 1428.

31. *Id.* at 1422-25.

32. The multisystems approach enhances the information the lawyer gathers and considers the client's needs in a broader context:

The multisystems approach can be a useful planning tool for thoughtful, competent consultation with an elder person seeking a viable plan for asset management. Many good lawyers already use this approach with initial intake questionnaires and the completion of informational documents. The multisystems approach is certainly a more comprehensive approach than, for example, simply drafting a will without concern for the larger context of estate planning.

Id. at 1418.

33. *Id.* at 1428.

34. Dreux and Goodman present an excellent overview of the ethical complexities of representing families, and they encourage lawyers to face the challenges:

Lawyers should feel confident in their ability to represent multiple family members in appropriate circumstances. Admittedly, representation of this nature requires a certain degree of circumspection and possesses a high degree of complexity, even difficulty, for the lawyer in terms of professional ethical conduct. Moreover, these difficulties do not allow a lawyer to exclude himself or herself from, or otherwise compromise, the application of the formal ethical rules promulgated under either the Model Rules or Model Code.

DREUX AND GOODMAN, *supra* note 29, at 115.

35. Professor Collett reaches this conclusion in her critique of representing a family as an entity:

Only in family entity representation is the individual subsumed by the family and therein lies its dangerous appeal. Yet the best interests of the family cannot be served by denial of the individuality of each member. Entity representation, by its very nature, demands this denial, and therefore can never safely accomplish that which is not already possible within the three existing models.

Collet, *supra* note 23, at 1501.

36. It is not always possible to give every family member exactly what he or she desires in large part because the interests that are being considered are never enough to go around. The family members can either fight tooth and nail for what they individually believe they are entitled to, or they can seek cooperation and accommodation of competing interests so that the family as a whole prospers. Families seeking the greater good for their families may not find it if all its

the family without harming individuals, or whether withdrawal from the representation is the appropriate course.³⁷

II. PARSING THE RULES - THE DOCTRINAL STRUCTURE

This section considers the doctrinal themes underlying the basic elements of conflict of interest analysis.³⁸ The basic elements are loyalty, zealousness, confidentiality, and competence. The principle of loyalty is based on the notion that there is only one client for whom the lawyer holds a sacred trust.³⁹ The lawyer is a fiduciary charged with the care of the client's life, property, or legal rights.⁴⁰ The principle of zealousness is founded on the idea that a lawyer must exercise independent professional judgment on behalf of a client.⁴¹

members have individual, adversarial lawyers. For a discussion of these issues for the advisor to a family business, see Glenn R. Ayres, *Rough Family Justice: Equity in Family Business Succession Planning*, 3/1 FAM. BUS. REV. 3 (Spring 1990).

37. Gerald Le Van states the challenge as an opportunity:

Lawyers must find better ways of representing multiple parties (givers and receivers) in the estate planning transaction. Most families want their relationships preserved and want a single lawyer to help them through the process. As Mark Twain eloquently said, "you never know someone until you share an inheritance with them." There must be a place for lawyers to help families preserve assets *and* relationships. The two are not necessarily exclusive. Lawyers, families, and feelings must work together.

Le Van, *supra* note 20, at 22.

38. Other scholars have explored this field with great detail. This article is premised on the lawyer's response when the lawyer must decline the representation or withdraw because of a conflict, even if the client has validly waived the conflict of interest protection. See Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823 (1992); Collett, *supra* note 23; and Pearce, *supra* note 22.

39. [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty . . .

2 Trial of Queen Caroline 8 (J. Nightengale ed. 1821) (quoting Lord Henry Brougham).

40. See *Sanguinetti v. Rosen*, 107 P. 560 (Cal. Ct. App. 1906). Where a widow and her children lost inherited property as a result of self-dealing by their attorney, the court set a high standard for lawyer conduct:

An attorney at law should be a paragon of candor, fairness, honor, and fidelity in all his dealings with those who place their trust in his ability and integrity, and he will at all times, and under all circumstances, be held to the full measure of what he ought to be. Equity would indeed be impotent if a trusted legal advisor could profit by withholding the benefit of his special knowledge and skill, or by giving false counsel during the continuance of a relation in the highest sense confidential and fiduciary.

Id. at 563.

41. See MODEL CODE, *supra* note 2, Canon 5 and EC 5-1. See also MODEL RULES, *supra* note 3, Rule 1.3 cmt. 1 (stating that "[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). Moreover, the court system assumes the adversarial model.

[Each attorney,] by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render

Thus, the lawyer protects the client's interest without prejudice or bias.⁴² Interests of third persons or interests personal to the lawyer should not influence the advice rendered to the client.⁴³ The principle of confidentiality requires the lawyer to hold inviolate the confidences and secrets of the client.⁴⁴ In the multiple-client situation, clients can consent to the conflicting representation after full disclosure.⁴⁵ This requires the client to give the lawyer permission to disclose confidences and secrets sufficient to inform the other client of the conflict.⁴⁶ Finally, in simultaneously servicing the legal needs of multiple clients, the lawyer must take care to perform with the competence and skill of a reasonable lawyer in similar situations.⁴⁷ The pursuit of professional excellence is paramount.⁴⁸

The larger meaning of these principles is wrapped in the generalized, descriptive wording of the rules, ethical considerations, and comments on conflicts. The language of the rules defines the principles by using the same or similar words in the descriptive examples of conflict situations. For example, in a multiple-client family representation, the lawyer would have to represent differing or conflicting interests.⁴⁹ Also, dual representation is said to diminish the loyalty given to each client.⁵⁰ We are further advised by the

impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.

MODEL CODE, *supra* note 2, EC 7-19 (internal citations omitted).

42. See MODEL CODE, *supra* note 2, EC 2-30.

43. See *id.* at EC 2-21, 5-21, 5-22, 5-23. See also MODEL RULES, *supra* note 3, Rule 1.8(f), Rule 1.7 cmts. 6, 10.

44. See MODEL CODE, *supra* note 2, DR 4-101; MODEL RULES, *supra* note 3, Rule 1.6.

45. See MODEL CODE, *supra* note 2, EC 5-16; MODEL RULES, *supra* note 3, Rule 1.7(b)(2) cmts. 12, 13.

46. See MODEL RULES, *supra* note 3, Rule 1.7 cmt. 5.

47. See, e.g., *Togstad v. Vesely*, 291 N.W.2d 686 (Minn. 1980).

48. In thinking about professional excellence, the example of Charles Hamilton Houston, civil rights litigator and former Dean of Howard Law School, comes to mind. It was once said of Houston that the call to the practice of law "was a call for the superlative." Spottswood W. Robinson, III, *No Tea for the Feeble: Two Perspectives on Charles Hamilton Houston*, 20 HOW. L.J. 1, 6 (1977).

49. See MODEL CODE, *supra* note 2, EC 5-14; ABA Canons of Prof'l Ethics Canon 6. Canon 6 provides the classic definition of conflicting interests:

Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

50. The Model Code states:

Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

descriptive language that serving multiple-family clients would have an adverse affect on the representation⁵¹ or would impair the judgment of the lawyer.⁵² Having more than one client could keep the lawyer from exercising the requisite zealousness on behalf of each client. Further, the Model Code suggests that it will be obvious to a reasonable lawyer when a dual family representation should not be taken⁵³ or when, as the Model Rules implore, a disinterested lawyer would not accept such a representation.⁵⁴

All these admonitions are descriptive of the general principles, but they fail to provide concrete, substantive understanding of when certain conflicts are nonwaivable. To obtain insight into what these admonitions mean, a brief review of some cases involving conflicting interests in the family context is helpful. The descriptive language of these terms often overlap and contain some of the multiple meanings implicit in the principles discussed at the beginning of this section. The doctrinal themes underlying the basic elements of conflict of interest will now be explored.

A. Differing or Conflicting Interests

The language of the rules speaks to the inadvisability of representing "differing interests, whether such interests be conflicting, inconsistent, diverse[] or otherwise discordant."⁵⁵ The spirit of the rules suggests that differing interests or conflicting interests have a consistent and synonymous meaning. Reference is often made to Canon 6 of the ABA Canons of Professional Ethics, which states:

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.⁵⁶

MODEL CODE, *supra* note 2, EC 5-14 (internal citations omitted).

51. See MODEL CODE, *supra* note 2, EC 5-17.

52. *Id.*

53. MODEL CODE, *supra* note 2, DR 5-105.

54. MODEL RULES, *supra* note 3, Rule 1.7, cmt. 5.

55. MODEL CODE, *supra* note 2, EC 5-14.

56. MODEL CODE, *supra* note 2, Canon 6. See also Rhode Island Ethics Op. 94-24 (May 5, 1994). The attorney was representing the income beneficiary and remainderman of a trust in a suit against the trustee for failure to appropriately invest the trust corpus. An attorney in promoting the interest of the income beneficiary (trustee should invest for greater income) may be in potential conflict when representing remainderman (trustee should invest for long-term growth).

