Creed or Code: The Calling of the Counselor in Advising Families

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Families succeed by maintaining a tradition of regular, honest, and wide-ranging communication. The highest calling of a counselor is to encourage and enable such communication, both in planned family meetings and as an ongoing mindset. This requires the counselor to earn the family's trust and to engage in open-minded listening that demonstrates that the family comes first.

But whenever the counselor has contact with so many members of the family, there are ethical implications that sometimes pose impossible dilemmas regarding conflicts of interest and the flow of information. The prevailing rules of professional conduct, rooted in the needs and limitations of litigation, are not always helpful, particularly when they might require the trusted and understanding counselor to withdraw from the engagement at a time of stress or conflict when the family might need that counselor's services the most. At those times, the counselor must consider whether technical rules should yield to the higher creed of placing the family first.

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This is a good time for ACTEC. The past year and a half was quite a time. We completed a transition to the Washington, D.C. office, with a mostly-new staff. Our presence in Washington matured in more ways than geographically, with unprecedented calls for our contribution to the honing of federal legislation and regulation with both domestic and cross-border significance. Last year's President Dennis Belcher, this year's President Karen Moore, and Executive Director Deb McKinnon provided leadership that was just right for the times, and we worked through one challenge after another.

I. ACTEC AS FAMILY

Now I know that Dennis, Karen, and Deb are thinking to themselves that they did not do all of this alone. Certainly leadership has had tremendous support from the membership. A lot of change always brings a lot of risk, and ACTEC Fellows pulled together, trusted leadership, were patient, kept an open mind, and became active and sincere supporters. This atmosphere of commitment, trust, patience, and support is what has prompted many of us over the years to view the ACTEC family as more than an aspirational label – it really describes us as an organization, a family.

This morning I want to do more than just celebrate our successes as a family. I want to use a very simple gimmick to challenge all of us to think about one of the attributes of this family and how it should influence the way we serve our clients. The gimmick is this. Many families are identified to the world *by their last name*. ACTEC's last name is "Counsel." Even before ACTEC was ACTEC, when it was the ACPC that many of us joined, its last name had been "Counsel" since 1959.[1] This can't be an accident. There must be something about what we do or even who we are that is captured by that name. Sure, it implies the counselor-at-law, the practicing lawyer who exercises independent judg-

[1] It was incorporated in California in 1949 as the "Probate Attorneys Association." Its name was changed to "The American College of Probate Counsel" in 1959. J. PENNINGTON STRAUS, ET. AL., THE ACTEC HISTORICAL COMMISSION, THE HISTORY OF THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL, 1 (1999) [hereinafter *History of ACTEC*], *available at www.actec.org/Documents/misc/History_of_ACTEC.pdf.*

ment on behalf of clients. And, generally speaking, entrance into ACTEC membership has traditionally been limited to those who are serving clients that way in private practice, or those in the classroom who are preparing those who do.

It is a great privilege to stand at this podium knowing something of those who have gone before on whose shoulders we all stand. But like the families many of us serve, ACTEC itself has now survived and prospered longer than anyone can personally remember. For example, the Board of Regents renamed the College's Learned Lectures the Joseph Trachtman Memorial Lectures shortly after Joseph Trachtman died in October 1975,[2] and that was less than a month after I had been admitted to the Minnesota Bar. I never knew Joe Trachtman, and very few of you did, not to mention earlier pioneers like John Clock and Joe Houston. We know of them through the records and traditions that are the stuff of family.

"No one did more to improve the quality and reputation of the American College of Probate Counsel than Joseph Trachtman."[3] So wrote Harrison Durand and Joe Straus in the ACTEC History. Joe Trachtman became President in 1966, when the membership of the ACPC rose above a thousand for the first time, and he is said to have done more than anyone to institutionalize strict membership standards of expertise and professional conduct that to this day guarantee that the Fellow sitting next to you is worthy of a referral of a sophisticated matter. As a past chairman of the ABA Real Property, Trust and Estate Law (formerly Real Property, Probate and Trust Law) Section, Joe Trachtman followed up that commitment to quality by recruiting many outstanding members of the Council of that Section, as well as from his legendary New York Chapter. We owe so much to the men who helped shape the College family through the early years.

I say "men" because they *were* men. Now it has become impossible to say that, of course – in no small part because of the very membership initiatives and standards those men put in place. Although it would have required rather long-range vision in the 50s and 60s, I believe that Mr. Clock and Mr. Houston and Mr. Trachtman, if they were alive today, would be as proud and inspired as I am to give the first Trachtman Lecture ever when a majority of ACTEC's officers are women.[4]

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[2] *Id.* at 10.

[3] *Id.* at 8.

[4] On the date of this lecture, three of the five ACTEC officers were women: Karen M. Moore, Mary F. Radford, and Kathleen R. Sherby. For updated information about ACTEC's Officers, see ACTEC, ACTEC EXECUTIVE COMMITTEE, http://www.actec.org/public/exec.asp (last visited June 1, 2011).

II. Trust and Estate Law as Family Law

Speaking of that, in 1995, Roberta Cooper Ramo of Albuquerque became the first woman to be President of the American Bar Association,[5] and in March 1996 in San Juan, Puerto Rico, she became the first female Trachtman Lecturer.[6] Her lecture was entitled "Musings of a Family Lawyer."[7] In that lecture, she recalled her own roots as an estate planner. And she inspired us with the challenge that trust and estate lawyers are the true "family law" lawyers, and it's a shame that that title has become largely associated with the *breakup* of families.

