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Brother's Keeper: The Legal Ethics of Representing Family Members The Sixth Annual Symposium on Legal Malpractice and Professional Responsibility: Comment.

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COMMENT

BROTHER'S KEEPER: THE LEGAL ETHICS OF REPRESENTING FAMILY MEMBERS

JASON W. WHITNEY

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I. INTRODUCTION

Traveling through Alabama on a cross-country road trip over summer break, local authorities arrest two college students. The students, Stan and Bill, unwittingly confess believing they had been arrested for petty theft. Suddenly, Stan and Bill realize the mistake—they are being held for the murder of a convenience store clerk! After their appointed coun-

sel proves completely inept, the boys frantically begin discussing how to locate, hire, and pay for a private attorney. One of the boys suddenly has a flash of inspiration: a recent law school graduate in the family might be able to help them and do it for free. "Great! Who?" Bill inquires; "My cousin Vinny!" Stan responds.¹

The preceding paragraph comically illustrates a common issue that most attorneys eventually encounter at some point during their careers: family members seeking legal representation.² For some, this event happens soon after graduating and passing the bar examination when he or she officially becomes an attorney in the eyes of the law.³ Such was the case for Vincent "Vinny" Gambini in *My Cousin Vinny*.⁴ For others, family members may wait a number of years before approaching the attorney, permitting him to obtain practical experience before handing him important family matters.⁵ Of course, for the honored few, the solicitation begins during or even before law school, when most law students only begin to realize the vast amount of information they must learn.⁶ Yet, no matter the time, almost every attorney inevitably deals with the issue of representing a relative at least once in her career.⁷

Undoubtedly, some lawyers will refuse to represent family members entirely when these inquiries from relatives arise, perhaps wary of step-

1. MY COUSIN VINNY (20th Century Fox 1992).

2. See, e.g., *id.* (portraying the representation of a family member). While this author could find no formal study documenting the frequency of family members seeking legal advice or representation, anecdotal evidence strongly suggests the near ubiquity of such occurrences. Numerous conversations with law students, law professors, and law practitioners all indicate a high rate of legal interaction between attorneys and family members.

3. See TEX. GOV'T CODE ANN. § 81.051 (Vernon 2005) (requiring bar membership to practice law in the state of Texas).

4. MY COUSIN VINNY (20th Century Fox 1992). Vinny successfully passed the bar examination on his sixth try. *Id.*

5. See Brook K. Baker, *Traditional Issues of Professional Responsibility and a Transformative Ethic of Client Empowerment for Legal Discourse*, 34 NEW ENG. L. REV. 809, 817-20 (2000) (describing the process by which new attorneys achieve legal competence). Baker explains that "especially for young lawyers, . . . so much of their learning must occur on the job, the only cure for inexperience being experience itself." *Id.* at 820; see also Douglas R. Richmond, *Subordinate Lawyers and Insubordinate Duties*, 105 W. VA. L. REV. 449, 469-70 (2003) (noting that "youth or inexperience" may provide a mitigating factor in disciplinary actions).

6. See Suzanne Valdez Carey, *An Essay on the Evolution of Clinical Legal Education and Its Impact on Student Trial Practice*, 51 U. KAN. L. REV. 509, 510-22 (2003) (providing a summary of the historical development of student practice). See generally Donald M. Zupanec, Annotation, *Propriety and Effect of Law Students Acting as Counsel in Court Suit*, 3 A.L.R.4TH 358 (1981 & Supp. 2006) (summarizing and discussing cases that examine the effect of court-approved law student representation).

7. See, e.g., MY COUSIN VINNY (20th Century Fox 1992) (portraying the representation of a family member by an inexperienced attorney).

ping into or causing an intra-family conflict.⁸ Other attorneys, possibly more sympathetic to the plight of their blood relatives or in-laws, choose to act as the family's lawyer but only in the limited context of their area of expertise.⁹ Finally, some lawyers opt to act as the general family attorney in all contexts, from business transactions to divorces, from probate to criminal defense.¹⁰

The latter situation, where an attorney represents the family in all matters, featured more prominently in years past than in the present time.¹¹ The form of a general practitioner of law has gradually diminished as law has become more specialized, requiring a greater commitment to become knowledgeable in any particular area.¹² However, the representation of relatives still commonly occurs, albeit on a smaller scale.¹³

When approached by an individual seeking representation, attorneys must always look to the relevant rules of professional conduct, advisory opinions, and case law to evaluate whether or not the representation ad-

8. See, e.g., DEBORAH J. MANUS & MICHAEL H. RILEY, BASIC PRACTICE SERIES: THE PROBATE AND ADMINISTRATION OF ESTATES IN MASSACHUSETTS § 1.2 (3d ed. 2006) (describing methods to avoid intra-family conflicts in estate division). The authors observe that “[c]onflicts within a family are often greatly exacerbated by the process of dividing up a deceased family member’s estate. The attorney should be alert to those conflicts, attempt to minimize them, and position himself or herself to avoid becoming a casualty of intrafamily war.” *Id.*; see also John J. Scroggin, *Protecting and Preserving the Family: The True Goal of Estate Planning, Part II—Some of the Tools*, PROB. & PROP., July-Aug. 2002, at 34, 36-38 (observing that many clients would prefer to preserve family harmony even at the expense of reduced inheritance).

9. See MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 1 (2006) (acknowledging that “[e]xpertise in a particular field of law may be required in some circumstances”); see also Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1054-60 (1994) (summarizing the institutional and legislative changes that have encouraged specialization in attorneys).

10. See MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 1 (2006) (commenting that “[i]n many instances, the required proficiency is that of a general practitioner”); Geoffrey C. Hazard, Jr., *The Changing Professional Environment and the Ideal of General Practice*, 30 HOFSTRA L. REV. 759, 760-61 (2002) (discussing the concept of a general practice lawyer). Hazard notes that in the nineteenth century, “[t]he subject matter was ‘general’ in that most lawyers could do all the kinds of work that their clientele might require. On this basis it could properly be described as ‘general practice.’” *Id.* at 760.

11. See Geoffrey C. Hazard, Jr., *The Changing Professional Environment and the Ideal of General Practice*, 30 HOFSTRA L. REV. 759, 761 (2002) (recognizing that “[t]he ‘general practitioner’ thus has become a vanishing breed. This transformation of law practice began over a century ago, although the traditional image of general practice was still widely held until about one professional generation ago—thirty years or so”).

12. See *id.* (identifying the “difficulty in maintaining a satisfactory level of competence in a legal world of increasingly specialized knowledge” as one cause for the decline of small law firms).

13. See *id.* (noting the decline in the general practice lawyer).

heres to ethical guidelines.¹⁴ The primary sources of ethical guidance for Texas practitioners are the Texas Disciplinary Rules of Professional Conduct (Texas Disciplinary Rules), advisory opinions from the Supreme Court of Texas Professional Ethics Committee (Texas Professional Ethics Committee), and Texas case law.¹⁵ On a quick examination, these sources indicate that the representation of family members by an attorney does not generally trigger ethical problems.¹⁶ Problems may arise, however, depending on the specific circumstances of the representation,¹⁷ and these sources provide surprisingly little information regarding how to handle specific situations that could create ethical problems when representing a family member.¹⁸ Thus, Texas attorneys must wade, virtually unassisted, into the often confusing mire of professional conduct to identify and avoid hazardous ethical situations involving family members.¹⁹

This Comment seeks to provide practical guidance in evaluating the ethical issues for Texas attorneys considering representing a relative. Part II discusses the history of professional responsibility, the characteristics of representing family members, and the common ethical problems arising from family representation. Part III examines sources of ethical gui-

14. See Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 316-17 (2002) (identifying "at least four important spheres of lawyer self-governance regulating the conduct of lawyers"). The spheres include (1) the "ethics rules adopted by each jurisdiction," (2) "enforcement of ethics rules," (3) "court proceedings relying on ethics rules," and (4) "ethics opinions." *Id.* at 316.

15. See Vinson & Elkins L.L.P., *Texas Legal Ethics*, at 0.1:100, http://www.law.cornell.edu/ethics/tx/narr/TX_NARR_0.HTM (last visited Feb. 24, 2007) (identifying sources of ethics law and guidance for Texas practitioners) (on file with the *St. Mary's Law Journal*). Those sources include the following: (1) "[t]he Texas Disciplinary Rules of Professional Conduct," (2) "Texas common law (*i.e.*, judge-made law)," (3) "[f]ederal and state statutes," (4) "[e]thics opinions (issued by a committee of the State Bar of Texas created for that purpose)," (5) "Model Rules adopted by the American Bar Association," and (6) "rules of other jurisdictions outside Texas." *Id.*

16. See, *e.g.*, Tex. Comm. on Prof'l Ethics, Op. 468, 54 TEX. B.J. 731, 731 (1991) (concluding that spousal representation is acceptable if no other violations of the ethical rules occur).

17. See, *e.g.*, *id.* (concluding that spousal representation would not be acceptable where the attorney-spouse would also testify in the suit and either the attorney-spouse did not notify opposing counsel or the client would not suffer substantial hardship due to the disqualification).

18. See, *e.g.*, TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08, 7.03, 7.05, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005 & Supp. 2006) (TEX. STATE BAR R. art. X, § 9) (mentioning family representation only three times and only tangentially to the general ethical issues).

19. See *generally* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01-9.01 (addressing ethical problems with general rules followed by comments, but providing little guidance for many everyday, practical ethical issues).

dance from Texas and other states which discuss the representation of family members and further analyzes how the legal profession addresses these ethical situations. Part IV summarizes the ethical considerations of representing family members and provides practitioners with a systematic basis for analyzing and deciding whether the representation of family members satisfies ethical requirements. Finally, this Comment suggests changes to the Texas Disciplinary Rules to clarify and facilitate evaluation of ethical issues surrounding family representation.

II. BACKGROUND

A. *History of Legal Ethics and Rules of Professional Conduct*

The first guidelines for the professional conduct of lawyers were the American Bar Association's Canons of Professional Ethics issued in 1908.²⁰ Most states adopted some form of the Canons of Professional Ethics within six years of its creation.²¹ Although the canons set guidelines for conduct and provided disciplinary action for violations, it was not adopted as mandatory in all states, leading to inconsistent enforcement.²² In Texas, the Texas Bar Association, with voluntary membership at the time, adopted the Canons of Professional Ethics in 1909.²³

In 1969, the American Bar Association's Model Code of Professional Responsibility, a partially mandatory and partially voluntary code, superseded the Canons of Professional Ethics.²⁴ "Texas adopted the Texas

20. MODEL CODE OF PROF'L RESPONSIBILITY Preface (1980), available at <http://www.abanet.org/cpr/mrpc/mcpr.pdf>; Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics-I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469, 479 (2001); see also Michael Ariens, *The Ethics of Copywriting Ethics Rules*, 36 U. TOL. L. REV. 235, 237-41 (2005) (providing a historical overview of the development of a code of ethical conduct in the United States).

21. Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 47 SMU L. REV. 199, 210 (1994).

22. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.2 (West Publ'g Co. 1986) (explaining the general lack of force of the American Bar Association *Canons of Professional Ethics*); Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics-I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469, 484 (2001) (stating that even with the *Canons of Professional Ethics*, in most states "possible malpractice claims would have devolved into open-ended swearing matches between experts").

23. Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 47 SMU L. REV. 199, 210 n.89 (1994); *Proposed Rule 8a of the Texas Rules of Civil Procedure*, 67 TEX. B.J. 116, 117 (2004) (citing 28 TEX. BAR ASS'N, PROCEEDINGS OF THE ANN. SESS. 47, 85 (1909)); Harriet Richman, *Texas Legal Ethics Research Guide*, <http://www.law.uh.edu/Libraries/Publications/ResearchGuides/TexasLegalEthics.htm> (last visited Feb. 24, 2007) (on file with the *St. Mary's Law Journal*).

