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Reasonable Expectations in Families, Businesses, and Family Businesses: A Comment on Rollock[†]

TERRY A. O'NEILL*

I. INTRODUCTION

I am happy to have the opportunity to comment on Alys Rollock's article, *Professional Responsibility and Organization of the Family Business: The Lawyer as Intermediary*.¹ In her article, Professor Rollock makes a much-needed contribution to the literature on lawyers' responsibilities when forming a business enterprise. As she observes, the guidelines provided by Model Rule of Professional Conduct 2.2² do not answer all of the questions,³ and indeed some of the questions left unanswered by the Rule are crucial to the lawyer's intermediary role.

Rollock's salient contribution is to establish a framework—her “reasonable expectations” approach—within which the lawyer can ascertain, first and foremost, who her clients are, and in the process of doing that, help them to articulate their own understandings of the reciprocal rights and responsibilities with respect to their family's business.

From my perspective as a corporate lawyer, being asked to comment on Rollock's article has allowed me to reflect on my own experiences in representing family businesses. Reading her article led me to think back on the interactions, dependencies, trust, and expectations in the family businesses I represented. Those businesses were peopled by wives, husbands, in-laws, cousins, grandparents, parents, sons, and daughters. Though the degree to which family members participated in the businesses varied dramatically, all of the family members surely harbored expectations about their families' businesses. Just as surely, as I think back, they did not all necessarily share their expectations with me or my colleagues at the law firm. Perhaps they thought it was not necessary. Perhaps we thought we understood what they wanted after talking with their relatives. In retrospect, those assumptions may have been warranted in some cases, but erroneous in others. Professor Rollock has done all of us a great service by showing us how important it is to get family members to ponder what their expectations are, so that their own roles, as well as that of the lawyer intermediary, can be clarified.

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1. Alys Christmas Rollock, *Professional Responsibility and Organization of the Family Business*, 73 IND. L.J. 567 (1998).

2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1995).

3. See Rollock, *supra* note 1, at 580. For a thoroughgoing critique of Model Rule 2.2, see John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741.

At the same time, from my perspective as a feminist, commenting on this article has allowed me to take my thoughts in another direction. I have found myself thinking that the idea of a "family business" is something of an oxymoron. The terms "family" and "business" don't seem to belong together. Certainly, the practice areas of "family law" and "business law" do not seem to fit together. A family-law practice involves highly emotionally charged issues, such as divorce, child custody, or adoption. By contrast, a business-law practice may be thought of as involving purely intellectual exercises, such as negotiating a purchase or sale of assets, or arranging financing for the transaction. To state the contrast more starkly, it might be said that business law entails rationality, clarity, hard-headed bargaining from self-interest, and cold-eyed calculation of risk, while family law entails emotionality (including anger as well as love), dependence, and altruistic self-sacrifice.

This polarized understanding of what it means to practice "family law" as opposed to "business law" reflects what feminist scholars have critiqued as the "family/market dichotomy," which describes a strict, and strictly gendered, division between the masculine sphere of commerce, rationality, and calculation, and the feminine sphere of family, emotion, and trust.⁴ The family/market dichotomy is factually distorted, but nonetheless ideologically powerful. It is factually distorted in that there is a significant measure of emotionality and trust in every commercial relationship, just as there is a significant measure of self-protection and calculation in every family relationship.⁵ But that is mere factual reality. The far more powerful myth is that, in commercial relations, everyone is strictly out for himself while, in families, everyone sacrifices his own personal welfare for the good of the group.⁶ For some, moreover, this myth is not only descriptive, but also normative. Oliver Williamson, for example, has called for the concept of "trust" to be abolished from analyses of commercial relations, arguing that trust should be relegated to the sphere of family and other purely personal relationships.⁷

4. The leading work on the false dichotomy between family and market is Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983). Recent discussions of this dichotomy include Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571 (1997) (discussing the impact of family/market dichotomy on disputes over validity of bequests to nonrelatives), and Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 47 HASTINGS L.J. 951, 963-64 (1996) (observing that assisted reproductive technology exposes the falsity of the family/market dichotomy because through it families are "assembled by means of arms-length transactions between individuals who purchase and sell the raw materials with which to produce a child").

5. See Olsen, *supra* note 4, at 1565-66. I have explored this issue previously, in Terry A. O'Neill, *Self-Interest and Concern for Others in the Owner-Managed Firm: A Suggested Approach to Dissolution and Fiduciary Obligation in Close Corporations*, 22 SETON HALL L. REV. 646 (1992).