III. The Role of the Counselor and the Importance of Communication

This morning I want to pull together all these themes and ask you to think with me about our role as "*counsel*," about the high standards of professional conduct that have been passed down to us through generations of the ACTEC family, about those many other families that we know and advise, about the challenges and privileges of a counselor in advising those families, and about our calling as the true "family lawyers" – not for the breakup of families, but for the fostering, feeding, fortification, and fulfillment of families.

My thesis is that the counselor can and must encourage and enable that fostering, feeding, fortification, and fulfillment of families.

Now those of you who know me know that my credentials to address this subject are bogus. I do not do the things I am going to talk to you about. By and large I have never done them, or, when I have tried to do them, I have not done very well. I have mostly seen the results of failure – when members of families of substantial wealth have not been able to get along, when the best that can be done is to find a settlement that leaves everyone unhappy, or formalizes a split-up, like the partition or reformation or termination of a long-term trust, that ensures that family members will never see each other again. My experience, of course, usually relates to the tax treatment of settlements. It isn't pretty. It's a living for me, but it's no life for them. The subtitle of this lecture might as well have been "Advice for Architects from a Fireman." But architects better listen to firemen.

Even so, you will probably not leave here having *heard* something for the first time. But you might leave here wanting to *try* something for the first time.

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[5] Modrall Sperling, Lawyers, http://www.modrall.com/0910071189446247.prs (last visited June 1, 2011).

[6] *History of ACTEC*, *supra* note 1, at 42.

[7] *Id.*

It seems axiomatic that, like the ACTEC family, any family should be an environment for fostering, feeding, fortifying, and fulfilling, a place of protection, a place of strength, a place of bonding. Now among the wealthy families that people in our profession have occasion to meet, I do not think I have ever seen a family that reflects those aspirations perfectly, that doesn't encounter problems it has to solve. But in this fireman's experience, it is very rare to see a family completely disintegrate that has maintained a tradition of regular, honest, and wide-ranging *communication*.

That's it. No steps, no parts, no points. The number one duty of the counselor to a family is not the estate plan, although that is critical. Not asset protection, although that is very important. Not taxes, although that is very important too. The number one duty of the counselor to a family is to use all reasonable means to insist on or otherwise encourage the fullest and freest dialogue within the family for the sake of the survival and strength of the family.

Dialogue about the existing estate plan. Dialogue about changes to the estate plan. Dialogue about the family business, if there is one. Dialogue about the business succession plan. Dialogue about trustees – and the trustee succession plan. Dialogue about dreams and aspirations. Dialogue about disappointments. Dialogue about restoration. Dialogue about everything that is important.

As I said, this is not new. It is not even new to this meeting. Seminar B at this meeting was entitled "They Don't Call Me Counselor For Nothing."[8] The description in the meeting program says "As estate planners, we are much more than trust and tax technicians; we are, in many cases, the family's 'counselor.'"[9] To me, what that means, for example, is that even if we help eliminate all the taxes a client might otherwise pay, all we have done is to permit the client to keep something. We have not added one dollar to the client's balance sheet – in fact, our fees have probably taken some dollars away. But the counselor who helps foster, feed, fortify, and fulfill the family by encouraging and facilitating constructive dialogue – that counselor adds something that is precious.

The introduction to Bob Kirkland's material for Seminar B says, "Although we all chose the trusts and estates practice [read *family law practice*] for a variety of reasons, we believe it is fair to say that many of us opted for this area of practice with a desire to assist clients and their families with not only the financial aspects of family wealth planning, but also the practical, ethical, and psychological aspects of dealing with

[8] ACTEC, ACTEC 2011 ANNUAL MEETING BROCHURE 6 (2011), http://www.actec.org/Documents/misc/ACTECAnnual2011Brochure.pdf.

[9] *Id.*

their families."[10] Anita Siegel's material for that seminar includes an article entitled "Leading the Client's Family Meetings,"[11] and she started her presentation with that article.

"Family meetings" certainly sounds like part of the communication within the family that this lecture regards as critical. But "leading" the family meeting? Where did that come from? I only said "encourage" – even "insist on." But in many cases if we do not lead, who will? And even when we do not personally lead the meeting, the encouragement to get the meeting organized and held is going to require the same attributes and efforts on our part anyway.

A. The Attributes of the Counselor

What are the attributes of the kind of counselor-facilitator the family needs to foster constructive and preservative communication within the family?

First, trust. But let me come back to that.

1. *Understanding*

Second, understanding – understanding of the family's values, objectives, and priorities. But those things must come from within the family itself. The lawyer cannot pull them out of a form book like a NIMCRUT or a QPRT. In fact, the lawyer cannot even pull a NIMCRUT or a QPRT out of a form book, much less a family limited partnership or buy-sell agreement, without understanding the family.

A family often does not even know what its values, objectives, and priorities are. We might expect the senior generation to be the custodians of the family's values and to pass them on to their children. But the senior generation might be too busy or too driven – too occupied with *what* they are doing to have ever paused to ask *why* they do it.

Every dialogue has to have a set of rules – a consensus set of principles greater than the dialogue itself that judges the relevance, usefulness, and appropriateness of everything that might be said. Those rules are the values of the family. Some experts urge every family to write a Mission Statement. All right, you tell that to some families, and their eyes will glaze over. "Mission Statement? Why? Who do you think we are? What are you talking about?"