24. See MODEL CODE OF PROF'L RESPONSIBILITY Preface (1980), available at <http://www.abanet.org/cpr/mrpc/mcpr.pdf> (noting that the "committee produced the Model Code of Professional Responsibility which was adopted by the House of Delegates in 1969 and

Code of Professional Responsibility in 1971 consisting of Canons, Ethical Considerations, and Disciplinary Rules.”²⁵ Thereafter, the Texas Code of Professional Responsibility remained the official code governing lawyer conduct in Texas for nearly two decades.²⁶

In 1983, the American Bar Association created the latest iteration of model professional regulations, the Model Rules of Professional Conduct.²⁷ In response to the new model rules, “the State Bar of Texas began considering possible changes to the Texas Code.”²⁸ Finally, “[i]n 1990, the Texas Code of Professional Responsibility was repealed by an order of the Texas Supreme Court dated October 17, 1989.”²⁹ Replacing the old Texas Code of Professional Responsibility were the new Texas Disciplinary Rules of Professional Conduct, which took effect on January 1, 1990, and remain in effect at the present time.³⁰

became effective January 1, 1970”); Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 47 SMU L. REV. 199, 210-11 (1994) (describing the promulgation of the Model Code of Professional Responsibility).

25. Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 47 SMU L. REV. 199, 211 n.90 (1994).

26. See Barbara Hanson Nellermeoe & Fidel Rodriguez, Jr., *Professional Responsibility and the Litigator: A Comprehensive Guide to Texas Disciplinary Rules 3.01 Through 4.04*, 28 ST. MARY'S L.J. 443, 447-48 (1997) (detailing the subsequent replacement of the Texas Code of Professional Responsibility).

27. MODEL RULES OF PROF'L CONDUCT Preface (2006). Between its creation and 2002, the rules and comments were amended on fourteen different occasions. *Id.* The most recent modifications came on August 12, 2002, with the adoption of amendments to rules 5.5 and 8.5. *Id.*

28. Vinson & Elkins L.L.P., *Texas Legal Ethics*, at 0.1:103, http://www.law.cornell.edu/ethics/tx/narr/TX_NARR_0.HTM (last visited Feb. 24, 2007) (on file with the *St. Mary's Law Journal*).

29. Barbara Hanson Nellermeoe & Fidel Rodriguez, Jr., *Professional Responsibility and the Litigator: A Comprehensive Guide to Texas Disciplinary Rules 3.01 Through 4.04*, 28 ST. MARY'S L.J. 443, 447 (1997); see Vinson & Elkins L.L.P., *Texas Legal Ethics*, at 0.1:103, http://www.law.cornell.edu/ethics/tx/narr/TX_NARR_0.HTM (last visited Feb. 24, 2007) (describing the adoption of the Texas Rules of Professional Conduct) (on file with the *St. Mary's Law Journal*).

30. Barbara Hanson Nellermeoe & Fidel Rodriguez, Jr., *Professional Responsibility and the Litigator: A Comprehensive Guide to Texas Disciplinary Rules 3.01 Through 4.04*, 28 ST. MARY'S L.J. 443, 447-48 (1997); Vinson & Elkins L.L.P., *Texas Legal Ethics*, at 0.1:103, http://www.law.cornell.edu/ethics/tx/narr/TX_NARR_0.HTM (last visited Feb. 24, 2007) (on file with the *St. Mary's Law Journal*).

B. *Sources of Legal Ethical Problems*

An attorney plays three primary roles when representing a client: First, the lawyer represents the interests of the client.³¹ Second, the lawyer fulfills an important role in the adversarial American legal system.³² Third, the lawyer acts on behalf of his own personal interests.³³ As a representative of the client, the attorney owes that client a fiduciary duty.³⁴ This fiduciary responsibility encompasses the duties of competence, loyalty, and confidentiality.³⁵ As officers of the courts, lawyers play a crucial role in the adversarial system.³⁶ The basic structure of an adversarial system

31. See NATHAN M. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* 1-3 (Aspen Publishers 3d ed. 2004) (explaining the fiduciary obligations that an attorney owes to his or her clients).

32. See *id.* at 1, 3-4 (describing lawyers as “officers of the court functioning in an adversarial system of justice”); GEOFFREY C. HAZARD, JR. ET AL., *PLEADING AND PROCEDURE: STATE AND FEDERAL* 47 (Found. Press 9th ed. 2005) (explaining the adversary system along with its strengths and weaknesses).

33. See NATHAN M. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* 1, 4-5 (Aspen Publishers 3d ed. 2004) (commenting on the numerous aspects of life that occupy an individual’s time).

34. See *id.* at 1-3 (defining the characteristics of a lawyer’s fiduciary obligations); TEX. DISCIPLINARY R. PROF’L CONDUCT 1.05 cmt. 1 (speaking of “the fiduciary relationship existing between lawyer and client”).

35. NATHAN M. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* 1-3 (Aspen Publishers 3d ed. 2004). See generally Deborah A. DeMott, *The Lawyer As Agent*, 67 *FORDHAM L. REV.* 301 (1998) (examining the attorney-client relationship from an agency law point of view). “Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” *Id.* at 302 (quoting *RESTATEMENT (SECOND) OF AGENCY* § 1 (1958)). However, DeMott opines that while the law of agency provides a strong foundation for understanding the attorney-client relationship, it “does not by itself capture all of the legal consequences of relationships between lawyers and clients.” *Id.* at 301. For example, the Texas Disciplinary Rules of Professional Conduct state:

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client’s affairs and reporting about them to the client or to others.

TEX. DISCIPLINARY R. PROF’L CONDUCT preamble ¶ 2.

36. NATHAN M. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* 3-4 (Aspen Publishers 3d ed. 2004); GEOFFREY C. HAZARD, JR. ET AL., *PLEADING AND PROCEDURE: STATE AND FEDERAL CASES AND MATERIALS* 47 (Found. Press 9th ed. 2005).

consists of (1) zealous advocates for each party (the lawyers); (2) a neutral decisionmaker deciding issues of law and fact (the judge and jury); and (3) fair rules of procedure designed to effect substantial justice.³⁷ The idea is that justice will be done and the truth discovered if each side presents its best argument to the neutral decision makers.³⁸ As such, lawyers act as an essential component in the American system; in the ideal situation, attorneys serving the best interests of their clients act in unison to bring about justice for both parties involved.³⁹ Finally, the lawyer acts on behalf of her own personal interests and values.⁴⁰ These self-interested motivations can include financial concerns, moral standards, family

37. See Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—“Much Ado About Nothing?”*, 46 HASTINGS L.J. 679, 764 (1995) (outlining the basic elements of the adversarial system); see also NATHAN M. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* 3-4 (Aspen Publishers 3d ed. 2004) (describing the professional conduct of an adversarial lawyer).

38. See GEOFFREY C. HAZARD, JR. ET AL., *PLEADING AND PROCEDURE: STATE AND FEDERAL CASES AND MATERIALS* 47-49 (Found. Press 9th ed. 2005) (emphasizing the distinctive nature of the adversarial system in that each side presents the facts, issues, and evidence and relies on a passive decision maker to decide); Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1060-66 (1975) (arguing in favor of the adversarial system as “one of the most efficient and fair methods designed for finding” the truth). Freedman explains:

[The adversarial] system proceeds on the assumption that the best way to ascertain the truth is to present to an impartial judge or jury a confrontation between the proponents of conflicting views, assigning to each the task of marshalling and presenting the evidence for its side in as thorough and persuasive a way as possible. The truth-seeking techniques used by the advocates on each side include investigation, pretrial discovery, cross-examination of opposing witnesses, and a marshalling of the evidence in summation. The judge or jury is given the strongest case that each side can present, and is in a position to make an informed, considered, and fair judgment.

Id. at 1065. The main alternative to an adversarial system is the so-called “inquisitorial system, used in countries of the civil law tradition such as France and Germany.” GEOFFREY C. HAZARD, JR. ET AL., *PLEADING AND PROCEDURE: STATE AND FEDERAL CASES AND MATERIALS* 47 (Found. Press 9th ed. 2005). In the inquisitorial “system, an active judge controls the development of the case and determines the law and finds the facts by his inquiries at trial concerning evidence ordinarily identified by the parties.” *Id.*

39. See TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 1 (stressing the need for high ethical standards in order for our system of law to function correctly). As expressed in the Texas Disciplinary Rules, “[l]awyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.” *Id.*

40. See NATHAN M. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* 1, 4-5 (Aspen Publishers 3d ed. 2004) (detailing the many aspects that compete for priority in an attorney's life).

considerations, and any of the other aspects that each individual considers when making a decision.⁴¹

When an attorney's three roles—first as the client's representative, second as a functionary of the legal system, and third as an individual—coincide, as they often do, ethical problems generally do not occur.⁴² Ethical problems arise, however, when these three competing interests conflict in some way.⁴³ For example, a conflict may arise when the client asks an attorney to act in some way that the attorney finds personally offensive, but legal, thus creating a conflict between the fiduciary obligation to the client and the attorney's personal interest.⁴⁴ Alternatively, the situation may occur where the attorney acts on behalf of his client in a way that, while not illegal, clearly takes advantage of the legal system in a way that circumvents justice, thus creating a conflict between the duty to the client and the administration of justice.⁴⁵ Lastly, the attorney may possess a personal interest to act in a manner contrary to the adversarial system, thus creating a conflict between the attorney's personal interest and his role in the adversarial system.⁴⁶

C. *Family Members: Not Your Ordinary Clients*

Generally, the relationship with a family member client will differ in a number of important ways from the relationship with the average unrelated client.⁴⁷ The major differences identified and discussed below are as follows: (1) the existence of extra-legal relationships with the client; (2)

41. *Id.*

42. See MODEL RULES OF PROF'L CONDUCT preamble ¶ 9 (2006) (indicating that ethical problems do not occur when different interests do not collide).

43. See *id.* (noting that “[v]irtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living”); NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 1 (Aspen Publishers 3d ed. 2004) (reasoning that “[t]he perplexing nature of these problems usually flows from the fact that troubling issues of professional ethics involve tensions or conflicts among [the] three ideas that are central to the lawyer’s role”).

44. See NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 5 (Aspen Publishers 3d ed. 2004) (giving examples of when an attorney’s personal interests conflict with the client’s interests). For example: “A lawyer who strongly supports the rights of gays and lesbians may represent a testator who has decided to disinherit his gay son.” *Id.*

45. See *id.* at 4 (offering the example of a client seeking to file a lawsuit which the attorney knows to be frivolous).

46. See *id.* at 3-5 (describing an attorney’s roles as officer of the court and as an individual with personal interests).

47. See Robert J. Condlin, “*What’s Love Got to Do with It?*”—“*It’s Not Like They’re Your Friends for Christ’s Sake*”: *The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. 211, 215 (2003) (highlighting general differences between family members

the existence of relationships with the client's family; (3) a high level of client familiarity with the attorney's personal life; and (4) the likelihood of a modified agreement for payment.⁴⁸ These differences affect the attorney-client relationship in both obvious and subtle fashions.⁴⁹

First, the presence of social relationships outside the legal representation represents one important way in which family member clients differ from the average unrelated client.⁵⁰ The representation of a family member often carries a high probability of seeing and interacting with the family member in settings outside the legal relationship.⁵¹ Family members often meet one another on a regular, if infrequent, basis at holidays, family get-togethers and reunions, and during significant changes in the family structure.⁵² Conversely, the average unrelated client is often a stranger to, or only mildly acquainted with, the attorney before legal representation begins.⁵³ While a relationship other than a strictly legal one can develop over the course of representing a client, the average unrelated client only has a professional relationship with the attorney.⁵⁴ Therefore, when accepting representation of an unrelated client, neither

and clients in so far as clients "are not family, where the decision to love is more or less inherited, and they usually are not social friends where the decision to love is chosen").