By general application, this is what is meant by differing or conflicting interests.⁵⁷ A lawyer is pressed simultaneously to hold opposite and equally compelling positions and to be faithful to both.⁵⁸ In the context of family representation, it occurs when interests of family members are adverse to one another.⁵⁹ The Model Rules also support this meaning.⁶⁰

In a family context, differing or conflicting interests are most evident in a representation of both husband and wife in a divorce. While often frowned upon and, in some states, strictly prohibited,⁶¹ one lawyer can represent a divorcing couple in limited circumstances.⁶² In *Klemm v. Superior Court of Fresno County*,⁶³ the leading case on this subject, the California court allowed an attorney, who was a family friend, to represent both spouses in a noncontested divorce where the conflict was merely potential and where there was found to be full disclosure and informed consent.⁶⁴

57. See CHARLES WOLFRAM, *MODERN LEGAL ETHICS* 314-16 (1986).

58. Virginia Bar Legal Ethics Op. 741 (Jan. 20, 1986). A lawyer cannot provide legal services both to the adoptive parents and the biological parent. Other ethics committees have come to the same conclusions. See State Bar of Wisconsin Formal Ethics Opinion E-88-4; ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1523 (1987).

59. The dictionary definition of "adverse" lends color to the inquiry:

Opposed; contrary; in resistance or opposition to a claim, application, or proceeding. Having opposing interests; having interests for the preservation of which opposition is essential.

BLACK'S LAW DICTIONARY 53 (6th ed. 1990).

In the family context, a lawyer cannot represent a husband in an uncontested divorce and simultaneously defend the wife in a criminal matter. Virginia State Bar Legal Ethics Op. 1015 (Jan. 5, 1988). Attorney cannot represent minor children whose mother was killed in an accident, the mother's estate in a wrongful death suit, and the children's grandparents who are the guardians and administrators of the estate. Philadelphia Bar Ass'n Professional Guidance Comm. Op. 93-24 (Jan. 1994).

60. Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations.

MODEL RULES, *supra* note 3, Rule 1.7 cmt. 4.

61. See *In re Breen*, 552 A.2d 105 (N.J. 1989) (representing husband and wife in divorce is impermissible conflict of interest). See also Oregon Ethics Op. 515 (1988) (prohibiting joint representation in divorce even when the "spouses have limited assets, no children, no disputes concerning the distribution of assets and liabilities, and neither spouse is seeking support"); Mississippi State Bar Ethics Comm. Op. 80 (1983); ABA/BNA Manual 801:5104; New Hampshire Ethics Op. 1986-7/2 (1986).

62. See *Perry v. Perry*, 406 N.Y.S.2d 551 (N.Y. App. Div. 1978) (holding that lawyer was able to preserve neutrality and separation agreement was fair); UNIF. MARRIAGE AND DIVORCE ACT § 303(c) (1970); 9A U.L.A. 126 (1979).

63. 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (Ct. App. 1977).

64. *Id.* at 900; 142 Cal. Rptr. at 513.

Conversely, the dangers involved in such dual representations were evident in the case of *Board of Overseers of the Bar v. Dineen*.⁶⁵ There, the attorney, James Dineen, represented the husband before the marriage and provided legal services to both husband and wife during the marriage. In the spring of 1982, Dineen agreed to assist the couple in pursuing a divorce.⁶⁶ The representation included meeting with the parties to work out a settlement agreement, explaining the concept of division of marital property, and drafting the divorce complaint.⁶⁷ The husband was listed as the plaintiff with Dineen as his attorney, and the wife, as party defendant, was served with the complaint in the attorney's office. The wife continued to believe that Dineen was her attorney.⁶⁸

The nature of this attorney-client relationship was further complicated in July of 1982, when Dineen was retained to defend the wife "on a civil complaint for operating a motor vehicle while under the influence of alcohol."⁶⁹ While the civil trial was heard on September 20, 1982, Dineen continued to assist the couple in securing a no-fault divorce before and after that date. In October of 1982, the wife committed herself to a substance abuse rehabilitation center. During her stay, the husband personally delivered a written divorce agreement prepared by Dineen. She signed it even though the terms were different than the ones to which she believed they had agreed in Dineen's office.⁷⁰ Subsequently, on December 22, 1982, she called Dineen, explained that she was undergoing treatment for alcohol abuse, and asked the attorney to obtain a continuance of the divorce case so that she might obtain separate counsel.

Dineen did obtain a continuance, but he also filed an amended divorce complaint alleging that "the wife was guilty of cruel and

65. 500 A.2d 262 (Me. 1985).

66. Dineen did discuss some of the risks in handling the divorce for both parties and warned them that "he could only handle the matter if the couple prepared a full agreement of their [sic] mutual understanding concerning the issues and terms of the divorce." *Id.* at 263. He also explained that the wife could retain separate counsel. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. She signed the agreement in spite of her misgivings about some of its terms:

She noticed that certain terms in the agreement had changed since the meeting between the [attorney], her husband[,] and herself: (1) the amount recited for the husband's child support payments was lower than that to which they had agreed, and (2) there was an added clause that allowed the husband to claim tax exemptions for their two minor children. The wife testified that, at this point, she formulated the opinion that she had been misled by the [attorney's] explanation of what constituted "marital property."

Bar v. Dineen, 500 A.2d at 263.

abusive treatment and of gross and confirmed habits of intoxication for the use of liquor.”⁷¹ He further sought, ex parte for the husband, custody of the minor children alleging “the wife’s unfitness to care for her children because of her alcohol abuse.”⁷² The wife eventually prevailed on a motion to compel Dineen to withdraw from representing her husband.

In *Dineen*, the husband and wife looked to the lawyer for legal advice, and he did little to alert the parties to the dangers of dual representation.⁷³ The court found inadequate disclosure of the nature of the conflict, despite the lawyer’s protestation to the contrary.⁷⁴ Further, the lawyer had no intent of serving two clients, as he was “acting with the intent of furthering the husband’s interests at the expense of the wife’s.”⁷⁵ The wife’s interests in preserving the confidence concerning her substance abuse differed from the husband’s interests in using this information against her. Nonetheless, Dineen used the wife’s valiant efforts in overcoming substance abuse against her. Clearly, the lawyer’s loyalty was in the exclusive province of the husband to the detriment of the wife.

B. Loyalty

As suggested earlier in discussing the principle of loyalty, the interests of a client are a lawyer’s sacred trust. Loyalty demands that the lawyer’s personal interest and the interests of others (including other clients) should not be allowed to harm the client.

In the family law context, such loyalty is often implicated when the lawyer in a dual, family representation may be forced to disclose

71. *Id.* (internal quotes omitted).

72. *Id.* at 264.

73. Mr. Dineen contends that he was not consulted as a lawyer in the divorce matter, but rather, fulfilled the function of a scrivener. Thus, given the nature of this limited role in relation to the parties, nothing existed to warrant a conclusion that he was representing differing interests. The testimony of both the husband and wife conflict with the appellant’s characterization of his role. Their testimony shows that, in fact, the appellant gave legal advice to both parties concerning the terms of their divorce settlement agreement and that, ultimately, certain terms of the agreement were changed to favor the husband’s interests over the wife’s.

Id. at 265-66.

74. The appellant asserts that the wife was aware of the long standing relationship between the appellant and her husband, and such awareness made disclosure unnecessary. We find that the record supports the single justice’s finding that the appellant failed to adequately disclose to the wife *the exact nature* of his relationship to the husband, who was a party adverse to the wife.

Bar v. Dineen, 500 A.2d at 265.

75. *Id.* at 265.

evidence of domestic violence. This presents a classic example of divided loyalties. Do you report the domestic abuser, or do you not offer protection to the abused spouse? The dilemma is further compounded when the principle of loyalty is measured as a component of effective assistance of counsel.

Such complicated issues of loyalty were demonstrated in *United States v. Rico*.⁷⁶ In that case, Manuel and Debra Rico, a husband and wife, were convicted of drug trafficking. They sought to appeal the conviction based, in part, on the failure of the trial court to suppress evidence obtained during a pre-arrest search of their home and vehicle. The wife appealed specifically on the ground that she received an unfair trial because her attorney represented both her and her husband, thus depriving her of a right to counsel free of conflict. She claimed she was an abused and battered spouse who was forced to participate in the drug ring under duress and that, had her attorney offered such evidence in her defense, she would have been exonerated or the charges against her would have been mitigated.