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[10] Robert K. Kirkland, *Material for Seminar B: They Don't Call Me Counselor For Nothing – Adding Value to Your Product and Strengthening Your Client Relationships*, ACTEC 2011 Annual Meeting (Mar. 10, 2011).

[11] Anita J. Siegel, *Material for Seminar B: They Don't Call Me Counselor For Nothing – Adding Value to Your Product and Strengthening Your Client Relationships*, ACTEC 2011 Annual Meeting (Mar. 10, 2011).

Okay, don't press it. Just ask what their shared values are. (It's probably best not to make that kind of family distinguish "values" and "objectives" and "priorities" in the first attempt.) And in some cases, you get them talking about shared values, and they will come up with something very close to a Mission Statement without even meaning to.

Sometimes – maybe usually – the place to start has to be with the senior generation alone, especially in a family of only young children. Here the focus is not as much shared values as it is transferable values. It's simple: what values do they want to teach their children? Again the objectives and priorities may take care of themselves. And a Mission Statement? Still a good idea, but maybe that can wait. It isn't nearly as much fun unless it's put together by at least two generations anyway.

2. *Listening*

Because the direction and bond of a family grows out of the family's values, not the counselor's values, the counselor must learn as much as possible from the family, and that means listening. Listening is more than just not talking. Listening means actively and curiously searching in the words you hear, and in the postures and gestures and faces – searching for something that reveals the makeup and passions of the client. Not just listening for what I need to fill in a blank in a document or craft the design of the next project or even ask the next follow-up question. Listening not just for the rational (which is our comfort zone), but for the emotional – even the irrational. Just listening for whatever there is to hear.

And lawyers for the most part are terrible at it.

Active, curious listening at first requires a totally blank slate. Then the slate begins to take on a structure, a framework, in which to place and process the next things that are said. But that framework must be the client's; it must be candidly volunteered by the client. In other words, it must not be the questioner's preconceived template. Here is an example:

> ATTORNEY: Before you signed the death certificate, had you taken the pulse?
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> CORONER: No.
>
> ATTORNEY: Did you listen to the heart?
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> CORONER: No.
>
> ATTORNEY: Did you check for breathing?
>
> CORONER: No.
>
> ATTORNEY: So, when you signed the death certificate, you weren't sure the man was dead, were you?

> CORONER: Well, let me put it this way. The man's brain was sitting in a jar on my desk. But I guess it's possible he could be out there practicing law somewhere.[12]

When listening, be sure to avoid preconceived templates.

Now just because the values that form the framework for all action must be the family's values, that does not mean that the counselor personally should have no values or should play no role besides listening. Indeed, the counselor must be prepared to help family members identify what is really important to them by prompting them with questions that are usually best when they are sharpened by the counselor's own values journey.

3. *Trust*

But understanding, gained by listening – and prompting – is just the second requirement of an effective facilitator. The first, remember, is trust. I had to mention trust first because it *is* first. But I want to talk about it second, because it occurs to me that trust, like understanding, is gained, in a larger way than we might think, by listening. That is because trust must grow – or, if you will, be earned. I can bring to an engagement expertise, experience, even some ideas, but I can't bring trust. Honesty is necessary for trust, and I can bring honesty – I *must* bring honesty – but I can't bring trust.

Trust must grow *in the client*. Listening is a good incubator because true listening demonstrates a client focus – it's about the client, not about me. There are two reasons why that is important. First, as I said, listening is informative – it is the only way to learn the client's values, objectives, and priorities, so as to be able to meaningfully guide a discussion or craft solutions by having a standard by which to judge relevance and usefulness. Second, listening is affirming. Only by truly listening and being truly committed to dealing with the family's concerns before promoting any agenda – even an agenda that is helpful to the family – will the counselor demonstrate that the family comes first. And that is essential to real trust.

Earning trust will usually also need follow-up. Trust is earned by making commitments and keeping them. The tougher the commitment, and the greater the risk of failing to keep it, the easier trust comes when the commitment is kept.

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[12] DAVID H. MAISTER, CHARLES H. GREEN & ROBERT M. GALFORD, THE TRUSTED ADVISOR 102 (Touchstone 2000). "Trusted advisor" is another term that has been used at this annual meeting. The term is not new. *See* Solomon (Sonny) Kamm, *How to Attract and Respond to the Needs of the Affluent—The Importance of Being a Trusted Advisor*, 21 ACTEC NOTES 312 (1996).

And we will respect the importance of trust as we should only if we regard it like a 4.0 average – it is hard to earn, harder to keep, easy to lose, and impossible to get back.

Then, as trust grows from listening – and from follow-up – so listening is enriched by trust, because the client is more willing to open up. Thus are understanding and trust built.

B. Time and Billing

But enough of the obvious. The problem is that these things take time. Especially the listening required to learn the client's non-technical framework in which the family's values, mission, and bonds must be built – that takes time. And that may be the best explanation why some lawyers are so bad at it. Either we don't have time or think we don't, or we do have time and want to bill for it.

There are two critical junctures in helping a family to discover for itself the strength and commitment it needs where it is hard to bill for our time. The initial listening is the first. The effect of turning off the clock on a client's willingness to talk can be miraculous. Fortunately, it is the more experienced among us in our profession who are most suited for this kind of work – judgment and wisdom born of experience are the third requirement of a good counselor – and they are likely to be at least somewhat less driven by billable hour targets. But here is a nifty secret. The counselor, the lawyer, the ACTEC Fellow who gains trust and understanding and fosters comfort by the time spent in listening off the clock can charge a higher hourly rate for work done on the clock. It doesn't always happen, but it happens often enough to be no accident, that we can bill a lot of hours as long as we don't bill all of them.[13]

C. Family Meetings

Our subject was the family meeting. Much has been written and said about family meetings, including this week in Seminar B and in the Business Planning Committee.[14] The formats that work are no doubt as diverse as families themselves. I will just touch on some of the obvious markers related to family meetings.