48. See generally *id.* (analyzing extensively the aspects of an attorney-client relationship).

49. See *id.* at 215-30 (illustrating the difficulty of precisely defining and understanding the attorney-client relationship).

50. See Betty Carter & Monica McGoldrick, *Overview to THE EXPANDED FAMILY LIFE CYCLE: INDIVIDUAL, FAMILY, AND SOCIAL PERSPECTIVES* 5 (Betty Carter & Monica McGoldrick eds., Allyn & Bacon 3d ed. 1999) (expressing the "belie[f] that individual development takes place only in the context of significant emotional relationships and that the most significant relationships are family relationships"); Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83, 113 n.159 (2003) (disagreeing with the "conception of the lawyer-client relationship as a 'friendship'"). But see Robert K. Vischer, *Legal Advice As Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 256-57 (2006) (providing the view that "analogizes the attorney-client relationship to a friendship, arguing that the attorney 'has a special care for the interests of those accepted as clients, just as his friends, his family, and he himself have a very general claim to his special concern'" (quoting Charles Fried, *The Lawyer As Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1067 (1976))).

51. See Betty Carter & Monica McGoldrick, *Overview to THE EXPANDED FAMILY LIFE CYCLE: INDIVIDUAL, FAMILY, AND SOCIAL PERSPECTIVES* 1 (Betty Carter & Monica McGoldrick eds., Allyn & Bacon 3d ed. 1999) (explaining that individuals generally experience all aspects of life within the context of families).

52. See *id.* at 202 (remarking that "[l]ife cycle events and transitions such as birth, marriage, and death are most frequently marked with familiar rituals").

53. See Dawn M. Evans, *Ten Ways to Improve Your Practice and Stay Out of Trouble*, MICH. B.J., Sept. 2006, at 28, 29 (commenting that an attorney is a "total stranger" to the potential client during the initial conversation).

54. See William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1137-38 (1988) (noting that "[l]awyering that is done directly for individuals often can be

counsel nor client typically expects to regularly interact in social settings outside the legal representation.⁵⁵

A second major difference between family member clients and unrelated clients arises from the family relationship itself and involves the interaction with other family members.⁵⁶ Ordinarily, an attorney does not interact with a client's family members.⁵⁷ While a client's family members may be curious about the client's legal affairs, these individuals typically would not regularly speak with the attorney unless legally involved with the case or issue.⁵⁸ However, the lawyer representing a family member often confronts not only the possibility of seeing the client on a regular basis in settings outside the legal relationship, but also faces the distinct possibility of dealing with the client's family—the lawyer's own family as well—on a regular basis.⁵⁹ Arguably, the more distant the relationship between the attorney and related client, the more attenuated will

done efficiently only on a high volume basis that provides little opportunity for developing a personal relation with clients").

55. *See id.* at 1138 (explaining that frequently, "lawyers are in it for the money" and the attorney's personal interest in the attorney-client relationship extends no further than financial gain).

56. *See* Roberta K. Flowers, *To Speak or Not to Speak: Effect of Third Party Presence on Attorney Client Privilege*, 2 NAT'L ACAD. OF ELDER L. ATT'YS J. 153, 154 (2006) (explaining that most clients do not involve their families in legal business).

57. *See id.* (discussing the low level of interaction between the attorney and the client's friends and family). Flowers declares the following:

Every day in law firms across the nation, clients arrive with spouses, friends and family members in tow. The friends and family may come for a variety of reasons. They come to support the client, encourage the client's actions, or merely to provide transportation. In the majority of cases, the friends or family members remain in the waiting room while the attorney consults with the client. It is simply understood that the client meeting is confidential and therefore will be held between the client and attorney only.

Id. (citations omitted).

58. *See id.* at 161-62 (providing one reason why clients may not involve families in their legal affairs: "Courts have generally held that the presence of spouses, family, or friends will waive the attorney-client privilege. Waiver has been found even when the family member or friend arranged for the representation"). *But see* Jennifer S. Gormley, *Ethical Concerns When Dealing with the Elder Client*, COLO. LAW., Oct. 2005, at 27, 27 (noting increased family involvement in the legal affairs of elder clients due in part to capacity concerns). In the situation of elder persons, "[o]ften, family members or friends want to be involved in the attorney-client relationship and to participate in the attorney-client meetings to assist elder clients in remembering or understanding what is discussed." *Id.*

59. *See* Betty Carter & Monica McGoldrick, *Overview to THE EXPANDED FAMILY LIFE CYCLE: INDIVIDUAL, FAMILY, AND SOCIAL PERSPECTIVES 3* (Betty Carter & Monica McGoldrick eds., Allyn & Bacon 3d ed. 1999) (remarking that society should "recognize our connectedness in life—regardless of the particular family structure or culture—with those who went before us and those who follow after").

be the interaction with interested family members.⁶⁰ Nevertheless, the mere existence of an attorney-client relationship with a relative guarantees that on some level the attorney will have to deal with inquisitive and curious family members at some time.⁶¹

The third difference in representing a relative arises from the fact that family member clients typically possess a significantly higher level of familiarity with the attorney than an average unrelated client would possess.⁶² The family member client often knows the attorney's personal information that would be typically unavailable to ordinary clients: the attorney's home telephone number and home address, who the attorney's spouse is and where he or she works, even where the attorney's children go to school.⁶³ The average unrelated client would not have access to that type of information unless the attorney provided the information.⁶⁴

Lastly, the agreement for payment of services between the attorney and a family member client often differs from the agreement between the attorney and an average unrelated client.⁶⁵ An attorney will more likely provide a discount for services rendered to a family member client than to an unrelated client.⁶⁶ Thus, a related client often receives some type of

60. *See id.* (noting that in America nuclear families often live on their own at great distances from the extended family).

61. *See id.* at 69-70 (illustrating that while different cultures define *family* in different ways, each nonetheless exhibits substantial familial interactions among the members).

62. *See* Robert J. Condlin, "What's Love Got to Do with It?"—"It's Not Like They're Your Friends for Christ's Sake": *The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. 211, 295-96 (2003) (highlighting the difference between lawyers and friends). Condlin comments that "lawyers and clients limit their contacts to formally scheduled and paid for meetings, in offices (and on golf courses), to talk about work, whereas real friends have the home phone number, meet when needed, anywhere, and at any time, and talk about everything important in one another's lives." *Id.*

63. *See* Stephen W. Comiskey, *A Good Lawyer: Secrets Good Lawyers [and their best clients] Already Know*, 66 TEX. B.J. 170, 172 (2003) (hinting at the wisdom (or rather lack thereof) in giving a client personal information by offering the following advice: "If you give your clients your home phone number, then expect they'll call you at home").

64. *See Internal, Cultural, & Management Issues Law Firms Must Note*, COMPENSATION & BENEFITS FOR L. OFF., Mar. 2005, at 1 (indicating that law firms have begun providing clients with the attorneys' home phone numbers for easier communication).

65. *See, e.g.,* Michael A. Mogill, *Professing Pro Bono: To Walk the Talk*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5, 21-22 (2001) (noting the fact that "statistics indicate that many lawyers do no pro bono work, and that those who do work either for charitable organizations, or *for relatives or friends*, or for organizations not involved in social change") (emphasis added).

66. *See* Steven K. Berenson, *A Cloak for the Bare: In Support of Allowing Prospective Malpractice Liability Waivers in Certain Pro Bono Cases*, 29 J. LEGAL PROF. 1, 23 (2005) (explaining that "[s]ome lawyers consider providing free assistance to a friend or close relative pro bono activity, regardless of the recipient's means"); Deborah L. Rhode, *Pro Bono in Principal [sic] and in Practice*, 26 HAMLINE J. PUB. L. & POL'Y 315, 318 (2005)

fee reduction or outright pro bono service from the attorney in the family.⁶⁷ This generosity typically does not afflict the attorney-client relationship with the average unrelated client.⁶⁸

Naturally, the conditions discussed above could arise in attorney-client relationships other than the representation of a family member.⁶⁹ However, these characteristics commonly occur with family members and impact any relationship with a family member client.⁷⁰ Because of the differences between representing one's relatives and representing an ordinary client, ethical problems arising from family representation will dif-

(reporting that "most pro bono service benefited friends, relatives, and employees of lawyers and their clients"); Deborah Rhode, *Profits and Professionalism*, 33 *FORDHAM URB. L.J.* 49, 64 (2005) (explaining that the pro bono efforts of many lawyers go towards "favors for clients and their relatives, or the personal legal matters of partners and their families"); Thomas R. Tinder, *The Tinder Box: "A Case in Point"*, *W. VA. LAW.*, Sept.-Oct. 2005, at 46, 47 (expressing the sentiment that "all of us [lawyers] provide pro bono legal services whether it is to our family, to groups and organizations in which we participate, to family members or to citizens who seek our assistance"). Particularly revealing is Rhode's examination of pro bono statistics from the few jurisdictions that provide the data. Deborah L. Rhode, *Pro Bono in Principal [sic] and in Practice*, 26 *HAMLIN J. PUB. L. & POL'Y* 315, 326 (2005). The information from New York indicated a high level of assistance to family members. *See id.* at 327 (noting that while 47% of New York lawyers report doing pro bono work, three-quarters include helping friends and relatives).

67. *See, e.g.*, Deborah L. Rhode, *Pro Bono in Principal [sic] and in Practice*, 26 *HAMLIN J. PUB. L. & POL'Y* 315, 318 (2005) (indicating that pro bono work often involves friends or family members).

68. *See* Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 *B.C. L. REV.* 455, 490 (2006) (concluding that "[t]he business reasons for which lawyers ordinarily enter the attorney-client relationship suggest that they will emphasize economic rather than outward-regarding considerations").

69. *See* Robert J. Condlin, "What's Love Got to Do with It"—"It's Not Like They're Your Friends for Christ's Sake": *The Complicated Relationship Between Lawyer and Client*, 82 *NEB. L. REV.* 211, 295-96 (2003) (explaining how the relationship between friends can be very close). Except for the fact that family are not chosen, Condlin's description of a friend could equally apply to a family member:

[F]riends have the home phone number, meet when needed, anywhere, and at any time, and talk about everything important in one another's lives. Friends know one another as persons, their hopes, their fears, their beliefs, their tastes, their hobbies, what they like to do for fun, what they lie awake at night worrying about, what they hope to make of their lives, what concerns they have for their children, what they are most proud of or most embarrassed about having done, and the like. They are chosen for their qualities as persons, how loving, forgiving, understanding, insightful, and honest they are, and not for any technical skill or specialized knowledge they might possess.

Id. at 296.

70. *See* Betty Carter & Monica McGoldrick, *Overview to THE EXPANDED FAMILY LIFE CYCLE: INDIVIDUAL, FAMILY, AND SOCIAL PERSPECTIVES 1* (Betty Carter & Monica McGoldrick eds., Allyn & Bacon 3d ed. 1999) (emphasizing the importance of family relationships and the family life cycle on "individual identity and development").

fer from ethical situations arising from ordinary clients.⁷¹ As one would expect, the common ethical problems of representing relatives include conflicts of interest,⁷² complications in attorney-client confidentiality,⁷³ and fee considerations.⁷⁴ The remainder of this Comment will analyze these problems based on the relevant sources for ethical guidance—rules of professional conduct, advisory opinions from state ethics boards and the American Bar Association, and case law.⁷⁵

III. ANALYSIS

A. Representation of Family Members in Texas

1. Texas Disciplinary Rules of Professional Conduct

The rules of professional conduct for the jurisdiction in which the practitioner works generally provide the starting point for the analysis of professional responsibility and ethical concerns.⁷⁶ These rules traditionally specify the precise standards that attorneys must meet when conducting

71. See Robert J. Condlin, "What's Love Got to Do with It"—"It's Not Like They're Your Friends for Christ's Sake": *The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. 211, 295 (2003) (differentiating the attorney-client relationship from the relationship with a friend or family member).