6. See Olsen, *supra* note 4, at 1505.

7. See Oliver E. Williamson, *Calculativeness, Trust, and Economic Organization*, 36 J.L. & ECON. 453 (1993). I critiqued this argument from a feminist perspective in *Trust is for Girls*, a paper I presented at the Annual Conference for the Society for the Advancement of Socio-Economics in 1996. See Terry A. O'Neill, *Trust is for Girls* (1996) (unpublished manuscript, on file with author).

A striking example of how the family/market dichotomy operates can be seen in a recent Second Circuit decision involving a quasi-family business. The case was *United States v. Chestman*,⁸ an insider-trading case involving the sale of Waldbaum's to A&P. Though publicly traded, Waldbaum's was still controlled by its founding family; its president and controlling shareholder was Ira Waldbaum, the family patriarch.⁹ Ira's niece Susan told her husband, Keith, about A&P's imminent purchase of Waldbaum's, but warned him not to tell anyone else. Keith betrayed his wife's confidence by tipping his stockbroker to the impending deal, and the stockbroker was prosecuted for insider trading.¹⁰ A key issue in *Chestman* was whether Keith had breached a fiduciary duty to his wife when he took the information she revealed to him and used it for his own purposes.¹¹ The Second Circuit ruled that he owed no such duty to her because their relationship was marital, thus not fiduciary in nature.¹² In critiquing this case, Professor Judith Greenberg has observed that the court's conclusion "is belied both by the facts which show a relationship of dependence and reliance [between the spouses], and by a line of family law cases which frequently find that marriage creates a confidential relationship."¹³ In other words, the court strained both the facts before it and relevant legal precedent in order to maintain the ideology of opposition between familial relations and corporate relations.¹⁴

The family business reveals the artificiality of the family/market dichotomy. It stands as a factual counterstory to ideological efforts at segregating the concept of business, and all it entails, from the concept of the family, and all it entails. This counterfactual reality should make us wonder about the ideology that produced the family/market dichotomy in the first place. From this perspective, Rollock's article provides an opportunity to reflect on what sorts of relations are possible, and what are desirable, within a family business, and what the role of the family-business lawyer is in fostering such relations. It also allows us to reflect on the possibilities for transcending the family/market dichotomy and for working toward social relations unburdened by false dichotomies.

II. THE REASONABLE-EXPECTATIONS MODEL OF INTERMEDIATION

Rollock's central insight is that, too often, lawyers overlook the fact that individual members within families may have separate, divergent, or even

8. 947 F.2d 551 (2d Cir. 1991).

9. *See id.* at 555, 570.

10. *See id.* at 555-56.

11. *See id.* at 565-71.

12. *See id.* at 568.

13. Judith G. Greenberg, *Insider Trading and Family Values*, 4 WM. & MARY J. WOMEN & L. (forthcoming Spring 1998) (manuscript pt. 3, at 4, on file with author).

14. Greenberg suggests, further: "An analysis of *Chestman* shows the importance of maintaining a clear line between market and family. Were this line to disappear, the distinction between family and market might be blurred, upsetting our notions of how to act in each realm, and thus, of gender roles." *Id.* (manuscript pt. 3, at 1).

directly conflicting interests with respect to their family businesses.¹⁵ Rollock argues that this oversight is not consonant with the requirements of Model Rules of Professional Conduct 1.7 and 2.2, as she interprets those provisions. Under her interpretation, the lawyer must clarify from the very outset of the representation which family members are to be represented and which are not. Importantly, however, the lawyer's ethical obligation does not end with ascertaining who the clients are. The lawyer must then notify the *unrepresented* family member(s) that she is not acting on their behalf, and that they should consider hiring their own lawyer.¹⁶

Rollock's interpretation of Model Rule 2.2 flows from her "reasonable expectations" model of the Model Rule's requirements. This model affirms both communitarian and individualist aspects of families. Indeed, I read her article as calling for a balancing of these two ethics—community and individual autonomy—within family businesses. In arriving at the reasonable-expectations approach, Rollock first considers both a communitarian approach and a contractualist approach to family-business intermediation. Ultimately she rejects both as unrealistic, and crafts the reasonable-expectations approach as a middle ground between the other alternatives.¹⁷

The communitarian approach to family representation calls on the lawyer to represent the family as a unitary entity, as opposed to undertaking a joint representation of individual family members.¹⁸ Because the family, as an entity