The Court of Appeals considered the standard analysis for determining whether this dual representation was constitutionally impermissible:

As with many other rights, though, the right to a conflict-free counsel is not absolute. It can be waived if (1) the waiver is made voluntarily, knowingly, and intelligently, and (2) the conflict is not so severe as to undermine the integrity of the judicial system. We consider first whether there was an actual conflict of interest; if so, whether Debra did in fact freely and validly waive her right to a representation by a conflict-free attorney; and if that too is so, whether the conflict is nevertheless so severe as to be unwaivable as a matter of law.⁷⁷

The court, after assuming that there was an actual conflict, considered whether the wife validly waived her right to a conflict-free counsel. The court noted that the magistrate and the counsel fully and

76. 51 F.3d 495 (5th Cir. 1995). The husband and wife were adamant about using the same attorney. The magistrate judge at the preliminary hearing warned the wife, Debra: You [Debra] have the right to a lawyer who is loyal to you, and there may be some potential conflict between a defense that is in your husband's best interest and a defense that is in your best interest. And this often happens between codefendants, that evidence that would tend to exculpate one of them tends to incriminate the other.

Id. at 510. The leading cases on effective assistance of counsel are *Strickland v. Washington*, 466 U.S. 668 (1984), and *Nix v. Whitesides*, 475 U.S. 157 (1986).

77. *Id.* at 508 (internal citations omitted).

properly advised her of the risk of the dual representation.⁷⁸ Therefore, she validly consented to waive her right to a conflict-free counsel. Nonetheless, the court further inquired whether this conflict was nonwaivable:

[B]ut our determination that Debra validly waived her right to conflict-free counsel does not end our inquiry. For if the conflict is so severe as to render a trial inherently unfair, then the integrity of the judicial system has been undermined, and the accused has been deprived of [her] right to effective assistance of counsel.⁷⁹

In *Rico*, there was no evidence of domestic violence against the wife, even though there was evidence that the husband abused his stepdaughters.⁸⁰ Consequently, no damage was done to the system of justice because counsel had not sacrificed the interest of the wife by failing to raise the defense of duress of battered spouse.⁸¹ The court further concluded that the dual representation did not “render Debra’s trial inherently unfair, thereby making her right to conflict-free counsel unwaivable. . . .”⁸²

Fairness and justice are necessary conditions of loyalty. The court was concerned about whether the wife would receive a fair trial in light of her counsel’s inability to vigorously pursue all of her options. Furthermore, the integrity of the judicial system might be impugned if a defendant did not have access to her full panoply of rights because of her allegiance to an alleged domestic abuser.⁸³ But as such cases imply, if a knowing choice is made by the family, the courts can honor that autonomous decision to stand as a united family.

78. *Id.* at 510.

79. *Id.* at 511 (internal quotes & citations omitted).

80. *Id.* at 509.

81. The opinion in *Rico* stated:

The record before us indicates that there are precious few facts on which a defense counsel could credibly construct an argument that Debra became involved in this multi-kilogram narcotics operation and continued her involvement for a protracted period because she was under duress or was a battered spouse, especially considering that Debra herself was apparently adamant in her refusal to allow either defense to be raised.

51 F.3d at 511.

82. *Id.*

83. Some distinction could be made between civil representation and criminal representation of a family. The right to counsel of choice in a criminal context has constitutional implications, as *Rico* suggests. Loyalty, zealousness, confidentiality, and competence apply nonetheless. *But see Dowell v. Commonwealth of Virginia*, 351 S.E.2d 915 (Va. App. 1987).

C. Impaired or Adversely Affected Judgment

The subtle problem in representing differing interests is that the lawyer's independent professional judgment can be impaired or affected to the detriment of one client. Objective, lawyer-like judgment may be shadowed by favoring one client over another or pursuing one specific result without reference to a wide range of options.⁸⁴ In either event, the lawyer must be attuned to the subtle pressures of influence that might affect professional judgment and must be prepared to consider whether the matter represents a nonwaivable conflict.

Impaired or adversely affected judgment can be measured in two ways. First, a lawyer with divided loyalties may provide inadequate representation.⁸⁵ The emphasis here is that the multiple conflict so impairs the representation that "a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests."⁸⁶ Second, the divided loyalty of the lawyer may affect the relationship with the client.⁸⁷ That is, the client may come to distrust and lose faith in the lawyer.⁸⁸

Both measurements of impaired judgment were evident in the *Dineen* case, discussed above, where the lawyer used information from the wife to her disadvantage because he was determined to help the husband.⁸⁹ Based on the state's conflict of interest rule, the court

84. See *Dowell v. Commonwealth*, 351 S.E.2d 915. Defendant had a grand larceny conviction vacated on grounds of ineffective assistance of counsel because her lawyer also represented her mother and stepfather in the same matter. The mother and stepfather were called as witnesses by the Commonwealth and the lawyer did not cross-examine his clients.

85. See MODEL RULES, *supra* note 3, Rule 1.7(b)(1).

86. MODEL RULES, *supra* note 3, Rule 1.7 cmt. 4. In *Dowell*, the lawyer objected, unsuccessfully, to having two of his clients testify against the third. 315 S.E.2d at 915. The lawyer chose not to cross-examine the witnesses. The court cast the issue as an impermissible conflict between competing choices:

If a witness's testimony will incriminate both the witness and the defendant, the attorney must choose between negotiating concessions in exchange for the witness's testimony or deterring the witness from testifying in order to protect the defendant. Consequently, the effect of such testimony would be to create a conflict of interest.

Id. at 917.

87. MODEL CODE, *supra* note 2, EC 5-19. See Virginia Bar Legal Ethics Op. 1144 (Oct. 26, 1988). A lawyer represented Client 1 in her divorce, and then Client 2 in her divorce. During preliminary filings, it is alleged that Client 1's estranged husband had committed adultery with Client 2. The lawyer had divided loyalties as Client 1 could be called as a witness and be subject to cross-examination by her own attorney.

88. See MODEL RULES, *supra* note 3, Rule 1.7 cmt. 8. See also Comm. on Legal Ethics v. Frame, 433 S.E.2d 579.

89. *Dineen*, 500 A.2d 262. The court found that not only did the lawyer violate the conflict of interest rule, but he also failed to preserve the confidences and secrets of the wife:

concluded that the lawyer should not have undertaken the representation of husband and wife because his "judgment was likely to be adversely affected by the acceptance of such employment."⁹⁰ Further evidence of his impaired professional judgment is found in the fact that, after he became openly adverse to the wife, he refused to heed the advice of the trial judge to withdraw from representing the husband.⁹¹

The case of *Blum v. Blum*⁹² provides another example of impaired or affected judgment. In that case, a husband and wife brought a handwritten draft of a divorce settlement agreement to their family lawyer who attempted to continue to represent them both.⁹³ After first giving her approval, Mrs. Blum later attempted to have the settlement agreement set aside. The property division was so one-sided that it "shock[ed] the conscience of this court."⁹⁴ The court found that Mr. Blum was "the dominant force in the marriage" and he dominated the terms of the divorce.⁹⁵ Their lawyer acquiesced to Mr. Blum's demands to the detriment of Mrs. Blum's interests. Moreover, even if Mr. and Mrs. Blum could negotiate their settlement agreement on equal terms, their lawyer failed miserably in advising them of the nature and extent of the potential and actual conflict of interest between them.⁹⁶

The single justice found that "without obtaining the informed consent of the wife, [appellant] used information he received from her." The use to which appellant put the information is reflected in the amended divorce complaint that charged the wife with "gross and confirmed habits of intoxication from the use of liquor" The single justice found that the appellant first gained this information from the wife in December, 1982, at a time when the wife believed she was still represented by the appellant.

Id. at 266-67.

90. *Id.* at 266 (internal citation omitted).

91. For example:

In chambers, the judge warned Mr. Dineen that his conduct was susceptible to charges of violation of the bar rules and suggested that he seriously consider withdrawing voluntarily from the case. The appellant disregarded the warning and continued to represent the husband.

Id. at 264. In the disciplinary proceeding, this conduct garnered an additional ethic violation for failing to withdraw when continued representation would cause a violation of the rules of ethics.

Id. at 267.

92. 477 A.2d 289 (Md. Ct. Spec. App. 1984).

93. *Id.* at 291.

94. *Id.* at 292.

95. *Id.* at 295.

96. In this case, Mr. and Mrs. Blum approached an attorney who had represented them in the past and presented him with their separation agreement. Counsel never informed the parties of their respective rights, never advised the parties of any potential conflicts of interest which [sic] might arise as a result of his representing both of them. Not surprisingly, the potential conflict which [sic] exists in every domestic case developed into an actual conflict after the agreement was signed.