How often? It will vary. But probably two or three or four times a year. The family that is more geographically dispersed and therefore

[13] In a setting where hourly billing is not the basis for compensation, these concerns are not as great.

[14] Business Planning Committee Meeting, ACTEC 2011 Annual Meeting (Mar. 9, 2011); Robert K. Kirkland, Anita J. Siegel, & Harry W. Wolff, Jr., *Materials for Seminar B: They Don't Call Me Counselor For Nothing – Adding Value to Your Product and Strengthening Your Client Relationships*, ACTEC 2011 Annual Meeting (Mar. 10, 2011).

maybe more distant might actually need to schedule such meetings more often.

Where? Once a year this should probably be more of a "retreat" and be scheduled offsite, perhaps even at a vacation spot, and should span two or three days, with a liberal portion of free time or "nonbusiness" activities. If that is done, the locations and formats of the other meetings might not matter as much.

Who should attend? Families must figure out their own preferences regarding ages for introducing the youngest generations, the suitability and timing of including spouses, and so forth.

About spouses: I understand the potential for divorce or other reasons the participation of spouses could be awkward. But a spouse (or other companion) is often the person who is most influential in the family member's life. So ordinarily it is good for them to be there. If desired, we can still provide mechanisms in the estate planning or business governance documents that prevent assets from passing outside the family.

Now a word about individual family members' lawyers: No. Lawyers can agitate each other like atoms in a nuclear reaction, with the same outcome. So my bias would almost always be to exclude separate counsel, or to have a separate meeting or portion of the meeting especially for them.

What should be the agenda? It is important to keep it as non-technical as possible without misstating or glossing over material information. When giving information or advice, make it understandable, yet provide reasoning – better still, lead the family in their own reasoning. For example, "here's one answer; can you think of any others?" Or simply "Does this make sense to you?" Remember to include – even emphasize – the "soft" stuff: how the kids are, how school is going, sports, and so forth. Try at every major meeting to feature some tribute to an older family member – or remembrance of a deceased family member. Use photos, videos, writings, memorabilia, or, if nothing else is available, just good stories. This will remind participants of what they have in common. There should be candor about where wealth came from, as well as where it goes.

What should be the ground rules? Not *Robert's Rules of Order*, of course. But there should be a commitment to rules of civility, appropriate to the ages and closeness of the participants. For example, everyone should promise to try to say "I disagree," not "You're wrong." Even "I *think* you're wrong" is better – it does a better job of judging the message, not the messenger. The subjective "I" is almost always a better way to express disagreement than the judgmental "you." Every participant is entitled to a voice and is entitled to respect.

It is vital that the basic estate plans of the senior family members should be explained to the whole family. Use dollar amounts only in age-restricted meetings. For handouts, I would generally stick with summaries and diagrams of estate plans, not actual documents – it serves no purpose to encourage questions about the meaning of "per *stripes*" or "*interstate* succession," not to mention the tedious "administrative" provisions. But do not omit anything that might materially affect a beneficiary just because it is part of the "boilerplate" – for example, trustee succession, treatment of adoptions, "spendthrift" protection, and no-contest and other forfeiture provisions.

And of course all this information about the estate plan should be updated whenever there is a material change. Like communication in general, it should not wait for a quarterly or bi-annual meeting. The meeting is just an illustration. The communication the counselor seeks to encourage is ongoing – it is a mindset.

D. Special Considerations for Family Businesses

Habits of regular communication within the family are important even if there is no family "business" in the usual sense of the word. But if there is a business, all of the available learning and advice about business planning and business succession should come fully into play. Most experts recommend measures such as a family council separate from the business, the reality check of outside directors for all but the most simple businesses, and clear succession planning. The importance of such measures cannot be overstated.

We have all heard the stories and statistics about how many family businesses "fail" in the second generation and the third generation. And we all know that sometimes those failures could have been avoided if better planning and more transparent communication had occurred. But such statistics can be exaggerated and misleading if they do not appropriately define "failure." Merely closing a business, and certainly selling a business, is not necessarily a failure. Especially if the family receives proceeds from an orderly sale, the family business could by any standard have been a great success – for the fulfillment it brought for a time, for the contribution it made to the economy and community, for the sale proceeds it produced to invest for the future, and for the wisdom and courage of the family to sell when the time was right.

Business succession is the second occasion in which it might be prudent to offer to meet with the client without billing time. The biggest challenge in business succession is usually just getting the senior-generation CEO to consider letting go. Often the problem is one of two fears: What if my successors don't do as well? Or what if they do better? Or

think about this: If my work is my life, what does that make my retirement?

One solution might be to urge the CEO to envision reasonably likely scenarios and "walk through" them. Just as probate snags can be anticipated and dealt with by hypothetically "pre-administering" the estate, so the need for a clear business succession plan and timetable can be highlighted by walking through hypothetical developments. What if the founder and current CEO dies? Or becomes ill? Or incapacitated? Or missing? What if a certain son takes over? What will the daughter do? What if she takes over? What will her brother do? Does the company even need both of them anyway? Can they even work together? What would that look like? How would that work? Who would break ties? What if the rest of the family had voting stock? How would they react? What if they had nonvoting stock? Who wants to work hard just to benefit their inactive or absent siblings or cousins? Would they do that? Would they try to buy them out? How? With what? Would they succeed? And so forth.

