Simultaneous Representation: Transaction Resolution in the Adversary System

James C. Hagy

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The proscription of simultaneous representation of potentially conflicting interests in the present Code of Professional Responsibility runs counter to the belief of many prospective clients that they are capable of formulating their own objectives. The author examines three possible simultaneous representation situations—the "friendly" divorce, the formation of a close corporation, and the simple transfer of residential property. Finding that all three may present appropriate cases for treatment by a single lawyer, the author suggests modifying the presently restrictive Canon 5 of the Code of Professional Responsibility to enable attorneys to better serve their clients' needs within the limits of acceptable ethical conduct.

I. INTRODUCTION

THE PRACTICING LAWYER NEED NOT be referred to Shakespeare\(^1\) or Dickens\(^2\) to be reminded of the historic discomfort experienced by the general public toward his profession. For those who come in contact with lawyers only upon extraordinary occasions such as the sale of residential real estate or to confer over a possible divorce, vocal objections to both the complex legal requirements necessary to achieve "simple" results and the significant legal fees connected therewith are quite common. Such sentiment has a detrimental effect upon the strength of any instinct to consult counsel in such situations.

A common example of the confusion and discontent of potential clients arises when amiable parties to a proposed event of legal import come to the attorney's office with what they believe to be a complete agreement embodying their compromises and desires for their prospective relationship. They approach the lawyer with the notion that he may guide them through the labyrinth of legal formalities required to effect their arrangement and perhaps offer advice as to various legal planning advantages along the way.

The lawyer, however, wishes to be quite cautious about becoming involved in the representation of differing interests generally precluded under Canon 5 of the Code of Professional Responsibility.\(^3\) Discipli-

\(^1\) Shakespeare, The Merchant of Venice.
\(^2\) C. Dickens, Bleak House (Illustrated Library ed.).
\(^3\) ABA Code of Professional Responsibility, DR 5-105(A) [hereinafter cited as ABA Code].
nary rules DR 5–105(A) and (B) generally forbid the acceptance or continuance of any employment situation in which "the exercise of the lawyer's independent professional judgment will or is likely to be adversely affected . . ." Language added in 1974 to both DR 5–105(A) and (B) also prohibits such employment "if it would be likely to involve the lawyer in representing differing interests . . .".

But there may be circumstances which fall within the exceptions to the broad rule. Both of the above-mentioned subsections of Canon 5 note that to the extent that a given factual situation may fall within the provisions of DR 5–105(C), the general prohibition shall not apply. This crucial exception for the lawyer contemplating a multiple representation relationship provides that:

In the situations covered by DR 5–105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

Guided by his training in conservative, careful judgment, the lawyer will be understandably concerned about proceeding with multiple clients due to the somewhat unpredictable nature of how his evaluation of the situation may be viewed in hindsight by a judge, an ethics grievance committee, or a jury in a malpractice action. Also, he may question the capacity of his clients to fully perceive and acquiesce in the effects that potential conflicts may later have upon his independent judgment. The practical choice confronting the lawyer may be even more difficult to deal with when one or more of the parties are previous or regular clients or personal friends who have an aversion to involving outside counsel.

In the event that the lawyer concludes not to undertake the representation of multiple interests, his recommendation of separate, independent counsel to one or more of a group of would-be clients may be received with incredulity. From the clients' perspective, the lawyer's refusal is unfathomable: his excessive cautiousness will mean inefficiency, added legal expense, and the possibility of an undesired adver-

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4. The Disciplinary Rules are mandatory in nature. Id. Preliminary Statement.
5. Id. DR 5–105(A) (dealing with accepting such employment), DR 5–105(B) (concerning the continuation of employment under these circumstances).
6. Id. "'Differing interests' include every interest that will adversely affect either the judgement or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." Id. Definitions.
7. Id. DR 5–105(A), (B).
8. Id. DR 5–105(C) (emphasis added).
sary atmosphere to their pre-agreed plan. Upon their insistence, even if
the lawyer should remain firmly committed to his original statement,
he may in many circumstances agree to conduct the necessary legal
tasks by representing only one of the parties. But, particularly if the
attorney enjoys the trust and confidence of all involved, the distinction
may indeed be merely nominal in practice. Despite his stress upon the
necessity of separate counsel, all parties may still be relying upon the
lawyer to advise them of what is "fair," and may well assume that he
is still "looking out for their interests," attributing his previous dis-
claimers and recommendation of separate counsel to overconscientious
legal caution.

In light of increased efficiency, economy, and harmony, should
lawyers feel less strictly constrained from representing clients who
have apparently ironed out their differences in a mature and competent
manner? Is the common practice of nominal representation of only one
party's interests an acceptable compromise which meets client de-
mands and satisfies at least the technical requirements of the Code of
Professional Responsibility? The goal of this Note is to stimulate
thought concerning these questions, and to suggest possible modifica-
tions of the current ethical standards related to simultaneous represen-
tation of amicable clients.

II. HISTORICAL BACKGROUND

The English origins of the prohibition upon representation of con-
flicting interests may be traced to the City of London Ordinance of
1280.9 The rule was adopted into English common law by an early
decision of the Court of Queen's Bench: "No man, though by consent
of parties, can be attorney on both sides."10 Exceptions to the general
rule became readily apparent, however, during the development of the
British Commonwealth. An example which remains to the present day
is the ability of solicitors, since 1866, to represent both vendor and
purchaser in real estate transactions in parts of the Commonwealth.11

The idea of informal dispute resolution by means of a quasi-
judicial mediator is not new to American jurisprudence. Experiments
using both laymen and lawyers to cope with differences between
parties willing to forego formal judicial processes may be noted in the
development of the nation's judicial system. During the late seven-
tenueh century, colonial community growth made supervision of the

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11. This exception has been the subject of modern challenge and often severe
system of intrafamily self-government impractical. As a result, "tithingmen"—individuals closely associated with a number of assigned families—were appointed to the task of "inspecting and re-enforcing family government" within each town in areas such as Colonial Massachusetts. Appropriate matters for the involvement of, and the ultimate binding resolution by, a tithingman included not only drunkenness and "Sabbath-breakers," but the gamut of family disputes, including divorce and property distribution.

Though this mechanism clearly provided a quasi-judicial, binding arbiter of family problems, it did indicate an early willingness to allow personal, intrafamily difficulties to be resolved without resort to a proceeding completely outside the family milieu. The process was thereby private, informal, and avoided the battleground atmosphere surrounding many modern uncontested divorce negotiations.

The American Civil War left in its aftermath not only the interruption of court functions throughout the South, but also the continued practice of not admitting black testimony, especially in matters against whites. The Freedmen's Bureau, established in the South as a federal agency to deal with a multitude of problems concerning the welfare of the newly emancipated population (and eventually of all needy southern residents) attempted to provide southern blacks with a fair tribunal. The relatively small number of Freedmen's Bureau agents dealt informally with a wide range of interracial matters as well as with disputes between blacks themselves and were frequently called upon to arbitrate between spouses. The Freedmen's Bureau courts were overworked, underexperienced, and highly informal, "the typical kind of Bureau court [being] a single-judge, no-jury court, backed by military power, and having jurisdiction over all minor cases between Negroes or between Negroes and whites, but not having authority to try more serious offenses." Here again, the bureau official functioned as a third party arbiter rather than an employee of two parties who share a desire for a given legal result as in the modern simultaneous representation situations. Nevertheless, the operations of the Freedmen's Bureau do indicate a recognition of the value of a more informal approach to intrafamily dispute resolution, at least in extraordinary circumstances.

13. Id.
15. Id. at 137, 160.
16. Id. at 160-61.
17. Id. at 153.
Louis D. Brandeis, maverick lawyer and eventually Associate Justice of the Supreme Court of the United States, became involved in several cases in which parties who consulted him ultimately had interests which differed. In one instance, he agreed to represent both the trustees of a trust and the lessees of trust property with their consent and after full disclosure of potential conflicting interests. In a second case, he conducted an initial session with both concerned creditors and an insolvent; he suggested a course of legal action, and then he ultimately represented the creditors. Although his actions in the latter case have been recently criticized because he did not satisfactorily explain to the insolvent that he would be unable to represent him if a conflict arose with a creditor, Brandeis' conduct was clearly of the highest ethical intent. These past arrangements did not prove an insurmountable obstacle in his appointment to the Supreme Court bench. But his self-characterization of his role in these matters as that of 'counsel for the situation' was, as one author has put it, 'one of the most unfortunate phrases he ever casually uttered.'