Id. at 296.

The Maryland version of the Model Code, case law, and good judgment demand disclosure of the nature of the conflict, even if the Blums' lawyer, "believed that he was merely acting as a 'scribe' with regard to the Blum's [sic] separation agreement. . . ."97 He left open the real possibility that his representation would come to naught because the settlement agreement could be challenged and set aside.⁹⁸

The nonwaivability of the conflicts is suggested because the Blums' lawyer and Dineen could not effectively exercise independent professional judgment in a manner that protected their respective clients. In the *Blum* case, the lawyer's services were dominated by one of the spouses. The adverse affect on his judgment is ensured by how much it impaired his relationship with the other spouse. In *Dineen*, the lawyer did not consider options that would have suited both clients' needs in terms of what was best for the family and the children. He went so far as to aggressively oppose the interest of one of his clients. The adverse effect on his judgment is measured by the inadequate representation of both clients. Neither lawyer represented their respective multiple clients in a professional manner.

D. Zealousness

True zealousness calls for the attorney, within the bounds of the law, to press for every advantage and pursue every legal avenue available on behalf of each client.⁹⁹ All must be considered, even if prudence and tactical strategy counsel against using every opportunity to advance the client's cause.¹⁰⁰ A dual representation of family members may unnecessarily limit the options of the attorney, causing

97. *Blum*, 477 A.2d at 297.

98. The case was remanded so that the lower court could reconsider whether the agreement should be set aside based on the standards articulated on appellate review. *Id.* at 299. See also *In re Estate of Benker*, 331 N.W. 193 (Mich. 1982).

99. See MODEL RULES, *supra* note 3, Rule 1.3 cmt. 1:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

See also, MODEL CODE, *supra* note 2, Canon 7; DR 7-101(A)(1). In *Dowell*, the court recognized the zealousness conundrum of a lawyer representing family members in a criminal case:

Finally, if the witness's testimony is expected to exonerate the witness and incriminate the defendant, the attorney, if he does not use the witness's [F]ifth [A]mendment right to protect the defendant, will be forced to cross-examine the witness, his own client. If he must cross-examine the witness as an adverse witness, he cannot be expected to zealously attempt to discredit one of his clients to protect another.

351 S.E.2d at 917-18.

100. See MODEL CODE, *supra* note 2, EC 7-1, 7-8; MODEL RULES, *supra* note 3, Rule 1.2.

a "fail[ure] to seek the lawful objectives of his client through reasonably available means permitted by law. . . ." ¹⁰¹

Such was the case in *Tyson v. District Court for the Fourth Judicial District*,¹⁰² where a husband and wife defended themselves against criminal charges from an alleged drive-by shooting. Robert and Barbara Tyson endeavored to have one attorney conduct their defense. They claimed to have a unity of interest in conducting a joint defense in which neither wished to pursue a guilty plea and neither wished to testify against the other.¹⁰³ The defendants were, in effect, saying they would rather stand and fight together as a married couple than sacrifice one for the other with separate counsel pursuing separate deals.

At a preliminary hearing, the judge reviewed the potential conflict issues. The court even assigned separate, advisory counsel on the conflict issue.¹⁰⁴ Each defendant was questioned thoroughly by the advisory counsel and given extensive information about the hazards of dual representation.¹⁰⁵ Each counsel (who could certainly be characterized as disinterested) reported back to the court that his client had made a knowing waiver of the right to conflict-free counsel.¹⁰⁶ The court initially permitted the dual representation.¹⁰⁷

As the trial approached, the court reconsidered its initial decision, weighing the defendants' right to counsel of their choice and their right to an effective counsel. Defense counsel had rejected an offered plea agreement for the wife of probation and no jail in exchange for giving testimony against her husband. In his order reversing his previous position, the trial judge ordered defense counsel not to represent either husband or wife, concluding:

[T]he court has looked at the nature of the defenses, the fact that the evidence is stronger against one person than the other, the preliminary hearing, that one cannot have zealous representation of one Defendant when that can hurt the other Defendant.

And I've taken into consideration that both Defendants have said, "I'm not going to take any deals. I'm not going to take any offers." However, even doing that, the court feels that any defense

101. MODEL RULES, *supra* note 3, DR 7-101(A)(1).

102. 891 P.2d 984 (Colo. 1995). *See also In re Cohen*, 853 P.2d 286 (Or. 1993) (regarding issue of domestic violence as evidence against a family member).

103. *Tyson*, 891 P.2d at 988.

104. *Id.* at 987.

105. *Id.* at 987-88.

106. *Id.* at 991.

107. *Id.* at 988.

attorney worth his salt would try to get a plea bargain, . . . and it's hard to get an appropriate or better plea bargain for your client when that would hurt the other client that you are representing [sic].¹⁰⁸

In a four to three decision, the Colorado Supreme Court reversed the trial court on the ground that the Tysons had been deprived of their right to counsel of their choice.¹⁰⁹ The court found that the Tysons knowingly "waive[d] their right to a conflict-free representation . . . [and their] right to later assert a claim for ineffective assistance of counsel as caused by the conflict of interest."¹¹⁰ Although it considered the integrity of the judicial process, the court gave greater weight to the Tysons' Sixth Amendment right to counsel of their choice.¹¹¹ Their lawyer was zealously pursuing what the clients perceived to be their joint, united interests.

In dissent, Justice Erickson focused on the impact the holding would have on the fairness and integrity of the justice system.¹¹² The dissent recounted significant evidence which tended to demonstrate that the husband was primarily culpable for the alleged offense. Justice Erickson would have emphasized:

The interest of the public in the fair and proper administration of justice includes concerns that trials be conducted in a evenhanded manner; that the participants in the adversary process . . . be protected from unfair tactics; and that the courts maintain the integrity of the judicial system and the highest ethical standards of the legal profession.¹¹³

These ethical standards include recognizing when a conflict of interest is nonwaivable, such as when it would be virtually impossible for the attorney to effectively represent both defendants.¹¹⁴ In other

108. *Tyson*, 891 P.2d at 989.

109. *Id.* at 992.

110. *Id.* at 992.

111. *Id.* at 990.

112. I dissent because the majority unnecessarily limits the discretion of a trial judge to disqualify a lawyer from representing a defendant when an obvious and actual conflict of interest exists that would deprive the defendant of the right to effective assistance of counsel.
Id. at 992.

113. *Id.* at 994.

114. The dissent elaborated on the appropriate ethical standards in a critical footnote: Without passing judgment on the attorney seeking to represent both defendants, I invoke two ethical concepts. First, the comment to Rule 1.7 of the Colorado Rules of Professional Conduct (Conflicts of Interest) states "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances,

words, the conflict would mute zealous representation by the lawyer. Such muted representation goes against the fundamental grain of our adversarial system, which assumes vigorous advocacy of every lawful advantage for the client.¹¹⁵

While I share Justice Erickson's concern for the integrity of the judicial system, the case is complicated by the fact that the husband and wife, even with two lawyers, would most likely pursue the same ends. Conducting their defense in the manner in which they choose is ultimately their decision and their right.¹¹⁶ This is particularly true in a criminal case where the Sixth Amendment is implicated. However, the lawyer's ethical response to the clients' choice is informed by his or her sense of professionalism. The Preamble to the Model Rules states:

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system[,] and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules[,] many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.¹¹⁷

In balancing competing professional values, the lawyer can and should be guided by his or her own sense of professional duty.¹¹⁸ As will be discussed in Section III, the lawyer must assess his or her ability to

the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." The present case illustrates a situation when a lawyer cannot properly ask each client to waive the conflict. Second, the Standard for Criminal Justice 4-1.6 requires that "[c]lient interests [be] paramount." The standard insists a lawyer "represent the client's legitimate interests. . . ."

Tyson, 891 P.2d at 994 n.7.

115. See *The Zealous Lawyer: Is Winning the Only Thing?*, 4 REPORT FROM THE CENTER FOR PHILOSOPHY & PUB. POL'Y 1 (Winter 1984), for a discussion of the wisdom of the zealotry tradition.

116. MODEL CODE, *supra* note 2, DR 7-101(A)(1), EC 5-12, 7-7, 7-8; MODEL RULES, *supra* note 3, Rule 1.2(a).

117. See MODEL RULES, *supra* note 3, Preamble.

118. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above the minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct.