72. See Tex. Comm. on Prof'l Ethics, Op. 468, 54 TEX. B.J. 731, 731 (1991) (discussing various conflicts of interest in spousal representation).

73. See Jennifer S. Gormley, *Ethical Concerns When Dealing with the Elder Client*, 34 COLO. LAW. 27, 27 (2005) (noting that because children of elder clients seek involvement in legal affairs of their parents, there is a possibility of compromising the elder client's attorney-client privilege).

74. See S.N. *ex rel.* J.N. v. Pittsford Cent. Sch. Dist., 448 F.3d 601, 605 (2d Cir. 2006) (examining the right of a parent-attorney to recover attorneys' fees under the Individuals with Disabilities Education Act).

75. See Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 316-17 (2002) (identifying the primary sources of ethical guidance for lawyers); Vinson & Elkins L.L.P., *Texas Legal Ethics*, at 0.1:100, <http://www.law.cornell.edu/ethics/tx/narr/> (last visited Feb. 24, 2007) (identifying the primary sources of ethical guidance for Texas practitioners in particular) (on file with the *St. Mary's Law Journal*).

76. See, e.g., TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 10 (stating that "[the Texas Disciplinary Rules of Professional Conduct] are *imperatives*, cast in the terms 'shall' or 'shall not'" (emphasis added). While clearly indicating that lawyers must comply with the Texas Disciplinary Rules of Professional Conduct, the preamble further notes that "[t]he rules and [c]omments do not, however, exhaust the moral and ethical considerations that should guide a lawyer." *Id.* ¶ 11.

themselves professionally.⁷⁷ In Texas, the Texas Disciplinary Rules govern the professional responsibilities of attorneys.⁷⁸

In general, the Texas Disciplinary Rules rarely mention specific situations that cause ethical problems.⁷⁹ Instead, the rules consist primarily of general requirements followed by extensive comments discussing the application of the rules.⁸⁰ Thus, the rules lay out only the general principles governing lawyer conduct in Texas and discuss only in broad terms situations causing ethical problems.⁸¹ With respect to the issue of representation of family members, the Texas Disciplinary Rules do not expressly

77. See MODEL RULES OF PROF'L CONDUCT preamble ¶ 14 (2006) (stating that "[t]hese [rules] define proper conduct for purposes of professional discipline"). The American Bar Association's Model Rules of Professional Conduct state that a "[f]ailure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process." *Id.* ¶ 19.

78. See TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 10 (explaining that "[t]he Texas Rules of Professional Conduct define proper conduct for purposes of professional discipline"); see also *Koch Oil Co., a Div. of Koch Indus. v. Anderson Producing, Inc.*, 883 S.W.2d 784, 787 (Tex. App.—Beaumont 1994) (stating that the "Texas Disciplinary Rules of Professional Conduct are mandatory in character because they establish the minimum level of conduct below which no lawyer can fall" (citing *Warrilow v. Norrell*, 791 S.W.2d 515, 519 (Tex. App.—Corpus Christi 1989, writ denied))), *rev'd on other grounds*, 929 S.W.2d 416 (Tex. 1996). The Supreme Court of Texas sets the rules of professional conduct under the authority granted by the State Bar Act. See TEX. GOV'T CODE ANN. § 81.024(a) (Vernon 2005) (commanding that "[t]he supreme court shall promulgate the rules governing the state bar").

79. See NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 15 (Aspen Publishers 3d ed. 2004) (describing the American Bar Association's Model Rules of Professional Conduct as "set[ting] forth general principles applicable to all areas of practice"). The Texas Disciplinary Rules follow the same basic form as the American Bar Association's Model Rules of Professional Conduct. See *Am. Home Assurance Co. v. Unauthorized Practice of Law Comm.*, 121 S.W.3d 831, 837 (Tex. App.—Eastland 2003, pet. granted) (noting that "[t]he Texas Disciplinary Rules of Professional Conduct . . . , adopted in 1990, were modeled after the American Bar Association's Model For Professional Conduct"). One problematic effect of a general rules system is the presence of a "gap between general professional rules and specific problems that lawyers encounter in practice." NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 15 (Aspen Publishers 3d ed. 2004).

80. See TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 10 (describing how "[c]omments also frequently illustrate or explain applications of the rules, in order to provide guidance for interpreting the rules and for practicing in compliance with the spirit of the rules"). The drafters of the Texas Disciplinary Rules intended the comments to be purely illustrative and took special care to note that "[t]he [c]omments do not . . . add obligations to the rules and no disciplinary action may be taken for failure to conform to the [c]omments." *Id.*

81. See *id.* ¶ 10, ¶ 11 (dividing the Texas Disciplinary Rules into separate "rules" and "[c]omments," with "rules" broadly describing the ethical rules and "[c]omments" providing illustrative guidance).

address any particular concern with a separate rule.⁸² However, family representation does arise within the context of the broader rules in several instances.⁸³

The first mention of family relationships occurs in Rule 1.08, which defines certain transactions that are prohibited by conflict of interest principles.⁸⁴ Rule 1.08(b) states: "A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, *except where the client is related to the donee.*"⁸⁵ The exception indicates that a per se conflict of interest does not arise when the recipient of the gift, either the attorney or his relative, is related to the client.⁸⁶ Instruments giving substantial gifts to the attorney or his family are therefore acceptable only when the client is also a family member.⁸⁷ One classic example of this type of representation is the preparation of a parent's will by a child-attorney.⁸⁸ In this instance, the Texas Disciplinary Rules seek to avoid interfering with representation of family members by excluding a lawyer's relatives from the general conflict of interest rule.⁸⁹

The Texas Disciplinary Rules further mention family relationships in the rules pertaining to solicitation.⁹⁰ Rule 7.03 prohibits live in-person solicitation of prospective clients,⁹¹ while Rule 7.05 places restrictions

82. See generally TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01-9.01 (providing many general rules while failing to define any specific rule defining the ethical constraints in representing family members).

83. See *id.* 1.08 (prohibiting certain transactions except when the transaction involves a family member client); *id.* 7.03 (mentioning family relationships in the context of prohibited employment solicitations); *id.* 7.05 (referring to family relationships in the context of prohibited solicitations to prospective clients).

84. *Id.* 1.08.

85. *Id.* 1.08(b) (emphasis added); *cf.* MODEL RULES OF PROF'L CONDUCT R. 1.8(c) (2006) (defining "related persons [to] include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship"). Thus, the American Bar Association's Model Rules of Professional Conduct Rule 1.8(c) appears to envision a somewhat broader sense of the word "related." See *id.* (including grandchildren, grandparents, and other close individuals).

86. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(b) & cmt. 1.

87. See *id.* 1.08 cmt. 3 (explaining that "[p]aragraph (b) recognizes an exception where the client is a relative of the donee").

88. See *id.* 1.08(b) (permitting gifts in the situation where the client is related to the attorney either directly or through an immediate family member).

89. See *id.* (creating an exception to the general prohibition on substantial gifts to the attorney or her family if the client is related to the attorney either directly or through an immediate family member).

90. See *id.* 7.03 (mentioning family relationships in the context of prohibited employment solicitations); TEX. DISCIPLINARY R. PROF'L CONDUCT 7.05 (referring to family relationships in the context of prohibited solicitations to prospective clients).

91. *Id.* 7.03.

and requirements on solicitations not in the public media (e.g., letters to prospective clients, recorded telephone advertisements, and email advertisements).⁹² Both rules, which moderately restrict the ability of attorneys to solicit business, provide exceptions for soliciting family members.⁹³ While the solicitation rules pertain to the mechanism of acquiring clients rather than directly to the representation of clients, these rules offer an insight into the breadth of permissible family representation.⁹⁴ Under Rule 7.03(a), an attorney may not solicit employment in person if, among other limitations, “the lawyer has no family . . . relationship” to the individual.⁹⁵ The clear implication is that an attorney can freely and ethically solicit family members in person and thereby profit from the familial relationship.⁹⁶ The Texas Disciplinary Rules do not define a *family relationship*, but at a minimum this would likely include members in the lawyer’s immediate family, if not the more distant members.⁹⁷ Rule 7.05 similarly restricts the non-public media solicitations that an attorney may make to prospective clients.⁹⁸ However, Rule 7.05(f)(1) provides an exception for communications “directed to a family member.”⁹⁹ While once again leaving *family member* undefined, the rule clearly contemplates attorneys taking advantage of their relationships with family members to turn a profit.¹⁰⁰ These two rules indicate that a lawyer incurs no penalty for using knowledge of his family’s affairs for personal gain, at least so far as client acquisition is concerned.¹⁰¹

92. *Id.* 7.05.

93. *See id.* 7.03(a) (prohibiting in-person solicitation of persons “with whom the lawyer has no family . . . relationship”); *id.* 7.05(f)(1) (imposing restrictions on non-public media solicitations except for those “directed to a family member”).

94. *See* TEX. DISCIPLINARY R. PROF’L CONDUCT 7.01-7.07 (regulating how information is disseminated regarding legal services, including all aspects of solicitation).

95. *Id.* 7.03(a).

96. *See id.* 7.03 cmt. 1 (stating that “in-person or telephone solicitations are permitted where the prospective client . . . has a family . . . relationship with the lawyer”).

97. *See id.* 1.08(b) (applying the definition of “parent, child, sibling, or spouse” for the familial exception to the general conflict of interest rule).

98. *See id.* 7.05 (imposing requirements and restrictions on solicitations made to prospective clients).

99. TEX. DISCIPLINARY R. PROF’L CONDUCT 7.05(f)(1).

100. *See id.* 7.05 cmt. 7 (stating that “[p]aragraph (f) provides that the restrictions in paragraph (b) and (c) do not apply in certain situations [such as family representation] because the dangers of deception, harassment, vexation and overreaching are quite low”).

101. *See id.* 7.03(a) (permitting employment solicitation of an attorney’s relatives); *id.* 7.05(f)(1) (eliminating the constraints on solicitations to potential clients when directed at an attorney’s relatives).

2. Texas Ethics Opinions

Advisory opinions issued by the state ethics boards and the American Bar Association provide a second source of instruction for evaluating ethical problems.¹⁰² Advisory opinions frequently are non-binding on state courts, including Texas, and thus do not preclude liability.¹⁰³ Nonetheless, advisory opinions carry persuasive value,¹⁰⁴ especially in states where a supreme court committee issues the opinions, such as the Texas Professional Ethics Committee.¹⁰⁵

Of the 556 advisory opinions issued by the Texas Professional Ethics Committee,¹⁰⁶ only one directly addresses the situation of representing a

102. See Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 313 (2002) (explaining that a prudent lawyer should turn to advisory ethics opinions for guidance because the professional ethics rules provide few answers to practical, everyday problems); see also Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67, 74 (1982) (citing the American Bar Association's Committee on Ethics and Professional Responsibility as a source for interpreting ethical rules and evaluating ethical behavior).