Brandeis was apparently committed to the belief that the practicalities of certain client counselling situations might best be dealt with by one attorney handling all legal details involving parties with potentially conflicting interests, given their informed consent. He believed that a single, scrupulous attorney could best assure fairness to all parties in the resolution of such matters. The hazards of being judged later upon actions pursuant to those beliefs were experienced by him firsthand, and the same risk threatens attorneys today under the Code

19. Id. at 694-703. The first case, referred to as the "Warren Matter," involved a trust made up of properties from an estate which the Brandeis firm represented—the firm also represented the beneficiaries. The properties were leased to a company comprised mainly of two trustees, one a beneficiary, and Brandeis represented them in their capacity as lessees as well, with consent of all parties. Later, another beneficiary objected to the management of these properties. In the second incident, known as the "Lennox Case," Brandeis agreed to have his firm act as trustee of property of an insolvent in an assignment for the benefit of creditors, with prior disclosure and consent. Brandeis was later challenged when the parties disagreed as to the necessity of disclosing all hidden assets of the insolvent, and as to what constituted minimal, reasonable payments to the insolvent for management of the assigned assets, on the theory that the Brandeis firm was not adequately representing the interests of the insolvent as a client. This was asserted despite the early insistence by Brandeis to the insolvent and creditors that he was not counsel for the insolvent, but rather represented the interest in preserving the assigned properties for payment of creditors. Id. at 694-703.
20. Id. at 702.
21. The practices were questioned at the Senate Subcommittee hearings concerning his nomination. Id.
22. Id.
of Professional Responsibility. The problems involved have led one observer to warn:

If I may share a purely personal lesson, the greatest caution to be gained from study of the Brandeis record is, never be "counsel for a situation." A lawyer is constantly confronted with conflicts which he is frequently urged to somehow try to work out. I have never attempted this without wishing I had not, and I have given up attempting it. Particularly when old clients are at odds, counsel may feel the most extreme pressure to solve their problems for them. It is a time-consuming, costly, unsuccessful mistake, which usually results in disaffecting both sides.

Yet Brandeis' commitment to the efficacy of multiple representation in such circumstances is an indication of its potential utility in dealing efficiently and economically with particular clients' needs. Such needs might be better served given a slightly altered perspective of the proper role of the adversary process in informal dispute resolution and a practical formulation of guidelines to identify suitable cases.

III. THE CURRENT CODE OF PROFESSIONAL RESPONSIBILITY

The Code of Professional Responsibility, adopted in 1969, attempts to deal in detail with the question of when an attorney may properly represent clients with actual or potential differing interests and provide some bases for the practitioner's determination of whether or not to proceed. Against the general prohibition of such relationships imposed by DR 5–105(A) and (B) is the exclusionary language of DR 5–105(C), which would permit the lawyer to represent clients with differing interests "if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

Even before the adoption of the new Code, one member of the American Bar Association actively involved in the re-evaluation pro-

23. ABA CODE, supra note 3, at DR 5–105(C).
24. Frank, supra note 18, at 708.
25. Under the previous ABA Canons of Professional Ethics, the lawyer was required to disclose all relationships which he had with parties regarding any matter and any possible connection with the situation that might have bearing upon the client's choice of counsel. The Canon resembled the current ABA Code provisions in requiring full disclosure and consent before permitting the representation of conflicting interests, which were defined as existing whenever it was the lawyer's "duty to contend for that which duty to another client requires him to oppose." ABA CANONS OF PROFESSIONAL ETHICS No. 6.
26. ABA CODE, supra note 3, at DR 5–105(C) (emphasis added).
cess noted that although some degree of flexibility was desirable, DR 5–105(C) situations would be rare. Applying the guidelines of DR 5–105(C) to a given situation poses difficult problems for the practitioner. First, he must consider whether he finds it "obvious" that he may be able to adequately represent each party without an adverse effect on his judgment or a dilution of his loyalty. He must also be concerned with the possibility that those who may review his choice later will come to a different conclusion, at least in part due to the benefit of hindsight. Further, careful thought must be addressed to the ability of the particular clients to fully appreciate the potential conflicts as they are explained by the attorney, given their prior experience with and understanding of the law. A subjective failure on their part would certainly be contrary to the spirit of the Canon, though apparently the consent would still be effective against possible malpractice charges if the disclosure by the attorney was objectively sufficient.

In recognizing the existence of DR 5–105 situations, the lawyer should be aware that differing interests may include those "conflicting, inconsistent, diverse, or otherwise discordant." The accompanying ethical considerations may indicate that appropriate cases exist only if disruption of client interest is not likely should conflicts require the attorney's later withdrawal.

The drafters clearly viewed the process of considering the desirability of simultaneous representation as individualized:

Whether a lawyer can fairly and adequately protect the interests of multiple clients ... depends upon an analysis of each case. 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.


28. ABA Code, supra note 3, at EC 5–14. The suggestion by one author involved in drafting the Code, that DR 5–105(C) allows the attorney to proceed even when the employment "will or is likely to adversely affect [his] judgment," seems questionable. Weddington, supra note 27, at 53.


30. ABA Code, supra note 3, at EC 5–14.

31. The ethical considerations are "aspirational." Id. Preliminary Statement.

32. Id. EC 5–15. Should the lawyer's employment include the role of impartial arbitrator or mediator between the clients, as opposed to attorney for each, he may be precluded later from acting for any of the parties should his efforts at the former stage prove unsuccessful. Id. EC 5–20; see note 116 infra and accompanying text.

33. Id. EC 5–17.
Even should the lawyer conclude that he can adequately represent the clients without sacrifice of independent judgment or client loyalty, the clients' ultimate agreement with this belief is, of course, crucial.\(^4\)

**IV. POSSIBLE CONSEQUENCES OF ERROR IN ELECTING TO REPRESENT MULTIPLE CLIENTS**

Although consented to by all clients involved, the consequences of an erroneous decision by a lawyer to represent interests in a manner inconsistent with DR 5-105(A), (B), and (C) may affect all concerned in a variety of ways. Should one or more of the lawyer's clients later feel that a sacrifice of loyalty or independent judgment on the part of his attorney resulted from the simultaneous representation arrangement, a malpractice suit against the attorney is a very real possibility. The lawyer will be held to a standard of ordinary care under the circumstances. Prior consent by all parties will not bar recovery if the attorney failed to meet his obligation to use reasonable care to maintain his neutrality vis-à-vis each of his clients.\(^5\) Even threats of spurious malpractice litigation, regardless of merit, would be unwelcome, of course. Again, the lawyer must consider that his judgment will be viewed by judge or jury with the benefit of hindsight in determining whether his actions fell below the norm into the realm of negligence.

Naturally, although the Code of Professional Responsibility is intended to provide guidelines for ethical conduct in every aspect of legal practice, the Code serves its most direct function with respect to disciplinary action. Barring the institution of a meritorious negligence suit against him, the threat of discipline may be the greatest personal concern of the practitioner involved. Even the tardy withdrawal of the lawyer from an improper situation may serve both to demonstrate good faith on his part and also to mitigate any formal sanction.\(^6\) Similarly, inexperience may mitigate penalties, though it will not excuse the new attorney for his unethical conduct.\(^7\)

Improper activity by the lawyer in attempting to act for all parties may also manifest itself in undesirable legal results for some or all of the clients. Where an agreement was negotiated and concluded between the parties, such as a land transfer from seller to purchaser, one

\(^4\) Id. DR 5-105(C), EC 5-19.


\(^6\) In re Farr, — Ind. —, 340 N.E.2d 777, 788 (1976).