Then factor in the possibility of outside managers, and go through it all again. How would the daughter like that? What would the son do then? And on and on.

But "on and on" is the issue here. The CEO's self-esteem can get a boost from such walk-throughs – it's being in control, it's better than suspecting that others are plotting secretly. And real problems and even solutions can be identified and addressed or scheduled to be addressed. Again, though, the commitment of the CEO to spend that kind of time – tough enough in ideal conditions – is invariably encouraged by the simple expedient of removing the billable hour concern.

So the counselor needs to be available to take the time both to learn the family's values in the first place and then as needed to feed back to the family the input it needs to follow up on those values, including not letting egos get in the way of sound planning.

IV. Ethics

Of course, whenever we have contact with so many people at the same time there are ethical implications. In the Summer 2009 issue of the *ACTEC Law Journal* (then it was the *ACTEC Journal*), Professor Mary Radford published an article entitled "Ethical Challenges in Representing Families in Family Limited Partnerships."[15] (There was also additional discussion of this point here at the Business Planning Committee meeting.) Mary's article, which I highly recommend, correctly

15 Mary F. Radford, *Ethical Challenges in Representing Families in Family Limited Partnerships*, 35 ACTEC J. 2 (2009).

describes the state of the ethical rules relating to multiple representation as "chaos."[16] The *ABA Model Rules of Professional Conduct* and the Comments on those Rules reveal an occasional effort to be helpful, but they are haphazard and inconsistent. The *ACTEC Commentaries on the Model Rules*[17] are consistently realistic. But despite those efforts, it is hard to separate the Model Rules from their roots, and the roots of the *Model Code of Professional Responsibility* that preceded them, and the roots of the *32 Canons of Professional Ethics* that preceded that – roots clearly grounded in the needs and limitations of litigation and other adversarial representation.[18]

By the way, I have spoken to the National College of Probate Judges, and I have seen and heard first-hand their great appreciation for the ACTEC Commentaries. The ACTEC Commentaries are one of the great success stories of this organization over the last two decades. The Fourth Edition was published in 2006, and when the Fifth Edition is published, I expect it to address with even more specificity many of the issues I will now turn to, in the context of the family counselor's role.

A. Conflicts

The easiest issue the first time around is the issue of conflicts of interest.

Model Rule 1.7 flatly prohibits "the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal."[19]

In other cases, without "informed consent, confirmed in writing,"[20] "the representation of one client" may not be "directly adverse to another client."[21] We estate planners are generally aware of those rules, and we avoid such conflicts.

Another type of conflict arises under Model Rule 1.7 when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client. . .."[22]

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16 *Id.* at 5.

17 ACTEC, COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf [hereinafter *ACTEC Commentaries*].

18 Perhaps the most thorough compilation of this history is found on the webpage of the American Bar Association's Center for Professional Responsibility, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited June 1, 2011).

19 MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(3).

20 *Id.* R. 1.7(b)(4). However, informed consent alone does not permit representation. *See id.* R. 1.7(b)(1)-(3).

21 *Id.* R. 1.7(a)(1).

22 *Id.* R. 1.7(a)(2).

Obviously, terms such as "significant risk" and "materially limited" make this more subjective and less bright-line. But, like direct conflicts, these conflicts can be avoided by withdrawal from the representation.

Estate planners are generally experienced in writing engagement letters to cover joint representations between spouses. It is not unusual for those engagement letters to provide that if a conflict arises – that is, if the interests of one spouse diverge from those of the other spouse – it might be necessary for the lawyer to withdraw from representing one or both of them.

ACTEC's Engagement Letters include the helpful addition that when there is a "conflict of interest" or "difference of opinion," the lawyer "can point out the pros and cons of [the] respective positions or differing opinions," without "advocating one of [the] positions over the other."[23] (Actually, in my experience with a husband and wife, I often *am* asked to "advocate," or choose between them when they disagree, and I do – but usually not about fundamental differences of view.)

The ACTEC Engagement Letters are essentially the same in this respect where multiple generations, not just spouses, are involved,[24] and it seems as if the principles ought to be the same, even when the larger number of people involved probably makes such conflicts or differences of opinion more likely.

Sometimes it is desirable to limit the obligation to withdraw by designating in the engagement letter the client who will get dropped and the client who will survive, if a conflict develops – or to say in the engagement letter that the lawyer gets to *choose* in that case. Not surprisingly, in the context of multiple generations, it is usually the senior generation that survives as clients.

But in some contexts these provisions seem to be simply attempts to obtain prospective consents to represent a client adverse to a former client. The ACTEC Commentaries state that "[a] client who is adequately informed may waive some conflicts that might otherwise prevent the lawyer from representing another person in connection with the same or a related matter."[25] A Comment to the Model Rules, added in 2002, states:

> The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that

[23] ACTEC, ENGAGEMENT LETTERS: A GUIDE FOR PRACTITIONERS 11 (2d ed. 2007), http://www.actec.org/Documents/misc/ACTECEngagementLetters-2ndEd.pdf.

[24] *Id.* at 17-24.

[25] *ACTEC Commentaries*, *supra* note 17, at 93.