103. TEX. GOV'T CODE ANN. § 81.092(c) (Vernon 2005) (stating that "Committee [on Professional Ethics] opinions are not binding on the supreme court"); *In re Meador*, 968 S.W.2d 346, 349 n.1 (Tex. 1998) (orig. proceeding) (describing how the American Bar Association's Committee on Ethics and Professional Responsibility "issues advisory opinions on ethics questions of general interest submitted by attorneys. While the Committee's opinions are often cited as persuasive authority by state disciplinary bodies, the opinions do not bind those bodies") (citations omitted); Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 314 (2002) (noting that "in many jurisdictions the ethics opinion will be purely advisory and not provide a safe harbor against discipline"); accord CAL. RULES OF PROF'L CONDUCT R. 1-100(A) (2007) (stating that "[a]lthough not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct").

104. See Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67, 73-74 (1982) (offering four ways that the American Bar Association's advisory opinions are used and commenting on its considerable influence); see also Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 318, 331-32 (2002) (noting that in many jurisdictions, ethics opinions are persuasive, if not binding, when courts interpret ethical duties, and some state supreme courts give greater deference to ethics opinions in order to create continuity of interpretation).

105. See TEX. GOV'T CODE ANN. §§ 81.091-.095 (Vernon 2005) (establishing the Committee on Professional Ethics and directing the Texas Supreme Court to appoint members thereto).

106. See Texas Center for Legal Ethics and Professionalism, Texas Professional Ethics Opinions, http://www.txethics.org/reference_opinions.asp (last visited Feb. 24, 2007) (indi-

family member: Opinion 468.¹⁰⁷ Opinion 468 discusses a broad range of ethical issues faced by a husband-attorney representing his wife.¹⁰⁸ Specifically, the inquirer posed three questions regarding the representation:

1. Can a husband who is an attorney represent his wife in a matter in which he is not a named party and where he shares no common liability with his wife but in which he will likely testify as a witness for his wife?
2. Can a husband who is an attorney represent his wife in a matter in which he is not a named party but in which he shares common liability and interests with his wife, and in which [he] will necessarily appear as a witness for his wife?
3. Is it ethically permissible for an attorney husband who represents his wife successfully in a suit to accept attorneys fees awarded by the court, if otherwise legally entitled to them?¹⁰⁹

The first two questions posed by the inquirer represent permutations of the classic advocate-witness conflict of interest problem.¹¹⁰ In the hypothetical scenarios, the lawyer would act as both counsel and witness in the same matter, with the added element of a spousal relationship between

cating that the total number of advisory opinions is currently 556) (on file with the *St. Mary's Law Journal*).

107. See Tex. Comm. on Prof'l Ethics, Op. 468, 54 TEX. B.J. 731, 731 (1991) (presenting various concerns stemming from spousal representation). Many of the Texas Professional Ethics Committee's advisory opinions address other ethical problems stemming from family relationships, but not family representation. See Tex. Comm. on Prof'l Ethics, Op. 539, 65 TEX. B.J. 368, 368 (2002) (examining the "represent[ion of] defendants in criminal cases in the county in which the lawyer's spouse is an assistant district attorney"); Tex. Comm. on Prof'l Ethics, Op. 528, 62 TEX. B.J. 388, 388 (1999) (considering the question of whether a conflict of interest exists when the opposing party employs the spouse of one of the firm's attorneys); Tex. Comm. on Prof'l Ethics, Op. 501, 58 TEX. B.J. 492, 492 (1995) (analyzing conflict of interest concerns "from representing a husband in a divorce action under circumstances where the wife previously consulted with the lawyer's former law partner concerning a divorce but did not actually hire the former partner"); Tex. Comm. on Prof'l Ethics, Op. 494, 57 TEX. B.J. 786, 786 (1994) (assessing whether a brief consultation with a husband disqualifies the attorney from representing the wife in a subsequent divorce action); Tex. Comm. on Prof'l Ethics, Op. 32, 13 TEX. B.J. 555, 555 (1950) (discussing whether a district attorney may prosecute a relative); Tex. Comm. on Prof'l Ethics, Op. 31, 13 TEX. B.J. 555, 555 (1950) (probing whether an attorneys' use of a deceased relative's name on letterhead violates ethical rules against self-laudation).

108. See Tex. Comm. on Prof'l Ethics, Op. 468, 54 TEX. B.J. 731, 731 (1991) (examining multiple issues surrounding spousal representation—in particular, conflicts of interest and recovery of attorneys' fees).

109. *Id.*

110. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 108 (2000) (describing the rules governing when a lawyer serving as counsel in a matter may also act as a witness).

the lawyer and the represented party.¹¹¹ With respect to the Texas Disciplinary Rules, Rule 3.08 prohibits an attorney from “accept[ing] or continu[ing] employment as an advocate . . . if the lawyer knows or believes that the lawyer is or may be a witness.”¹¹² While generally limiting the ability to represent clients in such circumstances, Rule 3.08 does not create an outright ban on representation.¹¹³ As noted in Opinion 468, the rule provides five different exceptions.¹¹⁴

To analyze whether the attorney could ethically represent his wife while serving as a witness, the Texas Professional Committee applied Rule 3.08 to the questions.¹¹⁵ Initially, the Texas Professional Ethics Committee noted that a lawyer representing a family member can anticipate being called as a witness when he is closely involved with the client family member or is involved in the events precipitating the litigation.¹¹⁶ Thus, on the surface, the two hypothetical scenarios would create an advocate-witness conflict of interest in violation of the Texas Disciplinary Rules.¹¹⁷ However, the Texas Professional Ethics Committee focused on the exceptions to Rule 3.08 as potential means of permitting the representation.¹¹⁸ In particular, the fifth exception, “substantial hardship on the client,” provided a possible basis for permitting the husband-attorney

111. Tex. Comm. on Prof'l Ethics, Op. 468, 54 TEX. B.J. 731, 731 (1991).

112. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08(a).

113. See *id.* 3.08 (providing exceptions that permit an attorney to simultaneously act as a witness and as counsel in a case).

114. *Id.* 3.08(a)(1)-(5). A lawyer may provide and continue representation, even if the lawyer will testify as a witness in the case, if:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
- (3) the testimony relates to the nature and value of legal services rendered in the case;
- (4) the lawyer is a party to the action and is appearing pro se; or
- (5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

Id.

115. Tex. Comm. on Prof'l Ethics, Op. 468, 54 TEX. B.J. 731, 731 (1991) (analyzing and debating the potential ethical problems stemming from spousal representation).

116. See *id.* (illustrating how personal involvement between a lawyer and his client may create an ethical dilemma). Opinion 468 noted that the attorney would almost certainly be called as a witness for his wife-client for the following reasons: (1) “because of the nature of the matter” (child support and visitation rights), and (2) because the attorney “ha[d] been involved in the dealings” of the case. *Id.*

117. See TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08(a) (forbidding attorneys to accept representation if the possibility of being a witness exists).

118. See Tex. Comm. on Prof'l Ethics, Op. 468, 54 TEX. B.J. 731, 731 (1991) (discussing the exceptions to Texas Disciplinary Rule 3.08).

to represent his wife.¹¹⁹ According to the Texas Professional Ethics Committee, under the substantial hardship exception, a husband-attorney may represent his wife despite the possibility of testifying so long as “he complies with Rule 3.08, i.e.[,] gives prompt notice to opposing attorney that he/she will testify[,] and that disqualification will work a substantial hardship on the client.”¹²⁰ Although the Texas Professional Ethics Committee did not discuss how to prove the requirement of substantial hardship, the opinion noted “that the right to have counsel of one’s choosing can be restricted only if the *opposing party* can show actual prejudice or other compelling reasons.”¹²¹ Therefore, the initial burden rests on the party seeking disqualification to prove that it has suffered actual prejudice; only if shown would the party with the conflict of interests be required to prove a substantial hardship to avoid disqualification.¹²²

The third question posed by the inquirer concerns the ever important issue of money: Can an attorney-husband receive attorneys’ fees from the representation of his spouse?¹²³ In response to the inquiry, the Texas Professional Ethics Committee simply stated that “if the attorney husband can ethically represent his wife in this matter, there is no ethical reason to prohibit his receiving attorney’s fees.”¹²⁴ In answering this question, the Texas Professional Ethics Committee presented no legal arguments to support its conclusory statement.¹²⁵ However, the suggestion that some other ethical reason could prevent the recovery of attorneys’ fees immediately raises thoughts of potential ethical conflicts between the attorney’s personal interest in the case and his responsibility to function as an independent advocate.¹²⁶

119. *See id.* (emphasis omitted) (stressing that where an attorney is not a named party to a case, he may represent the named spouse in that matter provided that his disqualification would impose an undue burden on the spouse).

120. *Id.* (emphasis omitted).

121. *Id.* (emphasis added) (citing *Ayres v. Canales*, 790 S.W.2d 554, 558 (Tex. 1990)).

122. *See id.* (hinting that the party with the conflict of interest need not show a substantial burden until the opposing party has shown “actual prejudice or other compelling reasons”).

123. Tex. Comm. on Prof’l Ethics, Op. 468, 54 TEX. B.J. 731, 731 (1991).

124. *Id.*

125. *See id.* (asserting that if an attorney is entitled to receive fees for his services as an advocate for a client, the fact that the attorney is married to the client should not operate as a bar to that receipt).

126. *See* NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 4-5 (Aspen Publishers 3d ed. 2004) (explaining the role that an attorney’s personal interests play in the attorney-client relationship).

In particular, Rule 1.06 of the Texas Disciplinary Rules outlines the general rule regarding conflicts of interest.¹²⁷ Rule 1.06(b)(2) states that an attorney “shall not represent a person if the representation . . . reasonably appears to be or become[s] adversely limited by the lawyer’s . . . own interests.”¹²⁸ The comments to Rule 1.06 further explain that “[l]oyalty to a client is impaired . . . in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer’s own interests.”¹²⁹ The comment clarifies that “[a] potential possible conflict does not itself necessarily” create an ethical violation.¹³⁰ Rather, the “critical questions” ask whether a conflict does or will exist, and if so whether the conflict “will materially and adversely affect the lawyer’s *independent professional judgment* in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.”¹³¹

The attorney in Opinion 468 obviously had a large personal stake in the outcome of the litigation, emotionally if not legally.¹³² If the attorney’s professional judgment becomes clouded because of his interest in the litigation, he certainly should not represent his wife,¹³³ and consequently, should not be entitled to any attorneys’ fees. In addressing the propriety of recovering attorneys’ fees in Opinion 468, the Texas Professional Ethics Committee correctly recognizes the possibility of other ethical considerations coming into play but fails to address the strong possibility of conflicting personal interests apparent from the facts.¹³⁴

Taken in its entirety, the sole advisory opinion discussing family representation seems to indicate that family relationships add nothing to the standard ethical and professional responsibility analysis.¹³⁵ The Texas Professional Ethics Committee engaged in a routine analysis of advocate-witness conflict of interest and presented no reasoning in support of its

127. See TEX. DISCIPLINARY R. PROF’L CONDUCT 1.06 (prescribing the general rule for legal conflicts of interests).

128. *Id.* 1.06(b)(2).

129. *Id.* 1.06 cmt. 4.

130. *Id.*

131. *Id.* (emphasis added).

132. See Tex. Comm. on Prof’l Ethics, Op. 468, 54 TEX. B.J. 731, 731 (1991) (indicating the husband-attorney’s significant involvement in the matter even though “[he] is not a named party to the suit”).

133. See TEX. DISCIPLINARY R. PROF’L CONDUCT 1.06(b)(2) (commanding that an attorney shall not continue to represent a client if the lawyer’s personal interests limit the ability to fulfill the duties to the client).