\(^7\) Annot., 17 A.L.R.3d 835, 842 (1968).
of the parties may later be able to obtain rescission. This may occur even in instances where both parties agreed to rely on the attorney's judgment at the time of the transaction, and where the lawyer's intentions are entirely honest. In instances where formal judicial resolution has taken place, as with the granting of a divorce after full trial procedure, the potential exists for later collateral attack upon the divorce decree. Failure to object to representation of conflicting interests at trial in a timely manner, however, may be viewed as a waiver. Also, the possibility is ever present upon the voluntary or mandated withdrawal of the lawyer that the parties may have to start from scratch with new and separate counsel.

As in other instances where an attorney fails to fulfill his employment obligation to represent his clients with independent judgment and loyalty, a lawyer may lose his right to compensation for services actually rendered should he improperly represent differing interests. Though in light of the potential for malpractice litigation and disciplinary action one would imagine that the loss of contractual rights to fees would be of relatively minor import, it is a pocketbook consideration which may have a substantial effect upon a lawyer's decision in DR 5-105(C) analyses.

V. POTENTIALLY APPROPRIATE AREAS FOR SIMULTANEOUS REPRESENTATION

There are many proposed events of legal significance which may lend themselves to a "situation" approach by one lawyer; a number of them have been discussed elsewhere. The scope of this Note is

39. E.g., Wachsmut v. Miller, 168 N.W. 344 (Iowa 1918).
43. The possibility also exists that should the clients' interests sufficiently conflict so as to require withdrawal from the simultaneous employment situation, the lawyer may (to his regret) be precluded thereafter from representing either party to the dispute. See note 116 infra and accompanying text.
44. See generally H. DRINKER, supra note 9, 103-22 (1953); Weddington, supra note 27, at 52. For an examination of individual applications of the "situation" approach, see also Hyman, Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache, 5 HOFSTRA L. REV. 315 (1977) (criminal defense); Katz, Negotiation and the Lawyer—Client Interview, 5 U. TOL. L. REV. 282 (1974) (negotiation); Polow, The Lawyer in the Adoption Process, 6 FAMILY L.Q. 72 (1972) (adoption); Symposium, Conflicts of Interest Problems in Insurance Practice, 37 INS. COUNSEL J. 497 (1970) (insurance); Note, Legal Ethics—If an Insurance Company Uses an Attorney Employed to Defend the Insured as an Investigator to Prepare a Policy Coverage Defense, It Is
limited to three areas which are each sufficiently different to test the desirability of simultaneous representation in modern American practice: (a) uncontested divorce actions, where both spouses feel that they can agree to a satisfactory settlement of their respective rights and possessions with the help of a single attorney to assist them in planning matters and the formalities of filing; (b) the formation of close corporations where all parties are amiable and employ a single attorney because they wish to minimize their legal expenses and to avoid giving the negotiations an adversary flavor; and (c) the typical, "straight forward" sale of real estate, particularly residential property. By an examination of the "situation" approach to providing legal services in these three settings, one can test the plausibility of using this method more frequently as a means of meeting client demands for greater efficiency, economy, and a less adversary atmosphere in appropriate circumstances.

A. Dual Representation in Uncontested Divorce Actions

Traditionally, the pursuit of a divorce decree has been viewed as fraught with hostilities, requiring full utilization of separate, aggressive counsel. Abuses of the attorney-client relationship in the divorce setting demonstrate the dangers of entering multiple client employment with less than complete objectivity.45 Many jurisdictions view divorce as so entwined in adversary necessity that representing both spouses is prohibited completely.46 This is true even after legislative adoption of "no-fault" dissolution.47

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The American Bar Association wished to encourage attempts by a lawyer to reconcile a non-represented spouse with the lawyer's client. Early recommendations included a warning, however, against even the appearance of proffering advice to the "adverse" party, which might lead the spouse to feel that his interests were being represented in any degree whatsoever:

The proper procedure for the lawyer representing a party seeking a divorce, and having occasion to communicate with the adverse party not represented by counsel, would be to limit the communication as nearly as possible to a statement of the proposed action, and a recommendation that the adverse party should consult independent counsel.

But the disapproval herein expressed should not be understood as condemning the laudable and proper efforts which an attorney may make to bring about a reconciliation between his client and an adverse spouse not represented by counsel, when such efforts involve no discussion of the facts which furnish, or might furnish, grounds for divorce.48

The sentiment expressed by that early opinion is reiterated in the present Code of Professional Responsibility.49

A substantial question exists as to whether the lawyer representing a client seeking a divorce decree is actually representing only one of the spouses in a pure sense. Recent studies indicate that substantial numbers of defendants to such actions never utilize the services of separate counsel in uncontested divorce proceedings.50 Discussions with a variety of practitioners lead one to the conclusion that although on the surface lawyers represent only one party to dissolution actions, their involvement may extend further. After impressing upon the non-client spouse the importance of obtaining separate counsel, it is apparently common for the attorney to allow the spouse to remain in the room and to participate in the discussion with the other spouse, so long as he understands that he is not represented.51

48. ABA Comm. On Professional Ethics, Opinions, No. 58 (1931). For an example of the more bizarre extremes in which dual representation may or may not be appropriate, see N.Y. County Opinion No. 99 (1916), reprinted in N.Y. Opinions, supra note 45, at 567 (lawyer properly engaged in dual representation in bigamy context); Comm. on Professional Ethics of the Ass'n of the Bar of the City of N.Y. Opinions 193 (1931), 689 (1945) [hereinafter cited as N.Y.C.], reprinted in N.Y. Opinions, supra note 45, at 94, 406.

49. ABA Code, supra note 3, at DR 7–104(A)(2).


Though the lawyer has made a sincere effort to encourage the employment of another lawyer, the practical effect of this dialogue may be quite different, particularly where the non-represented spouse has had previous contact with the attorney, and may have some degree of trust and confidence in him. The spouse may be greatly concerned with the prospect of expending additional money on legal fees beyond that necessary to pay the lawyer the couple has consulted together. He may also legitimately feel that separate counsel is unnecessary, either because of a failure to fully comprehend the differing interests involved, or because of a sophisticated approach to the dissolution process and a belief that the spouses can peaceably work out the terms of the agreement. In either instance, the spouse may well attribute the recommendations of the lawyer, however fervent, to overcautiousness on the part of attorneys, or he may believe that lawyers are devoted to generating unnecessary business for their colleagues. As a result, any recommendations made by the attorney concerning the negotiations and agreement may well be accepted by the unrepresented spouse without further reflection, especially when prior dealings have instilled a general feeling that the attorney is "fair."

The pressures exerted upon the lawyer by the spouses to represent both of their interests and to help them give legal effect to whatever agreement they may have reached between themselves may be even greater when the lawyer has become personally acquainted with the couple. Here, the reluctance may be strongest toward involving outside counsel. Dissolution of a marriage relationship is a delicate and private matter, and, where the parties feel that they can resolve the problems concerning the dissolution of the union, they may react violently to the notion of exposing their situation to anyone other than their trusted friend. Though it has been suggested that it would be desirable for the lawyer to decline the representation of either party when a close personal relationship exists, what is commendable in an ideal setting may be difficult for an attorney to achieve when faced with the persistence of friends.

Whatever the relationship between the attorney and the spousal clients, a more open approach to providing even minimal services to both parties is preferable to the current trend of effectively giving a legal opinion to both while nominally representing but one client.

52. N.Y.C. Opinion 583 (1941), reprinted in N.Y. Opinions, supra note 45, at 329.
Traditional Policies Against Dual Representation in Divorce Actions

Two primary rationales have consistently been asserted to support the proposition that representation of both divorcing spouses is ethically improper: the interest of the state in preserving the marriage process as something more than a mechanical filing easily erased by mutual consent, and the fear that such representation is a detriment to each client as the lawyer learns of the financial condition of both spouses.

The state’s interests in divorce proceedings are commonly viewed as those of preventing casual entrance to and exit from marital relationships, promoting the stability of a family setting where children are involved, and sustaining a public image of the law as substantive rather than a labyrinth of mere mechanical formalities. The settlement of property rights, dower interests, and the amount of alimony may also be viewed as state concerns. Tenacious adherence to these principles is demonstrated by a relevant ethics opinion:

Hence a dissolution of the marital relationship requires more than the mere acquiescence or consent of the husband and wife. This right of the state must be recognized and safeguarded in every divorce proceeding, and it is not sufficient to obtain an absent party’s consent to the preparation and filing of an answer on his behalf, because the public interest is paramount. It would make a mockery of divorce procedure if a lawyer could act for both husband and wife and ignore the public interest. Public consent to such procedure has not been given and it most certainly could never be presumed.

