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ETHICAL BLIND SPOTS IN ADOPTION LAWYERING

Malinda L. Seymore *

INTRODUCTION

When Sherrie Smith approached her lawyer, Robert Stubblefield, desiring to place her then-unborn child for adoption, he agreed to help her find adoptive parents for the child. He found them in his own home—he and his wife, without telling the mother until after she signed an irrevocable consent, adopted the child.¹ If Stubblefield had tried to buy her house under those circumstances, it would have been a clear violation of the *Model Rules of Professional Conduct* (the “*Model Rules*”)—when it comes to business transactions with clients, the *Model Rules* recognize that a lawyer’s legal training, together with the trusting relationship between the lawyer and potentially less powerful client, “create the possibility of overreaching.”² A lawyer cannot enter into business transactions with a client unless the terms are fair and reasonable to the client and disclosed in a writing transmitting those terms in a manner that can be understood by the client.³ The client must also be advised in writing that they should seek the advice of independent legal counsel and be given a reasonable opportunity to do so.⁴ Finally, the client must give informed consent in a writing signed by the client that outlines the transaction terms and the role of the lawyer in the transaction.⁵ Stubblefield took none of

* Professor of Law, Texas A&M University School of Law. I gratefully acknowledge the financial and institutional support of Texas A&M, without which this Article would not have been possible. This Article expands on an essay to be published by *Adoption Quarterly’s* special issue on adoption ethics. As is the tradition among those who write about adoption, I wish to note my place in the adoption triad: I am an adoptive parent of two children via international adoption.

1. State *ex rel.* Okla. Bar Ass’n v. Stubblefield, 766 P.2d 979, 980–82 (Okla. 1988). The case is discussed in further detail. For further discussion, see *infra* notes 278–90 and accompanying text.

2. MODEL RULES OF PROF’L CONDUCT r. 1.8 cmt. 1 (AM. BAR ASS’N 2019).

3. MODEL RULES OF PROF’L CONDUCT r. 1.8(a)(1) (AM. BAR ASS’N 2019).

4. MODEL RULES OF PROF’L CONDUCT r. 1.8(a)(2) (AM. BAR ASS’N 2019).

5. MODEL RULES OF PROF’L CONDUCT r. 1.8(a)(3) (AM. BAR ASS’N 2019).

these steps necessary to protect a client from an overreaching attorney in a business transaction when adopting his client's child without her knowledge.⁶ If he had been buying his client's business or house rather than adopting her child, his course of conduct would have clearly run afoul of the *Model Rules*.⁷

But perhaps it is wrong to compare an adoption process to a business transaction, though adoption is clearly a business in addition to a child welfare institution.⁸ Language of "gift" abounds in adoption;⁹ perhaps the transaction between Sherrie and Stubblefield was a gift. But lawyers are also prohibited from soliciting substantial gifts from clients,¹⁰ out of the same concerns for undue influence that arise in business transactions.¹¹ Even without the special rules regarding gifts and business transactions, Stubblefield was operating in his own self-interest—his desire to adopt the child—rather than out of undivided loyalty to his client. That, too, is a violation of the general conflict of interest rules regulating attorney behavior.¹²

How did Stubblefield miss these red flags signaling unethical behavior? Perhaps it is simply that the *Model Rules* fail to give sufficient guidance in specific areas.¹³ Perhaps the answer lies in

6. See *Stubblefield*, 766 P.2d at 980–81.

7. See, e.g., *In re Lupo*, 851 N.E.2d 404, 408–09, 411, 413 (Mass. 2006) (failing to provide a relative-client with reasonable terms in an understandable way and failing to advise the relative-client to seek independent counsel violated Rule 1.8); *LK Operating, LLC v. Collection Grp., LLC*, 279 P.3d 448, 455–58 (Wash. Ct. App. 2012) (purchasing interest in client's business without appropriate disclosures violated Rule 1.8).

8. Malinda L. Seymore, *Adopting Civil Damages: Wrongful Family Separation in Adoption*, 76 WASH. & LEE L. REV. 895, 903–11 (2019) [hereinafter Seymore, *Adopting Civil Damages*] (arguing that adoption is a business and economic endeavor).

9. See, e.g., Nigel V. Lowe, *The Changing Face of Adoption—The Gift/Donation Model Versus the Contract/Services Model*, in PARENTAL RIGHTS AND RESPONSIBILITIES 141, 152–53 (Stephen Gilmore ed., 2017); Barbara Yngvesson, *Placing the "Gift Child" in Transnational Adoption*, 36 LAW & SOC'Y REV. 227 (2002).

10. MODEL RULES OF PROF'L CONDUCT r. 1.8(c) (AM. BAR ASS'N 2019) ("A lawyer shall not solicit any substantial gift from a client, . . . or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift . . .").

11. ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 158 (8th ed. 2015).

12. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2019). Stubblefield was not ultimately sanctioned for his violation, but the court noted that in the future, attorneys would be so sanctioned. *State ex rel. Okla. Bar Ass'n v. Stubblefield*, 766 P.2d 979, 982–83 (Okla. 1988). The case is discussed further. See *infra* notes 278–90 and accompanying text.

13. Lynn Mather & Leslie C. Levin, *Why Context Matters*, in LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 3, 12 (Leslie C. Levin et al. eds., 2012).

the field of behavioral ethics, in “all too human modes of thinking.”¹⁴ Behavioral legal ethics posits that psychological factors blind lawyers to their own unethical conduct.¹⁵ Psychological factors may also blind lawyers to the ethical missteps of others as well,¹⁶ which may explain why the *Stubblefield* court had a great deal of difficulty imposing discipline on Stubblefield for adopting his client’s child and settled for merely proscribing such conduct in the future.¹⁷

For adoption lawyers, ethical blind spots may arise because of their views of the righteousness of adoption work:

It is also too easy for attorneys to become caught up in the view that family formation work always exemplifies goodness and morality, possibly causing them to disregard the interests of the other parent as the lawyer marches toward the goal of creating a new and legally recognized parent/child relationship.¹⁸

Even without a personal desire to adopt the client’s child, the attorney’s view of the inherent rightness of adoption may lead to unconscious bias. Lawyers often view adoption as “happy law,”¹⁹ ignoring the fact that adoption always starts with loss.²⁰

This Article discusses ethical issues relevant to adoption attorneys, as well as the lessons from behavioral ethics that inform the ethical blind spots common in the practice. The *Model Rules* for attorneys address a number of areas relevant to the complexities

14. Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1111 (2013).

15. Tigran W. Eldred, *Insights from Psychology: Teaching Behavioral Legal Ethics as a Core Element of Professional Responsibility*, 2016 MICH. ST. L. REV. 757, 762 (2016).

16. *Id.*

17. *Stubblefield*, 766 P.2d at 983. The court did sanction Stubblefield for making misrepresentations to a court in connection with the birth mother-client’s divorce. *Id.*

18. Dana E. Prescott & Gary A. Debele, *Shifting Ethical and Social Conundrums and “Stunningly Anachronistic” Laws: What Lawyers in Adoption and Assisted Reproduction May Want to Consider*, 30 J. AM. ACAD. MATRIM. L. 127, 153 (2017).

19. See, e.g., *Adoption*, LISA GHAN BLUMENSTOCK, <https://www.blumenstocklaw.com/services/adoption/> (“Adoptions are ‘happy law’—we love them!”) [<https://perma.cc/C6VU-XYRH>]; *Adoption*, TIMMONS WARNES LLP, <https://www.classiccitylaw.com/adoption-v-21.html> (“For us, this area of the law is an illustration of pure ‘happy law.’”) [<https://perma.cc/9FQF-74YX>]; Deborah M. Henson, *My Professional Story*, THE LAW OFFICE OF DEBORAH M. HENSON, <https://deborahmhenson.com/about-me/me-professional-story/> (referring to her adoption law practice as “happy law”) [<https://perma.cc/9M3E-Y994>].

20. EVELYN BURNS ROBINSON, *ADOPTION AND LOSS: THE HIDDEN GRIEF* 117 (2003); David M. Brodzinsky, *Children’s Understanding of Adoption: Developmental and Clinical Implications*, 42 PROF. PSYCHOL.: RES. & PRAC. 200, 202–03 (2011); Elsbeth Neil, *Coming to Terms with the Loss of a Child: The Feelings of Birth Parents and Grandparents About Adoption and Post-Adoption Contact*, 10 ADOPTION Q. 1 (2006).

of adoption practice. Rules relating to competency and confidentiality, conflicts of interest and dual representation, and the lawyer's roles as counselor as well as advocate are particularly germane. Although much has been written about the dual representation issue in adoption, other issues of professional responsibility in adoption cases have not been as carefully explored. This Article seeks to remedy that. Since legal ethics can be both descriptive and normative, this Article addresses both what the ethical requirements of professional responsibility are and what they should be in adoption practice. In doing so, this Article considers whether a more child-centered approach to adoption practice comports with the *Model Rules*. In addition to rules of professional conduct, there are other legal constraints on a lawyer's conduct:

[T]he rules adopted in every state to regulate the conduct of lawyers are just one set of guidelines for the practice of law. Discovery rules, malpractice claims, appellate review of lower court decisions, the inherent power of the courts to punish for contempt, and even the criminal law provide constraints on how lawyers should operate when representing clients.²¹

In assessing ethical lawyering in adoption, this Article examines all of these legal sources of ethical standards, as well as disciplinary rulings. This Article seeks to sketch the contours of ethical lawyering in adoption in order to shine light on the ethical blind spots adoption attorneys should avoid. Finally, this Article examines solutions to ethical blind spots from behavioral ethics.

I. ADOPTION LAWYERS AND ETHICAL BLIND SPOTS

Adoption is a creature of the law,²² creating the parent-child relationship when biology has not done so.²³ It is "conceived of as an area of comprehensive legal ordering,"²⁴ with the law's role an expansive one, making "determinations of who should adopt, how the

21. Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 209, 214 (2006).

22. Alex Elson & Miriam Elson, *Lawyers and Adoption: The Lawyer's Responsibility in Perspective*, 41 A.B.A. J. 1125, 1125 (1955) ("Adoption is a creation of the legal process."); Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 936 (2000).

23. CYNTHIA HAWKINS DEBOSE, *MASTERING ADOPTION LAW AND POLICY* 3 (Russell Weaver ed., 2015).

24. Amanda C. Pustilnik, *Private Ordering, Legal Ordering, and the Getting of Children: A Counterhistory of Adoption Law*, 20 YALE L. & POL'Y REV. 263, 263 (2002).

adoptions take place, and centrally of what constitutes an acceptable family.”²⁵ Lawyers are central to legal adoption, playing important roles from placement to finalization and beyond.²⁶ A lawyer may advise prospective adoptive parents²⁷ about locating a child, advertising rules, payment of prospective birth mother expenses, securing a home study, requirements for terminating the prospective birth parents’ rights, enforcing open adoption agreements, arranging adoption subsidies from the government, and the like.²⁸ A lawyer may represent a prospective birth mother in relinquishing parental rights or in revoking previously given consent to adoption or in enforcing open adoption agreements.²⁹ A lawyer may advise a prospective birth father about whether he has legally recognized parental rights and what he needs to do to secure those rights, and the lawyer may represent him in challenging an adoption.³⁰ A lawyer may represent the interests of the child in an adoption as a guardian or attorney ad litem or may represent an adult adoptee who seeks information about their birth family or adoption records.³¹ A lawyer may represent an adoption agency or the state involved in adoption placements.³² A lawyer may work in international adoption, concerned with both foreign law and United States

25. *Id.* at 264.

26. Joan Heifetz Hollinger, *The Role of the Lawyer* § 1.06, in 1 ADOPTION LAW AND PRACTICE (Joan Heifetz Hollinger ed., 2019) [hereinafter Hollinger, § 1.06].

27. Until an adoption is final, those seeking to adopt are “prospective” adoptive parents, not adoptive parents. Until a biological mother has relinquished her parental rights, she is a mother or a “prospective” birth mother. The distinction is often elided out of convenience, though doing so can mask the actual relationships and rights between the parties to an adoption. Prospective adoptive parents may see themselves as fully imbued with parental rights and entitled to the child long before the legal status of parent has been created. Public sentiment in contested adoptions tends to favor the prospective adoptive parents and sees any disruption as the destruction of a legal family, even when that legal family has not yet been constructed; the language of “adoptive parents” contributes to this confusion. The terminology of “birth mother” for a pregnant and considering mother-to-be presupposes that she will relinquish, ignoring that until she does, she is the legal mother with the right to parent. She has the right to change her mind about an adoption placement, and labeling her a birth mother before she relinquishes masks that fact. While recognizing the difficulty with this choice of language, in this Article, I bow to convenience and refer to the parties seeking to complete an adoption interchangeably as “prospective” and not-prospective adoptive parents and birth parents.

28. See Hollinger, § 1.06, *supra* note 26.

29. *Id.*; see also Malinda L. Seymore, *Sixteen and Pregnant: Minors’ Consent to Abortion & Adoption*, 25 YALE J. L. & FEMINISM 99, 102–03, 130–31, 154–56 (2013) [hereinafter Seymore, *Sixteen & Pregnant*].