134. See Tex. Comm. on Prof’l Ethics, Op. 468, 54 TEX. B.J. 731, 731 (1991) (failing to provide a substantial analysis on the issue of attorneys’ fees).

135. See *id.* (evaluating the spousal representation ethical dilemma with little apparent consideration toward the complexities of family member attorney-client relationships).

conclusions about attorneys' fees.¹³⁶ The fact that a familial relationship was involved had little apparent bearing on the conclusions.¹³⁷ The underlying message seems clear: representation of a family member does not create any additional requirements in analyzing ethical problems.¹³⁸

3. Texas Case Law

While relatively few opinions exist based on the representation of relatives, one particular Texas case provides an interesting glimpse into the world of family representation and reveals the complex problems that can arise.¹³⁹ In *Robertson v. ADJ Partnership, Ltd.*,¹⁴⁰ McGraw, a lawyer and family member by marriage, acted as the family's general attorney by handling its business, real estate, and probate matters.¹⁴¹ After the death of McGraw's father-in-law, a dispute arose between McGraw and his sister-in-law, Adams, over the amount charged for attorneys' fees.¹⁴² Eventually, the bickering degenerated into a full-blown legal battle over certain transactions involving the family's real estate and mineral properties, which were co-owned by McGraw, Adams, and various other family members.¹⁴³ Adams accused McGraw of breaching his fiduciary duty by engaging in transactions for his own personal gain.¹⁴⁴ McGraw argued that no fiduciary relationship existed as to the transactions at issue, and therefore, no breach could have occurred.¹⁴⁵ At trial, the jury "found a

136. *See id.* (relying almost entirely on Rule 3.08 of the Texas Disciplinary Rules to analyze the situation and failing to provide reasoning for the opinion regarding recovery of attorneys' fees).

137. *See id.* (mentioning the involved family relationship only to clarify identification of the parties).

138. *See id.* (examining the questions addressed to the committee, but neglecting to discuss other potential ethical problems apparent from the facts).

139. *See Robertson v. ADJ P'ship, Ltd.*, 204 S.W.3d 484, 486-91 (Tex. App.—Beaumont 2006, pet. denied) (analyzing the duties that arise in a family representation situation).

140. 204 S.W.3d 484 (Tex. App.—Beaumont 2006, pet. denied).

141. *Robertson*, 204 S.W.3d at 486-87 (summarizing the relationships between the parties). McGraw "worked in the family's businesses and took care of [his father-in-law's] legal matters." *Id.* at 486. In addition, McGraw "acted as counsel of record in the probate proceedings for [his father-in-law's and mother-in-law's] estates." *Id.* at 486-87.

142. *Id.* at 487. The court mentioned a "disagreement over a \$54,000.00 bill submitted by McGraw for legal services." *Id.*

143. *See Robertson*, 204 S.W.3d at 488-91 (detailing the transactions that were the subject of the litigation).

144. *See id.* at 486 (noting that appellants "challenge[d] the legal and factual sufficiency of the jury's findings on damages, on breach of fiduciary duty, and fraud").

145. *See id.* at 492 (stating that McGraw testified that "he felt they had no attorney-client relationship whatsoever").

relationship of trust existed between McGraw and [Adams]" and that a breach had occurred.¹⁴⁶

On appeal, the court examined whether there was indeed any type of fiduciary relationship, attorney-client or otherwise, between McGraw and his sister-in-law.¹⁴⁷ In analyzing the issue, the court first noted that "[t]o the extent McGraw provided legal services to Adams, such a formal fiduciary relationship existed."¹⁴⁸ While the court did not cite any sources in support of this statement, the Texas Disciplinary Rules clearly indicate that a fiduciary relationship exists for attorney-client relationships.¹⁴⁹ Similarly, the court stated that "to the extent McGraw acted as escrow agent, a formal duty of disclosure arose."¹⁵⁰ Finally, the court applied the theory that "[e]ven in the absence of a formal fiduciary relationship, an informal fiduciary duty arises in some personal relationships."¹⁵¹ With respect to business transactions, the duty arises if a "special relationship of trust and confidence . . . exist[s] prior to, and apart from, the agreement [that] made the basis of the suit."¹⁵² The court then turned to the relationship between McGraw and Adams to discern whether an informal fiduciary duty existed.¹⁵³

For the transactions at issue, the court reasoned that the record did not clearly show that McGraw acted as Adams's attorney, and McGraw's actions as escrow agent only established a duty of disclosure, not a fiduciary relationship.¹⁵⁴ Thus, a formal fiduciary relationship did not exist based on the first two grounds identified by the court.¹⁵⁵ With respect to the theory of an informal fiduciary relationship, the appellants argued that McGraw's prior legal services—including the probate work, the handling of the family business, and the real estate and mineral transactions—did

146. *Id.* at 491.

147. *Robertson v. ADJ P'ship, Ltd.*, 204 S.W.3d 484, 491-93 (Tex. App.—Beaumont 2006, pet. denied).

148. *Id.* at 491.

149. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05 cmt. 1 (asserting that a "fiduciary relationship exist[s] between lawyer and client").

150. *Robertson*, 204 S.W.3d at 491 (citing *City of Fort Worth v. Pippen*, 439 S.W.2d 660, 664-65 (Tex. 1969)).

151. *Id.* (citing *Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex. 2005) (per curiam)).

152. *Id.* (quoting *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 288 (Tex. 1998)).

153. *See id.* at 491-92 (examining the relationship between the attorney, his sister-in-law, and the family business to determine if a duty existed to Adams).

154. *See id.* at 491 (indicating that the evidence did not support a finding of formal fiduciary duty under either theory because McGraw ran most of the transaction funds through an escrow account that belonged to his law office).

155. *See Robertson*, 204 S.W.3d at 491 (suggesting that the evidence did not clearly support a formal fiduciary relationship).

not establish a “substantial enough connection” to constitute a relationship of trust that would “[give] rise to a fiduciary relationship in the transactions at issue.”¹⁵⁶ The court, however, disagreed.¹⁵⁷ The court relied primarily on three factors to justify the jury’s finding that the duty existed: “their close family relationship, their preexisting attorney-client relationship, and their history of joint business pursuits.”¹⁵⁸ Based on these factors, the court held that “a reasonable jury could conclude that Adams was justified in trusting McGraw.”¹⁵⁹ Moreover, McGraw apparently “invoked the confidence arising out of the family relationship” to deflect criticism from others, evidencing a relationship of trust and confidence.¹⁶⁰ Thus, although McGraw did not act as Adams’s attorney in the transactions at issue, a fiduciary relationship nonetheless existed based largely on prior representation and McGraw’s reliance on the family relationship for protection from critique.¹⁶¹ *Robertson* aptly portrays the intertwined and often confusing legal and personal relationships between family members that can occur as a result of family representation.

B. *Family Representation Across the States: A Wide Variety of Approaches*

1. Advisory Opinions

A number of jurisdictions have issued advisory opinions either directly or implicitly discussing the representation of family members.¹⁶² Interestingly, each advisory opinion addresses a different issue.¹⁶³ Examining the various ethics committees’ advisory opinions provides a broad view of

156. *Id.*

157. *See id.* at 491-93 (holding that the evidence legally and factually supported the jury’s finding of a fiduciary duty).

158. *Id.* at 492.

159. *Robertson v. ADJ P’ship, Ltd.*, 204 S.W.3d 484, 492 (Tex. App.—Beaumont 2006, pet. denied).

160. *Id.*

161. *See id.* (expressing that long years of family representation and use of the family relationship as a shield formed an informal fiduciary duty).

162. *See, e.g.*, Pa. Bar Ass’n Comm. on Legal Ethics and Prof’l Responsibility, Informal Op. 95-121 (1995) (discussing former client conflicts of interests in family representation).

163. *See* Cal. State Bar Standing Comm. on Prof’l Responsibility and Conduct, Formal Op. No. 1987-92 n.1 (1987) (examining sexual relations and an attorney’s representation of his or her spouse); N.J. Sup. Ct. Advisory Comm. on Prof’l Ethics, Op. 566 (1985) (analyzing advocate-witness problem in a family representation); Pa. Bar Ass’n Comm. on Legal Ethics and Prof’l Responsibility, Informal Op. 95-121 (1995) (discussing former client conflicts of interests); S.C. Bar Ethics Advisory Comm., Op. 92-07 (1992) (examining the distinction between an attorney’s role as a family member and a family attorney).

the different types of ethics concerns that have occurred with respect to representing relatives.

The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility (Pennsylvania Committee) has considered the problem of former client conflict of interest when representing a family member.¹⁶⁴ The ethics opinion discussed a situation in which an attorney wished to represent his sister in a divorce action after having represented the sister's husband regarding the incorporation of his business.¹⁶⁵ The attorney sought guidance on whether the sister's representation would run afoul of Rule 1.9 of the Pennsylvania Rules of Professional Conduct, which prohibits "[a] lawyer who has formerly represented a client in a matter" from "represent[ing] another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client."¹⁶⁶ Additionally, the rule prohibits the "use [of] information relating to the representation to the disadvantage of the former client."¹⁶⁷

The Pennsylvania Committee analyzed the representation under both parts of the rule.¹⁶⁸ The Pennsylvania Committee first noted that while "[the] sister and husband's interests [were] materially adverse[,] . . . the representation of [the] sister would not be in the same or a substantially related matter."¹⁶⁹ Thus, the representation of the sister would not violate the first part of Rule 1.9, which would only arise from the "same or a substantially related matter."¹⁷⁰ The Pennsylvania Committee concluded, however, that the attorney would violate the second part of the rule in representing the sister in the divorce action.¹⁷¹ Because the prior representation of the husband probably involved confidential information

164. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 95-121 (1995).

165. *Id.*

166. PA. RULES PROF'L CONDUCT 1.9 (West 1995). Similarly, Rule 1.09 of the Texas Disciplinary Rules prohibits an attorney from "represent[ing] another person in a matter adverse to [a] former client . . . if it is the same or a substantially related matter." TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09(a). The American Bar Association's Model Rule of Professional Conduct 1.9, on which both the Pennsylvania and Texas rules are based, currently states the following: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." MODEL RULES OF PROF'L CONDUCT R. 1.9 (2006).

167. PA. RULES PROF'L CONDUCT 1.9 (West 1995).

168. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 95-121 (1995).

169. *Id.*

170. *Id.*

171. *See id.* (explaining that the prior representation of the husband likely involved privileged communications which would "fall[] within the attorney client privilege").

that the attorney could not ethically use in the sister's subsequent representation, the Pennsylvania Committee judged the attorney could not ethically represent his sister in the later divorce action.¹⁷² The opinion reveals a significant risk in representing family members: the potential for disqualification in *future litigation* involving other family members.¹⁷³

The South Carolina Bar Ethics Advisory Committee (South Carolina Committee) has examined the issue of whether ethics rules restrict an attorney in the family from acting merely as an interested party to the litigation, not as an attorney.¹⁷⁴ The South Carolina advisory opinion involved an attorney-spouse who wished to contact his wife's ex-husband on matters relating to the wife's and ex-husband's children.¹⁷⁵ The attorney sought to do so not in the capacity of his wife's attorney, but as a concerned husband.¹⁷⁶ Rule 4.2 of the South Carolina Rules of Professional Conduct generally prohibits contact between a lawyer representing a client or another represented party without the consent of the other party's attorney.¹⁷⁷ The South Carolina Committee noted, however, that "Rule 4.2 generally does not prohibit one party from contacting another party directly, even without the consent of the other party's counsel."¹⁷⁸ The issue, according to the South Carolina Committee, "[was] whether the answer differs because a party happens also to be a lawyer."¹⁷⁹ The South Carolina Committee concluded that the rule does not preclude "contact by one individual with another represented individual, even though the contacting party is a lawyer, when the contact is not made in the course of representing a client."¹⁸⁰ Thus, an attorney in the family may still act as a mere relative with a familial interest in the matter as long as no representation occurs.¹⁸¹

The New Jersey Supreme Court Advisory Committee on Professional Ethics (New Jersey Committee) has discussed the substitution of a re-

172. *Id.*

173. *See* Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 95-121 (1995) (reasoning that the representation of a husband on a business incorporation would disqualify an attorney from representing the wife in a divorce action).