The strength of these rationales for state concern in the preservation of marriage relationships came under attack as early as the mid-nineteen fifties, and appears to have weakened with the widespread adoption of various forms of “no-fault” dissolution statutes.

55. Id.
57. See text accompanying notes 67–79 infra. The dissolution process has recently been characterized as primarily “elementary formalities, ancillary functions irregularly exercised, and episodic mediation problems that can be exacerbated by legal representation.” The study argues strongly that additional efforts by counsel to provide “emotional support and personal counselling” are often wholly inadequate and such client problems should be referred to medical and sociological professionals. Yale Project, supra note 50, at 152.
A concern may also be raised that simultaneous representation in the divorce setting violates Canon 9 of the Code of Professional Responsibility, which proscribes engaging in conduct which may appear improper to the public; but this line of reasoning seems highly questionable in view of persistent client demands for such services and often appears to be a mere makeweight in place of more substantial analysis. An additional factor often raised by laymen as a cause of the prohibition is an assumed incestuousness on the part of the bar to generate the maximum amount of legal business possible. Though the existence of such public sentiment may be a consideration in any proposed change of the current restrictions, it has no apparent substantive validity as a justification for the present ethical position of the profession.

The danger that dual representation may result in the revelation of each spouse's confidential financial status to his partner is often stated as a concern. One bar ethics committee in a state with "fault" divorce even felt that dual representation was undesirable because disclosure of "the general relations between the parties, their acquaintances, methods of life, etc." to the same attorney might harm one or both of the parties in the divorce proceedings. Realistically, of course, the amount of harm from disclosure of such confidences seems slight given the full consent of both parties to the subsequent dual representation. A belief that the risks are great implies a presumption that the spouses will wish to be less than candid in their negotiations (rather than desiring an amiable and mature parting of the ways), and also assumes that the husband and wife have concealed financial and other data during their marriage. Though both presumptions may be warranted in some circumstances, one would imagine them as comparatively rare, and tenuous support for a general prohibition against consensual dual representation.

58. See generally A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 38 (1976). For a specific and proper application of Canon 9's sanction, see General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974).
60. N.Y.C. Opinion 427 (1937), supra note 59.
2. Unique Characteristics of Dissolution of Marriage Situations

The mention of divorce typically conjures up visions of emotional and psychological devastation, and indeed such a decision is exhausting to the spirit. Providing legal counsel to spouses who have become firmly and vociferously entrenched on opposite sides has been referred to as "playing with dynamite." At the other extreme is the spouse who is so preoccupied with the notion of finally being freed from the marriage bond that he is oblivious to settlement terms and will make any concession, however regrettable later.

Clearly, neither of these situations lend themselves to dual representation treatment. In the former case, the lawyer would be at a loss to function in an advisory capacity between the hostile parties, and it is even doubtful whether he could serve any useful purpose as an impartial mediator between them within the contemplation of the Code. In the latter instance, separate counsel seems mandatory to assure that the agreement reached while one or both parties are intent solely upon the immediate dissolution does not result in bitterness or undue hardship once the numbness of emotional shell shock passes.

These two extremes on the emotional spectrum in divorce situations should not be permitted to blur recognition of a very substantial middle ground. Certainly, the bitterness, guilt, and other psychological effects of dissolution must be acknowledged and dealt with by both the compassionate legal practitioner and other professionals whose services may be necessary. Still, the possibility cannot be ignored that many couples may be able to calmly and rationally negotiate the terms of a mutually agreeable settlement without requiring the services of separate, independent counsel. In uncontested divorce actions it is evident that "[r]arely is the divorce itself at question. The real decisions concern custody and finances, and overwhelmingly these issues are decided in law offices." The states and their respective bar associations have a legitimate concern that parties may be inclined to negotiate terms privately with which they may later be displeased when the intensity of emotion dissipates and the economic and other ramifications of the agreement begin to take effect. But a blanket

63. ABA Code, supra note 3, at EC 5-20.
64. See Yale Project, supra note 51, at 152-53; see also Lindsley, The Family Court: A Rational, Reasonable, and Constructive Revolution in Domestic Relations Law, 5 Calif. W.L. Rev. 7, 7-8 (1968).
65. Johnson, supra note 62, at 598.
assumption that spouses are never able fully and competently to arrive at a shared solution to marital dissolution by themselves at the kitchen table in an amiable and equitable fashion is both paternalistic and unfounded. To assert such a proposition would create the impression that the legal profession presumes that spouses unfamiliar with the rigors of the adversary process are incapable of determining their own best interest, an attitude which approaches functional guardianship. This attitude on the part of the legal profession has led to one suggestion that lawyers be dispensed with completely in uncontested dissolution petitions, permitting the parties to proceed pro se without the benefit of any legal planning advice except what may be available through printed matter and from non-legal advisors.\textsuperscript{66}

The notion that a couple may be capable of deciding the terms of their dissolution agreement by themselves at the kitchen table is buttressed by the trend toward "no-fault" divorce legislation. The past decade has seen rapid reform of state divorce laws. With the exception of Illinois, Pennsylvania and South Dakota, all states have now adopted one or another form of "no-fault" dissolution of marriage legislation.\textsuperscript{67} The philosophy behind this trend has been attributed to:

agreement [which] seems to be universal on the qualitative aspects of marital dissolution—that the negative repercussions of divorce are directly related to the existence of the adversary process . . . . Recognition of this adverse effect and the need for a remedy has been a prime motivating force behind the move to no-fault legislation. It is reasoned that by removing the fault-based grounds for divorce, or at least providing a no-fault alternative to present grounds, the bitterness and resulting problems that surround the dissolution of a marriage can be mitigated.\textsuperscript{68}

Though one may question the validity of attributing the negative aspects of marriage dissolution completely to the adversary process, it seems clear that such statutes are based upon the conviction that the spouses may effect a settlement without the stimulus of litigation.\textsuperscript{69} The indication is that when the level of hostility is relatively low, the parties may well be competent to negotiate their agreement without lengthy court mediation. This being so, it would follow that the need

\textsuperscript{66} Yale Project, supra note 50, at 165.

\textsuperscript{67} Id. at 105 n.1. Pennsylvania is currently considering such legislation. 3 Fam. L. Rep. (BNA) 2182 (1977).

\textsuperscript{68} Johnson, supra note 62, at 596.

\textsuperscript{69} See OSBA Ethics Committee Issues Opinion On Dissolution of Marriage—Formal Opinion No. 30, 48 Ohio St. B. Rep. 780, 781 (1975). Indeed, such practice is common in uncontested divorce cases. Yale Project, supra note 50, at 138.
for supervision of the negotiation by separate attorneys should also be dispensable if the parties so elected.

This contention seems totally unacceptable to state ethics committees, however, even in the aftermath of "no-fault" legislation. Shortly after the incorporation of such provisions in the Ohio Revised Code, the Ohio State Bar Association Ethics Committee expressed its explicit disapproval of dual representation under DR 5-105(C) in dissolution cases:

Spouses who seek a dissolution of marriage will not necessarily be antagonistic to one another, but, they will have differing interests with respect to all matters which must be covered by the Separation Agreement. Furthermore, even though those matters are not to be litigated in the usual adversary way at the time of the hearing on the petition, (although either may then express dissatisfaction) they may well be the subject of adversary litigation after the marriage contract is dissolved.

The emotionally-charged atmosphere surrounding the divorce situation was cited as making impossible any prediction of when it may be "obvious" that differing interests may be adequately represented by one lawyer:

[The existence of fear and intimidation most often would be masked and not readily ascertainable. Revelation of the real problem and reasons prompting the action would not likely be made to the lawyer nor would a spouse readily repose in him confidences or secrets. Therefore, the professional obligation of the lawyer to obtain full knowledge of his client's cause could not be adequately performed. In effect, the lawyer representing both spouses would be materially shackled in any effort to obtain the information essential to a truly professional performance.