30. Hollinger, § 1.06, *supra* note 26; see also Malinda L. Seymore, *Grasping Fatherhood in Abortion and Adoption*, 68 HASTINGS L.J. 817, 828, 834 (2017) [hereinafter Seymore, *Grasping Fatherhood*].

31. Hollinger, § 1.06, *supra* note 26.

32. *Id.*

immigration law;³³ or with an Indian tribe in an adoption involving the Indian Child Welfare Act.³⁴ The lawyering tasks under the heading “Adoption Law” are multitudinous. And, in addition to following the complex network of laws relating to adoption, lawyers are also obligated to follow the *Model Rules* designed to ensure ethical lawyering.³⁵

The American Bar Association (“ABA”), which accredits law schools, mandates that law schools “offer a curriculum that requires each student to satisfactorily complete . . . one course of at least two credit hours in professional responsibility that includes substantial instruction in *Model Rules*, and the values and responsibilities of the legal profession and its members.”³⁶ The ABA also promulgates the *Model Rules*, which set minimum rules regulating the conduct of lawyers.³⁷ Most courses in law schools’ professional responsibility curricula focus on those *Model Rules*.³⁸ And in most states, lawyers must take and pass the Multistate Professional Responsibility Exam, which focuses on the *Model Rules*, in order to be licensed to practice.³⁹ So when lawyers are trained and tested on lawyering ethics, they are instructed almost exclusively on the *Model Rules* that will prevent them from being disciplined, sanctioned, or disbarred by licensing authorities. Perhaps not surprisingly, “[i]ncreasingly, lawyers are equating ethical conduct with the minimum standards for avoiding discipline under the professional rules of professional conduct.”⁴⁰

33. *Id.*; see also Malinda L. Seymore, *Openness in International Adoption*, 46 COLUM. HUM. RTS. L. REV. 163, 167–68, 193, 196 [hereinafter Seymore, *International Adoption*].

34. Hollinger, § 1.06, *supra* note 26.

35. MODEL RULES OF PROF’L CONDUCT xi–xiii (AM. BAR ASS’N 2019).

36. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 303 (2018–2019). The ABA requirement was adopted in 1974 in response to Watergate, a scandal that included more than its fair share of lawyers. Mary C. Daly et al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 LAW & CONTEMP. PROBS. 193, 194–95 (1995).

37. MODEL RULES OF PROF’L CONDUCT xi–xii (AM. BAR ASS’N 2019). Attorneys cannot be disciplined for violating the *Model Rules*, but the *Model Rules* have been extremely influential and have been adopted by bar authorities who can discipline lawyers for ethical violations. Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637, 640–41, 653–54 (2005). As of 2013, forty-six jurisdictions had adopted the 2002 ABA Model Rules of Professional Conduct. *Status of State Review of Professional Conduct Rules*, A.B.A. (Sept. 20, 2013), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics_2000_status_chart.pdf [https://perma.cc/J8T5-5MZN].

38. See Daly et al., *supra* note 36, at 194–96.

39. *Id.* at 195–96.

40. Susan Saab Fortney, *Mandatory Legal Malpractice Insurance: Exposing Lawyers’*

The *Model Rules*, though mandatory, “are notoriously under- or unenforced by disciplinary authorities.”⁴¹ They create a one-size-fits-all approach to lawyering ethics, one that often fails to provide concrete guidance to lawyers in specific areas.⁴² The *Model Rules*, often vague and uncertain, leave much ethical decision making to a lawyer’s own judgment.⁴³ It is in that area of judgment that the lessons of behavioral ethics can be so important. Behavioral ethics tells us that unethical decisions may start with faulty information acquisition. “Bounded awareness” prevents decision makers from focusing on important information that is needed and available and that may allow them to make better, more ethical decisions.⁴⁴ By focusing narrowly on a limited outcome—a need to make a profit, for example, or complete an adoption successfully—the actor is led “to not ‘see’ important, accessible, and perceivable information during the decision-making process.”⁴⁵ In deciding to adopt his client’s child, for instance, Stubblefield may focus on the good of adoption and not see the potential for conflict of interest and overreaching. Outcome bias allows decision makers to mask unethical conduct when an outcome is perceived as favorable, seeing only unethical or blameworthy behavior when it leads to a bad outcome.⁴⁶ If the adoption is perceived as good, then whatever behavior produced it must also be good. Immediacy of outcome also influences decision making; future interests lose out to immediate self-interest.⁴⁷ Stubblefield may not consider the future effects on his adopted child of his unethical conduct in completing the adoption. Further information-gathering may be caused by commit-

Blind Spots, 9 SAINT MARY’S J. ON LEGAL MALPRACTICE & ETHICS 190, 235 (2019); see also Victoria J. Haneman, *The Ethical Exploitation of the Unrepresented Consumer*, 73 MO. L. REV. 707, 726 (2008) (“The dismal truth is that most practitioners do not contemplate ethics beyond reading a statute or code to determine if there is a violation.”).

41. Mather & Levin, *supra* note 13, at 12. For statistics on the low level of discipline for attorneys, see Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PROF. 209 (2011).

42. Mather & Levin, *supra* note 13, at 12.

43. *Id.*; Robbennolt & Sternlight, *supra* note 14, at 1125.

44. Max H. Bazerman & Ovul Sezer, *Bounded Awareness: Implications for Ethical Decision Making*, 136 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 95, 97 (2016).

45. *Id.* The authors use as an example experiments where participants are asked to count the number of passing balls on a video and miss the person in a gorilla costume: “By focusing on a particular task, they missed obvious information in their visual world.” *Id.*

46. Ovul Sezer et al., *Ethical Blind Spots: Explaining Unintentional Unethical Behavior*, 6 CURRENT OPINION PSYCHOL. 77, 78 (2015).

47. See *id.*

ment bias; once a lawyer has committed to the position of her client, she may discount information inconsistent with the client's objectives.⁴⁸

"Bounded ethicality," or ethical blind spots, are "the psychological processes that lead people to engage in ethically questionable behaviors that are inconsistent with their own preferred ethics."⁴⁹ Thus, Stubblefield may recognize that an attorney should not represent a client when he cannot give undivided loyalty to her exclusive interests, but he may believe that he is able to put aside his self-interest in favor of his client's interest.⁵⁰ Ethical blind spots explain why people are unintentionally unethical.⁵¹ We often think of unethical behavior as intentional—lying, cheating, etc.—but in fact, "a large body of research has shown that unethical behavior often stems from actions that actors do not recognize as unethical."⁵² Implicit biases, largely unrecognized, can cause someone to act against their explicit ethical values.⁵³ Favoring one's own group over disfavored out-groups is a common form of implicit bias, as is favoring one's self-interest over that of others.⁵⁴ An adoption attorney may believe, for example, that unwed teen mothers cannot be adequate parents and may ignore his client's expressions of a desire to parent when representing a prospective birth parent. After all, his implicit bias tells him that adoption placement is the only

48. Deborah L. Rhode, *Moral Counseling*, 75 *FORDHAM L. REV.* 1317, 1326 (2006).

49. Bazerman & Sezer, *supra* note 44, at 99; see Sezer et al., *supra* note 46, at 77. Social scientists define "ethical blind spots" as "situations in which people pay little (or no) attention to ethical considerations when doing so is against their self-interest." Andrea Pittarello et al., *Visual Saliency Influences Ethical Blind Spots and (Dis)honesty*, *PSYCHONOMIC BULL. & REV.* 1, 1 (2019) [hereinafter Pittarello et al., *Visual Saliency*].

50. See Bazerman & Sezer, *supra* note 44, at 99. The article uses the example of Justice Antonin Scalia's failure to recuse in a case involving his hunting buddy, Vice President Dick Cheney. The authors conclude that Justice Scalia "was unaware of the strong evidence that conflicts of interest have a strong psychological basis." *Id.*; see, e.g., Pittarello et al., *Visual Saliency*, *supra* note 49, at 1.

51. Sezer et al., *supra* note 46, at 77.

52. *Id.*; see also MAX. H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT* 21 (2011); Eldred, *supra* note 15, at 759 ("Unethical conduct is frequently the product of psychological factors that occur largely outside of the conscious awareness of the decision-maker."); Leslie C. Levin, *Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock*, 22 *GEO. J. LEGAL ETHICS* 1549, 1561 (2009) (reviewing RICHARD ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* (2008)) ("Psychologists now believe that conscious deliberation plays a relatively minor role in shaping behavior and that much of what we might call ethical decision making is non-conscious.").

53. Sezer et al., *supra* note 46, at 77.

54. *Id.*

rational response to her situation, and he may disregard the specifics of her situation or more recent empirical evidence that paints a more nuanced view of teen mothers.⁵⁵

But an attorney's biases will remain implicit, invisible even to himself. A decision maker who acts against his own ethical values—say, by ignoring the wishes of the client because he knows better what is in her interest—will “maintain an ‘illusion of objectivity,’”⁵⁶ tending to assess himself as “objective, fair, and unbiased,” and thus capable of making the correct ethical choices when confronted with them.⁵⁷ Thus, in exercising ethical judgment, lawyers tend to be overconfident in their abilities to make ethically correct choices:

[A]ttorneys tend to believe that their own ethics and their firm's ethical standards are more stringent than those of other attorneys and other firms. These views of the self can lead to an ethical blind spot that impedes our ability to perceive and thoughtfully consider the ethical tensions we inevitably face.⁵⁸

Believing in their own high ethical standards, people seek to avoid straying so far over the line as to “require them to negatively update their self-perception that they are honest.”⁵⁹ Indeed, people are likely to remember only the facts that paint them as ethical actors and suppress facts that call that status into question.⁶⁰ “And if we are overconfident—in our own ethical judgment, or in our ability to fix or otherwise manage ethical problems—then we are unlikely to stop and think carefully about a decision or to revisit that decision later.”⁶¹ Maintaining a moral self-image can motivate a decision maker to engage in “motivated forgetting,” actually changing the rules they believe in after engaging in wrongdoing.⁶²

55. See Seymore, *International Adoption*, *supra* note 33, at 175.

56. Sezer et al., *supra* note 46, at 77 (quoting Dolly Chugh et al., *Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest*, in *CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY* 74, 82 (Don A. Moore et al. eds., 2005)).

57. Robbennolt & Sternlight, *supra* note 14, at 1117.

58. *Id.* at 1116–17.

59. Andrea Pittarello et al., *Justifications Shape Ethical Blind Spots*, 26 *PSYCH. SCI.* 794, 795 (2015) [hereinafter Pittarello et al., *Justifications*].

60. Levin, *supra* note 52, at 1562.

61. Robbennolt & Sternlight, *supra* note 14, at 1117.

62. Sezer et al., *supra* note 46, at 78.

In that way, they can “close the gap between their unethical behavior and their moral self-image.”⁶³

A lawyer who carefully and appropriately follows every mandate of the *Model Rules*, with its focus on representing exclusively the interests of one’s client, may still find himself in conflict with what we might think of as the moral imperatives of an ethical society. Dr. Richard Wasserstrom describes the lawyer’s role as follows:

Once a lawyer represents a client, the lawyer has a duty to make his or her expertise fully available in the realization of the end sought by the client, irrespective, for the most part, of the moral worth to which the end will be put or the character of the client who seeks to utilize it. Provided that the end sought is not illegal, the lawyer is, in essence, an amoral technician whose peculiar skills and knowledge in respect to the law are available to those with whom the relationship of client is established.⁶⁴

Leading scholar Carrie Menkel-Meadow also decries the tendency of rules of legal ethics to assume all law operates in focus on the sole interests of clients:

[T]he macro and philosophical ethical issues of when lawyers should not be adversarial, but should focus instead on more positive and creative forms of legal problem-solving, continue to be ignored in a system of law practice that assumes that adversarialism, winning legal cases, and maximizing client gain are the major goals of legal practice and legal dispute resolution.⁶⁵

Adoption lawyers should struggle, even more than most lawyers, in the role-differentiated world described by Wasserstrom and decried by Menkel-Meadow. The touchstone for modern adoption has long been the best interest of the child,⁶⁶ but lawyers do not represent the child in adoption, instead representing the prospective

63. *Id.*

64. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 5–6 (1975).

65. Carrie Menkel-Meadow, *The Evolving Complexity of Dispute Resolution Ethics*, 30 GEO. J. LEGAL ETHICS 389, 392 (2017).

66. E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 11–12 (1998). The 1851 Massachusetts adoption statute is “commonly considered the first modern adoption law,” and it first imposed the “best interests of the child” standard to adoptions. *Id.*; see also Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796–1851*, 73 NW. U. L. REV. 1038, 1042–43 (1979). The best interest of the child standard remains consistent in the adoption statutes of all fifty states. Joan Heifetz Hollinger, *Introduction* § 1.01, in 1 ADOPTION LAW AND PRACTICE (Joan Heifetz Hollinger ed., 2019) [hereinafter Hollinger, § 1.01]; see also UNIFORM ADOPTION ACT § 3-703(a) cmt. (1994) (“A judicial determination that a proposed adoption will be in the best interest of the minor adoptee is an essential—and ultimately the most important—prerequisite to the granting of the adoption.”).

adoptive parents or birth parents (or sometimes both).⁶⁷ Lawyers are obligated under this traditional client-centered approach to lawyering ethics to represent only the interests of their client and to ignore the interests of the child.