174. S.C. Bar Ethics Advisory Comm., Op. 92-07 (1992).

175. *Id.*

176. *Id.*

177. *See id.* (citing S.C. R. OF PROF'L CONDUCT 4.2) (noting the prohibition on "communicat[ing] about the subject of the representation with a party the lawyer knows to be represented by another lawyer"); *see also* MODEL RULES OF PROF'L CONDUCT R. 4.2 (2006) (prohibiting similar communications).

178. S.C. Bar Ethics Advisory Comm., Op. 92-07 (1992).

179. *Id.*

180. *Id.*

181. *See id.* (highlighting the difference between acting as an attorney and acting as an ordinary individual).

lated attorney as counsel on appeal after a prior withdrawal because of an advocate-witness conflict.¹⁸² The inquiring attorney had withdrawn from representing his spouse at the trial level at the trial court's suggestion.¹⁸³ The attorney anticipated that he would be called as a witness at trial, which would necessitate his withdrawal in order to avoid an advocate-witness conflict.¹⁸⁴ The anticipated testimony never occurred, and the attorney did not participate in the trial.¹⁸⁵ During the appeal process, the attorney again desired to represent his spouse.¹⁸⁶ The New Jersey Committee concluded that the rule against advocate-witness conflict of interest does not preclude an attorney, disqualified on the basis of anticipated but not actualized participation as a witness, from acting as counsel on appeal.¹⁸⁷ This New Jersey advisory opinion serves to emphasize yet again the intertwined and often delicate relationship between an attorney and a family member client.¹⁸⁸

Finally, the California State Bar Standing Committee on Professional Responsibility and Conduct (California Committee) has examined the ethical considerations of an attorney engaging in a sexual relationship with a client.¹⁸⁹ In this instance, the California Committee declined to interpret all sexual relations with clients as per se violations of ethical rules, in part because "a per se rule would seriously affect the ability of an attorney to represent his or her own spouse."¹⁹⁰ Rather, the California Committee concluded that "each sexual relationship may be characterized by a distinct set of circumstances" and that an examination on an individual basis was necessary.¹⁹¹ The California Committee cautioned, however, that any lawyer having sexual relations with a client "should seriously contemplate all of the possible personal and professional ramifications attendant to such a relationship."¹⁹² Although the attorney seeking guidance in the facts of the opinion was not related to the client, the California Committee plainly anticipated that a complete prohibition on

182. N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 566 (1985).

183. *Id.*

184. *Id.*; see also MODEL RULES OF PROF'L CONDUCT R. 3.7 (2006) (stating the general rule that attorneys may not serve as advocates when the lawyer is likely to be called as a witness).

185. N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 566 (1985).

186. *Id.*

187. *Id.*

188. See *id.* (illustrating one incident where an attorney representing his spouse also anticipated being called as a witness in the litigation).

189. Cal. State Bar Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 1987-92 (1987).

190. *Id.*

191. *Id.*

192. *Id.*

sexual relations with clients would have far-reaching consequences, including a negative impact on the ability to represent one's spouse.¹⁹³

2. Case Law

One interesting and perhaps unexpected consequence from the representation of family members is a potential restriction on the ability to obtain attorneys' fees after a successful suit.¹⁹⁴ Some courts have held that under certain laws, a related attorney cannot collect attorneys' fees specifically because of the family relationship.¹⁹⁵ For example, in *S.N. ex rel. J.N. v. Pittsford Central School District*,¹⁹⁶ an attorney-parent sued a school district on behalf of his child, "alleging violations of the [Individuals with Disabilities Education Act] and requesting attorneys' fees."¹⁹⁷ After reaching a settlement with the school district, the parent-attorney motioned for fees.¹⁹⁸ Both the district court and the court of appeals rejected the parent-attorney's motion primarily on the basis of promoting the retention of "independent counsel."¹⁹⁹ According to the court of appeals, "like an attorney representing himself, a parent-attorney representing his child 'is deprived of the judgment of an independent third party in framing the theory of the case, . . . formulating legal arguments, and in making sure that reason, rather than emotion,' informs his tactical decisions."²⁰⁰

193. *See id.* (declining to create an absolute ban on sexual relationships with clients in part because such a prohibition would interfere with spousal representation).

194. *See, e.g., Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087, 1090 (9th Cir. 2006) (holding that parent-attorneys cannot recover attorneys' fees under the Individuals with Disabilities Education Act).

195. *See, e.g., S.N. ex rel. J.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601, 605 (2d Cir. 2006) (barring recovery of attorneys' fees based on a parent-child relationship).

196. 448 F.3d 601 (2d Cir. 2006).

197. *S.N.*, 448 F.3d at 602.

198. *Id.* As noted by the appellate court, the settlement agreement included terms "that called for the district court to retain jurisdiction to allow a motion by S.N. for attorneys' fees." *Id.*

199. *Id.* at 602-03.

200. *Id.* at 603 (quoting *Kay v. Ehrler*, 499 U.S. 432, 437 (1991)). The court's analysis in *S.N.* relied heavily on the reasoning in *Kay v. Ehrler*, 499 U.S. 432 (1991). *See S.N.*, 448 F.3d at 603 (citing *Kay* repeatedly). In *Kay*, the Supreme Court concluded that pro se litigants were not entitled to recover attorneys' fees under the Civil Rights Attorney's Fees Awards Act, regardless of whether the individual was a member of the bar. *Kay*, 499 U.S. at 433, 438. The Supreme Court based its decision on "the overriding statutory concern . . . in obtaining independent counsel for victims of civil rights violations." *Id.* at 437. Similarly, *S.N.* recognizes that parent-attorneys may lack independent judgment "to provide effective representation" of his or her disabled child for suits brought under the Individuals with Disabilities Education Act. *S.N.*, 448 F.3d at 601, 603-04 (asserting that parent-attorneys lack sufficient emotional independence).

Quite foreseeably, the parent-attorney advanced the argument that the rule “adopt[ed] today could result in courts arbitrarily distinguishing between [Individuals with Disabilities Education Act] attorneys’ fee requests filed by [parent-attorneys] and those filed by more distant relatives.”²⁰¹ The appellate court appears to have missed the obvious point of the argument, namely that the supposed “lack [of] sufficient emotional detachment to provide effective representation” recognized in a parent-attorney could equally apply to any related attorney or close family-friend of the disabled child client, preventing any such individuals from being able to recover attorneys’ fees.²⁰² Rather than addressing the potential implications of its rulings, the court “simply note[d] that the statute defines ‘parent,’ and that S.N.’s father clearly fits within the definition.”²⁰³ Thus, the court apparently attempts to assure that only parents, and not other relatives, will be excluded from receiving attorneys’ fees.²⁰⁴ Unfortunately, the court fails to expressly disclaim any future expansion of the holding, perhaps boding further restrictions on recovery of fees.²⁰⁵

IV. PROPOSAL

A. *Guidelines for Representing Family Members*

A few simple guidelines can be constructed from the cases, rules, and advisory opinions discussed above to assist Texas attorneys in deciding whether to represent a family member. First, the clearest guideline appears to be that, absent some additional ethical problem, attorneys may freely represent their family members.²⁰⁶ None of the sources for ethical

201. *S.N.*, 448 F.3d at 605.

202. *Id.* at 603. The court concludes that an attorney-parent cannot recover attorneys’ fees under the Individuals with Disabilities Education Act primarily because the attorney-parent lacks sufficient emotional independence. *Id.* Unfortunately, the reasoning of *S.N.* could potentially disqualify a host of additional individuals, including other relatives and even unrelated friends of the family, from receiving attorneys’ fees. See *S.N. ex rel. J.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601, 603 (2d Cir. 2006) (applying a broad rationale to disqualify parent-attorneys from receiving fees). *But see Matthew V. ex rel. Craig V. v. Dekalb County Sch. Sys.*, 244 F. Supp. 2d 1331, 1335-38 (N.D. Ga. 2003) (declining to extend *Kay* to the Individuals with Disabilities Education Act to prevent parent-attorneys from recovering attorneys’ fees).

203. *S.N.*, 448 F.3d at 605.

204. See *id.* (dismissing concerns of arbitrary application of the rule).

205. See *id.* (referring to the statutory definition of *parent* to assuage concerns of arbitrary application of the rule).

206. See *id.* at 601 (proceeding under the assumption that a parent can represent his or her child under the Individuals with Disabilities Education Act); *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102, 105 (5th Cir. 1978) (noting that “[o]rdinarily there would be no objection to an attorney representing his wife in litigation”); *Srouf v. Srouf*, 733 So. 2d 593,

guidance in Texas—the case law, the Texas Disciplinary Rules of Professional Conduct, or the advisory ethics opinions—indicate any prohibition on representation of family members.²⁰⁷ However, because of the unusual relationships that can accompany family ties, attorneys should be on guard for specific problems.²⁰⁸

Attorneys contemplating family member representation must be wary of conflicts of interest, which appear to be the most common type of ethical problem.²⁰⁹ First, lawyers should take care to avoid conflicts of interest from past representation of family members.²¹⁰ With respect to past representation, Rule 1.09 of the Texas Disciplinary Rules addresses conflicts of interest stemming from the representation of former clients.²¹¹ Rule 1.09 prohibits an attorney from representing another person in a substantially related matter adverse to a former client without the former client's permission.²¹² An attorney should always discern whether the past representation of a family member precludes the representation of another relative under Rule 1.09 before representing a family member.²¹³

More importantly, however, the attorney should carefully evaluate the possibility that a contemplated family representation may create a barrier

593 (Fla. Dist. Ct. App. 1999) (stating that “[t]here is no prohibition against a lawyer representing himself, let alone a family member”).

207. See *Robertson v. ADJ P'ship, Ltd.*, 204 S.W.3d 484, 491-92 (Tex. App.—Beaumont 2006, pet. denied) (noting that an attorney's previous work for family members was sufficient for a jury to find a fiduciary relationship); TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(b) (allowing the preparation of an instrument giving substantial gifts to the attorney or his or her family if from another relative); *id.* 7.03(a) (creating an exception to permit solicitation of family members); *id.* 7.05(f)(1) (eliminating some solicitation regulations for family member solicitation); Tex. Comm. on Prof'l Ethics, Op. 468, 54 TEX. B.J. 731, 731 (1991) (explaining the circumstances when spousal representation would not violate the ethical rules).

208. See, e.g., Tex. Comm. on Prof'l Ethics, Op. 468, 54 TEX. B.J. 731, 731 (1991) (stating that advocate-witness conflicts of interest could preclude an attorney from representing his or her spouse).

209. See *id.* (examining advocate-witness conflicts of interests in spousal representation); cf. N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 566 (1985) (discussing the consequences of disqualification due to advocate-witness conflicts); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 95-121 (1995) (analyzing former client conflicts of interest in family representation).

210. See Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 95-121 (1995) (concluding that under the specific circumstances, an attorney could not represent a particular family member in a divorce action because the attorney represented another family member in the past).

211. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09.