. . . In a marriage dissolution situation pragmatics make it impossible for . . . [the lawyer] to make a proper judgment as to the degree of variances in differing interests."

The Ethics Committee did indicate its approval of the lawyer's drafting of the ultimate separation agreement, however, under the conditions that:

(1) the second party is made fully aware that the lawyer does not represent him or her; (2) that the second party is given full opportunity to evaluate his or her need for representation free


72. Id. at 783.
of any potential conflict and to obtain his or her own counsel; and (3) each spouse consents, in writing contained in or attached to the Separation Agreement, to the lawyer so proceeding.\textsuperscript{73}

The lawyer may not appear as counsel of record for both sides, however.\textsuperscript{74} This compromise is permitted in order to accommodate the statute’s purpose of allowing minimization of the adversary aspects in divorce and to limit the legal fees to those of one attorney. Yet it has the effect of returning to the practice of nominally representing one party, while the effects may be quite different upon the mind of the unrepresented spouse. When both parties feel sufficient trust and confidence in the lawyer to retain him as the sole drafter of what ultimately will be their document, it is difficult to contend that any amount of disclaimer by the attorney will eliminate a feeling that he is drafting a document which will be “fair” to both spouses.\textsuperscript{75} Of course, any actual proffering of advice to the unrepresented spouse would violate DR 7-104(A)(2).\textsuperscript{76}

An attorney contemplating dual representation, even after moderation of the traditional disdain for such practice, would need to examine carefully the present ability of each spouse to exercise the emotional maturity and independence necessary to conduct settlement negotiations.\textsuperscript{77} Should the lawyer be convinced that such capacity exists, yet another potential problem must be addressed. To proceed with the simultaneous representation of both parties in a hypothetical jurisdiction where such practice is permissible, it would still be necessary to fully explain the potential adverse effects of such multiple representation upon the lawyer’s judgment, and to obtain the spouses’ consent to the employment. Where the clients are relatively experienced or sophisticated in legal matters, the task of effectively communicating the conflicts involved may be a simple one. On the other hand, detailing possible legal ramifications to a client with little or no

\textsuperscript{73} Id. at 783–84.

\textsuperscript{74} Florida takes a similar approach. Fla. B. Comm. on Professional Ethics Opinion No. 66-8 (1966), summarized in MARU SUPP., supra note 46, at 186.

\textsuperscript{75} The final copy of the separation agreement will be presented to a referee for a review. The judge’s acceptance of the referee’s decisions is normally perfunctory. See Boyer, Parting Can Be a Bitter Sorrow: Judge Has Tough Role, Cleveland Plain Dealer, March 20, 1977, § 4, at 1, col. 5.

\textsuperscript{76} See Yale Project, supra note 50, at 150. One wonders whether the practical effect of allowing the unrepresented spouse to remain during the conferences about the agreement, given a prior relationship of trust and confidence, is within the spirit of the prohibition of DR 7–104(A)(2).

\textsuperscript{77} The degree to which one spouse may exert pressure and influence upon the other, even at this late state of their relationship, must be considered. See text accompanying notes 61–62 supra.
previous contact with legal affairs may be a tremendous task in which even the orderly presentation of the pertinent information is difficult. Even with the advice of separate counsel, failure to fully comprehend the terms of a divorce agreement is not at all uncommon. Caution should be exercised to be certain that the consent obtained from the parties to such a dual representation is intelligent and fully informed. When the clients are inexperienced—peculiarly handicapped in understanding the attorney's explanation of the potential conflicting interests which may arise—the attorney should consider carefully whether, even if he could structure his disclaimer to fall within the technical requirements of DR 5-105(C), the "situation" approach is appropriate for these parties within the spirit of that provision.

3. Policies Favoring Dual Representation in Dissolution with Implementation Guidelines

a. The Economy of Using One Attorney. Particularly in middle and lower income groups, the expense of legal advice and court fees connected with a divorce can be a major concern. It is this factor which motivates a large number of clients to use only one attorney, leaving the other party unrepresented under the present ethical structure, though he himself may feel that his interests are also being looked after.

Though the Supreme Court of the United States has recently held that the foreclosure of state divorce mechanisms for failure to meet filing fee requirements is a violation of due process, this principle has not been extended to a right to counsel for indigent parties. The advent of inexpensive "divorce kits" in some areas has proven to be of little value to those who, due to educational limitations, lack of clerical skills such as typing, and the unavailability of non-legal professional

78. On the other hand, inexperience in legal matters may not be inconsistent with the ability of the spouses to equitably divide their possessions and comprehend the ways in which they desire their marital relationship to be terminated, particularly when family finances are not complex. An understanding of tax planning matters is not indispensable to a decision as to the distribution of the family car, dog, personal momentos, and bank account.

79. Johnson, supra note 62, at 599.
80. Id. at 605.
help or guidance, cannot properly complete the necessary procedures.\textsuperscript{83} In some jurisdictions, recent decisions have made the sale of such kits impermissible.\textsuperscript{84}

The ability of many parties to successfully use the divorce kit alternative, however, may create an even stronger reluctance to incur the expense of two attorneys for a procedure which the parties view as primarily one of filing which can be accomplished without counsel.\textsuperscript{85} The availability of one attorney to represent both spouses' interests when drafting a dissolution agreement may be an ideal method of regaining the confidence of the public in the utility of an attorney in both the drafting and the planning aspects of a proposed divorce. It would seem evident that such lawyer service would be preferable to the widespread adoption of pro se divorce without the benefits of planning advice.

b. \textit{Reduction of Artificial Hostilities.} An oft-noted objection to the current handling of divorce matters is the adversary atmosphere surrounding the negotiation and settlement of even uncontested cases where separate attorneys are involved.\textsuperscript{86} The reduction of such tensions is quite worthy of attention, though several commentators seem to have gone to the extreme in attributing the entire hostile flavor of all divorce actions to the present adversary structure,\textsuperscript{87} and even suggest that it may be the lawyers' perception of their own role which adds this flavor to the practice.\textsuperscript{88} It seems quite appropriate, therefore, to allow parties who have decided that dissolution will resolve their personal dilemma to work out the terms of a separation agreement and petition for divorce with one attorney. Where hostilities are already of such proportion that simultaneous representation is not possible, the resultant use of separate counsel need not exaggerate those emotions if the counsel involved exercise proper reserve.\textsuperscript{89}

4. \textit{Application of a "Situation" Approach to Uncontested Petitions for Dissolution of Marriage}

Any attempt to change the present trend by state bar association

\begin{itemize}
\item[83.] Yale Project, \textit{supra} note 50, at 163–64.
\item[84.] \textit{Id.} at 167–68.
\item[85.] \textit{Id.} at 123–29.
\item[86.] \textit{See, e.g.}, OSBA Ethics Committee Issues Opinion On Dissolution of Marriage—Formal Opinion No. 30, 48 \textit{OHIO ST. B. REP.} 780, 783 (1975).
\item[87.] Note, \textit{The Role of the Lawyer in Divorce: Some Ethical Problems}, 21 \textit{U. PITT. L. REV.} 720 (1960); Johnson, \textit{supra} note 62, at 596.
\item[88.] Johnson, \textit{supra} note 62, at 599.
\item[89.] For a proposed code of practice to guide practitioners in the area, which has already been adopted in New York State, see \textit{id.} at 603–13.
\end{itemize}
ethics committees to prohibit dual representation in divorce actions in light of the above policy considerations would be difficult absent an expression of support by the American Bar Association through a modification in the Code of Professional Responsibility. Several alterations of the present ethical considerations in Canon 5 might be effective in this regard. First, the uncontested divorce between amiable consenting clients might be specifically included in EC 5–17. A preferable option would be the inclusion of an additional ethical consideration addressing the area specifically and directly:

Married persons who mutually desire the uncontested petition for dissolution of their marriage may ask a lawyer to serve as counsel of record for both husband and wife. In cases where the potential hostilities between the parties seem obviously minimal, and both appear to the lawyer to be capable of dispassionately negotiating and selecting alternatives in the preparation of the separation agreement, a lawyer may properly accept such employment. The lawyer shall only proceed when he feels that his independent judgment will not be likely to be affected, and only after giving a full disclosure of such possible effects and having obtained the written consent of the parties as a part of or attached to the separation agreement.