A starting point for ethical lawyering in adoption is the *Model Rules*. What do the *Model Rules* tell adoption attorneys about their ethical behavior?

II. RULES OF PROFESSIONAL CONDUCT APPLICABLE TO ADOPTIONS

Adoption lawyers, like all lawyers, are required to follow all the *Model Rules* mandated in the state in which they practice. Like all lawyers, they must serve clients competently and diligently, avoid conflicts of interest, communicate adequately with clients, be candid toward courts and (some) others, avoid deceptive advertising, charge reasonable fees, report the professional misconduct of other lawyers, and maintain the integrity of the legal profession. But some of these issues are more prominent in adoption practice than others. This Part examines the *Model Rules* in the context of adoption-related cases to illustrate the common ethical blind spots of adoption practice.

A. Competence

*A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*⁶⁸

Adoption law can be extremely complex, involving both state and federal law (and potentially the laws of multiple states) and the rights and interests of multiple parties. This can be especially true where birth father rights are involved:

67. In a leading treatise on adoption law and practice, in a section describing the role of attorneys in adoptions, the treatise lists fourteen different roles that lawyers could play in adoptions, such as representing prospective adoptive parents, Indian tribes in ICWA cases, and birth parents, but only one of the roles references adoptees in adoption placement—counseling an adolescent child on whether to consent to a proposed adoption by a stepparent or other known person and serving as a guardian ad litem for a younger adoptee. Hollinger, § 1.06, *supra* note 26; see also Elizabeth Samuels, *Legal Representation of Birth Parents and Adoptive Parents*, 9 ADOPTION Q. 73, 74 (2006) (noting that at least two states permit dual representation of the adoptive parents and the birth parents).

68. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2019).

A father is not a legal parent unless he takes affirmative steps to grasp fatherhood. Being married to the mother at the time of conception or at the time of birth is one of those affirmative steps. If he is not married to the mother, he must do far more before he will be legally recognized as a father.⁶⁹

What that “far more” is, to be legally recognized as a father, is often a contested issue in adoption.⁷⁰ Courts will consider whether the birth father supported the mother emotionally and financially during the pregnancy; whether he made plans for a baby, such as buying a crib or car seat; whether he offered marriage; whether he made arrangements to place the baby on his insurance; whether he expressed excitement at becoming a father; and whether he was listed on the birth certificate.⁷¹ Given the fact-specific nature of a court’s inquiry, an inexperienced lawyer may not appropriately advise a birth father on how to assert his parental rights or provide sufficient guidance to prospective adoptive parents of the riskiness of a placement where a birth father is refusing to consent. A lawyer may also face civil liability for tortious interference with parental rights if she takes actions that cut off a birth father’s opportunity to parent.⁷²

69. Seymore, *Grasping Fatherhood*, *supra* note 30, at 819; *see, e.g.*, *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641 (2013); *Lehr v. Robertson*, 463 U.S. 248, 261 (1983); *Caban v. Mohammed*, 441 U.S. 380, 385–89 (1979); *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

70. *See* Elizabeth Brandt, *Cautionary Tales of Adoption: Addressing the Litigation Crisis at the Moment of Adoption*, 4 WHITTIER J. CHILD & FAM. ADVOC. 187, 192 (2005) (“Cases involving litigation of adoption by unwed fathers are increasingly becoming a staple of adoption practice.”).

71. *See, e.g.*, *In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 967 (Fla. 1995) (ruling that failure to provide emotional and financial support during pregnancy provides grounds to block father’s objections to adoption placement); *In re Adoption of Baby James Doe*, 572 So. 2d 986, 987, 989 (Fla. Dist. Ct. App. 1990) (holding that father expressed sufficient care and concern to be granted a say in the adoption, based upon evidence of “(1) an apartment lease signed by him and the natural mother, for the apartment in which they resided together during the natural mother’s pregnancy; (2) receipts for baby furniture, bedding, clothing, and gifts which he had purchased for the baby; and (3) an identification band worn by the mother using the [putative father’s name] while she was in the hospital for the birth of the child”); *In re Adoption of B.G.S.*, 556 So. 2d 545, 550–51 (La. 1990) (noting that father acted sufficiently to acquire rights by holding himself out as father and seeking to place his name on the child’s birth certificate); *In re Baby Girl S.*, 535 N.Y.S.2d 676, 681–83 (Sur. Ct. 1988) (ruling that father was entitled to block adoption based on the facts that he offered marriage upon learning of pregnancy, sought custody of the child, offered to pay pregnancy-related expenses, sought in court to establish paternity), *aff’d sub nom. In re Raquel Marie X.*, 559 N.E.2d 418, 428–29 (N.Y. 1990).

72. *See, e.g.*, *Wyatt v. McDermott*, 725 S.E.2d 555, 556–58, 564 (Va. 2012) (accepting tortious interference with parental rights as a viable cause of action, including lawyer’s advice to birth mother to cut off birth father); *Kessel v. Leavitt*, 511 S.E.2d 720, 734–35, 765 (W. Va. 1998) (recognizing tortious interference with parental rights as a viable cause of

A father may protect his rights in some states by filing in the putative father registry.

Putative father registries, which exist in some thirty-five states, allow men to file forms asserting a parental interest in a child. In those states, an adoption cannot be completed unless there is a certification that the putative father registry has been searched and that no match can be made. If there is a match, then the putative father is entitled to notice of the adoption proceeding.”⁷³

Putative father registry statutory schemes can be very complex, with short deadlines⁷⁴ and hyper-technical requirements.⁷⁵ One difficult issue with the putative father’s registry is where to file. When a birth father does not know when or where the child is born, or when or where the adoption proceeding is filed, he may fail to file timely or file in the wrong jurisdiction and may not receive notice of the adoption. “[S]ince there is no national putative father registry, confusion can exist as to where to file when the birth mother leaves the state where the birth father might be expected to file.”⁷⁶

In a recent case, *In re Krigel*, where a long-time adoption lawyer was sanctioned for violations of legal ethics rules, the birth father resided in Kansas, the nonprofit adoption agency was incorporated in Kansas, and the birth father’s initial attorney was located in Kansas.⁷⁷ Kansas does not have a putative father’s registry.⁷⁸ The adoption proceeding, however, was in Missouri, which has a putative father’s registry.⁷⁹ Although Krigel represented the birth mother and was ultimately sanctioned for his ethical missteps in the case, Krigel was not the only lawyer involved in the adoption

action, involving actions by lawyer as well as birth mother).

73. Seymore, *Grasping Fatherhood*, *supra* note 30, at 854–55 (footnotes omitted).

74. Putative father statutes may give fathers as little as five days to file. *See* NEB. REV. STAT. § 43-104.02. Though a thirty-day deadline is more typical. Rebeca Aizpuru, *Protecting the Unwed Father’s Opportunity To Parent: A Survey of Paternity Registry Statutes*, 18 REV. LITIG. 703, 715–16 (1999). The Missouri statute applicable in this case gives a fifteen-day window in which to file. MO. REV. STAT. § 453.030.

75. Seymore, *Grasping Fatherhood*, *supra* note 30, at 855–56 (discussing strict time limits on filing and difficulties in determining where to file); Dale Joseph Gilsinger, Annotation, *Requirements and Effects of Putative Father Registries*, 28 A.L.R. 6th 349, 363 (2007) (discussing complexity in whether registries are applicable where father has already filed paternity action).

76. Seymore, *Grasping Fatherhood*, *supra* note 30, at 855.

77. 480 S.W.3d 294, 296–98, 306 (Mo. 2016) (en banc).

78. Brief for Informant at 32, *In re Krigel*, 480 S.W.3d 294 (No. SC95098).

79. MO. REV. STAT. § 192.016; *In re Krigel*, 480 S.W.3d at 298.

matter.⁸⁰ The birth father's first lawyer was inexperienced in adoption cases, specializing instead in business and real estate matters.⁸¹ His lack of knowledge caused him to rely on Krigel's expertise, to the detriment of the birth father. The birth father's first attorney did not appear to consider that the birth father needed to file in a putative father registry. In fact, one well-recognized problem with registries is that so few people know of their existence.⁸² An expert witness in the *In re Krigel* case, Professor Mary M. Beck, testified that very few persons ever register for the putative father registry in Missouri; in the fifteen years since the registry was created, only a little over fifty men had registered.⁸³ It is not just birth fathers who are ignorant about the putative father registry; attorneys are often unaware of its existence if they do not practice in the adoption law area. I frequently receive calls from lawyers representing birth fathers, and the first question I ask is, "Have you filed in the putative father registry?" The most common response I get from lawyers is, "What's the putative father registry?"

The birth father's lawyer in *In re Krigel* was apparently not subject to discipline for his handling of the case, but he might well have been considered incompetent in failing to recognize that he was unprepared to handle the intricacies of a contested adoption case. He did not seek to associate an experienced lawyer on the case and instead relied on informal assurances from opposing counsel because of his expertise.⁸⁴ Though deceptive practices from Krigel may have played a part in his conduct, the birth father's lawyer should have investigated further both legally and factually. Given that the birth mother resided in Missouri,⁸⁵ it would not have been unexpected for the birth and adoption to occur in Missouri and be subject to Missouri law. To appropriately protect the interests of the birth father, he should have filed in the putative father registry in Missouri.

The complexities of adoption practice go beyond issues surrounding birth fathers, of course. One particularly vexing area involves the Indian Child Welfare Act ("ICWA"), which imposes additional

80. *In re Krigel*, 480 S.W.3d at 297, 300.

81. Brief for Informant, *supra* note 78, at 9.

82. Aizpuru, *supra* note 74, at 727.

83. Brief for Informant, *supra* note 78, at 14 n.3.

84. *Id.* at 22.

85. *Id.* at 5. The birth mother lived about fifteen miles from the birth father's Kansas residence, but across the state line in Kansas City, Missouri. *Id.*

requirements in adoptions involving Indian children.⁸⁶ In an Alaska case, a court found that the lawyers representing the adoptive parents did not act with the “skill, prudence, and diligence required of an attorney” when they failed to advise their clients to fully comply with the ICWA in securing the consent of the birth mother.⁸⁷ The facts of the case are odd: the birth mother, the sister of the adoptive mother, became artificially inseminated with the adoptive father’s sperm.⁸⁸ The birth/adoptive father was Chickasaw, potentially triggering all the protections of the ICWA even for the non-Indian birth mother.⁸⁹ The birth mother’s consent needed to be affirmed in court before a judge, a step that the lawyers failed to do.⁹⁰ The birth mother then challenged the adoption.⁹¹ Although the adoption was ultimately upheld, with the court ruling that the ICWA did not apply,⁹² the adoptive parents sued the lawyers for legal malpractice.⁹³ They claimed that the lawyers were negligent in failing to follow the requirements of the ICWA, a subject in which they claimed expertise.⁹⁴ That failure gave the birth mother grounds to challenge the adoption. The lower court ruled in favor of the lawyers, finding it to be “a mere error of judgment, . . . a point of law [upon] which reasonable lawyers could differ.”⁹⁵ The appellate court disagreed, ruling that “the risk in failing to obtain the biological mother’s consent to the adoption in conformity with [the ICWA] should have been clear to any attorney possessed of the required level of professional competence.”⁹⁶

A lawyer’s incompetence is often revealed by her failure to take appropriate steps to protect a client’s rights in what may look like more straightforward cases as well. In *In re Hagedorn*, the lawyer in an adoption case was disciplined for failure to provide competent representation.⁹⁷ While representing prospective adoptive parents, that lawyer failed to arrange for a required preplacement evaluation of the prospective adoptive parents, and in fact seemed not to

86. 25 U.S.C. §§ 1901 to 1923 (2012).

87. *Doe v. Hughes*, 838 P.2d 804, 807 (Alaska 1992).

88. *Id.* at 805.

89. *In re Adoption of T.N.F.*, 781 P.2d 973, 973–74 (Alaska 1989).

90. *Id.* at 975.

91. *Id.* at 974.

92. *Id.* at 981–82.

93. *Hughes*, 838 P.2d at 806.

94. *Id.*

95. *Id.*

96. *Id.* at 806–07.

97. 725 N.E.2d 397, 399–400 (Ind. 2000) (per curiam).

realize the evaluation was necessary; failed to terminate the parental rights of the birth mother and father, having to belatedly notify the birth father by publication in order to terminate his rights; and failed to prepare or file a petition for adoption.⁹⁸ Though the child was in the custody of the prospective adoptive parents for over two years, the lawyer failed to secure the adoption despite promises to do so.⁹⁹

The rule regarding competence requires lawyers to have the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹⁰⁰ What is reasonably necessary depends on the complexity and specialized nature of the matter, as well as the lawyer’s general experience.¹⁰¹ But that standard is not one of specialized expertise: “In many instances, the required proficiency is that of a general practitioner.”¹⁰² The comments to the rule provide, “[a] lawyer need not necessarily have special training or prior experience to handle legal problems of a type which the lawyer is unfamiliar A lawyer can provide adequate representation in a wholly novel field through necessary study.”¹⁰³ A lawyer can also mitigate the issue by associating with a lawyer of established competence in the field.¹⁰⁴ At its core, however, “[c]ompetence includes the ability to discern when an undertaking requires specialized knowledge or experience that a lawyer does not have.”¹⁰⁵ A lawyer is expected to be familiar with basic well-settled principles of law and to possess the ability to analyze a client’s situation so as to apply the correct law to the facts.¹⁰⁶ A lawyer is also

98. *Id.* at 398–99.