15. See Rollock, *supra* note 1, at 572-73.

16. See *id.* at 585-86.

17. See *id.* at 584-86.

18. The most intense advocate of the communitarian view is Thomas Shaffer. See Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987). Grounding his views in his Christian faith, Professor Shaffer categorically rejects the value of individual autonomy. His central thesis is that, in a family, the role to be played by each member is preordained by external authority, and to that authority the individual in the family must submit. However, within the confines of that ground rule, the individual family member must decide for himself or herself how to be the assigned role. See, e.g., Thomas L. Shaffer & Mary M. Shaffer, *Character and Community: Rispetto as a Virtue in the Tradition of Italian-American Lawyers*, 64 NOTRE DAME L. REV. 838, 839 (1989) ("We choose because of where we belong, we do not choose where to belong.").

Another proponent of the communitarian view is Russell Pearce, though his advocacy is far more qualified than Shaffer's. See Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253 (1994). Pearce does recognize individuality within families in that he would have family members choose, as individuals, whether they wish to give up their individuality and have their family be represented as a unitary entity. See *id.* at 1294-95. Moreover, any individual family member could drop out of the group at any time and seek separate representation. However, once they make the choice for entity representation, the lawyer would treat the family as an "organization" is treated under Model Rule 1.13. See *id.* at 1312-13. Under that Rule, the organization is presumed to be hierarchical, and the lawyer ultimately looks to the "highest authority that can act in behalf of the organization"—prototypically, a corporate board of directors—to determine the needs, preferences, and interests of the entire entity. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1995). A lawyer who applies Rule 1.13 to a family thus treats it as if it were structured patriarchally, with a "highest authority" having the last word in dealing with the lawyer.

unto itself, would be considered the client, the lawyer would not necessarily inquire into the interests or desires of individual family members as such. Instead, her singular focus would be on determining what is in the best interest of the family entity.¹⁹ Presumably, she would make that determination by a combination of talking to family members and relying on her own experience, common sense, and sound judgment. In representing the family as an entity, moreover, the lawyer would not be required to maintain the confidentiality of individual family members' communications. Thus, whatever is revealed by one family member would ordinarily be shared with all.

Rollock fully appreciates the communitarian insight that people do exist in relationships, such as families, with shared goals and common interests. However, she rejects as unrealistic the conclusion that family businesses should therefore be viewed as "black box" entities, in which family members' individuality is not recognized. She argues, first, that the relationships within families are not static. They change over time, by divorce and remarriage, for example.²⁰ Thus, the family changes as its individual members change, and a lawyer cannot understand the dynamics of a family business without understanding the individuals who comprise it. That requires going beyond a view of the family as an entity unto itself. Second, viewing the family business as an entity precludes the lawyer from recognizing disagreements among family members. As a result, decisions purportedly made by and for the family may actually reflect the preferences of the dominant family member, or the lawyer's own opinion of what is good for the family.²¹

Rollock also rejects a strictly contractualist view of family business representation. Her objection to this view is that it, too, distorts the reality of family relationships. The contractualist view treats each family member as an autonomous individual who has his or her own separate, individualized relationship with the family lawyer. This means that it is up to each family member to establish a lawyer-client relationship with the family lawyer by some sort of purposeful action.²² Any family member who fails to act individually in this manner will not be deemed a client. For Rollock, this emphasis on family members' individual initiative ignores the reality of how family members behave. In particular, family members who take a passive or subordinated role with respect to business matters may not be able to establish their own independent relationship with the family-business lawyer, and may believe that the other family members will protect their interests.²³ The contractualist view would leave these persons without representation. As a result, in the event of a dispute, they would find themselves without a champion just when they need one most.

Having rejected the communitarian and contractualist approaches to family representation, Rollock crafts a reasonable-expectations approach that seeks to make use of aspects of both of the former approaches. It recognizes that, within

19. See Rollock, *supra* note 1, at 580-83.

20. See *id.* at 582.

21. See *id.*

22. See *id.* at 583-84.

23. See *id.* at 584.

families, tasks are often allotted in such a way as to create special interdependencies. A couple may decide that they do not both need to meet with the lawyer to set up their new business, and that the husband can attend to that chore alone. That should not necessarily mean that they do not both have a real, cognizable stake in the business. The wife, even though she never lays eyes on the lawyer—indeed, even though she fails to affirmatively assert her ownership interest in the business—will often nonetheless expect the lawyer to be serving her interests as well as her husband's. According to Rollock, such an expectation would be reasonable.²⁴ The lawyer should be ethically required to recognize it as such, and to respond accordingly.