Id.

conduct the representation as requested by the multiple clients.¹¹⁹ Unless subject to a court order to continue with the representation,¹²⁰ a lawyer could withdraw if the representation is at odds with his or her sense of professional values.¹²¹

E. *The Disinterested Lawyer and the Obviousness Test*

Implicit in the language of the rules is that there is some general, objective agreement as to when a multiple client conflict is nonwaivable. The cases examined on this point suggest that the lawyers should have known better and not taken on the representations. The lessons learned suggest that a reasonable lawyer would not represent a couple in divorce or in a joint criminal defense. This section considers the assumption of nonwaivability as a function of reasonable reflection.

The Model Rules establish a "disinterested lawyer" test to determine if a conflict is nonwaivable:

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.¹²²

The Model Code admonishes a lawyer not to proceed unless "it is *obvious* that he can adequately represent the interest of each. . . ."¹²³ At times, even with client consent, a lawyer should decline the representation.¹²⁴

In *Kelley's Case*,¹²⁵ a disciplinary proceeding, two lawyers were retained to assist a mother and a daughter in settling the estate of the mother's husband and the daughter's father. The lawyers advised the mother and daughter "that their interests are coincidental but not identical."¹²⁶ They further reviewed Rule 1.7 of the New Hampshire

119. See MODEL CODE, *supra* note 2, EC 2-30; MODEL RULES, *supra* note 3, Rule 1.16 cmt. 7.

120. MODEL RULES, *supra* note 3, Rule 1.16(c).

121. MODEL RULES, *supra* note 3, Rule 1.16(b)(3); MODEL CODE, *supra* note 2, EC 7-8.

122. MODEL RULES, *supra* note 3, Rule 1.7 cmt. 5. See *Tyson*, in which the dissenting judge invoked the disinterested lawyer standard. 891 P.2d at 994, n.7.

123. MODEL CODE, *supra* note 2, DR 5-105(C) (emphasis supplied).

124. *But cf.* Virginia Bar Legal Ethics Op. 728 (Nov. 11, 1985) (holding that a lawyer may prepare reciprocal wills for a husband and wife if it is obvious that he can adequately represent the interest of each).

125. 627 A.2d 597 (N.H. 1993).

126. *Id.* at 598.

Rules of Professional Responsibility with their clients and had them sign a conflict consent waiver.¹²⁷ The potential conflict arose under the will, which provided the daughter with the proceeds from half of a two part trust. The mother would receive proceeds from both parts of the trust.¹²⁸ Part of the total estate was devised to a third party who may have improperly influenced the testator. If the wife elected to challenge the will and take her statutory share, she could stand to receive a larger portion of the estate. However, such a challenge ran the risk of the daughter not receiving as much from the trust established for her benefit.

The probate court disqualified the two lawyers from representing the daughter, finding "that a disinterested lawyer would conclude that [the daughter] should not agree to the representation under the circumstances. . . ."¹²⁹ In the disciplinary proceeding, the lawyers were publicly censured under Model Rule 1.7(b) because the respective interests of their clients were in clear conflict. The court found:

The respondents' representation of the two women, who had substantially different interests in the estate, presented a fundamental conflict and violated Rule 1.7(b). . . . The potential conflict in this case would be so clearly fundamental to a disinterested attorney that undertaking the joint representation was *per se* unreasonable.¹³⁰

The court characterized this as a "fundamental" conflict.¹³¹ I take that to mean that, for the lawyers to proceed with their legal theory, they would enhance one client's position at the possible expense of the other. This form of direct, adverse conflict has been also labeled "impermissible."¹³² By extension, if the lawyer's personal interest or the interest of a third party were adverse to one or more of the represented family members, this too would be a fundamental, impermissible conflict.¹³³

127. *Id.* at 599.

128. *Id.*

129. *Kelly's Case*, 627 A.2d at 600.

130. *Id.*

131. The Model Rules give one example of a fundamental nonwaivable conflict: "For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other. . . ." MODEL RULES, *supra* note 3, Rule 1.7 cmt. 12.

132. See *In re Boyles's Case*, 611 A.2d 618 (N.H. 1992).

133. See *In re Captran Creditors Trust*, 104 B.R. 442 (U.S. Bankr. M.D. Fla. 1989). A debtor motioned to disqualify creditors' attorney in a bankruptcy proceeding based on impermissible conflict between attorney and his clients, who were being challenged for bad faith filing of an involuntary bankruptcy proceeding against the debtor. The court found that even with informed client consent, a disinterested lawyer would not ask for a waiver of conflict

The court also focused on the reasonableness of the joint representation. This reflects the language of parts (a) and (b) of Model Rule 1.7, which requires the lawyer to reasonably believe that the representation will not be adversely affected.¹³⁴ The reasonableness of a multiple representation is often determined by assessing many different factors¹³⁵ as well as the role played by the lawyer in the representation.¹³⁶

SUMMARY

Family clients come to attorneys for legal services in times of family crisis and in times of celebration. When family clients present the most personal, intimate issues of their lives, they are telling lawyers, "We trust you, and we are entrusting our family's most prized possessions with you. We trust that you will not harm any of us and that you will do your utmost to resolve our family crisis."

Representing families is really about attitude. One has to have the right mindset to be able to successfully handle families in distress. It takes special skills and a people-friendly personality to have the right attitude to be a counselor at law in family matters. There must be openness, honesty, and humility to fully explore the family's desire and to confront whether you can fairly and competently help it achieve its stated desire. Clearly, the lawyers in *Dineen* and *Blum* overreached that boundary to the detriment of the parties. In *Rico* and *Tyson*, the families expressed desire to stick together, no matter the costs, and their wish for one lawyer was honored. In *Kelley's Case*, the court erred on the side of caution and prohibited the family representation. However, in that situation it may have been possible to work out a compromise that ostensibly would not have pitted the mother and daughter against one another. The next section will explore further

protection. In approving the disqualification, the court found:

In the present instance, it is clear that Warren's own interest[s] are in direct conflict with [those of] Mills and Smock[,] who are also being sued. In this case, it is also clear that Warren's conduct, as well as that of Mills and Smock[,] will be at issue, which will require Warren to justify the actions of his clients in filing the involuntary Petition against the Debtor, as well as his own behavior and motivation with respect to the same.

Id. at 445.

134. MODEL RULES, *supra* note 3, Rule 1.7(a), (b).

135. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise[,] and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

MODEL RULES, *supra* note 3, Rule 1.7 cmt. 11.

136. See MODEL RULES, *supra* note 3, Rule 1.7 cmt. 13.

possible methods for distinguishing cases where nonwaivability is the issue.

III. THE ANALYTICAL STRUCTURE OF CONFLICT OF INTEREST RULES OF ETHICS

In looking at the doctrinal structure of the rules, Section II of this Article explored the theoretical underpinning of conflict of interest analysis. The descriptive language of the rules was explored to obtain a deeper understanding of the doctrinal themes implicit in the basic elements of conflict of interest analysis. This section will consider the analytical structure of the conflict of interests rules. The focus is on identifying the process necessary to frame a conflict of interest analysis. How does a lawyer recognize a conflict of interest, determine the nature of the conflict, and respond appropriately, given the context of the representation? Of particular concern is how the rules shape the analysis of a lawyer in deciding if a conflict is nonwaivable. After considering the Model Code and the Model Rules, I will propose a basic structural framework for analyzing these questions.

A. *The Model Code*

The conflict of interest rules in the Model Code are placed under Canon 5, which states that a lawyer should exercise independent professional judgment on behalf of a client.¹³⁷ The rules admonish the lawyer not to let anything or anyone affect her professional judgment.¹³⁸ Expressed in terms of accepting or continuing professional employment, the rules have two primary reference points from which a lawyer is to assess her ability to proceed without compromising her professional duty to any client.¹³⁹

The first reference point focuses on the lawyer's personal interests.¹⁴⁰ Included under the rubric of personal interests are: property interest in which a client may also have an interest;¹⁴¹ a client business venture in which the lawyer wants to invest;¹⁴² the publication rights to a client's story based on the representation;¹⁴³ imploring the client to bestow a gift upon the lawyer;¹⁴⁴ influencing