99. *Id.* at 399. Sometimes it is difficult to tell whether a lawyer’s failure is caused by a lack of competence—ignorance of what ought to be done—or a lack of diligence, in failing to do what she well knows ought to be done. Lack of diligence is also a violation of the rules of professional conduct. MODEL RULES OF PROF’L CONDUCT r. 1.3 (AM. BAR ASS’N 2019) (“A lawyer shall act with reasonable diligence and promptness in representing a client.”). The court in *In re Hagedorn* found a violation of rule 1.3 as well. 725 N.E.2d at 400.

100. MODEL RULES OF PROF’L CONDUCT r. 1.3 (AM. BAR ASS’N 2019).

101. MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 1 (AM. BAR ASS’N 2019).

102. *Id.*

103. MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 2 (AM. BAR ASS’N 2019).

104. *Id.* When associating with another lawyer, the lawyer must obtain informed consent from her client and believe the other lawyer’s services will contribute to the competent representation of the client. MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 6 (AM. BAR ASS’N 2019).

105. BENNETT ET AL., *supra* note 11, at 27; *see, e.g., In re Richmond’s Case*, 872 A.2d 1023, 1028 (N.H. 2005) (“Rule 1.1 mandates that a general practitioner must identify areas in which the lawyer is not competent . . .”).

106. Christopher Sabis & Daniel Webert, *Understanding the “Knowledge” Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 GEO. J. LEGAL ETHICS 915, 919

expected to possess the necessary legal research skills “to ascertain applicable rules of law, whether or not commonly known or settled, using standard research sources.”¹⁰⁷

Lawyers must recognize that adoption is not simply a rosy-eyed “happy law.”¹⁰⁸ The law is complex, and the consequences of mistakes are potentially grave. Even if a lawyer avoids sanction from a bar authority or legal malpractice liability, violations of legal ethical rules can risk the finality of the adoption.¹⁰⁹ While the requirement to provide competent representation is a clearly stated rule of professional responsibility, “[c]ertain routine decisions or practices—providing competent services, maintaining sufficient support staff, or communicating with clients—may not be thought of as raising ethical issues in the same ways as more egregious behaviors”¹¹⁰ This tendency toward “ethical fading,” the failure to “see” the ethical aspects of a decision, is an ethical blind spot attorneys must guard against.¹¹¹

B. *Candor*

*A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . . or (3) offer evidence that the lawyer knows to be false.*¹¹²

*A lawyer shall not[:] (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.*¹¹³

*In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client*¹¹⁴

(2002).

107. BENNETT ET AL., *supra* note 11, at 27.

108. See sources cited *supra* note 19.

109. See discussion *infra* Sections II.C–F, III.B *passim*.

110. Robbenolt & Sternlight, *supra* note 14, at 1121.

111. *Id.* at 1120.

112. MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2019).

113. MODEL RULES OF PROF'L CONDUCT r. 3.4(b) (AM. BAR ASS'N 2019).

114. MODEL RULES OF PROF'L CONDUCT r. 4.1 (AM. BAR ASS'N 2019).

While lawyers are obligated to represent the interests of their clients, lawyers are also officers of the court with an obligation to avoid undermining the integrity of the court's process.¹¹⁵ That obligation to the court is heightened in *ex parte* proceedings—those proceedings where only one side is presenting the case to the tribunal. Since there is no balance of presentation by opposing counsel, the sole advocate present has the duty “to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.”¹¹⁶ That duty is especially strong when the lawyer's failure to provide notice to the opponent is why the presentation is *ex parte*, as in adoption cases where the birth father is often not notified of the proceeding.

A lawyer cannot, consistent with the *Model Rules*, offer evidence knowing it to be false.¹¹⁷ He cannot “ignore an obvious falsehood” when it is presented in court.¹¹⁸ A lawyer who unknowingly offers false evidence has an obligation to the tribunal to correct that false evidence.¹¹⁹ That obligation exists even if the testimony is elicited from his client by another lawyer's examination, not his own.¹²⁰ Rule 3.3 clearly applies “to an attorney who fails to correct a misstatement to the court that was made in his presence by another attorney.”¹²¹ As one court put it:

[A]s a general proposition, the prohibitions set forth in these [*Model Rules*] are not limited to affirmative misstatements of fact or law by an attorney. Indeed, we have recognized that, depending upon the circumstances, “silence can be no less a misrepresentation than words.” Therefore, our evaluation of the attorney's discharge of his or her obligation is not simply a matter of considering the affirmative statements and misstatements of counsel. Rather, if an attorney has an obligation to speak in order to comply with his or her duty of candor

115. MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 2 (AM. BAR ASS'N 2019).

116. MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 14 (AM. BAR ASS'N 2019); *see* *People v. Ritland*, 327 P.3d 914, 921 (Colo. 2014) (sanctioning lawyer for failure to disclose in *ex parte* adoption proceeding where birth father was absent).

117. MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 5 (AM. BAR ASS'N 2019).

118. MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 8 (AM. BAR ASS'N 2019).

119. MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 10 (AM. BAR ASS'N 2019).

120. *Id.*

121. *Daniels v. Alander*, 844 A.2d 182, 188 (Conn. 2004) (disciplining the associate who sat silently at counsel table while senior lawyer lied to the court for violating the rule requiring candor to the tribunal); *see also In re Bruno*, 956 So. 2d 577, 578 (La. 2007) (*per curiam*) (sanctioning the lawyer who remained silent when another lawyer falsely claimed they had not paid a witness, when the silent lawyer knew he had paid the witness); *Brundage v. Estate of Carambio*, 951 A.2d 947, 956 (N.J. 2008).

to the tribunal, then silence also may also be a violation of the [*Model Rules*].¹²²

In the *In re Krigel* case, Krigel permitted false and misleading testimony to be presented in court that portrayed a false impression that the birth father was not interested in the child or in asserting his parental rights.¹²³ During the hearing on the birth mother's consent to adoption, Krigel elicited testimony from the birth mother and sat silently while another attorney elicited testimony from the birth mother that was false or misleading.¹²⁴ For example, the following exchange took place:

Krigel: Now, [birth father] has been consulted at length about this matter, has he not?

Birth mother: Yes.

Krigel: You and Ms. Merryfield have met with him on at least one occasion. Has it been more than once?

Birth mother: Just once.

Krigel: Even though he has been consulted, he has not stepped forward since the birth of the child claiming any rights to the child?

Birth mother: No.¹²⁵

This exchange lacked an appropriate disclosure to the court that the attorney had advised the birth mother not to inform the birth father about the birth, the adoption plans, or anything else.¹²⁶ The birth father would have been hard pressed to step forward since the birth of the child, when the fact of the child's birth had been concealed from him. Krigel also did not inform the court that the birth father had retained an attorney, instead creating the impression that the father had done nothing to assert his parental rights.¹²⁷ And even if Krigel did not know about the birth mother's lies to the birth father, he had to have known that the entirety of the testimony was wildly inaccurate and incomplete. Krigel made no attempt to correct the impression created by the examination of

122. *Brundage*, 951 A.2d at 956 (citation omitted).

123. 480 S.W.3d 294, 299 (Mo. 2016) (en banc).

124. *Id.* (finding that Krigel's questioning of the birth mother was designed to mislead the court); Brief for Informant, *supra* note 78, at 35 (noting that Krigel was in the courtroom throughout the testimony of his client and discussing other attorney's questioning of the birth mother while Krigel was present).

125. Brief for Informant, *supra* note 78, at 38–39.

126. *In re Krigel*, 480 S.W.3d at 297–98 (describing the “passive strategy” Krigel employed in his representation of the birth mother).

127. Brief for Informant, *supra* note 78, at 42.

the birth mother that the birth father, knowing about the birth, willfully shirked his responsibilities and showed no concern for the well being of the child.¹²⁸ In *Mississippi Bar v. Land*, the lawyer ran afoul of the rules when he answered discovery in such a way as to be “not only unresponsive, but also misleading in that it tended to give the impression” of a false state of affairs.¹²⁹ While lawyer Land’s statements may have been technically true, they “were calculated to deceive,”¹³⁰ much like Krigel’s carefully constructed questions to the birth mother.

Krigel also sat in silence when the guardian ad litem, Mann, questioned the birth mother, eliciting the following testimony:

Mann: . . . [F]rom the time of conception until now, has [birth father] had the ability to make contact with you continuously if he wanted.

Birth mother: Yes.

* * *

Mann: So there’s never been a gap in time where he could not communicate with you?

Birth mother: No.

* * *

Mann: Did he know about when the due date was?

Birth mother: Yes.

* * *

Mann: Has he come to the hospital?

Birth mother: No.¹³¹

At the time Krigel heard this testimony, he knew that he had advised against any contact with the birth father and knew that there were already steps taken to ensure that there would be no communication between his client and the birth father.¹³² Even if

128. *In re Krigel*, 480 S.W.3d at 299.

129. 653 So. 2d 899, 901, 907 (Miss. 1994) (en banc). The court concluded the lawyer failed to correct the mistaken impression he created that there were no reports or photographs related to a personal injury where the plaintiff was struck in the eye. *Id.* at 909. The plaintiff believed it was a rock thrown from a lawnmower, but the lawyer knew it was his client’s son shooting with a BB gun. *Id.* at 900, 903. There were reports and photographs related to the BB gun, but not the lawnmower. *Id.* at 900.

130. *Id.* at 908.

131. Brief for Informant, *supra* note 78, at 40–41.

132. In fact, at the hearing on attorney discipline, Krigel testified as follows concerning communication:

Q. Did you do anything to encourage communication between the young couple?

A. No, I suggested to my client that the parties’ agreement that had existed before I ever got involved in the case, that they only communicate through lawyers and that

he did not know that the birth mother lied about a later due date for the baby, he knew that the April 6 hearing was being held before the April 8 due date first communicated to the birth father.¹³³ He knew that if the birth mother had followed his no-contact advice, the birth father would not have known which hospital to go to even if he had known about the birth of the child.

Further, Krigel filed a document falsely stating that the birth mother did not know of any person claiming to have custody or visitation rights, though he knew full well that the birth father had such a claim.¹³⁴ And Krigel lied to the birth father's lawyer when he assured him that the child would not be placed for adoption without the father's consent, though he had already determined to employ a "passive strategy" to cut out the birth father and allow the adoption without his consent.¹³⁵ Omissions can be as dishonest as affirmative misrepresentations; "[a]ny differences between 'false' and 'misleading' statements are irrelevant" under the rules.¹³⁶

A Utah lawyer was recently admonished for lack of candor when he misled the court in an adoption case where he represented an adoption agency.¹³⁷ After the birth mother consented to adoption, a possible birth father's attorney sent a letter to the adoption agency stating that he did not consent to the adoption.¹³⁸ He filed to be declared the father and sought custody, and the adoption agency was served with the complaint.¹³⁹ When a hearing to terminate the natural father's parental rights was held in a Utah court and the attorney appeared on behalf of the adoption agency, the

there not be further communication between the birth mother and birth father, I suggested to her my advice to her was that probably was a good idea under the circumstances.

Id. at 26–30.

133. *In re Krigel*, 480 S.W.3d at 298; Brief for Informant, *supra* note 78, at 16–18, 57.

134. *In re Krigel*, 480 S.W.3d at 300.

135. *Id.* at 297–98.

136. See Douglas R. Richmond, *Appellate Ethics: Truth, Criticism, and Consequences*, 23 REV. LITIG. 301, 310 (2004); see also *In re Cardwell*, 50 P.3d 897, 898–99 (Colo. 2002) (en banc) (holding the lawyer should have spoken up when client falsely denied prior convictions); *Daniels v. Alander*, 844 A.2d 182, 188 (Conn. 2004) (holding the associate who sat silently at counsel table while senior lawyer lied to the court also violated rules requiring candor to the tribunal); *In re Page*, 774 N.E.2d 49, 49 (Ind. 2002) (per curiam) (holding the lawyer who remained silent while client lied, when the lawyer knew of credible evidence to the contrary, displayed lack of candor).

137. *State Bar News: Attorney Discipline*, 32 UTAH B.J. 57, 57 (May/June 2019).

138. *Id.*

139. *Id.*

judge asked “whether there was anything he needed to know that would prevent the court from issuing the order terminating parental rights.”¹⁴⁰ Although the attorney was aware of the lawsuit filed by the birth father, he “told the court only that they were aware that the named father had consulted a lawyer.”¹⁴¹ The court signed the order terminating the third party’s parental rights.¹⁴² The court later vacated the order citing the concealment of the complaint as the basis for vacating the order.¹⁴³ The case bears a striking resemblance to *In re Krigel*, with the attorney misleading the court via half-truths.