Rollock elaborates on the claim that such expectations are reasonable by developing a concept of implicit ownership of a family business. An explicit interest, according to Rollock, arises from either legal title or equitable notions of beneficial ownership.²⁵ An implicit interest in a family business, on the other hand, arises out of arrangements that do not necessarily trigger equitable-ownership rules.²⁶ The most compelling example of an implicit interest arises when family assets are used to fund start-up costs and/or ongoing operating expenses of the family business. In such a situation, even if one spouse—the husband, for example—legally owns the business and the wife has neither a legal nor a cognizable equitable claim to it, the wife may nonetheless expect that, because family assets went into the business, the business itself is a shared family enterprise. As such, she may expect that the family-business lawyer is representing her interests no less than her husband's.²⁷

Rollock asserts that this implicit-ownership expectation also occurs when the wife cosigns personal guarantees of the business's debt, or consents to mortgaging the family home to secure such a debt, even if such acts do not give her a legally cognizable interest in the business.²⁸ Rollock reasons that in making these contributions to the business, the wife is not merely making a gratuitous gift to her husband.²⁹ Rather, she makes that investment in the expectation of sharing in the success of the business. In other words, family members—perhaps especially husbands and wives—reasonably understand their relationship as a pooling of resources and a sharing of the wealth produced by that pooling of resources. In such an economically interdependent relationship, an implicit ownership expectation simply reflects the reality that each spouse's "economic welfare depends, at least in part, on the other spouse's wealth."³⁰ A concomitant to this reality is that the implicit owner of the business expects her interests to be represented by the family-business lawyer. Rollock maintains that the family-business lawyer should be ethically bound to recognize this expectation.

Rollock's reasonable-expectations approach to intermediation is persuasive to me for two reasons. First, it echoes the "reasonable expectations" model that

24. *See id.* at 586.

25. *See id.* at 571.

26. *See id.*

27. *See id.* at 572.

28. *See id.* at 571.

29. *See id.* at 572.

30. *Id.* at 571.

applies in the context of closely held corporations—the preferred organizational form for many family businesses. In closely held corporations, owner-managers' fiduciary duties prohibit them from acting in such a way as to frustrate the reasonable expectations of their fellow owners.³¹ Rollock expands on this notion somewhat in that she advocates recognizing implicit ownership of family businesses. The fiduciary-duty rules developed for close corporations protect only actual shareholders of the corporations.³² By contrast, Rollock calls on the family-business lawyer to respect the reasonable expectations of those family members who are implicit owners of the business, albeit not actually shareholders or partners.³³ This expansion is entirely appropriate. The close-corporation fiduciary-duty rules were crafted specifically because of the special vulnerability of noncontrolling (thus, in a sense, silenced) owners of such businesses.³⁴ The dynamics of family life, in which one or more of the family members are often expected to keep silent about business matters, create an analogous kind of special vulnerability. That they keep silent does not mean they should be overlooked. Indeed, because their silence may indicate vulnerability, the family lawyer should explore and clarify their expectations at the outset of the representation. This is what Rollock's approach requires.

In addition, Rollock's reasonable-expectations approach, it seems to me, best captures the practical reality of family businesses in that it affirms that such enterprises embrace both communitarian and individualist ethics. Much as we may find it jarring to recognize, a family business is both a family and a business. Moreover, it is not a little bit family and a little bit business. It is *fully* both. It harbors all the complex emotions, and emotional baggage, of families. At the same time, its members engage in the day-to-day activities of running a business for corporate and personal gain. By contrast, the communitarian and contractualist models of Model Rule 2.2 interpretation each ultimately rely on one-sided visions of a family, both of which are unworkable in the face of the complex reality of family businesses.

The legal profession needs to be able to accept that the individual members in a family business are, and legitimately ought to be, self-serving. That is the accepted norm for coowners of close corporations; their fiduciary duty to respect one another's reasonable expectations operates as a check on their basic right of

31. See, e.g., *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657 (Mass. 1976); see also *In re Kemp & Beatley, Inc.*, 473 N.E.2d 1173 (N.Y. 1984); *Meiselman v. Meiselman*, 307 S.E.2d 551 (N.C. 1983).

32. See cases cited *supra* note 31. See generally 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS § 4:07 (2d ed. 1985 & Supp. 1997).