The attorney considering engaging in this form of practice should be fully aware of the possibility that if the amiability of the parties sours, and he is required to withdraw from the dual representation, he may very well be precluded from thereafter serving as counsel for either spouse in the proceeding. The numerous ethical opinions suggesting this result gain strong support from EC 5–20, which states that:

90. EC 5–17 does not discourage representation by one lawyer of co-defendants in criminal cases, or beneficiaries of an estate, or the insured and insurer in personal injury cases, but suggests that whether a lawyer should represent both sides depends on the circumstances surrounding each particular case.

91. For a recommendation that the written agreements as to form of lawyer employment be attached to the separation agreement, see OSBA Ethics Committee Issues Opinion On Dissolution of Marriage—Formal Opinion No. 30, 48 OHIO ST. B. REP. 780 (1975). See also W. FISHER, supra note 61, at 43; Johnson, supra note 62, at 606; but cf. In re Boone, 83 F. 944 (N.D. Cal. 1897) (agreement entered into by client, purporting to release attorney from obligation not to represent others in matters related to attorney's former representation of client, held invalid as too indefinite and obtained without complete understanding by client).

After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.\textsuperscript{93} Though technically the lawyer in the proposed situation is not a mediator or arbitrator, as he is presenting the legal ramifications of dissolution and allowing the parties to mutually choose alternatives, the spirit of this consideration clearly extends to the situation.

If the situation approach is adopted, additional secondary recommendations should include the possibility of review by the referee and judge in the ultimate court procedure to ascertain that the parties are satisfied with the choices they have made in the final separation agreement.\textsuperscript{94} Also, as lawyers begin dealing more frequently with dual representation, further educational training in the related skills of counselling may be appropriate to meet more effectively the demands of the new role.\textsuperscript{95}

When spouses have considered the possibility of dissolving their marriage, and have come to an attorney’s office to discuss this option with him, it is generally accepted that the lawyer’s first action should be to attempt a reconciliation between the parties.\textsuperscript{96} On its face, this is always a desirable measure which will help to affirm that the parties are genuine in their decision and that neither spouse is using the visit to the lawyer as a final attempt to communicate the seriousness of the marital problems to the other spouse. It would seem, however, that moderation in that effort is appropriate in some circumstances. Particularly in the instance where the lawyer might contemplate representing both spouses, an over-zealous attempt to reconcile a couple who come to the lawyer having thoughtfully negotiated their dissolution could cause alienation of the clients’ confidence.\textsuperscript{97} Exploring the potential for reconciliation is an important first step, however, as later advice to separate may further limit opportunities for the spouses to consider reunion.\textsuperscript{98}

\textsuperscript{93} ABA Code, \textit{supra} note 3, at EC 5-20.
\textsuperscript{94} Yale Project, \textit{supra} note 50, at 138. Similar review is already the practice in some jurisdictions. \textit{See}, e.g., Boyer, \textit{supra} note 75.
\textsuperscript{95} For a vivid description of the current failure of many lawyers to counsel effectively, see Yale Project, \textit{supra} note 50, at 152-53.
\textsuperscript{96} ABA Committee on Professional Ethics, Opinions, No. 58 (1931).
\textsuperscript{97} One survey shows that ninety percent of uncontested divorce actions involve couples whose minds were made up to end their marriage from the moment they began to seek dissolution; the only questions to resolve were the terms of the separation agreement. Johnson, \textit{supra} note 62, at 598.
\textsuperscript{98} For a criticism of the adversary process as actually working against the interests of the parties and impeding attempts at reconciliation, see Note, \textit{The Role of the Lawyer in Divorce: Some Ethical Problems}, 21 U. PITt. L. Rev. 720 (1960).
Although the lawyer may not be the professional with the most expertise in personal and emotional counselling, often he may be called upon to provide this service. The dual representation case would presume a lower level of hostility between the clients, but the severe psychological effects of their decision may still require professional attention. Even when the lawyer feels capable of providing such support, he may wish to seriously consider how it could appear to the spouses to reflect upon his independent legal judgment and he may, therefore, decide to refer the client(s) to a medical or social professional.99

When these initial steps are concluded and the parties are still intent upon petitioning for the divorce decree after a full disclosure of conflicts, and after informed consent has been given by both parties,100 the lawyer's next consideration is what role he shall play in the negotiations, settlement, and preparation of the petition. If the spouses have a general idea of the result they wish to effect with their agreement, but have not discussed in detail the terms concerning property division, possible alimony, and the variety of rights concerning any dependents involved in the marriage, the lawyer may serve as a mediator between the parties eliciting their feelings and, ultimately, their mutual decisions. This function is recognized as appropriate for the lawyer by the Code of Professional Responsibility.101

The lawyer may be most useful as a planning advisor when the couple has amicably arrived at the terms which they wish to include in their agreement.102 Impartiality is the necessary key to the lawyer's presentation. Detailing the various legal planning advantages in the area of income tax and elsewhere should be accompanied by careful explanation of the available options and the effects of each decision. The ultimate choice should then be made by the spouses jointly. The direct recommendation of a conflicting mode of action to each spouse in succession, on the other hand, would give the appearance of conflict, and would erode trust and confidence in the lawyer. Done properly, a counselling session may be of enormous aide to spouses who are trying to insure that the results they desire are expressed in the final agreement. Though one study indicates that many attorneys fail to

99. One study suggests the possibility of pro se divorce as a means of eliminating attorney's fees and reallocating available funds to suitable professional counsellors and medical personnel. Yale Project, supra note 50, at 153.

100. See text accompanying notes 61–79 supra.

101. ABA Code, supra note 3, at EC 5–20. But this may preclude the lawyer from representing either party later. See also text accompanying note 92 supra.

102. Form filing may be accomplished by parties without counsel in some cases. Yale Project, supra note 50, at 123–29.
provide this important service in a comprehensive manner, and that others succeed only to have the advice ignored by the parties,\(^{103}\) this modicum of failure clearly should not lead to the conclusion drawn in the Yale study that the attorney be eliminated in his role as a planning counsellor.

Naturally, in engaging in dual representation, the attorney should keep a careful record of both the disclosures of potential conflict which were made to the clients, and their responses to his various planning and drafting suggestions. To further document the consent of the parties, he may wish to consider not only noting his representation on the ultimate agreement, but also having the parties sign a consent form indicating that the situation has been fully explained and understood. Though such consent will not be deemed a release of the attorney's duty of care in maintaining his independent professional judgment,\(^{104}\) it may serve as prima facie evidence of compliance with the disclosure requirements of DR 5–105(C) and the proposed accompanying ethical consideration.\(^{105}\)

B. Multiple Representation of Clients Forming A Close Corporation

A hypothetical may best establish the most troublesome situation in this area. A number of friends or acquaintances of the lawyer enter his office to propose that he represent them in the formation of a new business venture which they have planned. The lawyer cautions them at great length concerning their potentially differing interests and the advisability of separate counsel, fully aware that originally friendly business ventures may quickly sour. Yet they persist in their desire to retain him.

As one authority has noted, in a concise but comprehensive exploration of this situation, the parties may at best attribute the warnings of the attorney to a tendency toward conservative judgment and cautiousness on his part, and at worst may become highly insulted at the suggestion that their harmonious group might become divided.\(^{106}\) In most instances they will continue to exert pressure upon their trusted lawyer to accept the employment proposed.

There is some support for the propriety of accepting employment in these matters under some circumstances. The drafting of contracts for

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103. Id. at 138–39.
104. In re Boone, 83 F. at 955. At least one commentator has suggested that the lawyer and the parties enter into an employment contract detailing their expectations and responsibilities. See Johnson, supra note 62, at 606.
105. See text accompanying note 91 supra.
both parties where they so consent has been approved,107 and it has been proposed that corporate reorganizations and some business planning matters may also be appropriate for simultaneous representation.108 Additionally, there may be "exceptional situations [in which] the client's interests may be better served by the lawyer's representation than by his refusal, even though such employment subjects him to the influence of differing interests."109 The decision to hire one lawyer to represent the interests of all parties could conceivably even be viewed as one of the many business risks which may be acceptable to the clients in determining the costs of operation. The disclosure requirements which ethical guidelines place upon the attorney arguably make the risk for the entrepreneurs no greater than those associated with the real asset projects contemplated for the corporation, and businessmen are accustomed to balancing such risks against costs every day.