Lack of candor to the tribunal is an offense courts are unlikely to overlook. But a lawyer’s obligation of candor extends beyond the court.¹⁴⁴ “A lawyer is required to be truthful when dealing with others on a client’s behalf.”¹⁴⁵ The obligation is more limited than that owed to the court, however.¹⁴⁶ While a lawyer cannot lie to others, she “generally has no affirmative duty to inform an opposing party of relevant facts.”¹⁴⁷ A duty to disclose arises only “when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client,” and then only if disclosure is not prohibited by rules concerning confidentiality.¹⁴⁸

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* Lack of candor was also an issue in a recent case out of Arizona, where the State sought to terminate the parental rights of a birth father so that the child could be adopted. *Donald W. v. Dep’t of Child Safety*, 444 P.3d 258, 264, 268 (Ariz. Ct. App. 2019). The child was removed from the mother at birth because the mother had previously lost custody of a child due to neglect. *Id.* at 262 n.1. The father expressed a desire to parent his child and had taken a number of steps to develop a legal and emotional relationship with the child, even though the mother had moved to another state during the pregnancy and married another man. *Id.* at 262–64. Nonetheless, the State filed a petition alleging that the father was unfit and had abandoned or neglected the child. *Id.* at 263. The court chided the Department of Child Safety attorney for unethically filing a petition for termination, citing the Arizona version of the rules regarding candor: “The lack of factual support for the allegations in the petition relating to Father’s unfitness creates significant concerns about the ethical propriety of filing the dependency petition claiming Father abused or neglected and abandoned Melody.” *See id.* at 268 n.4. The court pointed out potential ethical problems in having brought a legal action without basis in fact or law, and in the lawyer’s not having carefully determined the factual basis of the action before bringing it. *Id.*

144. *See* MODEL RULES OF PROF’L CONDUCT r. 4.1(a) (AM. BAR ASS’N 2019).

145. MODEL RULES OF PROF’L CONDUCT r. 4.1 cmt. 1 (AM. BAR ASS’N 2019).

146. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* § 4.1-1 (2018) (“A lawyer’s obligation [to the tribunal under Rule 3.3] are greater than a lawyer’s obligations under Rule 4.1.”).

147. MODEL RULES OF PROF’L CONDUCT r. 4.1 cmt. 1 (AM. BAR ASS’N 2019).

148. MODEL RULES OF PROF’L CONDUCT r. 4.1(b) (AM. BAR ASS’N 2019).

In the *In re Krigel* case, the court sanctioned the attorney for the statement made to the birth father's attorney, "indicating the child would not be adopted without Birth Father's consent."¹⁴⁹ Krigel denied that the statement was one of fact, claiming that he was merely explaining Missouri law of adoption since he knew the birth father's lawyer was not well-versed in adoption law.¹⁵⁰ But, of course, false statements regarding law, as well as false statements regarding facts, are proscribed by the rule.¹⁵¹ At the time he made that statement (whether of law or fact), he was employing a "passive strategy" designed to allow the adoption without the birth father's consent.¹⁵² Thus, at the time of making the statement, Krigel knew the statement of fact was false "and that his client, in fact, would seek to place the child for adoption without the father's knowledge or consent."¹⁵³ Further, given his experience in adoption law, and his previous use of the "passive strategy" to shut out birth fathers, he would have been well aware that Missouri law did permit adoptions without the consent of the birth father.¹⁵⁴ False statements about facts and law are equally deserving of sanction.¹⁵⁵

While lawyers may be well aware of the obligation of candor, sometimes they seek to skirt as close to the line as they can because they feel an obligation to present the most favorable case possible in the interests of their clients. They may feel a conflict between their obligation of candor and their obligation to keep confidential certain matters disclosed by their clients. But lack of candor to the tribunal is an offense courts are likely to take very seriously. Courts may excuse other mistakes or take inexperience into account when lawyers make errors, but "inexperience does not go far in our view to excuse or to mitigate dishonesty, misrepresentation, or misappropriation. Little experience in the practice of law is necessary to appreciate such actual wrongdoing."¹⁵⁶

149. *In re Krigel*, 480 S.W.3d 294, 299 (Mo. 2016) (en banc).

150. Brief for Informant, *supra* note 78, at 60 n.15.

151. MODEL RULES OF PROF'L CONDUCT r. 4.1 (AM. BAR ASS'N 2019).

152. See discussion *infra* notes 162–66 and accompanying text (concerning the "passive strategy" employed by Krigel).

153. Brief for Informant, *supra* note 78, at 61.

154. *Id.* (noting that Krigel testified that he intends to keep using the strategy).

155. See, e.g., *Idaho State Bar v. Eliassen*, 913 P.2d 1163, 1164, 1167 (Idaho 1996) (disciplining lawyer for misstatement of law regarding consequences of failing to pay a judgment).

156. *In re Cleland*, 2 P.3d 700, 705 (Colo. 2000) (en banc) (per curiam).

C. *Respect for Rights of Others*

*In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person*¹⁵⁷

While a lawyer's first duty is to the interests of the client, that duty "does not imply that a lawyer may disregard the rights of third persons."¹⁵⁸ Many of the cases under this rule prohibiting embarrassment, delay, or burden involve lawyers engaging in harassing or embarrassing conduct.¹⁵⁹ But there are cases where lawyers burdened a third person by interfering with their rights or imposing unwarranted obligations; for example, in *In re Royer*, an attorney was disciplined for arranging the sale of his client's building in need of demolition to a homeless man for one dollar so that the client could avoid paying demolition costs.¹⁶⁰ The sale burdened the purchaser with the costs of demolition, and since he would be unable to pay, it burdened the city which would have to undertake the costs.¹⁶¹

In *In re Krigel*, attorney Krigel was sanctioned under this provision because of his conduct toward the birth father.¹⁶² As the Office of Disciplinary Counsel said,

Under the circumstances of this case, and given Respondent's clear understanding as to the identity of the father, that the father was not willing to consent to an adoption, and that the father wanted to raise his child, Respondent's conduct, including his conversation with [birth father's lawyer], his instructions to the mother and her family to have no communication with the father, and his overall implementation of

157. MODEL RULES OF PROF'L CONDUCT r. 4.4 (AM. BAR ASS'N 2019).

158. MODEL RULES OF PROF'L CONDUCT r. 4.4 cmt. 1 (AM. BAR ASS'N 2019).

159. See, e.g., *People v. Beecher*, 224 P.3d 442, 444 (Colo. 2009) (sanctioning the attorney for asking irrelevant questions about sexual abuse during deposition); *Fla. Bar v. Buckle*, 771 So.2d 1131, 1132, 1134 (Fla. 2000) (per curiam) (disciplining a criminal defense lawyer for sending humiliating letter to crime victim intended to intimidate her into withdrawing complaint); *In re Comfort*, 159 P.3d 1011, 1017, 1021 (Kan. 2007) (per curiam) (reprimanding the lawyer who wrote and published accusatory letter to another lawyer); *In re White*, 707 S.E.2d 411, 413, 415 (S.C. 2011) (per curiam) (finding the lawyer's letter calling town officials "pagans" deserved disciplinary action).

160. 78 P.3d 449, 452, 455–57 (Kan. 2003) (per curiam).

161. *Id.* at 457.

162. *In re Krigel*, 480 S.W.3d 294, 299–300 (Mo. 2016) (en banc).

his “passive strategy” to “actively do nothing,” had no substantial purpose other than to impair and delay the father’s assertion of his parental rights¹⁶³

The purpose of the “passive strategy” was to delay the birth father from learning facts necessary to his assertion of his legal rights.¹⁶⁴ Since the date of the child’s birth would have triggered the fifteen-day deadline for filing in the putative father’s registry, keeping the date of birth from the birth father was important to the strategy.¹⁶⁵

Krigel’s strategy is a common one in adoption cases—ignore the birth father in the hopes that he will not successfully assert his parental rights and block the adoption.¹⁶⁶ Indeed, an expert witness who testified on behalf of Krigel said that it was “reasonable and within the ordinary practice of Missouri adoption attorneys representing the birth mother to utilize the ‘passive strategy.’”¹⁶⁷ Even where the identity of the birth father is known to the attorney, and he is represented by counsel, and he has made known his objection to the adoption and desire to parent, the expert witness testified, the “passive strategy” was appropriate.¹⁶⁸ Indeed, in an amicus brief filed by professors of family law and professional responsibility, the professors say of the “passive strategy” utilized by Krigel, “it is an appropriate course of action that any competent lawyer (in an adoption or otherwise) could choose.”¹⁶⁹ The brief of amici characterizes Krigel’s action as zealous representation of the client, fulfilling his obligation of loyalty and confidentiality in meeting the objectives of representation.¹⁷⁰ The amici opine that neither the birth mother nor her attorney had any legal obligation

163. Brief for Informant, *supra* note 78, at 50.

164. *Id.* at 61.

165. See *In re Krigel*, 480 S.W.3d at 309–10; Brief for Informant, *supra* note 78, at 18 (“The deliberate decision not to tell [birth father] the date of the birth of his own child was based upon Respondent’s legal advice and strategy.”); Brief for Informant, *supra* note 78, at 61, (arguing the purpose of the passive strategy was to “keep [birth father] ‘in the dark’ regarding the events that would have triggered the father’s right to exercise his parental rights.”); see also MO. REV. STAT. § 453.030.3(2)(c) (requiring father to file in putative father registry within fifteen days of the child’s birth).

166. Seymore, *Grasping Fatherhood*, *supra* note 30, at 817, 846–47.

167. Brief for Informant, *supra* note 78, at 34. Krigel also testified that the passive strategy was common among adoption attorneys, and that he would continue to utilize the strategy in future adoption cases unless the Missouri courts ruled otherwise. *Id.* at 62.

168. *Id.*

169. Brief of Amici Curiae Law Professors and Practitioners of Professional Responsibility and Family Law at 24, *In re Krigel*, 480 S.W.3d 294 (No. SC95098).

170. See *id.* at 47–58.

to inform the birth father of his rights or the facts necessary to assert his rights.¹⁷¹ Indeed, in the advisory comments to the rule requiring truthfulness in statements to others, the ABA makes clear that a lawyer “generally has no affirmative duty to inform an opposing party of relevant facts.”¹⁷²

The *In re Krigel* case is more complicated than mere passivity, however, as it is inextricably intertwined with deceit, misdirection, and obfuscation. As the court stated:

Krigel advised Birth Mother and her family to have no contact with Birth Father and to not divulge any information to Birth Father regarding the birth of their child. Krigel communicated with Zimmerman, indicating that the child would not be adopted without Birth Father’s consent. Further, Krigel advised Birth Mother and Birth Father to receive “counseling” from Merryfield, who was actively working with Birth Mother to place the child in an adoptive home. Despite actual knowledge that Birth Father wanted to raise the child, Krigel pursued a course of action that disregarded the parental rights of Birth Father and the best interests of the child in remaining with a natural parent. Krigel’s actions served no substantial purpose other than to impair and delay Birth Father’s assertion of his parental rights.¹⁷³

Thus, Krigel actively concealed information, not just passively failed to disclose information. He actively misled the birth father into “counseling” without disclosing the actual purpose of the relationship. And he communicated with counsel for the birth father, actively deceiving him about the adoption by assuring him that no adoption would happen without the birth father’s consent.

Krigel’s conduct, in behavioral ethics terms, is a textbook example of “ethical fading:”

In order to avoid a conflict between their interests and principles, individuals are drawn to strategies that bleach out the moral content of their choices. Tendencies such as adopting euphemistic labels for injurious conduct, or understating responsibility for acts of omission, allow the ethical dimensions of decision making to fade from view.¹⁷⁴

171. *Id.* at 32–33.

172. MODEL RULES OF PROF’L CONDUCT r. 4.1 cmt. 1 (AM. BAR ASS’N 2019).

173. *In re Krigel*, 480 S.W.3d at 300. Although the court did not identify the child as a person burdened by Krigel’s conduct, such an argument could clearly be made. The court did recognize the “best interests of the child in remaining with a natural parent,” and Krigel’s actions certainly interfered with that. *Id.* at 300.

174. Rhode, *supra* note 48, at 1322.

Using the neutral-sounding language of “passive strategy” allows Krigel to fade the ethical dimensions of burdening the birth father’s interests in favor of his self-interest.

After *In re Krigel*, it appears ethically risky to utilize the “passive strategy” of ignoring the rights of the birth father in hopes that he will not step forward to spoil the adoption, though without the active efforts at concealment at play in that case, it is uncertain that another court would reach the same conclusion as the *In re Krigel* court. It is a risky strategy for other reasons and might in fact show a lack of competence and diligence. As Elizabeth Brandt argues, “any system that finalizes an adoptive placement without notifying the father risks increased litigation at the moment of adoption.”¹⁷⁵ The delay tactic is not ultimately in the best interests of the child, since disrupting an adoption placement after a child has bonded with the prospective adoptive parents is potentially harmful.¹⁷⁶ A lawyer advising this strategy may also find himself and his clients subjected to liability for tortious interference with the birth father’s parental rights.¹⁷⁷

It is better to find out as early as possible if the birth father objects to the adoption or is interested in parenting. Notifying the birth father of the adoption may serve to assuage his concerns about adoption, leading to his consent.¹⁷⁸ Seeking to exclude the birth father may actually cause objection to the adoption that shutting him out is designed to avoid, since “[b]irthfathers who either openly or tacitly approved of adoption were predominately those who were permitted to participate in the proceedings, whereas those who opposed adoption were mainly those who had been excluded.”¹⁷⁹ A lawyer can satisfy his ethical obligations of competence, diligence, loyalty, and confidentiality to the client, while respecting the rights of the birth father, by advising the birth mother or adoptive parent clients of the benefits of dealing with the birth father early and the dangers of ignoring his interests.