137. MODEL CODE, *supra* note 2, Canon 5.

138. See MODEL CODE, *supra* note 2, EC 5-1, 5-2.

139. See MODEL CODE, *supra* note 2, EC 5-1.

140. See MODEL CODE, *supra* note 2, DR 5-101(A).

141. MODEL CODE, *supra* note 2, EC 5-3.

142. *Id.*

143. MODEL CODE, *supra* note 2, EC 5-4.

144. MODEL CODE, *supra* note 2, EC 5-5.

a client to name the lawyer as executor or trustee under an instrument drafted by the lawyer;¹⁴⁵ acquiring an impermissible financial interest in the outcome of litigation,¹⁴⁶ and deciding whether to employ additional counsel to assist with the representation.¹⁴⁷ Generally, these rules provide that the concerns and cares of the client should not be sacrificed to the lawyer's self-interest. For example, in a tort case involving multiple family members, a lawyer should not rush a settlement in the interest of collecting a quick contingency fee.¹⁴⁸ In handling a divorce, a lawyer should not engage in sexual relations with a client, especially in light of the emotional turmoil the client is experiencing.¹⁴⁹ Even if the lawyer and the client are viewed as consenting adults and the lawyer has disclosed the potential for adverse affect, "a reasonable lawyer would conclude that the lawyer's interest would inevitably affect the representation, [and] the client's consent cannot operate as a waiver of the lawyer's conflicting interest."¹⁵⁰

The second reference point focuses on external forces adversely influencing or affecting the lawyer's professional judgment.¹⁵¹ External forces include other clients the lawyer represents in other matters;¹⁵² multiple clients attempting to obtain an aggregate settlement in the same case;¹⁵³ a third party who pays the fee for the lawyer's client;¹⁵⁴ or a third party who can exert economic, political or social pressure on the lawyer.¹⁵⁵ These forces might be present at the time a representation is being considered or may arise after the representation commences. Similar external forces are confronted when the lawyer specifically represents multiple clients in the same matter.

Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent codefendants in a criminal case, plaintiffs in a personal injury case, an insured and

145. MODEL CODE, *supra* note 2, EC 5-6.

146. MODEL CODE, *supra* note 2, EC 5-7, 5-8.

147. MODEL CODE, *supra* note 2, EC 5-11.

148. See WOLFRAM, *supra* note 57, at 529; Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L.R. 247 (1996).

149. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 364 (1992). See also *Mussick v. Mussick*, 453 S.E.2d 361 (W. Va. 1994) (holding that state's version of the Model Rules prohibited sexual relations with a client during the representation). The Ohio Supreme Court came to a similar conclusion under its version of the Model Code in *Office of Disciplinary Counsel v. DePietro*, 643 N.E.2d 1145 (Ohio 1994).

150. Oklahoma Bar Ass'n Legal Ethics Comm., Op. 308, December 1994.

151. See MODEL CODE, *supra* note 2, DR 5-105(A)(B)(C).

152. MODEL CODE, *supra* note 2, DR 5-105(c).

153. MODEL CODE, *supra* note 2, DR 5-106.

154. MODEL CODE, *supra* note 2, DR 5-107(A).

155. MODEL CODE, *supra* note 2, EC 5-22.

his insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case.¹⁵⁶

With a multiple representation, independent professional judgment may be adversely affected by a dilution of loyalty¹⁵⁷ or by representing differing interests.¹⁵⁸

In determining whether to proceed with a multiple representation, the lawyer must assess his or her ability to represent each client without his independent professional judgment being adversely affected.¹⁵⁹ Disciplinary Rule 5-105(c) sets out a standard of obviousness, stating that it should be "obvious that he can adequately represent the interests of each. . . ."¹⁶⁰ The obviousness test requires a weighing process to assess if the lawyer's "judgment may be impaired or his loyalty divided"¹⁶¹ The rules further recognize that each case is different and should be analyzed individually.¹⁶² Although the Ethical Considerations speculate that sometimes there may be little "likeli[ness]"¹⁶³ or "chance"¹⁶⁴ of multiple representation having an adverse effect on the lawyer's independent professional judgment, the lawyer should avoid all situations where his or her loyalty to the client would be subject to question.

156. MODEL CODE, *supra* note 2, EC 5-17.

157. See MODEL CODE, *supra* note 2, EC 5-14, 5-15.

158. MODEL CODE, *supra* note 2, EC 5-15.

159. If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation.

Id.

160. MODEL CODE, *supra* note 2, DR 5-105(c).

161. MODEL CODE, *supra* note 2, EC 5-15.

162. MODEL CODE, *supra* note 2, EC 5-17.

163. If the interests vary only slightly, it is generally *likely* that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client: and if the interests become differing, withdrawal is *less likely* to have a disruptive effect upon the cause of his clients.

MODEL CODE, *supra* note 2, EC 5-15 (emphasis added).

164. In certain circumstances, there may exist little *chance* of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the *chance* of adverse effect upon his judgment is not unlikely.

MODEL CODE, *supra* note 2, EC 5-17 (emphasis added).

B. The Model Rules

The Model Rules have two primary reference points from which to discuss multiple representation. Each requires an assessment of the lawyer's ability to proceed without compromising professional duty to any client. The reference points are suggested by the two parts of Model Rule 1.7, which establishes the general rule for handling conflicts of interest.

The first reference point is set out in part (a) of Model Rule 1.7: "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client. . . ." ¹⁶⁵ This rule arises from the concept of loyalty to the client. Under Model Rule 1.7(a), loyalty is understood to focus on the relationship with the first client. ¹⁶⁶ An attorney should not stab one client in the back by giving aid and comfort to an adverse party. The principle of loyalty is expressed in terms of refusing to undertake a representation that is adverse to the client. The Comments speak of a continuum of adverseness from direct to unlikely. ¹⁶⁷

The second reference point is grounded in the concept of avoiding representations that may be limited by the lawyer's responsibilities to others or himself. Under part (b) of Model Rule 1.7:

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

. . . ¹⁶⁸

The rule directs the lawyer to avoid letting his independent professional judgment be impaired or limited by his obligations or concerns for others. This is comparable to the Disciplinary Rules under Canon 5 of the Model Code.

The Comments to the Model Rules advise a lawyer to do a self-assessment of the conflict with the two reference points in mind. The lawyer should not proceed with the multiple representation, even with client consent, "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances. . . ." ¹⁶⁹ This requires the lawyer to conduct a risk assessment for adverse effect, as suggested by Model Rule 1.7 Comment:

165. MODEL RULES, *supra* note 3, Rule 1.7.

166. MODEL RULES, *supra* note 3, Rule 1.7(a).

167. *See* MODEL RULES, *supra* note 3, Rule 1.7 cmt. 3.

168. MODEL RULES, *supra* note 3, Rule 1.7(b).

169. MODEL RULES, *supra* note 3, Rule 1.7 cmt. 5.

The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.¹⁷⁰

The key is for the lawyer to determine if he must advocate against a current client even if the matter is unrelated.¹⁷¹ Further, the lawyer must assess whether a minimal risk will have an adverse effect on the relationship or the representation. In a litigation setting, the nature of the litigation will determine the extent of the risk of adverse effect.¹⁷² Loyalty might also be questioned when a lawyer advocates legal positions for one client that are antagonistic to another client.¹⁷³

The risk assessment process should also be conducted in non-litigation situations, as suggested by Model Rule 1.7 Comment 11:

Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.¹⁷⁴

As in the litigation setting, the nature of the representation and the nature of the law involved will inform the assessment process. Multiple "representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them."¹⁷⁵

C. Structural Framework

There are significant semantic and structural differences between the Model Rules and the Model Code in the area of simultaneous multiple representations. Nevertheless, both sets of rules suggest a common approach to the specific issue of nonwaivable conflict of interest. The doctrinal themes, as reflected in the descriptive language of the rules, require the lawyer to consider two key factors: loyalty and

170. MODEL CODE, *supra* note 2, Rule 1.7 cmt. 4.

171. See MODEL RULES, *supra* note 3, Rule 1.7 cmt. 3.

172. See *Tyson v. District Court for the Fourth Judicial Circuit*, 891 P.2d 984 (Colo. 1995).

173. See MODEL RULES, *supra* note 3, Rule 1.7 cmt. 8.

174. MODEL CODE, *supra* note 2, Rule 1.7 cmt. 11.

175. MODEL CODE, *supra* note 2, Rule 1.7 cmt. 12. See also MODEL RULES, *supra* note 3, Rule 1.7 cmt. 7.

zealousness. From the perspective of these two factors, the lawyer assesses his or her ability to competently provide legal services to multiple family members in a manner consistent with overall conflict of interest doctrine. This section further develops the structural approach to conflicts analysis.

The first common element is a loyalty factor.¹⁷⁶ Loyalty to the client or clients is fundamental. Any force or factor that dilutes loyalty should be avoided. This is true whether the rules speak of adverse interests, differing interests, divergent interests, conflicting interest (actual or potential), or the adverse effect on the relationship between the lawyer and the client. The element of loyalty is understood more clearly in the family context as the following case suggests.