Counter to this is the suggestion by one prominent panel that the attorney might best deal with the situation posed in the above hypothetical by refusing to represent more than one of the parties, while at the same time explaining that the other participants may stay during the consultation, though they are not to be represented by him.110 As in the divorce situation,111 the practical effect of such an arrangement may be that the parties continue to regard the lawyer as concerned for each of their interests, especially when they have had a previous relationship of trust and confidence with him, either professionally or personally. In any case, it would appear inescapable that if they decide to remain without independent counsel, the ultimate effect will be the adoption by all parties of the lawyer's recommendations to his single client. To insist upon the thin distinction that only one party is nominally represented as a client is to deny the reality of the situation, and the reliance which all present place upon the lawyer's comments. Perhaps the preferable solution, if the lawyer is unwilling to represent the interests of all parties, is to refuse employment completely in anticipation of a later rift among the prospective shareholders.112

107. N.Y. County Opinion 155 (1918), reprinted in N.Y. Opinions, supra note 45, at 605.
109. Id. at 35.
110. Seminar, Business Planning and Professional Responsibility: Problem 1, 8 Prac. Law 17, 23 (1962).
111. See pp. 95-109 supra.
112. See W. Fisher, supra note 61, at 44.
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Should the attorney decide to proceed with the representation of all parties, numerous problems must be overcome. First, he may find it difficult to detail for the clients the potential differing interests which may influence his independent judgment, a disclosure required by DR 5-105(C). Potential conflicts which may arise include tax planning, the effect of death, retirement, or disagreement by a shareholder, comingling of personal and corporate assets, or other breaches of statutory formalities. The future rights of minority shareholders, the probable lack of a viable market for closely held corporate shares should a stockholder decide to shift his investment, early obsolescence of patents or inventions, and the addition of new contributions of the same nature are also possible problems over which conflicts may arise. The possible differences that may develop between the parties are so complex, and so numerous, that the lawyer may feel unequal to the virtual clairvoyance expected of him. Even if the lawyer feels that he can adequately foresee how his judgment may be influenced in the future, he may find it difficult in some situations to sufficiently explain the impact of differing interests upon his prospective clients.

One of the most important factors making the formation of close corporations appropriate for an "attorney for the situation" approach is the frequent sophistication of the parties involved in business and legal matters. They are much more capable of appreciating the possible conflicts, and of weighing them during the drafting stage and through subsequent dealings, than are the typical parties to a divorce proceeding who may have had little or no prior contact with the legal process. But the possibility that the clients may have experience in legal matters cannot be asserted as a general presumption; the parties may come to the lawyer with only minimal notions of what they wish to accomplish, and seek not only the lawyer's legal advice but his business judgment as well in formulating the direction of their proposed venture. In the latter instance, great caution should be exercised in explaining the situation to the parties. The attorney should feel confident that they perceive the differing interests which may arise, and are able to cope with them in the course of sessions which the attorney may conduct. Any doubts which the attorney has should be resolved against the representation of multiple clients. Again, it should be kept in mind that discussing in detail the proposed arrangement with all the parties

113. Smith, supra note 106, at 244.
114. Id.
115. ABA CODE, supra note 3, at EC 5-15.
may lead the attorney to be barred from representation of any of the clients under certain circumstances.116

These considerations, combined with a conscientious effort on the part of the lawyer to fully apprise the parties of the potential conflicts and the effect they may have upon his judgment, may be a sufficient guide to the attorney attempting to comply with DR 5-105 as it presently exists. Indeed, the representation of multiple parties in the drafting of documents concerning the formation of closely held corporations is not wholly uncommon today.117

Finally, the representation of multiple clients in the close corporation setting could be subject to a different standard of care than that normally associated with the attorney-client relationship. Though one commentator has suggested that the standard of care in multiple representation cases be raised,118 this does not seem to be the real implication of a new rest. The role of the attorney must now be viewed not in terms of strict adversary loyalty to the individual client, but rather in terms of a strong duty to pursue the legal objective which the parties wish to accomplish, and to present the various alternatives to the clients in a neutral manner for their ultimate selection. Such a standard would not necessarily be higher than that of ordinary care usually associated with the attorney-client relationship, but rather would shift its focus to a loyalty to the mutually established goals of the parties. The practitioner, while being encouraged to engage in a "situation" approach to legal counselling in appropriate cases, would be held to a strict standard in his subsequent actions to verify that he can implement the desires of the clients in an unbiased manner.

C. Representing Seller and Purchaser in Real Estate Transactions

One additional area in which the employment of a "situation" approach to the dispensing of legal advice might be appropriate is in the sale of real estate, particularly when residential real estate is sold by a homeowner without the use of any intermediary. Here the concern for minimal legal expense is again a strong factor, and it is also in this situation that the parties may least understand the differing interests which may arise. Their view of the transaction's import may not

116. See, e.g., N.Y. County Opinion No. 577 (1970) (issued in looseleaf form by the New York County Lawyers' Association Committee on Professional Ethics); N.Y. County Opinions 389 (1950), reprinted in N.Y. OPINIONS, supra note 45, at 776.

117. See Smith, supra note 106.

extend beyond the paperwork involved and issues concerning title examination.\textsuperscript{119}

The practice of allowing one attorney to handle a real estate sale between buyer and seller has been accepted in parts of the British Commonwealth since 1866.\textsuperscript{120} The approach has come under severe criticism,\textsuperscript{121} however, and does not appear to have originated with a desire to reduce the costs of counsel in such instances.\textsuperscript{122} Arguing for the abolition of the practice, one author comments that since the sale of real estate is such an uncommon event for most people, the cost of separate legal representation on such occasions is not burdensome.\textsuperscript{123} Though this fact may make the potential client no less hesitant to expend additional money upon legal counsel, the situation may be distinguished to some degree from that of the divorce action in that there is some revenue being generated for the seller, and thus he may be somewhat less reluctant to invest in legal fees. The purchaser will also want to protect his substantial investment. Oddly enough, although it has been urged that the general British policy allowing simultaneous representation in real estate closings should be abandoned, in instances where the parties are both previous clients of the solicitor it has been suggested he should proceed to accept the employment.\textsuperscript{124} It would seem that the interests of the attorney in placating his existing clients is placed ahead of the general recognition by the author that, particularly where the parties are previous clients, simultaneous representation is improper due to the conflicts involved.

It does appear that the use of one attorney by both sides in the British situation results in savings of approximately twenty five percent in legal fees for each party to the transaction.\textsuperscript{125} Arguably, efficiency may also be increased due to the elimination of communications between attorneys, and the ability of one attorney to rely upon his own past title searches when subsequent transfers of the same fee are accomplished.\textsuperscript{126}

But, as a practical matter, there are drawbacks in the widespread practice of dual representation. Some have expressed doubt as to whether an attorney can apply the same scrutiny to his own document

\begin{itemize}
\item \textsuperscript{119} See "Conflict of Interests" in Realty Transactions, 83 N.J.L.J. 76 (1960).
\item \textsuperscript{120} 79 L.Q. Rev. 25, 27 (1963). See also Burbidge, Acting for Both Parties, 4 Austl.
\item \textsuperscript{121} 79 L.Q. Rev. 27–28 (1963).
\item \textsuperscript{122} Id.
\item \textsuperscript{123} Id. at 27.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Burbidge, supra note 120, at 66.
\item \textsuperscript{126} Id.
\end{itemize}
as to those drafted by others, and further problems may arise if, for example, a defect in title were discovered by the attorney. It has been argued that disclosure of the defect (which would seemingly be the appropriate course of action) or failure to disclose would be a breach of duty to one party or the other. There may not actually be a breach of duty or a hardship, however, if full disclosure has taken place beforehand. Both parties should understand that any difficulty or defect discovered concerning the real estate or the transaction itself will necessarily be raised for their mutual consideration.