33. See Rollock, *supra* note 1, at 584-86.

34. The special vulnerability exists because minority shareholders of close corporations have neither an effective voice in decisionmaking within the entity, nor a viable means of leaving it. They cannot divest themselves of their interest in the firm when relations with their fellow shareholders turn sour because they have neither an organized market into which to sell their shares nor a statutory right to dissolve the entity. That makes them unique—unlike shareholders of publicly traded corporations, who can sell their shares into an organized market, and unlike partners, who can dissolve the partnership. See, e.g., *Wilkes*, 353 N.E.2d 657.

selfish ownership.³⁵ Partnership law and the law of other closely held businesses (especially in recent codifications) also recognize the fundamental right of coowners to advance their own selfish interests, albeit within the limits of their fiduciary duties.³⁶

At the same time, in that the business partners are also family, the legal community ought to acknowledge their affective ties and accept that they have an important stake in being able to maintain those bonds over the long term. As a practical matter, whatever happens to their business, the family members will continue for their entire lives to meet at weddings, funerals, graduations, and other family reunions. They are not merely strangers interacting at arms' length. Practicality, moreover, is not the only reason family members seek to maintain strong relationships. Another reason is that, in reality, family-member business partners are not motivated solely by their own selfishness, constrained only by the externalized force of fiduciary obligation. Quite the contrary. Their desire to pursue their own ends coexists with their affection for one another. Thus, they also want to further one another's ends, and not so much out of legal duty as out of love.³⁷ Their lawyers need to understand this.

More specifically, family-business lawyers need to understand the complexity of the intentions and goals of family members in a family business. In general, family members may want their relationships to be structured to strike a balance among four considerations. First, each individual family member has economic rights that deserve to be protected, and that she should be entitled to advance.

35. An example of a corporate shareholder's basic right of selfish ownership may be found in *Tryon v. Smith*, 229 P.2d 251 (Or. 1951), where a controlling shareholder was held entitled to sell his control block to a purchaser for a premium over the price offered to the minority shareholders. Thus, he was permitted to use his position of control to his own benefit, even if this disadvantaged the other shareholders.

36. The scope and nature of fiduciary duties concerning joint owners of partnerships, limited partnerships, and limited liability companies have been highly controversial recently. Traditionally, fiduciary duties in partnerships (as well as corporations) have been a matter of judge-made law and have been couched in extremely expansive terms. See *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) ("Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty."). However, the 1994 Revised Uniform Partnership Act, as well as the Uniform Limited Liability Company Act, both purport to limit partners' and managers' fiduciary duties to the specific terms laid out in those statutes. See UNIF. LTD. LIAB. CO. ACT § 409 (1995); REVISED UNIF. PARTNERSHIP ACT § 404 (1994). The narrow statutory formulation of coowners' fiduciary duties clearly envisions that on numerous issues owners may treat one another as strangers bargaining at arms-length with each concerned for his own personal gain. For critiques of these statutory attempts to restrict fiduciary duties, see Claire Moore Dickerson, *Is It Appropriate to Appropriate Corporate Concepts: Fiduciary Duties and the Revised Uniform Partnership Act*, 64 U. COLO. L. REV. 111 (1993); Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 73 B.U. L. REV. 523 (1993); Allan W. Vestal, *The Disclosure Obligations of Partners Inter Se Under the Revised Uniform Partnership Act of 1994: Is the Contractarian Revolution Failing?*, 36 WM. & MARY L. REV. 1559 (1995).

37. For a discussion of this theme with respect to owners of closely held firms generally, see O'Neill, *supra* note 5. While I reject the myth that love and altruism are all that exist in family relations, these qualities are surely no less present in family businesses than in other closely held firms.

Second, relatedly, each family member has an obligation to respect the individual rights of each of the others. Third, beyond this duty to respect others' rights, which applies even among strangers, family members are bound by love. They express their love for one another by affirmatively seeking to respond to each other's wants and preferences. Although this makes them vulnerable to one another, the fact that they do love each other should not be permitted to overwhelm their right to have their interests protected. Fourth, family members also have a sense of the family business as an entity unto itself, with its own interest in thriving through future generations, and they want to promote that interest as such.

The communitarian approach to family representation does a good job of capturing the fourth consideration listed above (the entity aspect of the family business), but ignores the first three. The contractualist approach recognizes the first consideration (that each family member is an autonomous individual), but fails to grasp the last three. By contrast, Rollock's reasonable-expectations approach calls on lawyers to broaden their understanding of the dynamics of family businesses, and to respond to the actual reality of their clients' lives.

