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One Lawyer for the Family: A Response to Alysa Rollock

PATRICK L. BAUDE*

Alysa Rollock's analysis is an impeccably accurate representation of the law, and her argument is powerfully rooted in the values of autonomy, individualism, and decency.[1] Therefore, I am reluctant to do so, but I disagree with her almost completely. Let me explain my position. I need to be particularly careful because she disagrees with Tom Shaffer. My disagreeing with her does not mean that I agree with Tom Shaffer. Those of you who follow this literature know that Tom Shaffer writes from a powerful, Christian-community point of view.[2] His idea of the community and the family is one that is connected to his larger Christian themes, and is one with which Marilyn Quayle would feel very comfortable. I do not come from the Marilyn Quayle school of jurisprudence. Nor in disagreeing with her do I want to endorse patriarchy; but, if I end up there, I cannot help myself.

To explain my position, I really have three things to offer: a puzzle, a word game, and an argument. The puzzle is this. From time to time, the American Bar Association sponsors what it calls "on-line seminars" for two-week periods in which it creates a hypothetical problem and then invites an equal number of professors and practicing lawyers to share in an on-line resolution of this problem.[3] We are one week into one of these on-line seminars that, by pure coincidence, happens to be on a hypothetical much like Alysa's problem. It is slightly different because it involves two different married couples who go together to start a pizza parlor. And the question is: Do they need one, two, three, four, or five lawyers, the fifth lawyer being the Brandeis "lawyer for the situation," as well as one for each of the parties?

While the terms of the on-line seminar preclude me from quoting from any results directly, I want to summarize from this what I find to be an interesting puzzle: that virtually every practicing lawyer participating in this seminar says there is no way he or she would undertake to represent any more than one of those four individuals, whereas virtually every participating professor of legal ethics, in effect, says, "Hey no problem, just get the waivers!" This is not the expected result, right? I would expect professors who do not have to meet a payroll, who do not have to tell clients "no" and all that, to be hypersensitive to ethical issues, whereas I would expect practicing lawyers to say, "Hey, you know, if the money's coming in, I'll take the case." Okay, this is the puzzle.

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1. *See* Alysa Christmas Rollock, *Professional Responsibility and Organization of the Family Business: The Lawyer as Intermediary*, 73 IND. L.J. 567 (1998).

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

3. *See* American Bar Ass'n (Real Property Section) & Business Lawyer (Business Law Section), BORG-901 (a nonpublic, limited-access, nonquotable listserv at <borg-901@abanet .org>).

Now the word game is this. It is just another way of phrasing the whole legal analysis. If a family were a juridical entity, we would not even have an issue, "Is it a conflict of interest to represent a family?" because a family would be a "thing." A lawyer can represent a partnership, a corporation, an unincorporated association, a church, a bingo club, and it is not a conflict of interest. But conflicts-of-interest problems arise because we ask, "Is a family a 'thing'?" If a family is a "thing," it can have a lawyer. If a family is a "group of individuals," then there is a conflict-of-interest problem. Thus, one way to state Alysa's thesis is that a family is not a "thing" in the law.

There is a point to that. There is an odd texture to all of family law, particularly in the area we are talking about now. Families control wealth and exercise great economic, institutional, and social power, yet we have no family law for the ongoing family until it cracks up. Family property law is the law of divorce, dissolution, and death. It is not the law of ongoing families. That is not true for any other ongoing economic institution I can think of. How weird the law of corporations would be if it were all made in bankruptcy court. How gutless, cautious, risk averse, and totally useless such a law would be. But when you ask, "What is the law of an ongoing family?" the only way we know is to break it up and see who gets to take the various pieces home. So, in a way, the case I want to make is that we should think of the family as a legal institution, as an economic institution with ongoing rules of its own, and as such, as an entity entitled to have a lawyer in just the way a partnership is entitled to have a lawyer, as a "thing" of its own.

Historically, we have been reluctant to have a law of the ongoing family because it intervenes in the family. The family is viewed as sacred and private. There are constitutional objections, as well as strong political and moral reservations, to a legal (and thus governmental) role in ongoing family disagreements. For example, there has been a major political reaction to even the most moderate restrictions on physical discipline of children. Yet we are conscious today that respect for privacy in cases of spousal violence is giving the powerful members of the family even more power to exploit the interests and violate the rights of the weaker members. So the conception I propose is one in which the family is conceived of as a "thing," and in which a law of the family is written that explicitly defines, and by defining, limits, intrafamily power.