175. Brandt, *supra* note 70, at 222.

176. *Id.* at 223.

177. See sources cited *supra* note 72.

178. Brandt, *supra* note 70, at 224.

179. See Eva Y. Deykin et al., *Fathers of Adopted Children: A Study of the Impact of Child Surrender on Birthfathers*, 58 AM. J. ORTHOPSYCHIATRY 240, 243 (1988); see also Brandt, *supra* note 70, at 223–24 (“Moreover, the secrecy with which these cases move forward may, in itself, result in polarization and mistrust leading to litigation that might not otherwise take place.”).

D. *Compensation from Someone Other Than Client*

*A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgement or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by [rules regarding confidentiality].*¹⁸⁰

*A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgement in rendering such legal services.*¹⁸¹

Krigel represented the birth mother in the adoption case, though his fee was paid by the prospective adoptive family and he was retained after recommendation of the adoption agency.¹⁸² This pattern frequently occurs in adoption cases, with an attorney representing a birth parent who is unable to pay but whose fees are paid by the adoptive parents or an adoption agency.¹⁸³ Such arrangements, with third-party payers of attorney fees for the client, do present difficulties, however.

Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client.¹⁸⁴

Further, this fee arrangement often creates ambiguity about who the lawyer is actually representing.¹⁸⁵ A prospective adoptive parent paying the bills may believe he is the lawyer's client, the birth parent may have that same understanding or may believe

180. MODEL RULES OF PROF'L CONDUCT r. 1.8(f) (AM. BAR ASS'N 2019).

181. MODEL RULES OF PROF'L CONDUCT r. 5.4(c) (AM. BAR ASS'N 2019).

182. *In re Krigel*, 480 S.W.3d 294, 307 (Mo. 2016) (Fischer, J., dissenting).

183. Statutes in a number of states permit this practice. *See, e.g.*, CAL. FAM. CODE § 8800(d); KAN. STAT. ANN. § 59-2115.

184. MODEL RULES OF PROF'L CONDUCT r. 1.8(f) cmt. 11 (AM. BAR ASS'N 2019).

185. *See* Nancy J. Moore, *Ethical Issues in Third-Party Payment: Beyond the Insurance Defense Paradigm*, 16 REV. LITIG. 585, 603–109 (1997) (noting the importance of clarifying client identification).

she is the client, and the lawyer may also have a different understanding of who the client is. The lawyer may believe both parties are clients, which sets up a situation ripe for a conflict of interest.¹⁸⁶ There may also be issues regarding the scope of representation—the adoptive parents are likely only willing to pay for legal services related to the consent and relinquishment of parental rights, but not any attempt to revoke that consent.¹⁸⁷

Courts have approved arrangements whereby the adoptive parents pay legal fees for the birth parent. In *In re Adoption of Banda*, the birth mother sought to revoke her consent because her lawyer was paid by the adoptive parents.¹⁸⁸ The court held, in accordance with Ohio statutes, “the adoptive parents may agree to pay the birth mother’s attorney fees.”¹⁸⁹ In order to satisfy the *Model Rules*, however, the attorney should exercise independent judgment on behalf of the client even when paid by the adoptive parents.¹⁹⁰ Further, the court outlined best practices for adoption cases:

We are compelled to emphasize that while there is no evidence of any impropriety as to the fee arrangement here, such may not always be the result. The better practice is that the birth mother be solely responsible for her fees, or if the adoptive parents agree to the payment of the birth mother’s attorney fees, such payments must not be contingent upon the outcome of placement or adoption. The agreement for payment of fees by the adoptive parents should be in writing and consented to by all parties concerned.¹⁹¹

While noting that “there are concerns with the appearance of the petitioners or agency providing the independent counsel,” the Kansas legislature has approved such payments of counsel representing minor birth mothers since “there is also an incentive for such

186. See *infra* Section II.F (discussing dual representation problems in adoption law).

187. An analogous issue was presented in *In re Adoption of N.A.P.*, 930 P.2d 609, 612, 614–15 (Kan. Ct. App. 1996). There, the birth mother was represented by independent counsel as required by Kansas law for minors relinquishing parental rights. *Id.* at 611, 614. After representing the birth mother in the execution of her relinquishment documents, the attorney, who was paid by the adoptive parents, declined to represent her when she went to him to revoke her consent. *Id.* at 614. The court held that the statute requiring independent counsel was satisfied by the initial representation and did not guarantee representation throughout the adoption proceeding. *Id.* at 614–15. Such a limited scope of representation would have to be adequately explained and consented to by the client. See MODEL RULES OF PROF’L CONDUCT r. 1.2(c) (AM. BAR ASS’N 2019) (“A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”).

188. 559 N.E.2d 1373, 1376–77 (Ohio Ct. App. 1988).

189. *Id.* at 1381.

190. *Id.*

191. *Id.* at 1383.

persons to insure a valid instrument is obtained and, consequently, to provide minors with attorneys who are truly independent of the petitioner or agency.”¹⁹²

Payments to the birth parent’s attorney by the adoptive parents or adoption agency creates the appearance, if not the reality, that the attorney will be more supportive of the interests of the adoptive parents or agency in ensuring the adoption is finalized. While the *Model Rules* allow the practice, the attorney must take great care to represent only the interests of the client, not the person paying the bills. The *Model Rules* require the lawyer to exercise independent judgment in the interests of the client, so the attorney must carefully guard against even unconscious bias in favor of the adoptive parents. Any appearance of bias may well provide grounds for the birth mother to challenge her consent in court.

E. Fees

*A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.*¹⁹³

Fees, including lawyer fees, are regulated in adoption¹⁹⁴ because of concerns about commodification of children,¹⁹⁵ and both the appearance and reality of baby-buying and baby-selling.¹⁹⁶ States criminalize baby-buying and baby-selling,¹⁹⁷ though there can be

192. *In re Adoption of N.A.P.*, 930 P.2d at 614 (quoting FAMILY LAW ADVISORY COMMITTEE OF THE KANSAS JUDICIAL COUNCIL, COMMENTS TO 1990 ADOPTION AND RELINQUISHMENT ACT cmt. 5 S.B. 431 (1990)).

193. MODEL RULES OF PROF’L CONDUCT r. 1.5(a) (AM. BAR ASS’N 2019).

194. See, e.g., ARIZ. REV. STAT. ANN. § 8-114; IOWA CODE ANN. § 600.9; MICH. COMP. LAWS § 710.54; S.C. CODE ANN. § 63-9-310(F); see also UNIF. ADOPTION ACT § 7-102 (UNIF. LAW COMM’N 1994) (regulating unlawful payments related to adoption); UNIF. ADOPTION ACT § 7-103 (UNIF. LAW COMM’N 1994) (regulating lawful payments related to adoption).

195. See Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1925–27 (1987) (discussing commodification in the context of blood, organ, and baby-buying and selling).

196. Joan Heifetz Hollinger, *Types of Adoptions* § 1.05, in 1 ADOPTION LAW AND PRACTICE (Joan Heifetz Hollinger ed., 2019) [hereinafter Hollinger, § 1.05] (noting that in independent adoptions there is “the potential for black market transactions: the limited supply of adoptable babies, in contrast to the great demand for them, is said to generate incentives to unscrupulous birth parents, lawyers, and other intermediaries to sell babies at whatever price prospective adopters are willing to pay”).

197. See, e.g., CAL. PENAL CODE § 181 (prohibiting the buying and selling of any persons); CAL. PENAL CODE § 273 (making it an offense “to pay, offer to pay, or to receive money or anything of value for the placement for adoption or for the consent to an adoption of a child”); TEX. PENAL CODE § 25.08 (stating that for purposes of adoption, it is an offense if a person “offers to accept, agrees to accept, or accepts a thing of value for the delivery of the child to

considerable disagreement in distinguishing between these clearly prohibited practices and the permissible payment of fees and expenses in adoption.¹⁹⁸ High fees are not inevitable in adoption; adoption agencies did not initially charge fees to adoptive parents,¹⁹⁹ and until 1945, adoption agencies “maintained that financial transactions between adopters and agencies were strictly unethical.”²⁰⁰ In other countries, adoption is exclusively government-run and does not entail high fees.²⁰¹ But high fees in American adoption is de rigeur.²⁰² And lawyers earn a portion of those fees.

Although law is a learned profession, as distinguished from a trade or business, it is not unreasonable for a lawyer to expect to be paid for his work.²⁰³ The factors to be considered in judging the reasonableness of the fee include the time and labor involved, the novelty and difficulty of the issues involved, the fee customarily charged for similar legal services, and the experience and reputation of the lawyer.²⁰⁴ Lawyers can charge fees contingent on the outcome in appropriate cases, but one leading adoption practitioner suggests contingent fees are not appropriate in adoption cases:

Contingent fees are not appropriate in adoptions. Whether the contingency is locating a child, having the child placed with the prospective adoptive parents, obtaining the birth parents’ consents, or successfully completing the adoption, a contingent fee suggests child selling

another” or “offers to give, agrees to give, or gives a thing of value to another”); WASH. REV. CODE § 9A.64.030. In *Thacker v. State*, 889 S.W.2d 380, 384, 397 (Tex. App. 1994), the sole proprietor of an adoption agency was convicted of baby-buying because of payments made to a prospective birth mother.

198. Hollinger, § 1.05, *supra* note 196 (“[C]onsiderable uncertainty remains as to what constitutes an unlawful payment in connection with an adoption.”).

199. Danielle Saba Donner, *The Emerging Adoption Market: Child Welfare Agencies, Private Middlemen, and “Consumer” Remedies*, 35 U. LOUISVILLE J. FAM. L. 473, 487 (1996).

200. ELLEN HERMAN, *KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES* 45 (2008).

201. See, e.g., Lloyd Nelson, *US vs. UK: International Differences in Fostering and Adoption*, FOSTER CARE NEWSLETTER (Sept. 1, 2017), <http://foster-care-newsletter.com/us-vs-uk-international-differences-in-fostering-and-adoption/> (“Whilst a private adoption in the U.S. can cost anywhere between \$20,000 and \$40,000, U.K. adoptions—much like adoptions through the state in the U.S.—are almost entirely without cost, with U.K. parents often paying just a small court fee to apply to adopt their matched child.”) [<https://perma.cc/M9MV-ELUL>].

202. ADAM PERTMAN, *ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA* 189 (2000).

203. Eugene R. Gaetke & Sarah N. Welling, *Money Laundering and Lawyers*, 43 SYRACUSE L. REV. 1165, 1182, 1182 n.85 (1992) (noting the origin of lawyers’ discomfort in discussing fees arises from the fact that law is a learned profession).

204. MODEL RULES OF PROF’L CONDUCT r. 1.5(a) (AM. BAR ASS’N 2019).

and that the attorney's professional objectivity is compromised by the incentive to satisfy the condition. In a dual representation, a contingent fee militates against the attorney's giving equal recognition to protecting the birth mother's rights; the contingency is invariably an event at least theoretically a step closer to terminating the birth mother's parental rights and thus hostile to her legal interests.²⁰⁵

According to that same practitioner, "[a]doption attorneys commonly charge a set fee or an hourly rate. . . . The most straightforward adoption will take at least 15 professional hours to complete proficiently; any set fee, or cost estimate, should reflect that expectation."²⁰⁶ According to an annual survey at *Adoptive Families Magazine*, newborn adoption using an adoption attorney averages \$37,829, with \$13,780 attributable to attorney fees.²⁰⁷ Using an adoption agency, the newborn adoption averages \$43,239, with \$4435 attributable to attorney fees.²⁰⁸ In adoption from foster care, the average cost is \$2938, with \$947 attributed to attorney fees.²⁰⁹ Thus, attorney fees in adoptions can vary widely.

In *In re Krigel*, the lawyer earned more than \$20,000 as his fee for representing the birth mother and admitted that he worked less than ten hours on the case.²¹⁰ Interestingly, Krigel's law firm's web page includes an article about the costs of adoption, with a reminder that "[i]t is best to know upfront what fees and expenses you can anticipate so you can plan and budget accordingly."²¹¹ The judge, who ultimately removed the child from the prospective adoptive parents and placed legal custody with the birth father, questioned the amount of the fee, noting the large amount "for a minimal role in the litigation."²¹² Though the *Model Rules* prohibit lawyers from charging an unreasonable fee, Krigel was not charged

205. Jed Somit et al., *Formalizing the Legal Relationships* § 5.04, in 1 ADOPTION LAW AND PRACTICE (Joan Heifetz Hollinger ed., 2019); see also *In re Adoption of Banda*, 559 N.E.2d 1373, 1383 (Ohio Ct. App. 1988) (holding that payment of fees cannot be contingent on placement or adoption); Pamela K. Strom Amlung, *Conflicts of Interest in Independent Adoptions: Pitfalls for the Unwary*, 59 U. CIN. L. REV. 169, 188 (1990) (noting that payment of fees contingent upon the adoption's finalization may present conflict of interest).