In *In re Colestock*,¹⁷⁷ a disciplinary proceeding, the attorney represented a husband and wife in their efforts to be named guardians and, later, adoptive parents of their niece. The attorney represented the niece in a personal injury action arising from the automobile accident that killed the niece's mother (the wife's sister). The attorney also represented the estate of the niece's mother and had the husband appointed administrator of the estate. One month after filing the adoption petition for the couple, the attorney filed a petition for the dissolution of the marriage on behalf of the wife. The husband objected to his attorney taking on the divorce representation against him.

While the court acknowledged the appropriateness of representing the family in pursuing common objectives,¹⁷⁸ family representation was inappropriate in that case. The divorce created "discord in [the] professional relationship," and the lawyer "failed to appreciate the obligation of undivided loyalty owed by an attorney to every client for whom he appears and whose interests he must protect."¹⁷⁹ As long as the lawyer worked with the family to secure a stable home for the niece after the tragedy, all interests of the family converged. However, the adverseness of the divorce action dissolved the family unity and caused the individual interests to diverge. By representing the wife, the lawyer was disloyal to the husband and potentially undermined the work he had previously done for the family.

176. As a practical matter, I would subsume confidentiality under loyalty because a betrayal of a confidence is a breach of the duty of loyalty. However, I do recognize that confidentiality could be treated as a separate topic. See, e.g., Collett, *supra* note 23, at 1468.

177. 461 N.E.2d 137 (Ind. 1984).

178. *Id.* at 139.

179. *Id.* at 140.

The second common element of both the Model Rules and the Model Code is the zealousness factor. Service and advice should be freely given so that the client receives the full benefit of the lawyer's expertise and legal wisdom. The lawyer should not compromise the dedication to full service because of the various and differing interests of individual clients.¹⁸⁰ The only exception should be when the clients' interests are generally convergent and no (or minimal) harm will be done to clients during the representation. Generally, this is most possible when the legal situation does not place members in an adversarial position.

The dilemma created when a lawyer attempts to represent family members with potentially adverse interests is illustrated in *In re Boyle's Case*.¹⁸¹ In that case, the attorney represented a father in a criminal matter while also serving as guardian ad litem (GAL) for the father's children in a bitter divorce. In the ethics hearing, the court determined that this was a nonwaivable conflict under Model Rule 1.7(b) because an assessment of the risk of adverse effect would have lead the lawyer to reasonably believe that the conflict could not be waived.¹⁸² The court further noted, citing to the Comments to Model Rule 1.7, that a "disinterested lawyer" would not recommend this representation.¹⁸³ The court sought to distinguish the two different roles the attorney had assumed in serving different members of the family:

Consequently, because a fundamental conflict exists between the respondent's role as advocate for the children and his role as advocate for the father, the [lawyer's] representation of the father was inappropriate.¹⁸⁴

180. This assumes that part of offering legal services and advice is disclosing all of the options and allowing the clients to decide for themselves.

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. . . . A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which [sic] may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.

MODEL CODE, *supra* note 2, EC 7-8.

181. 611 A.2d 618 (N.H. 1992).

182. *Id.* at 619.

183. *Id.*

184. *Id.* at 620.

There was a reasonable possibility that, by virtue of the lawyer's duties as GAL, he might discover facts that would inure to the detriment of his client.¹⁸⁵ The individual responsibilities in one of the attorney's roles could cool his zealously in fulfilling responsibilities in the other role.

What follows from loyalty and zealously is a third factor shared by both the Model Codes and the Model Rules: the lawyer must engage in a self-assessment process to decide for himself the wisdom of the multiple representation, even if the client is capable of valid consent after full disclosure. The lawyer should determine whether it is obvious that the client should not consent or if a disinterested lawyer would advise against such a multiple representation. It is imperative that the lawyer be able to provide adequate representation for each client.

If the conflict is not fundamental, it is possible to provide the requisite level of representation.¹⁸⁶ This assessment requires a consideration of the nature of family law and family relationships. Antenuptial agreements may be handled by one lawyer if the parties are of similar ability and resources. However, divorces are almost too adversarial by nature to engage in concurrent representation. When the goals of the family and each member are united for the common good, then concurrent representation may be possible. A lawyer who has provided legal services to a family unit should not turn around and prosecute the divorce for one of the family members.¹⁸⁷

IV. HYPOTHETICAL FAMILY PROBLEMS

The hypotheticals presented for this symposium ask whether a lawyer can provide legal service to a family.¹⁸⁸ My response is

185. *Id.*

186. *See In re Cohen*, 853 P.2d 286. A wife sought legal assistance with a juvenile case and possible criminal case facing her husband. Both matters arose out of an incident in which the husband beat and injured the wife's nine-year-old daughter from a previous marriage. A petition had been filed in juvenile court regarding the nine-year-old, and criminal charges were brought against the husband. In that case, the lawyer could not represent the family without grossly diserving the entire family.

187. A lawyer should not attempt to be all things to all family members. *See generally* District of Columbia Committee on Legal Ethics, Op. No. 243 (1991).

188. 22 SEATTLE U. L. REV. 1, app. at 14 (1998). Hypothetical One Synopsis: Christian Wife with significant personal wealth desires to let Christian Husband control and manage her assets, investing them in his fledgling business as he sees fit in his capacity as head of this conservative Christian family.

Hypothetical Two Synopsis: Physician Wife seeks to have Homemaker Husband relinquish any marital property rights he might have in medical practice she is preparing to join as a partner.

premised on the acceptance of Professor Pearce's Optional Family Representation Model.

Optional Family Representation allows family members to determine how they will be represented. It provides them with the option of choosing representation as a collection of individuals under established conflicts rules or as a family group. Within the family group, Optional Family Representation protects the ability of each family member to obtain the information relevant to, and participate equally in, all decisions, including the option to withdraw from the family representation at any time.¹⁸⁹

I assume that the family has been fully advised of the nature of the legal services offered and that the lawyer is serving as a legal facilitator of their goals and objectives.¹⁹⁰ As suggested above, the family consents to the lawyer serving as a legal counselor in a situation in which their individual interests may be differing or conflicting. Accordingly, the lawyer must conduct a self-assessment of the risks involved in providing such services by analyzing the doctrinal elements of conflict of interest jurisprudence, focusing especially on loyalty and zealotry. Furthermore, the lawyer must consider whether he or she can provide the requested services in a manner that honors the family's concerns and honors the fundamental principles of professionalism.

Before discussing the issues specific to each hypothetical, there are certain family matters that both hypotheticals have in common. The structural framework is useful for exploring issues that must be considered by the lawyer. First, loyalty can be viewed from the context of the family. As Professor Pearce suggests, the Optional Family Representation places the interests of the family as a whole into the forefront.¹⁹¹ The loyalty is expressed in helping the family achieve its stated objectives by presenting the full panoply of legal options, including full exploration of the attendant benefits and difficulties. This would include observations about the personal, financial, and legal sacrifices and rewards to which each member would be subject.

Disloyalty is present when the lawyer actively represents one family member to the detriment of others who were depending on the lawyer being neutral among family members. It is also manifested when the family members begin to express divergent objectives that do

189. Pearce, *supra* note 22, at 1294.

190. See Steven H. Hobbs, *Facilitative Ethics in Divorce Mediation: A Law and Process Approach*, 22 U. RICH. L. REV. 325 (1988).

191. Pearce, *supra* note 22, at 1301.

not appear subject to the family's normal process of working out such relational conflicts. The lawyer, proceeding in the face of unresolvable family bickering, has strayed from the purpose of Optional Family Representation.¹⁹² Finally, disloyalty is clearly present when the lawyer handles a family divorce or other legal squabble requiring an active advocate to vigorously defend his or her clients' rights.

In the hypotheticals presented, both families are pursuing business ventures that put family financial assets at risk or immediately compromise a right or privilege grounded in the marital status. Loyalty in this context requires honoring the philosophical choices both families have made in constructing their respective families. The family in hypothetical one honors conservative Christian values, and the family in hypothetical two honors the family-focused tradition of the higher salaried spouse in the workforce supporting the other spouse whose high task it is to be homemaker. We dishonor and are disloyal to both families when we refuse to respect their chosen paths.¹⁹³ We would also be disloyal to the family if we did not explore the depth and context of their express, united interests.

Second, the zealousness factor also requires the lawyer to present the full panoply of options with attendant upsides and downsides. The wisdom of the lawyer, who is presumably competent to offer advice on family businesses, gives each family the knowledge necessary for deciding as a family how the assets should be invested.¹⁹⁴ Recognizing that, in the context of these two families, one spouse is deferring to the interests of the other spouse, who is entrusted with pursuing the family fortune, we know that, at times, this trust is either misplaced or the vicissitudes of economic life in a free market system make the decision look foolhardy. But if the family fully understands this, and consents to it, as did the family in *Rico*,¹⁹⁵ we will have given the family the tools necessary to follow its chosen destiny.