212. *Id.*

213. See Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 95-121 (1995) (examining an attorney's former client conflicts in family representation).

to representing some other relative in future litigation.²¹⁴ For example, as previously discussed, the Pennsylvania Committee on Legal Ethics and Professional Responsibility has considered a situation wherein an attorney unknowingly disqualified himself or herself from representing his or her sister in a divorce action by previously representing the brother-in-law.²¹⁵ In the unpredictable realm of family relationships, lawsuits between family members are certainly not rare and could even be labeled as common in some situations.²¹⁶ In deciding whether to represent any relative, an attorney must weigh the potential impact on representing other family members in the future.²¹⁷

In addition to conflicts of interest, attorneys must watch for any other unusual consequences stemming from the family relationship.²¹⁸ For example, many attorneys might be surprised to learn of the limitation on the ability to recover attorneys' fees when representing their child under the Individuals with Disabilities Education Act.²¹⁹ Four federal circuit courts have reached that conclusion, largely to ensure that the attorney possesses sufficient independence for rational representation.²²⁰ In the

214. *See id.* (illustrating a situation where a family representation created future ethical problems).

215. *See id.* (revealing an unintentional disqualification from representation).

216. *See, e.g.,* Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 *LOY. L.A. L. REV.* 691, 709 (2006) (explaining that "divorce is a big business for U.S. courts. In 2001, the most recent year for which complete statistics are available, . . . fourteen percent of the non-traffic filings, about 5.3 million cases, fell into their 'domestic' category, which includes divorces, property division, and child custody adjudications"). Indeed, legal disputes occasionally arise between family members over some aspect of the legal representation by the family attorney. *See Dunham v. Dunham*, 528 A.2d 1123, 1126 (Conn. 1987) (depicting an intra-family dispute over the mother's will, which the son-attorney had prepared).

217. *See* Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, *Informal Op.* 95-121 (1995) (illustrating one attorney's unintentional disqualification from representing a family member by the representation of another).

218. *See, e.g.,* *S.N. ex rel. J.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601, 601-02 (2d Cir. 2006) (stating that a parent-attorney could not recover attorneys' fees under the Individuals with Disabilities Education Act for the representation of his child).

219. *See id.* at 603 (citing the risk that a parent-attorney's relationship with his or her child could prevent the emotional detachment needed for effective representation).

220. *See Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087, 1090 (9th Cir. 2006) (holding that parent-attorneys cannot recover attorneys' fees under the Individuals with Disabilities Education Act when representing their children); *S.N.*, 448 F.3d at 605 (denying parent-attorneys the ability to obtain attorneys' fees under the Individuals with Disabilities Education Act for cases involving their children); *Woodside v. Sch. Dist. of Phila. Bd. of Educ.*, 248 F.3d 129, 131 (3d Cir. 2001) (concluding that the parent-attorney could not "receive attorney fees for work representing his minor child in proceedings under the [Individuals with Disabilities Education Act]"); *Doe v. Bd. of Educ. of Baltimore County*, 165 F.3d 260, 265 (4th Cir. 1998) (declining to permit parent-attorneys to recover attorneys' fees under the Individuals with Disabilities Education Act).

only Texas source on the issue of attorneys' fees and family representation, the Texas Professional Ethics Committee concluded that, absent other ethical problems, family representation did not prohibit the recovery of attorneys' fees.²²¹ Of course, an advisory opinion does not guarantee that attorneys' fees and other considerations will work out favorably for the attorney and client in the court room.²²²

Finally, an attorney should avoid complicated, intertwined personal and legal relationships with their family members.²²³ As indicated in *Robertson v. ADJ Partnership, Ltd.*, such intertwined relationships may create liability even though the attorney has not represented the family member in the particular matter at issue.²²⁴ Acting as a general family attorney is most likely to cause problems, and should be avoided if possible.²²⁵

In summary, although these recommendations certainly cannot encompass all of the ethical concerns arising from family representation, this author believes that several significant ethical problems can be avoided by following these guidelines.

B. *Suggested Changes to Texas Disciplinary Rules of Professional Conduct*

While the Texas Disciplinary Rules provide fairly thorough general guidance to practitioners, a few minor changes to the rules would greatly assist lawyers seeking to evaluate ethical issues surrounding family representation.²²⁶ First, the exceptions in Rules 7.03 and 7.05 permitting solici-

221. See Tex. Comm. on Prof'l Ethics, Op. 468, 54 TEX. B.J. 731, 731 (1991) (stating that "if the attorney husband can ethically represent his wife in this matter, there is no ethical reason to prohibit his receiving . . . fees").

222. See *id.* (advising that the attorney should be able to recover attorneys' fees). As an advisory opinion, Opinion 468 does not guarantee the outcome. See Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 313-14 (2002) (explaining that ethics opinions in most jurisdictions are purely advisory in nature and do not protect against discipline or liability).

223. See, e.g., *Robertson v. ADJ P'ship, Ltd.*, 204 S.W.3d 484, 487, 492 (Tex. App.—Beaumont 2006, pet. denied) (detailing very complex family relationships that created an unexpected fiduciary duty).

224. See *id.* at 492 (holding that the attorney owed a fiduciary duty to the family member even though the attorney did not represent the family member in the particular matter at issue).

225. See *id.* at 488-91 (indicating that the attorney acted as the family lawyer in many matters, including business, real estate and mineral property, and probate).

226. See NATHAN M. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* 15 (Aspen Publishers 3d ed. 2004) (explaining the presence of a "gap" between the professional rules and application of the rules to specific problems encountered by attorneys). See generally TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01-9.01

tation of individuals with a family relationship should be eliminated.²²⁷ This would eliminate confusion as to what constitutes a “family relationship” or a “family member,” both undefined terms under the current rules.²²⁸ Additionally, the change would not affect pro bono work for family members because Rule 7.03 only applies “when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.”²²⁹

Second, the Texas Disciplinary Rules contain an inherent discord related to the representation of family members that should be eliminated.²³⁰ While the rules seek to encourage, or at least not punish, lawyers who represent family members,²³¹ the Texas Disciplinary Rules simultaneously and contrarily recognize the increased risk of conflicting interests stemming from personal relationships between the attorney and client, such as family relationships.²³² As observed by the Second Circuit in *S.N. ex rel. J.N. v. Pittsford Central School District*, those family members an attorney would most want to represent, such as his or her spouse and children, carry the highest risk of decision-making by emotion instead of reason.²³³ It is precisely because of the risk that a close family relationship will undermine decision-making that a more stringent standard should be applied before permitting family representation.²³⁴

(omitting specific rules to guide attorneys through ethical problems arising from family representation).

227. See TEX. DISCIPLINARY R. PROF'L CONDUCT 7.03(a) (disallowing solicitation of individuals except, among others, those with whom the attorney possesses a “family . . . relationship”); *id.* 7.05(f)(1) (providing an exception for the solicitation requirements for communications “directed to a family member”).

228. See *id.* 7.03(a) (failing to define a “family . . . relationship”); *id.* 7.05(f)(1) (failing to define a “family member”).

229. *Id.* 7.03(a).

230. Compare TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(b) (sanctioning prohibited transactions when involving family members), with *id.* 1.06 (applying strict rules for conflicts of interests).

231. See *id.* 1.08 (permitting certain prohibited transactions when involving family members); *id.* 7.03(a) (allowing solicitation of family members when normally disallowed); *id.* 7.05(f)(1) (eliminating the usual communication requirements when directed toward relatives).

232. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 (prescribing the general rule for a conflict of interest). The Texas Disciplinary Rules explain that “[l]oyalty to a client is impaired not only by the representation of opposing parties . . . but also in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer’s own interests.” *Id.* 1.06 cmt. 4.

233. See *S.N. ex rel. J.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601, 603 (2d Cir. 2006) (concluding that awarding attorneys’ fees to parent-attorneys representing their children would discourage the use of independent counsel).

234. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmt. 4 (emphasizing the necessity of the attorney’s independent judgment); *S.N.*, 448 F.3d at 603 (disallowing the recovery of attorneys’ fees in order to promote the employment of truly independent counsel).

Therefore, the Texas Disciplinary Rules should incorporate a showing of good cause before permitting any representation of family members.²³⁵ Under such a rule, good cause could be satisfied by a number of different criteria, such as showing financial need, prejudice to the party if the representation is disallowed, or substantial hardship for some other reason.²³⁶ Such a good cause requirement would still permit an attorney to represent a relative for good justification and at the same time reduces the risk of representations tainted by influenced judgment.²³⁷

V. CONCLUSION

Because of the limited number of professional conduct rules, advisory opinions, and cases relating to the representation of family members, Texas practitioners cannot realistically obtain all the necessary ethical guidance for such representation from Texas jurisprudence. The Texas jurisprudence that does exist, however, points towards a general principle that representation of family members does not trigger any special ethical concerns.²³⁸ From the Texas Disciplinary Rules of Professional Conduct, which authorize solicitation of family members, to the Texas Professional Ethics Committee advisory opinions, which apply little more than a standard ethical analysis, all indications suggest that the family relationship plays little role in ethical considerations.²³⁹

235. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15(a)(3) (noting that an attorney must cease representation even if discharged without "good cause"); *id.* 1.15(b)(7) (allowing withdrawal from representation on a showing of "good cause"); *id.* 1.15(c) (requiring withdrawal from representation if ordered by a tribunal regardless of "good cause"); *id.* 6.01 (permitting avoidance of appointment by a tribunal only on showing of "good cause"). In addition to good cause, the Texas Disciplinary Rules should adopt the definition of family used in the American Bar Association's Model Rules of Professional Conduct. See MODEL RULES OF PROF'L CONDUCT R. 1.8(c) (2006) (defining a family member primarily as "a spouse, child, grandchild, parent, grandparent").

236. See Tex. Comm. on Prof'l Ethics, Op. 468, 54 TEX. B.J. 731, 731 (1991) (describing substantial hardship under the former Texas Code of Professional Responsibility).

237. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmt. 4 (highlighting the importance of having independent counsel).

238. See, e.g., Tex. Comm. on Prof'l Ethics, Op. 468, 54 TEX. B.J. 731, 731 (1991) (concluding that spousal representation is acceptable if no other violations of the ethical rules occur).

239. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(b) (allowing gifts to the attorney preparing an instrument only in circumstances where the attorney preparing the instrument is a relative); *id.* 7.03(a) (allowing solicitation of family members); *id.* 7.05(f)(1) (eliminating solicitation requirements for family member solicitation); Tex. Comm. on Prof'l Ethics, Op. 468, 54 TEX. B.J. 731, 731 (1991) (applying a standard ethical analysis to spousal representation).

Likewise, the jurisprudence from other states parallels that of Texas.²⁴⁰ In the states that have considered the representation of a family member, virtually no additional weight has been placed on the ethical scales based on the family relationship.²⁴¹ Indeed, the clear approach across many states is to require merely a standard ethical analysis for family representation.²⁴² A better ethical rule system would place the initial burden on those seeking to represent family members to show that, despite the risk of ethical problems, good cause supports permitting the representation.²⁴³ The changes to the Texas Disciplinary Rules suggested above would greatly improve the ability of attorneys to evaluate ethical problems, while limiting the risk of conflicting representation.

240. *See, e.g.*, *Srou v. Srou*, 733 So. 2d 593, 593 (Fla. Dist. Ct. App. 1999) (proclaiming that “[t]here is no prohibition against a lawyer representing himself, let alone a family member”).

241. *See, e.g., id.* (commenting on the lack of rules prohibiting representing family members).

242. *See* Pa. Bar Ass’n Comm. on Legal Ethics and Prof’l Responsibility, Informal Op. 95-121 (1995) (examining spousal representation).

243. *See* TEX. DISCIPLINARY R. PROF’L CONDUCT 1.06 cmt. 4 (emphasizing the importance of capable, independent counsel).