> might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding.[26]

The problem is that under a Comment to the Model Rules, "[i]nformed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable *ways* that the conflict could have adverse effects on the interests of that client."[27] More bluntly, the *California Rules of Professional Conduct* require written consent following written disclosure "of the relevant circumstances and of the actual and reasonably foreseeable adverse *consequences* to the client or former client . . . ."[28] In other words, it is necessary to spell out the worst-case foreseeable scenarios.

We almost never do that – or all our clients would be scared off! They certainly would not consent. Conclusion: Most prospective waivers may be inadequate. At least they are risky.

B. Information Flow

But conflicts of interest are the easy issue – the first time around. The really vexing issue is the flow of information.

The basic rule – Model Rule 1.6 – is pretty simple: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation . . . ."[29]

But what about a joint representation? A joint *meeting* is no problem, because everyone is there. But what about a joint representation with occasional separate meetings? Comment [31] to Rule 1.7 (the conflict of interest rule) states:

> As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests . . . . The lawyer should, at the outset of the common representation and *as part of the process of obtaining each client's informed consent*, *advise each client that information will be shared* and that *the law-*

26 MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2010).
27 *Id.* R. 1.7 cmt. 18 (emphasis added).
28 CAL. RULES OF PROF'L CONDUCT R. 3-310(A)(1)-(2) (emphasis added).
29 MODEL RULES OF PROF'L CONDUCT R. 1.6(a).

> *yer will have to withdraw if one client decides that some matter material to the representation should be kept from the other*.[30]

So the lawyer "advise[s] each client that information will be shared." The clients give "informed consent." In other words, they consent "that information will be shared." Later, one of them "decides that some matter material to the representation should be kept from the other." But there is an agreement that the lawyer must tell that. So the lawyer follows the agreement and tells – right? One would think so, but the Comment says no, "the lawyer will have to withdraw." This fundamental schizophrenia of the Model Rules and the failure of the commentators to come down on one side or the other of this issue make the Model Rules unworkable in the context of serving as a counselor to families as this lecture envisions.

The unhelpfulness of the Model Rules in this area was confirmed by the 2008 ABA Legal Ethics Opinion 450,[31] which discussed the duties of lawyers hired by an insurance company to represent both an insured employer and an employee. Ignoring the encouragement of Comment [31] that the lawyer address the sharing of information "at the outset of the common representation,"[32] the Opinion viewed it as "highly doubtful" that consents will satisfy the "informed consent" standard if they are provided "before the lawyer understands the facts giving rise to the conflict,"[33] which will almost always be the case with the continuing counsel to a family that is contemplated by this lecture.

The confusion is aggravated by the fact that the *Restatement of Law Governing Lawyers* takes an opposite view. While the ABA Model Rules favor secrecy and withdrawal in the absence of an agreement (and maybe even with an agreement, as Comment [31] and Opinion 450 imply), the Restatement concludes that "[i]n the absence of such an agreement, the lawyer ordinarily is required *to convey communication* to all interested co-clients."[34]

That is why this subject is "chaos."

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30 *Id.* R. 1.7 cmt. 31 (emphasis added). Comment [31] does go on to state that "[i]n limited circumstances, it may be appropriate for the lawyer to proceed with the representation *when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential*." *Id.* (emphasis added). And that might be the best approach in some cases.

31 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-450 (2008). This paragraph in the text is an amplification of the original lecture.

32 MODEL CODE OF PROF'L CONDUCT R.1.7 cmt. 31.

33 Formal Op. 08-450, *supra* note 31, at 4-6.

34 RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 75, cmt. d (2000) (emphasis added). *See also* A v. B, 726 A.2d 924 (N.J. 1999) (analyzing the various viewpoints, but rejecting a "keep secrets" approach, in the context of the duty of the lawyer jointly representing a husband and wife who learns from a third party that the husband

The ACTEC Commentaries are much more accommodating of joint representations, and they offer this advice:

> When the lawyer is first consulted by the multiple potential clients, the lawyer should review with them the terms upon which the lawyer will undertake the representation, including the extent to which information will be shared among them . . . . The better practice in all cases is to memorialize the clients' instructions in writing and give a copy of the writing to the client[s].[35]

But even this advice is not entirely helpful, for four reasons. First, of course, it cannot eliminate the tension in the ABA Model Rules and Comments.

Second, it can stifle family participation in such discussions to present them with what amounts to a "waiver" at the beginning of the discussion.

Third, it does not easily fit the model of the family advisor this lecture contemplates. If the model is a kind of "representation" of the family from generation to generation, with new members added as they become adults or reach some other agreed-upon age, then there really is no time that "the lawyer is first consulted by the multiple potential clients" and no convenient way "to memorialize the [new] clients' instructions in writing and give [them] a copy of the writing."

It is just not practical to expect an 18-year-old who comes of age in a family used to a kind of multiple representation to give a solitary "in-

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fathered a child out of wedlock). This paragraph in the text is also an amplification of the original lecture.

[35] *ACTEC Commentaries*, *supra* note 17, at 75. The ACTEC Commentaries add:

> Before, or within a reasonable time after commencing the representation, a lawyer who is consulted by multiple parties with related interests should discuss with them the implications of a joint representation (or a separate representation, if the lawyer believes that mode of representation to be more appropriate and separate representation is permissible under the applicable local rules).. . . In particular, the prospective clients and the lawyer should discuss the extent to which material information imparted by either client would be shared with the other and the possibility that the lawyer would be required to withdraw if a conflict in their interests developed to the degree that the lawyer could not effectively represent each of them. The information may be best understood by the clients if it is discussed with them in person and also provided to them in written form, as in an engagement letter or brochure.