206. Somit et al., *supra* note 205.

207. Editorial Team, *Adoption Cost and Timing in 2016–2017*, ADOPTIVE FAMILIES, <https://www.adoptivefamilies.com/resources/adoption-news/adoption-cost-timing-2016-2017-survey-results/> [<https://perma.cc/2499-6WTS>].

208. *Id.*

209. *Id.*

210. *In re Krigel*, 480 S.W.3d 294, 307 (Mo. 2016) (Fischer, J., dissenting).

211. *Understanding the Costs of Adoption*, KRIGEL & KRIGEL (Nov. 5, 2015), <https://www.krighelandkrigel.com/understanding-the-costs-of-adoption/> [<https://perma.cc/Q65H-NA46>].

212. *In re Krigel*, 480 S.W.3d at 309–10 (Breckenridge, C.J., dissenting in part, concurring in part).

with violating this rule.²¹³ Yet, “[c]harging a lot for doing very little is just as likely to violate Rule 1.5(a) as charging for doing nothing.”²¹⁴

F. *Dual Representation / Conflict of Interest*

*[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client.*²¹⁵

One of a lawyer’s primary obligations to a client is singular loyalty and independent judgment:

The principle of loyalty of lawyer to client is a basic tenet of the Anglo-American conception of the lawyer-client relationship. . . . Where choices have to be made between the interest of a client and any other person—whether the lawyer personally or another client, the lawyer must be in such a position that all options that might favor the client can be considered free from the likely impairment of any interest other than those of the client.²¹⁶

Thus, a lawyer cannot represent two clients when their interests are directly adverse—like representing both husband and wife in a divorce²¹⁷ or representing both the buyer and seller of real estate.²¹⁸ Even without direct adversity, however, a lawyer’s representation of multiple clients may impinge on the duty of loyalty by limiting the lawyer’s “ability to consider, recommend or carry out

213. See Information at 8–9, *In re Krigel*, 480 S.W.3d 294 (No. DHP 14-001).

214. BENNETT ET AL., *supra* note 11, at 79.

215. MODEL RULES OF PROF’L CONDUCT r. 1.7(a) (AM. BAR ASS’N 2019). The rule provides an exception that permits dual representation when a lawyer reasonably believes that she is able to provide competent and diligent representation despite the conflict, and the representation is not prohibited by law. Each affected client also has to give informed consent in writing. Finally, the representation is still prohibited if it involves representation in the same litigation or before the same tribunal. MODEL RULES OF PROF’L CONDUCT r. 1.7(b) (AM. BAR ASS’N 2019).

216. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.1.3 (1986).

217. See, e.g., *Vinson v. Vinson*, 588 S.E.2d 392, 394, 398–99 (Va. Ct. App. 2003).

218. See, e.g., *Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Wagner*, 599 N.W.2d 721, 722–23 (Iowa 1999); *In re Herriott*, No. 2010-9790/A, 2014 N.Y. Misc. LEXIS 119, at *3–4, *10–11 (N.Y. Sur. Ct. Jan. 17, 2014).

an appropriate course of action for the client” because of the lawyer’s obligation of loyalty to the other client.²¹⁹

A lawyer’s obligation to keep the confidences of a client can create a conflict between two clients. The obligation to keep secret one client’s information may violate the duty of loyalty to the other client to whom the information may be relevant and useful.²²⁰ For example, in the context of adoption, consider a case where the adoption attorney tries to represent both the birth mother and the birth father:

If, for example, the birth father abruptly wishes to contest the adoption, “reasonable steps to avoid reasonably foreseeable prejudice” may logically include assisting him in filing a timely challenge or paternity action; yet such conduct would overtly violate the duty owed to the birth mother wishing the adoption to continue. Warning the birth mother of the father’s changed intention may be necessary to avoid harm to her; yet this can hardly be squared with the attorney’s duty to protect the birth father and to maintain his confidences.²²¹

Where the birth mother is represented by the same counsel as adoptive parents, or her independent counsel is paid by adoptive parents, “the birth mother may assume that her questions or any sign of hesitation will immediately be conveyed to their attorney; the resulting inability to talk freely with the attorney vitiates the purpose of separate representation.”²²²

An adoption lawyer seeking to represent both the prospective adoptive parents and the prospective birth mother will often face conflicts of interest. As one lawyer notes, “At first blush, one might regard the objectives and interests of birthparents, prospective adoptees, and adoptive parents in every adoption as wholly consistent and aligned toward a common goal: the timely and permanent placement of a child in a loving and proper home.”²²³ But as is readily evident, “[a]n adoption is a highly emotional undertaking

219. MODEL RULES OF PROF’L CONDUCT r. 1.7 cmt. 8 (AM. BAR ASS’N 2019).

220. ROTUNDA & DZIENKOWSKI, *supra* note 146, at § 1.7-1(a).

221. See Somit et al., *supra* note 205.

222. *Id.*

223. Hope C. Todd, *Speaking of Ethics: Ethical Mandates in Private Adoptions*, WASH. LAW. 12 (Mar. 2014), <https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/march-2014-speaking-of-ethics.cfm> [<https://perma.cc/MJ7B-QPF9>]; see also Somit et al., *supra* note 205 (arguing that dual representation is beneficial because “the conflict of interest between adopting parents and birth parents is often more hypothetical than real” with dual representation allowing “the adoption to be planned and proceed efficiently as a cooperative effort” based on “the shared interest in the welfare of the child”).

for both the adoptive and the biological parent[.]”²²⁴ and even when interests might align at first, parties can change their minds for any reason in the course of the adoption case.²²⁵ For that reason, the ABA Commission on Ethics and Professional Responsibility issued an informal opinion holding that “[a] lawyer may not ethically represent both the adoptive and biological parents in a private adoption proceeding.”²²⁶ The Commission reasoned that the rights surrendered by the birth parents and granted to the adoptive parents are in potential conflict, and “[t]he biological parent’s right to revoke the consent is in direct conflict with the interests of the adoptive parent.”²²⁷ Since each is entitled to independent advice from their attorney, they cannot both be appropriately advised by the same attorney; “[t]he inherent conflicts cannot be reconciled.”²²⁸

New York takes a very firm stand against dual representation in adoptions.²²⁹ In *In re Michelman*, Stanley B. Michelman was suspended from the practice of law for three years after representing both the birth mother and the adoptive parents in two private adoptions.²³⁰ He was sanctioned despite his argument that the adoptions were completed successfully and both sets of adoptive parents and birth mothers were satisfied with the outcomes.²³¹ He had been previously admonished by the Grievance Committee

224. ABA Comm’n on Ethics & Prof’l Responsibility, Informal Op. 87-1523 (1987).

225. Todd, *supra* note 223, at 12.

226. ABA Comm’n on Ethics & Prof’l Responsibility, *supra* note 224.

227. *Id.*

228. *Id.* The Commission found support for its conclusion by relying on opinions of several state bar authorities. See State Bar of Michigan Ethics, Op. 156 (1953); New York State Bar Ass’n Prof’l Ethics Comm., Op. 68 (1968); North Carolina State Bar Ethics, Op. 38 (1947); Virginia State Bar Ethics, Op. 741 (1986). Since the ABA opinion was issued, other bar authorities have also ruled that dual representation in adoption cases is unethical. See Oregon State Bar, Formal Op. No. 2005-28 (2005); Pa. Ethics, Op. 95-59 (1995); Wisconsin State Bar Ethics, Op. E-88-4 (1988). A number of states have also banned dual representation in adoption by statute. See Amanda Tamayo, *A State Survey—Dual Representation in Adoption*, 27 J. AM. ACAD. MATRIM. LAWS., 481, 485–88 (2015).

229. Katherine G. Thompson & Douglas H. Reiniger, *The Need for and Importance of Separate Representation of the Parties in a Private-Placement Adoption* § 6.01, in 1 ADOPTION LAW AND PRACTICE (Jennifer Heifetz Hollinger ed., 2019).

230. 616 N.Y.S.2d 409, 409–10, 412 (N.Y. App. Div. 1994) (per curiam).

231. *Id.* at 411–12. Michelman’s argument exhibits a classic outcome bias in ethical reasoning, where ethicality is judged not from the intentions of the actors but rather from whether the outcome is considered favorable or unfavorable. Bazerman & Sezer, *supra* note 44, at 100–01.

three times for representing adoptive parents and biological parents in the same proceeding.²³² In one case where Michelman was the attorney, the trial court refused to accept the birth parents' extrajudicial consent to the adoption because Michelman advised them while representing the adoptive parent:

Conversations between a natural parent and the adoptive parents' attorney, no matter how extensive, do not provide the assurance an adoption court needs that the natural parent fully understood her rights and options. The adoption process is typically a highly emotional undertaking for both natural and adoptive parents. . . . Since a natural parent gives up her superior position by signing an extrajudicial consent and has 45 days to revoke it, there is an inescapable conflict of interest between the two sets of "parents." It is evident that an attorney for adoptive parents cannot be fully dedicated to achieving the goals of his clients and at the same time be relied upon to ensure that the natural parent's relinquishment of her rights was knowing, intelligent and voluntary. Indeed, that attorney has, at the very least, a strong incentive to persuade her on behalf of his clients that surrender of the child is the best course of action.²³³

A conflict of interest because of dual representation will not only potentially subject a lawyer to discipline, it may also put the adoption at risk. A court may conclude that the birth mother's consent is invalid because she did not have the services of an independent counsel, and even if the adoption is ultimately upheld, the dual representation provides one more point from which to argue the invalidity of the consent.²³⁴

Sometimes lawyers will seek to "cure" the dual representation problem by representing the adoptive parents and leaving the birth parent unrepresented. Consider the case of Tammy Lemley. Tammy's boyfriend convinced her to relinquish their child for adoption and took her to an attorney's office where she eventually signed a consent to the adoption.²³⁵ But she was under age, making her consent void under Ohio law.²³⁶ The lawyers told her after she turned eighteen that she needed to sign more papers—actually, she needed to sign papers once she reached majority because the previous papers were void.²³⁷ That same day, Tammy's parents went to the lawyers to ask for the return of the child and pointed

232. *In re Michelman*, 616 N.Y.S.2d at 411–12.

233. *In re Male D.*, 523 N.Y.S.2d 369, 369, 372 (N.Y. Fam. Ct. 1987) (citation omitted).

234. See discussion *infra* notes 253–62 and accompanying text.

235. *Lemley v. Barr*, 343 S.E.2d 101, 102–03 (W. Va. 1986).

236. See *id.* at 103 (citing OHIO REV. CODE ANN. § 5103.16).

237. *Id.*

out that Tammy's consent was void because she was underage.²³⁸ The lawyers refused, having already delivered the child to a couple in West Virginia for adoption.²³⁹ The courts of Ohio ruled that Tammy's consent was invalid,²⁴⁰ and the West Virginia court granted full faith and credit to that ruling.²⁴¹ When Tammy brought a legal malpractice action against the lawyers who deceived her, the courts ruled in favor of the lawyers.²⁴² Legal malpractice requires that a lawyer breach a duty to a client, and Tammy Lemley was never the client, the adoptive parents were.²⁴³ Of course, the issue may not be quite as clear-cut as the general rule that nonclients cannot sue for legal malpractice; courts may find that a lawyer owes a duty to nonclients in some circumstances.²⁴⁴ And a court might also find that the lawyer was actually

238. *Id.*

239. *Id.*

240. *Id.* The court ruled that the lawyers "had obtained Tammy's consent through duress, that she had no understanding of her position at the time she signed the adoption papers and, therefore, her consent was invalid." *Id.*

241. *Id.* at 104–05.

242. *Lemley v. Kaiser*, No. 1804, 1987 Ohio App. LEXIS 6674, at *1, *3–4 (Ohio Ct. App. Apr. 30, 1987).