192. Here family systems analysis is particularly helpful to gather information on the family and to assess how it makes decisions.

193. This responds to the criticism Professor Collett makes about substituting the lawyer's definition of what is best for the family:

The most serious objection is that the family entity model allows the lawyer to disregard the expressed objectives of individual family members, and substitute objectives created from the lawyer's perception of the best interest of the family. Nowhere else are lawyers permitted such broad-ranging discretion in defining the objectives of representation.

Collett, *supra* note 23, at 1405.

194. See Steven H. Hobbs and Fay Wilson Hobbs, *Family Business and the Business of Families*, 4 TEX. WESLEYAN L.R. __ n.2 (forthcoming Spring 1998).

195. See *supra* note 76, and accompanying text.

Finally, the self-assessment process requires the lawyer to gauge the family dynamics to determine if the requested services will be used to pursue a common goal. Admittedly, this is tricky; the family assessment is complicated by the reality that the united family front might be thin and even illusory. Legal services should not be provided to a family if it is obvious that the services call for pitting one family member against another or if one family member is exceedingly vulnerable because of such handicaps as domestic violence or substance abuse.¹⁹⁶ In some circumstances, the individual family member's needs and interests must be protected, and protected by independent counsel.

The lawyer must check his or her reaction to these family situations. Is there a bias or prejudice against Christian values or a more traditional situation in which one person is a homemaker? Is the concern about dominance in the decision-making so strong that the lawyer has limited faith in the family's ability to choose its own path? Can the lawyer adequately handle the legal tasks required in light of a nonadversarial focus? The lawyer assesses his or her own temperament and asks whether this family presents a good fit given the context of its legal and family objectives and the lawyer's skills.

A. *Hypothetical One*

To offer legal services to this family, I would use the family systems analysis discussed earlier to gather information about the family and its interconnected social systems, such as a church or a Christian community. I would be interested in determining if the family is united in its articulation of these Christian values. Are the family members equally yoked to these values or are the values more hers than his? If the husband views himself as the head of the house, what sacrifices is he willing to make as he demonstrates the depth of his unbounded love for her as a Christian man ought? Does their faith teach them to trust God in all things, even if the business fails and assets are lost? Do they have access to spiritual resources and advisors who could prayerfully aid them in their life decisions? I am not concerned about whether they pass any particular litmus test for Christian values. I am concerned that they, as a family, operate under a jointly-held belief system, which then informs me how they

196. Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 FL. ST. U. L. REV. 43 (1995).

experience the world and make decisions.¹⁹⁷ If they operate from the same point of view and receive the legal, financial, and business information from me in that light, they should be able to make the best decision for their family. If I must worry about protecting the wife from a husband whose actions will not be faith-based, then I should not proceed as their counselor.

As I suggested earlier, this couple could proceed without the benefit of my legal knowledge and make it the best way it can. Ironically, this is how most couples make decisions about utilizing family assets. A spouse quits a lucrative job to return to school and change careers. The family relocates to pursue a career opportunity for one spouse, which causes the other spouse to lose seniority in an enjoyable or rewarding position. A family business is started using the family's life savings. In each case, much is at risk and the family autonomously reaches for goals that may not materialize. In this case, the magnitude of the family fortune at stake gives one pause. Whether its one hundred dollars or one million dollars, the decision-making process is the result of family deliberation. That process should be honored if the family has chosen the Optional Family Representation Model and I, as a professional, have assessed both my and their ability to proceed after full disclosure and consent.

B. *Hypothetical Two*

In this setting, the husband is asked to forfeit valuable marital rights. If this were a negotiation for an antenuptial agreement or a post-marital agreement, I, as lawyer for the bride/wife, would advise the groom/husband to seek independent counsel and inform him that my services were dedicated to protecting the bride/wife's interests. But would I advise the family concerning a document that clearly restricts the husband's rights? I would in this case if I assessed the situation as one that promotes the family's best interests, as decided by the family after full knowledge of the available options and the opportunity to weigh the results projected over the life of the marriage. Additionally, I would recommend that the husband seek independent advice if he is at all in need of reassurance about the wisdom of this action.¹⁹⁸

197. See D.G. Flemons & P.M. Cole, *Connecting and Separating Family and Business: A Relational Approach to Consultation*, 5 FAMILY BUS. REV. 257 (1992).

198. As suggested earlier, the lawyer is here serving as a facilitator of family goals and objectives in the special context of the whole family. In a work on mediation ethics, I suggested an approach that is analogous to this situation:

Clearly, the primary concern is whether the wife's perceived dominance in this situation is such that serving as counsel for this family would only enhance the control she seems to have to the husband's detriment.¹⁹⁹ Part of my reluctance to proceed is my awareness of the contemporary version of the Golden Rule: he or she who has the GOLD gets to make the RULE! While this is troubling, it should be placed in the context of the variety of forms family dynamics take. One, it is not realistic to assume that in any marital relationship power is shared equally. Two, even if the partners have egalitarian ideas about relationships, in some decisions one or both of the partners must yield and compromise must be sought if they are to avoid irreconcilable differences. And, finally, it is their decision to make and not their lawyer's. If I, in my capacity as legal counsel, believe that the decision-making authority should be equally shared, then I probably should not accept this engagement because I could not honor their decision-making process.

My best advice could be given if I step back and view the longer history of this family and glimpse where it dreams of heading in the future. First the wife, as a doctor, has to assess her career opportunities if this one is not realized. Is this ultimately a good move for the family? Input from the rest of the family should be encouraged. Second, we should view this situation as one in which the family is related to the practice in unique ways. Certainly, the practice provides a lucrative income for the family. But also, the family derives benefits from the practice being divorce-proofed from the other doctors and their spouses.²⁰⁰ And finally, can the family negotiate other benefits

The facilitation principle further assumes that what is at stake is a significant change in the way attorneys practice in the family law setting. The neutral lawyer's ethical conduct should embody his new role as facilitator of family dispute resolution[,] which society has demanded of the profession. In restructuring family relationships, the attorney should not minimize the parties' legal responsibilities nor try to maximize individual personal benefits to the financial and emotional detriment of the other spouse. Such a course of conduct has a negative effect on marital partners as well as on the very fabric of society.

Hobbs, *supra* note 190, at 364.

199. See *Blum v. Blum*, 477 A.2d 289 (Md. Ct. Spec. App. 1984).

200. The concept of divorce-proofing recognizes the realities of modern married life and the negative impact this could have on a business if it is not protected by prenuptial agreements, family trusts or buy/sell agreements:

With a generation of family-business owners getting ready to retire and almost half of all marriages failing, the issue of keeping company ownership in family hands is more pressing than ever. Yet few business-owning families actually take steps to prevent divorce proceedings from jeopardizing their wealth, thereby leaving their life work exposed to lengthy, expensive, and often bitter legal battles over financial settlements.

from the practice in lieu of a marital interest being found at divorce? Other family protection could be provided, such as life insurance reflecting the value of the partnership interest or a pension or other savings plan that could protect the family from financial troubles. With Optional Family Representation, the family's greater interests can be pursued if that is the family's desire.

CONCLUSION

Families come in a variety of shapes and sizes. They function as cohesive units, battle with royal abandon, or exist as distant strangers. Regardless of the form, families need a myriad of legal services. A single lawyer can meet the unique needs of a family if, after fully disclosing and explaining the competing ethical parameters of such an engagement, the lawyer assesses his or her ability to appropriately and professionally perform the tasks at hand. The lawyer should factor in the obligation to remain loyal to the family and its stated goals and values, while not overreaching the agreed upon task by using his or her legal skills against an individual family member. Additionally, the lawyer should factor in the obligation to pursue zealously the stated goals of the family, recognizing and honoring its ability to make tough, individual choices for the family's good.

The analysis done by the lawyer is framed by the doctrinal themes flowing from the language of conflict of interest rules. Further, additional guidance can be found in the general professional standards inspired by the codes of ethics and the individual lawyer's "exercise of sensitive professional and moral judgment."²⁰¹ The context of the family's system should also aid the analysis as the lawyer brings her practice experience and family counseling skills derived from the sensitive understanding of family dynamics. In the end, the lawyer will know whether the conflicts inherent in providing legal services to multiple family members can be managed or are such that, even with consent of all concerned, the conflict of interest should not be waived.

Abby Livingston, *Make Your Family Business 'Divorce-Proof'*, 85/1 NATION'S BUSINESS 64 (Jan. 1997).

201. MODEL RULES, *supra* note 3, Preamble.