Id. at 91-92. The Commentaries even provide an illustration emphasizing this point:

> Lawyer (*L*) was asked to represent Husband (*H*) and Wife (*W*) in connection with estate planning matters. *L* had previously not represented either *H* or *W*. At the outset *L* should discuss with *H* and *W* the terms upon which *L* would represent them, including the extent to which confidentiality would be maintained with respect to communications made by each.

Id. at 92, Ex. 1.7-1.

formed consent" under the obvious pressure to conform to the model of the surrounding family members. Nor is it practical to expect the new participant in the family circle to go out and get separate counsel. By far the preferable approach is to just let it go so far as group meetings are concerned, until the new "client" actually wants to "*do*" something, such as sign a will or other document affecting legal rights or seek specific *legal advice* apart from the group.

Fourth, sometimes the flow of information just takes us back to conflict issues. While the issue of conflicts of interest may have been easy the first time around, the second time around it is not so easy. Unfortunately, no matter what the arrangement on confidentiality is, it is obvious that someone might blurt out something that could affect the counselor's ability to represent someone else who is a client. Rule 1.7 states that "[a] . . . conflict of interest exists if . . . there is a *significant risk* that the representation of one or more clients will be *materially limited* by the lawyer's responsibilities to another client, a former client, *or a third person*. . .."[36]

C. Secrecy Versus Loyalty

So what do you do if you have a duty, for example, to the parents, and one of the children, to whom you promised secrecy, says something about the parents that creates "a significant risk" that your representation of one or both parents will be "materially limited"? Conflicts of interest were the easy issue the first time around, because they can almost always be resolved by complete withdrawal. But in these circumstances is withdrawal good for the client? Is it good for the family if the family then must do without the counselor, or another counselor must start all over building trust and gaining understanding?

I think not. The duty of withdrawal stemming from secrecy concerns creates a situation that is impossible. Chaos!

Yet, consistent with the role of the counselor, the supremacy of client-focus, and the importance of free-ranging intra-family communication that are the focus of this lecture, we cannot accept impossibility; we cannot accept failure.

D. Reconciliation Within the Family

Still speaking as a fireman to an audience of architects, I will tell you that what's important is saving and preserving the family.

When there are conflicts, even direct conflicts, the family should be the place the conflicts are resolved and reconciliation is achieved, if at

[36] MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2010) (emphasis added).

all possible, and that reconciliation should be facilitated by the lawyer as counselor, not the lawyer as lawyer. As Abraham Lincoln wrote:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.[37]

Lincoln continued, in a somewhat different vein:

> Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife, and put money in his pocket? A moral tone ought to be infused into the profession which should drive such men out of it.[38]

Sometimes, of course, there must be litigation, because sometimes even the most well-meaning and effective peacemaker cannot secure peace without justice. Even Lincoln litigated, 175 times all the way to the Illinois Supreme Court, 51 times as sole counsel.[39] But if one agrees that the family itself should be the court of *first* resort, where does that leave us? If the adversity is viewed as a conflict that causes the lawyer to withdraw, the family loses the services of the trusted, understanding, and wise counselor at the very time those services are needed most. We must resist such a monstrous result. We cannot accept impossibility; we cannot accept failure.

V. Creed Over Code

I have titled this lecture "Creed or Code." What I am trying to capture is something higher than the Model Rules – or "Code" – that can avoid a monstrous result, avoid impossibility, prevent failure, resolve chaos. Something that, like the values of the family in the case of the family dialogue, can judge the relevance and usefulness of the applicable rules.

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[37] The Abraham Lincoln Ass'n, Notes for a Law Lecture, July 1,1850 *reprinted in* 2 Collected works of Abraham Lincoln 1809-1865 82 (Roy P. Basler et al. eds., Rutgers University Press 1953) *available at* http://showcase.netins.net/web/creative/lincoln/speeches/lawlect.htm.

[38] *Id.*

[39] Thirty-one of the 51 were decided in his favor. James S. Handy, Book Review, *Abraham Lincoln, the Lawyer-Statesman* 440 (Northwestern University Law Publication Association 1917).

Many state bars have adopted documents with titles like "A Lawyers Creed of Professionalism."[40] Surely that is the higher principle I am looking for! In fact, so important is the *Texas Lawyer's Creed*, mandated in 1989 by the Supreme Court of Texas, that its preamble proclaims: "I am committed to this Creed for no other reason than it is right."[41]

But the "Creeds" I have read, even the *Texas Lawyer's Creed*, seem to merely summarize the Model Rules, not transcend them.

So I must find that Creed within me, in the principle of simply *putting the client first* and in a commitment to that principle "for no other reason than it is right."

Arguably, the Model Rules themselves admit to subjection to higher principles. The Preamble to the Model Rules states: "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."[42]

And under the heading of "Scope," we read, "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself."[43]

Viewed favorably as those comments encourage us to do, the Model Rules, as I have said, reveal an occasional effort to be helpful, but in my view they fall short. For example, Rule 2.4 permits a lawyer to serve as a third-party neutral,[44] but Rule 1.12 would then bar that lawyer from an advocacy role.[45] Rule 5.7 permits a lawyer to step out of a lawyer role, but appears to contemplate distinct "businesses" of delivering "law-related services."[46] The examples given are "providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting."[47] Assuming that "psychological counseling" implies the practice of a trained and credentialed professional and not the psycho-

40 *See, e.g.,* ARIZ. ST. BAR, A LAWYER'S CREED OF PROFESSIONALISM OF THE STATE BAR OF ARIZONA (2005) *available at* http://www.myazbar.org/Members/creed.cfm.