III. RECONCEPTUALIZING FAMILY RELATIONS

Rollock convincingly demonstrates that, when lawyers are asked to represent family businesses, neither the communitarian nor the contractualist approach to representing families gives adequate guidance. In this final section, I suggest that it is not only family businesses that are ill-served by the communitarian and contractualist visions of intermediation. I suggest these models may also be inadequate to guide family lawyers, even with respect to nonbusiness family matters, because they rely on skewed visions of familial relations.

The communitarian model of family representation, by insisting that the family be viewed only as a unitary entity, treats individual family members as if they have no independent existence and no legitimate interest distinct from the family group.³⁸ This is not how people actually experience their own families. In reality, we never shed our individuality even though it is also true that we exist in families, as we live in many other overlapping communities (communities of work, of faith, of neighborhood, to name a few). What, then, accounts for the communitarian suppression of family members' individual autonomy? One explanation lies in the family/market dichotomy to which I alluded earlier.³⁹ That is, an unspoken premise underlying the communitarian approach may be that in an idealized family, altruism, sharing, and sacrifice reign supreme, whereas

38. This is true in both Shaffer's extreme stance that individual autonomy destroys the integrity of families, *see* Shaffer, *supra* note 18, at 968-71, as well as in more moderate versions of the communitarian model. For example, Pearce recognizes that individual members of families are autonomous persons, but his proposal is that, once the family group has chosen to be treated as an entity, then the lawyer is thrown back on the principle of Model Rule 1.13 and must treat the individual family members as strangers to her client, the family group. *See* Pearce, *supra* note 18, at 1294-314. Thus, individual family members' interests would not be permitted to come into play in the lawyer's representation of the family.

39. *See supra* notes 4-14.

individualism is a trait reserved for an idealized "market." On that view, individual family members should want to suppress their own self-interest for the good of family unity and prosperity. Only weakness of character drives them to assert their own interests as individuals. Accordingly, the lawyer who ignores or suppresses the personal agenda of individual family members would simply be doing what the individual family members want (or should want) her to do.

Similar observations may be made about the contractualist model of family intermediation. By insisting that each individual family member must autonomously and affirmatively seek the lawyer's services in order for the lawyer to owe her any consideration at all, the contractualist model ignores the reality that some family members are silenced or subordinated.⁴⁰ Not all of them are equally able to assert their own self-interest in dealing with their loved ones. Yet, the contractualist model treats them as if they were, and denies representation to those who fail to meet its standard of autonomy and self-protection. The explanation for this counterfactual stance may lie, again, in the family/market dichotomy. Within the logic of this dichotomy, if a relationship is cast as one between autonomous individuals, then it must be a "market-like" relationship. As such, ideally, each individual should negotiate with the others at arms' length in an equal competition for personal advantage. Any person who makes sacrifices for the good of others or of the group is a less-than-ideal competitor. Viewed in this light, such a person can, indeed should, be penalized because her altruism is seen as illegitimate in individualist, market-like relations.

Thus, what is shared in common between the communitarian and the contractualist models of family lawyering may be more important than that which divides them. Though they seem to offer utterly opposing approaches, they are, nonetheless, united in adhering to the myth of family/market opposition. If that myth is false, as I claim it is, the foundation on which both approaches are built is seriously undermined. Some new approach, not beholden to the false dichotomy of family-versus-market, is needed for effective family representation. It seems to me that Rollock's reasonable-expectations model moves us in that direction. Ideally, it will offer a means by which family lawyers can proceed with heightened sensitivity to the needs of their clients.

To be sure, some families may be highly egalitarian. In that case, the contractualist assumption that any family members who do not speak up do not want or expect to be represented, may well hold. By the same token, some families may be extremely patriarchal. In that case, the communitarian assumption that, when the dominant family member speaks he speaks for the family and all of its members, may also hold. By far most families, however, fall somewhere in the middle. For them the communitarian and contractualist models of representation, each in its own way, would do more harm than good. I suggest they would be better served by a family lawyer who, in accordance with the reasonable-expectations approach, asks specific questions about the

40. Notwithstanding our commitment to political equality for all persons, families remain sites of steeply hierarchical relations. In part, that may be because legal recognition of equality within families is thought to entail too much state intervention into the privacy of the family. See Olsen, *supra* note 4, at 1505.

particularized dynamics of the family she is being asked to represent. I think it is also fair to hope that, by engaging in that kind of inquiry, the legal community may come to relinquish the family/market dichotomy and become sensitized to the complex interplay of selfishness and altruism, competitiveness and sacrifice, that pertains in most families.