In a recent ethical opinion encouraging the use of dual representation only in rare circumstances, the traditional view of possible differing interests was reiterated:

In real estate transactions it is not always true, even in relatively simple ones, that representation of both buyer and seller involves nothing but computations of adjustments and preparation of the deed. A number of questions arise that require the exercise of legal judgment. Examples are (i) whether the deed should be full covenant and warranty, bargain and sale, with or without covenants, or quitclaim, (ii) what customs are to be followed in making adjustments, (iii) which points disclosed in the title report are important and which may be disregarded, (iv) what title company to use, considering the fact that a title company reinsuring may perpetuate past errors which another title company would pick up.

The same ethics committee addressed the matter again four years later, and though emphasizing its previous hesitations, this time the committee seemed more favorable toward the use of dual representation in appropriate buyer/seller situations, given complete disclosure and consent.

Numerous other jurisdictions have approved the use of one attorney for both sides in real estate closings and related legal matters as a general proposition, so long as requirements parallel to those of DR 5–105(C) are met, even where the attorney may give little advice and in effect serve as a mere scrivener for the parties. Indeed, a number

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127. Reynolds, supra note 120, at 311.
128. Id.
129. Cf. N.Y. County Opinion 90 (1916), reprinted in N.Y. OPINIONS, supra at 45, at 563 (duty to disclose defect to both parties even though nominally representing only one, where lawyer enjoys their mutual trust and confidence).
132. N.Y. County Opinion 615 (1973); Opinions of State Bar of Texas Comm. on Interpretation of the Canons of Ethics, Opinion 228 (1959), reprinted in 18 BAYLOR L.
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of courts have stated that such situations do not even involve the representation of conflicting interests at all, where the terms of sale have been ironed out between the parties before they consult the lawyer.\(^3\) Similarly, an attorney's representation of both the purchaser and the seller was held proper when a defect in the title was found during preparations for closing.\(^4\)

It would appear that a distinction may be made between real estate transactions and other types of multiple representation cases. Unlike many other areas, the potential conflicting interests and effects upon an attorney's independent judgment seem uniquely predictable:

The parties expect to give and receive a good title, upon customary terms. If special questions arise, either of title or terms, they can be discussed with both parties. The question will be of a well-defined class. It may turn out that one party or both will be disappointed if the lawyer raises issues that burden one or the other with unexpected expenses or that cause the deal to fall through; but there will be no feeling of disappointment with the lawyer's role. He was expected to raise such issues. Once raised, there were no practical alternatives to what had to be done about them; they had to be dealt with on lines established by real estate law or custom.


We are fully aware of the delicacy of the questions which can arise in cases where an attorney attempts to represent two parties whose interests might develop a conflict. But in the absence of litigation or contemplated litigation, the general rule prohibiting the representation of clients with conflicting interests by a single attorney has never been so broadly stated as to preclude an attorney from ever accepting employment from two different persons merely because of a possibility of a conflict of interests. . . . Were this not the rule, the common practice of attorneys in acting for both partners in drawing articles of copartnership or drawing agreements for the dissolution of copartnership, in acting for both the grantor and the grantee in the sale of real property, in acting for both the seller and purchaser in the sale of personal property, in acting for both the lessee and the lessee in the leasing of property, and in acting for both the lessor and the borrower in handling a loan transaction would be prohibited even though done in the utmost good faith and with the full consent of all parties concerned. In each of these instances there is the possibility of conflict, if not an actual conflict, in the interests of the persons represented, but it cannot be said as a matter of law that an attorney is prohibited from acting for both parties in such cases with the knowledge and consent of both.


\(^133\) Id. at 605-06, 45 P.2d at 261. Though the case supports the propriety of simultaneous representation under some circumstances, the statement that even when actual conflicts are present the attorney may proceed with the representation, given full disclosure and consent, appears inconsistent with EC 5-15.

Both clients understood this when they consented to be represented by the same lawyer. So the disappointed client does not blame the lawyer, for he knows that he had consented to have the lawyer do just what was done.\textsuperscript{135}

Should the lawyer elect to engage in such multiple employment situations, he may be held to a high standard in ascertaining that his clients fully understand and consent to the relationship they are entering:

The court is well aware of the common practice of adverse parties agreeing to use the same attorney, particularly in real estate settlements. An attorney, so acting, has a \textit{heavy burden to see that there is full disclosure and full protection of both parties}.\textsuperscript{136}

Among the numerous results of failure on the lawyer's part may be rescission of the contract or deed by a dissatisfied party.\textsuperscript{137} Yet, with careful adherence to the guidelines of DR 5–105(C) and conscientious action to protect the respective interests of all parties to the transaction, it would seem that in the area of real estate fee transfers an attorney will most easily be able to represent dual interests while meeting the higher standard of care due to the certainty of the substantive law in this area and the predictability of results.

\section{VI. Conclusion}

The above examination of three potential cases suggests there may be a wide variety of situations in which parties feel that they may bring their interests into harmony and etch them into legal obligations without separate legal assistance in negotiations and drafting. Though the need for such a mechanism is most imperative in the divorce context,\textsuperscript{138} it is in this area, due to the high degree of emotion and psychological strain involved, that hesitation has been most persistent, even in light of the recent trend toward the acceptance of a "no-fault" option in dissolution statutes. Adding an ethical consideration to the Code of Professional Responsibility would serve as a first step toward responding to this client need, and would set uniform guidelines which

\begin{footnotes}
\item[135.] W. FISHER, \textit{supra} note 61, at 42.
\item[137.] Holley v. Jackson, 39 Del. Ch. 32, 40, 158 A.2d 803, 808 (1959); Wachsmut v. Miller, 168 N.W. 344 (Iowa 1918).
\item[138.] The outcry to provide a viable alternative to the expense and tension of an adversary approach is demonstrated in both Johnson, \textit{supra} note 62, and Yale Project, \textit{supra} note 50.
\end{footnotes}
could be adopted by the states to assist attorneys desirous of selecting appropriate cases.

The close corporation setting seems the most difficult to deal with due to the vast potential consequences which any imaginable conflict might have upon the lawyer's independent judgment. But a "situation" approach has already gained considerable practical acceptance, even if under the guise, in many instances, of nominal representation of one client only. With careful planning and explicit advance disclosure to all involved, such practice may be conducted consistent with the Code of Professional Responsibility as it now exists. In analyzing costs of separate counsel to guard against possible future differences, businessmen may even view the "situation" approach as a minimal and, therefore, an acceptable business risk.

The real estate fee transaction in which the lawyer may represent both the buyer and seller seems a clear case for a "situation" approach due to the predictability of potential conflicts and the relatively standard procedures for dealing with such exigencies when they do arise. A change in focus on the part of the attorney, from acting as counsel for a single party in an adversary setting to working impartially to achieve the clients' goals, would be the attorney's proper role in such "situations."

One commentator has proposed a list of factors appropriate for consideration by the attorney contemplating multiple client employment:

>T]he degree to which the interests differ, the probability that the lawyer will be influenced by the differing interests, and the extent to which his client's interests would be harmed if the lawyer's judgment were affected.\textsuperscript{139} Factors favoring the propriety of representation would include any unique value to the client's interest in retaining the lawyer in question, such as his familiarity with the details of a complex legal transaction, or the desire of several parties that the lawyer in question serve as mediator or arbiter of these interests.\textsuperscript{140}

Added to this should be the desire of the parties to avoid an adversary setting to their relationship, and a concern to avoid added expense of additional counsel.

Any decision whether and when to undertake the simultaneous representation of potentially differing interests requires careful reflection and, to a substantial degree, an intuitive feeling of the extent to

\textsuperscript{139} This last consideration must not weigh heavily in the analysis; if influence on the lawyer's judgment is likely, DR 5-105(C) requires refusal of the offer of employment.

\textsuperscript{140} Weddington, supra note 108, at 36.
which the individual lawyer knows he can maintain his independent judgment. With such qualities warehoused, he may well feel the preparedness which was attributed to Brandeis by a recent commentator. For when the actual client enters, project in hand, it is the decisiveness which comes from personal conviction that must ultimately be the key for any "attorney for the situation."\footnote{Frank, The Legal Ethics of Louis D. Brandeis, 17 Stan. L. Rev. 683, 709 (1965).}

JAMES C. HAGY