Now, the argument itself. We have been talking about a family—specifically, a married couple, although you could probably throw in a few generations up and down. Indeed, David Chambers wrote an impressive analysis of what it would mean on some of these questions if gay couples married, and how we would rethink or not the economic ongoing nature of a family in that situation.[4] In any case, I do not mean to define exactly what a family is, but a family, I say, has a right to have a lawyer, just the way any other institution in society has a right to have a lawyer, and this would be a good thing. Why?

There are three reasons. The first two reasons are not very interesting, although I do not think they are bad by any means. One is just the transaction cost. This

4. *See* David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996).

is big bucks. For an ordinary family budget, if a family wants to start a pizza parlor, an extra lawyer is an extra $5000. What does the family get for it? It is in the nature of an insurance policy. They are insured against some kind of risk. That is a lot of money to pay for insurance. I do not pay that kind of insurance for my car or my house. To pay it against a certain contingency of my family business coming apart does not seem to me a very good investment for the rules of legal ethics to force a family to make. They are probably better off taking that $5000, not putting it into the pizza business, and putting it in zero-coupon bonds in their children's names. Thirty years from now they will have something that is left, rather than just something to sue about when the business comes apart. I just do not think an extra lawyer is a good value for the money. I think most families that make investments should be able to judge the value of that investment for themselves. It seems to me not a good idea for the legal community to encourage people to buy that kind of insurance in this form.

Second, if the family does not have a lawyer, the result will be that the managing partner—the patriarch—will have the lawyer and the limited partner—the wife—will not have any lawyer at all. That is how it will come out 95% of the time. That is an empirical proposition for which I have no evidence. It simply strikes me that is the way it would probably go. The closest analogy I know is in the area of divorce, where there has been a big problem as a practical matter—lawyers traditionally represented both husband and wife in an "amicable" divorce, one of the great oxymorons, of course, of family law. Once it became fairly clear that this was not an ethically acceptable behavior, anecdotal evidence suggests that the husband has a lawyer, and the wife does not. This does not strike me as a desirable social outcome. But it strikes me, given the cost of legal services when a family is making an investment decision to start a business, that this is going to be the way it happens, realistically.[5] It would be better to have a lawyer who has some kind of ambiguous relationship to all the parties, rather than have the wife be unrepresented, as a practical matter.

The third reason why the family should have a lawyer is the most interesting. I want to analogize the family to a criminal conspiracy. If you look at the law of conflict-of-interest and criminal conspiracy, one of the remarkable things is that the defendants who are charged with criminal conspiracy all want to have one lawyer. The prosecutor wants them all to have a separate lawyer, and she will always file a motion to force that. The prosecutor will go to the judge and plead that the defendants' rights are not being adequately protected because they only have one lawyer. This is the only instance I know of in which prosecutors routinely try to overrule the defense counsel by demanding more protections for the defendants than they have chosen for themselves. The reason for this in the criminal conspiracy case is obvious. It is commonly known as the "Prisoner's Dilemma": If each defendant acts completely independently, the prosecutor can and will play one against the other and get them all, whereas if they all have the same lawyer and the same strategy, none will give evidence against any of them, and they all will walk.

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5. *See generally* Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401 (1996).

The general point is that having a common lawyer is a very powerful institutional way to achieve a common purpose; that when people have separate lawyers, the very nature of the lawyers' duty begins to move the entire process away from the common purpose. That is the inevitable pressure of having the separate lawyer, if the lawyer takes his/her role of being separate seriously. I think the institutionalization of this pressure is a bad thing to happen to families and family businesses.

If I could go back, finally, just to the puzzle with which I started. The reason many lawyers in the on-line seminar give for not taking the case is not ethical sensitivity. It is almost always, they say that "This deal is going to go belly up. And when a business goes belly up, they always look for somebody to get the money from, and that will be me." I think it is desirable as a social matter to have the lawyer recognize that he or she is a lawyer for the family and, if that enterprise collapses, they will all come after him or her. The reason lawyers want to represent each party separately is so that the families will not come after them. That will not be their duty. I think principles of professional responsibility should provide financial incentives *for the lawyer* that are identical with the incentives *for the family*, which is: The deal, if possible, sticks together. And the family is the big deal.