41 *See* SUP. CT. TEX. & CT. CRIM. APP., A MANDATE FOR PROFESSIONALISM (1989) *available at* http://www.co.montgomery.tx.us/410dc/creed.pdf.

42 MODEL RULES OF PROF'L CONDUCT Preamble and Scope ¶ 9 (2010).

43 *See id.* Preamble and Scope ¶ 14.

44 *See id.* R. 2.4.

45 *Id.* R. 1.2.

46 *Id.* R. 5.7.

47 *Id.* R. 5.7, cmt. 9.

logical counseling we all do every day without admitting it, this list is not encouraging.

But the "law-related services" of Rule 5.7 are still the most convenient context for dealing with a family conflict for example (although with no attorney-client privilege), while still maintaining an attorney-client relationship with some or all of the family members. And of course, we truly will be giving advice that is by no means legal advice, including the personal advice and business judgment that the counselor of the Twenty-First Century cannot avoid.

I realize that Rule 5.7 might be read to require elaborate disclosures, perhaps acknowledged by the family members, before proceeding like a non-lawyer. If so, then the counselor must ask whether that very disclosure would likely widen the gap between disagreeing factions and therefore aggravate the conflict – for example, by giving each disagreeing faction one more unpleasant complication, losing an advisor, to blame each other for. It is also less likely that the counselor can get everyone's affirmative consent in a conflict environment anyway.

Again, because it may not be in the family's best interest for the counselor to withdraw and forgo reconciliation efforts, and it is certainly not in the family's best interest to aggravate the conflict, the counselor in such a case might have to consider whether such a reading of Rule 5.7 must yield to the higher Creed of placing the client first.

I understand the maxim that "I should not make the client's problem my problem." That has a place. But if the choices are avoiding my problem at the risk of aggravating the client's problem or continuing to seek a solution for the client's problem at the risk of stretching ethical rules that otherwise do not work anyway, how can I possibly justify not putting the client's interests first?

In a reconciliation effort, it will be obvious when trust has deteriorated to the point that the counselor's own participation can no longer be helpful. Then, hanging in there to seek reconciliation may actually have increased the likelihood that the only option for the counselor is to withdraw from representing everyone, even the presumed "favored" client. But again, as long as reconciliation was a reasonable possibility, the Creed of putting the client first can make such an attempt worth it, even at an increased risk to the lawyer's "business."

VI. Call to Action

We can do this. Many of you are doing this. If you are not, look for opportunities to try. If you are doing it timidly, be bold. If you are doing it boldly, encourage others.

These are unique opportunities. And those of you that accept this challenge, you are unique, but you are not alone, and you should not be

alone. Share your victories and challenges. Seek affirmation and wisdom – even correction – from your partners.

Of course, in some firms this style of practice would not be understood. Some have left the practice of law altogether to pursue goals like this in fiduciary or financial intermediary settings or in family offices or private trust companies. Earlier I mentioned the evolution of ACTEC's membership standards,[48] which would not permit counselors to families working in such settings to join ACTEC, although we are beneficiaries of the rich diversity offered by ACTEC Fellows who have migrated to such settings after joining ACTEC. I am not calling now for a reexamination of our membership standards in that regard, but I can envision a day when it might be time to do so.

Maybe you are in a small firm or solo practice. You have no partners to encourage or admonish you. You are still not alone. Reach out to other ACTEC Fellows; have lunch together. ACTEC Fellows, especially more experienced Fellows, be prepared to mentor, be prepared to listen, be prepared to be a reality check, especially for Fellows in small firms and solo practices. Those Fellows often will not be able to share identifying details, although they might share some general background facts to help you give advice. If so, don't go right back to your office and enter what you heard into an Internet search to try to discover the identity of the client. If a colleague is close to crossing a line of confidentiality, don't drag him or her over it. Remember that if "Counsel" is the family name that describes ACTEC to the world, then *"Trust" is our middle name.*

And finally, if there is no such thing as putting the client first without subordinating our own interests and therefore incurring some risk, and that risk leads to misunderstanding, and that misunderstanding gets one of us into real trouble, even though we have done right, then unfortunately not every jurisdiction has judges who specialize like members of the National College of Probate Judges do. And not every judge has the same appreciation for the ACTEC Commentaries or even ever heard of them. And – maybe most to the point – neither has every state bar disciplinary committee.

Your attendance here this morning ought to be taken as a covenant that when one of your brother or sister counselors you see sitting around you ever has a need for support because a technical rule is invoked to attack client-focused counsel, your character testimony, or even your standard-of-care expert testimony, will be as freely offered as if it were your actual brother or sister who was in need. When appropriate – which I expect will be rare, if ever – ACTEC itself, acting through

48 *See supra* Part I.

its officers and Board of Regents, should be available for the same rescue efforts. If not us, who? *"Trust" is our middle name.*

The counselor must be committed to the Creed of placing the client's interest first above all else – including self-interest, maybe even *especially* self-interest. The counselor must realize that nothing is built without risk, including family strength and transparency. The counselor must proclaim without reservation "I am committed to this Creed for no other reason than it is right."

There are people who say things like that and are dismissed with pity: "They are dreaming!" There are others who say things like that and are affirmed with admiration: "*They* are *dreamers*!" Be a dreamer. Be a counselor.