243. *Id.* at *11–13. ("It is clear that no formal, explicit [attorney-client] relationship existed. A retainer was never signed, Miss Lemley paid no legal fees to the Kaiser firm, nor did the firm ever send her a bill."). Interestingly, Krigel, whose case is discussed elsewhere, was previously sued for legal malpractice by birth parents who claimed he gave them faulty advice about the revocability of their consent to adoption. *Collins v. Mo. Bar Plan*, 157 S.W.3d 726, 730–31 (Mo. Ct. App. 2005). He defended by arguing that he was not in fact representing them. *Id.* at 736. The appellate court concluded that the birth parents had presented sufficient evidence to create an issue of fact on that point and remanded for the lower court to determine whether there was an attorney-client relationship. *Id.*

244. Seymore, *Adopting Civil Damages*, *supra* note 8, at 952–55 (discussing legal malpractice liability in adoption cases, including liability to non-clients); *see also* 7 AM. JUR. 2D *Attorneys at Law* § 221 (2017) ("Attorneys may owe a duty of care to nonclients when the attorneys know, or should know, that nonclients will rely on the attorney's representations and the nonclients are not too remote from the attorneys to be entitled to protection."); Alan L. Cohen, *Liability to Non-Clients for Malpractice*, in 3 PERSONAL INJURY—ACTIONS, DEFENSES, DAMAGES § 11.06 (Mary James Courtenay ed., 2018) ("An adversary party may have a cause of action against an attorney for fraudulent, malicious, or intentional misrepresentations."); *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1551 (1994) ("Where once only the client could bring a malpractice action against the lawyer, now third parties can bring lawsuits . . .").

representing the birth mother, despite disclaimers to the contrary.²⁴⁵ Further, dealing with an unrepresented birth mother presents other ethical issues, addressed elsewhere in this Article.²⁴⁶

One argument offered in support of dual representation is that the realistic alternative is unrepresented—or poorly represented—birth parents:

Often, the birth parents don't want separate representation, sometimes to spare the cost, often because they recognize they don't want advice, just closure on the pregnancy. . . . Moreover, the ideal of separate representation is seldom realized. The birth parents often elect no representation when dual representation is prohibited or declined, and instead get their adoption information secondhand through the adopting parents.²⁴⁷

While an attorney representing both parties may be conflicted, the argument goes, at least that the attorney owes a duty to both parties. Where dual representation is prohibited, “[s]ince the adoptive parents’ attorney has a duty to represent his clients zealously but has no corresponding duty to the birth mother, the *Model Rules*’ prohibition may put her in a worse situation than if she had no advice at all.”²⁴⁸ Further, a birth parent’s attorney “is seldom paid commensurate with the adoptive parents’ attorney.”²⁴⁹ In California, the statutory fee for independent counsel for birth parents, to be paid by adoptive parents, is “up to a maximum of five hundred dollars (\$500) for that representation, unless a higher fee is agreed to by the parties.”²⁵⁰ The typically low rate paid to birth mothers’

245. See, e.g., *Tierney v. Flower*, 302 N.Y.S.2d 640, 644 (N.Y. App. Div. 1969) (finding lawyer represented birth mother, though he had been claimed he was exclusively representing the prospective adoptive parents).

246. There are ethical issues in a lawyer’s interaction with an unrepresented birth parent, as well as issues surrounding dual representation. See MODEL RULES OF PROF’L CONDUCT r. 4.3 (AM. BAR ASS’N 2019); discussion *infra* notes 304–16 and accompanying text.

247. Somit et al., *supra* note 205; Thompson & Reiniger, *supra* note 229.

248. Sharon Fast Gustafson, Note, *Regulating Adoption Intermediaries: Ensuring That the Solutions Are No Worse than the Problem*, 3 GEO. J. LEG. ETHICS 837, 862 (1990).

249. Somit et al., *supra* note 205.

250. CAL. FAM. CODE § 8800(d). As a point of comparison, one matrix of hourly attorney fees that are considered reasonable ranged from \$307 per hour for attorneys with less than two years of experience to \$613 per hour for attorneys with over thirty years of experience. USAO Attorney’s Fees Matrix—2015–2019, U.S. DEPT. JUSTICE, <https://www.justice.gov/usao-dc/file/796471/download> [<https://perma.cc/C33P-PVQ5>]. Recall that Krigel testified that he spent approximately ten hours representing the birth mother and charged \$20,000 for that representation. *In re Krigel*, 480 S.W.3d 294, 307 (Mo. 2016) (en banc) (Fischer, J., dissenting). The fee approved in California would amount to less than two hours of representation at the less-experienced end of the scale.

attorneys caused one commentator to argue that “the resulting quality of representation may be inferior.”²⁵¹

A number of jurisdictions permit dual representation of birth parents and prospective adoptive parents in at least some circumstances, reasoning that the birth parents and the adoptive parents have similar interests, each side only interested in appropriate placement for the child.²⁵² California permits an attorney to represent both the prospective adoptive parents and the birth parents so long as written consent is obtained after informing the birth parents that they are entitled to representation by independent counsel paid for by the adoptive parents, and they waive the right to that representation.²⁵³ One commentator argues that “if the requisite full disclosure is given to each client in a private adoption, the result will not be the client’s consent to dual representation. On the contrary, the client will recognize the dangers of dual representation.”²⁵⁴ This position presumes, however, that the attorney is motivated to thoroughly explain the danger of dual representation, when in reality, “the lawyer has an incentive to phrase her explanation in a way that encourages the client to waive the conflict.”²⁵⁵ After all, dual representation ensures more legal work and consequently more attorney fees. Consent to dual representation may also be impaired by the highly emotional nature of the decision of a birth mother to relinquish parental rights, such that she “may be unable to comprehend the potential problems that may arise when her lawyer attempts to represent not only her interests, but also those of persons whose interest is in permanently obtaining her child for themselves.”²⁵⁶

251. Somit et al., *supra* note 205.

252. Tamayo, *supra* note 228, at 483 (“The attorney has the ability to represent both clients without creating a conflict of interest as they cooperatively work towards a common goal of adoption.”); Linda Jean Davie, Note, *Babes and Barristers: Legal Ethics and Lawyer-Facilitated Independent Adoptions*, 12 HOFSTRA L. REV. 933, 945 (1984) (“[T]he two sides are coming together for the same basic goal—namely, the transfer of custody and parenthood of a child—and that the interests of the parties are not conflicting at all.”).

253. CAL. FAM. CODE § 8800(d); *see also* Arden v. State Bar, 341 P.2d 6, 8–13 (Cal. 1959) (en banc) (permitting attorney’s dual representation of birth mother and adoptive parents because both consented, though the lawyer was publicly reprimanded for dishonesty in helping the birth mother hide her pregnancy from her parents and for secretly recording a conversation with her and threatening to use the tape to have her prosecuted for extortion when she sought to revoke her consent to the adoption).

254. Thompson & Reiniger, *supra* note 229.

255. Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 422 (1998) (footnote omitted).

256. *See* Davie, *supra* note 252, at 949.

The Kansas courts have held that so long as there is no actual conflict, dual representation is permissible:

In adoption cases, such as this, the attorney can represent both the natural and adoptive parents. The attorney owes both sets of parents a duty to provide good faith advice concerning the legal consequences of their acts. This multiple representation can continue so long as no conflict develops between the parties. However, if a conflict occurs, the attorney must choose which conflicting interest he or she will represent.²⁵⁷

Representing both parties until a conflict arises, and then withdrawing when it does so, is risky in a number of ways. It is likely to delay proceedings as the now-unrepresented parties need to secure new counsel at a critical and newly contentious phase of the proceedings.²⁵⁸

The conflicted representation may also serve as grounds for challenging the validity of the birth mother's consent, significantly disadvantaging the adoptive parents.²⁵⁹ In *Adoption of Alexander S.*, the appellate court chided the attorney representing both parties: "[u]nder any standards, [the birth mother] did not receive representation of counsel at a time when she needed it most." The court further noted the attorney's "failure to act on behalf of his client during the critical period when she expressed her unwillingness to consent."²⁶⁰ Even if arguments about dual representation vitiating consent ultimately prove unsuccessful, the possibility of dual representation provides one more avenue for seeking to undo the adoption and thereby increases costs, delays finality, and adds to stress for all.

It is not only dual representation of the birth parents and adoptive parents that may prove problematic. In one case, the court found an impermissible conflict when the same attorney represented the adoption/foster agency and the prospective adoptive parents.²⁶¹ The agency had supervised the child's foster placement

257. *In re Adoption of Baby Boy Irons*, 684 P.2d 332, 340 (Kan. 1984); see also *In re Baby Girl T*, 21 P.3d 581, 589 (Kan. Ct. App. 2001) (permitting legal representation of both the adoptive parents and the birth parents so long as the attorney obtains consent after fully disclosing the foreseeable consequences of the dual representation).

258. Thompson & Reiniger, *supra* note 229; see also Zacharias, *supra* note 255, at 419 (noting the existence of a danger of delay in permitting waiver of potential conflicts).

259. See, e.g., *Adoption of Alexander S.*, 235 Cal. Rptr. 761, 767, 769–70 (Cal. Ct. App. 1987), vacated on jurisdictional grounds, 750 P.2d 778, 785 (Cal. 1988).

260. *Id.* at 769 (emphasis omitted).

261. *In re Adoption of Vincent*, 602 N.Y.S.2d 303, 304 (N.Y. Fam. Ct. 1993).

with the prospective adoptive parents, and when a second home study found deficiencies in the home, the lawyer had the child removed from the home, and the agency opposed the adoption.²⁶² The court held that the prospective adoptive parents needed to be represented by new counsel, not the attorney who was also representing the agency that was no longer advocating for the adoption.²⁶³ “Clearly the agency attorney could not act both for the agency that originally consented to the adoption and for the prospective adoptive parent.”²⁶⁴ The conflict was clear, and the prospective adoptive parents deserved “a lawyer who will deal with the agency only for the benefit of the [adoptive parent] and the [adoptive parent]’s desire to complete the adoption.”²⁶⁵

Dual representation may also present a conflict of interest when an attorney represents competing sets of adoptive parents seeking to adopt the same child. In *In re Petrie*, a couple seeking to adopt contacted attorney Petrie, who said he did not currently know of any adoptable children, but that if the couple were to find such a child, he would represent them in the adoption.²⁶⁶ Some eighteen months later, the couple, through a mutual friend, learned of a birth mother seeking to place a child and arranged for her to be referred to Petrie.²⁶⁷ Petrie notified the couple that he now had a child available for them, and they responded positively. Shortly thereafter, Petrie received a call from another couple seeking to adopt.²⁶⁸ By this time, the lawyer believed he was representing the birth mother who believed that she had no obligation to the first couple, so he advised the birth mother to place the child with the second couple.²⁶⁹ The court sanctioned Petrie for violations of the rules of professional conduct, noting, “In a situation involving independent sets of adoptive parents and only one available child, obviously one set of parents will be disappointed. An attorney cannot simultaneously represent both sets of adoptive parents without

262. *Id.* at 304–05.

263. *Id.* at 305.

264. *Id.*

265. *Id.*

266. 742 P.2d 796, 798 (Ariz. 1987) (en banc).

267. *Id.*

268. *Id.* at 798–99.

269. *Id.* at 799, 804. Petrie recommended placement with the second couple because they were local and placing the child with the first couple would require him to travel to their county of residence, something he was “not excited” about. *Id.*

compromising his representation of one of them.”²⁷⁰ The court also noted that it might be possible for an attorney ethically to represent multiple parties to an adoption, but that would only be permitted with disclosure and consent, which did not happen here.²⁷¹

Permitting dual representation of birth parents and adoptive parents seems particularly odd in light of other similarly prohibited conflicts. For example, a lawyer is not permitted to represent both the buyer and seller in a real estate transaction.²⁷² For the buyer and seller, “what one party gets the other must concede,”²⁷³ a description that is equally apt in an adoption when representing both the birth parents and the adoptive parents. Given the importance of the interests at play in adoption—constitutionally protected parental rights and the best interests of the child—independent counsel, unimpaired by dual loyalty, is essential.²⁷⁴ In many states, there are few protections to ensure a birth mother’s rights are secured. She does not have to appear before a judge or other public official to confirm the validity of her relinquishment, and in private adoptions, there may not be a potentially neutral adoption worker or social worker to counsel her.²⁷⁵ Thus, a birth mother’s lawyer is the only potential buffer to ensure that her consent is free from duress or coercion.²⁷⁶ A lawyer representing the adoptive parents as well as the birth parent may, even unconsciously, privilege the interests of the person paying his fee.

270. *Id.* at 800.

271. *Id.*

272. See sources cited *supra* note 218.

273. State Supreme Court Bd. of Prof'l Ethics & Conduct v. Wagner, 599 N.W.2d 721, 7216 (Iowa 1999) (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 434 (1986)).

274. See Seymore, *Sixteen & Pregnant*, *supra* note 29, at 154–55.

275. A birth mother can waive all rights to appear and to even receive notice of the adoption proceedings in her initial out-of-court consent. See, e.g., TEX. FAMILY CODE § 161.103(c)(1) (allowing affidavit for voluntary relinquishment of parental rights to contain waiver of process in termination and adoption suit); UNIFORM ADOPTION ACT § 2-406 (UNI. LAW COMM'N 1994) (permitting waiver of notice in consent or other written document); Joan Heifetz Hollinger & William M. Schur, *Notice, Process and In Personam Jurisdiction* § 4.10, in 1 ADOPTION LAW AND PRACTICE (Joan Heifetz Hollinger ed., 2019) (acknowledging acceptance of pre-suit waivers of process in adoption and termination of parental rights proceedings); Seymore, *Sixteen & Pregnant*, *supra* note 29, at 154 (“Though adoption is a legal process, it is not uncommon for a birth mother never to set foot in the courtroom.”).

276. *In re J.M.P.*, 528 So. 2d 1002, 1019–20 (La. 1988) (Calogero, J., dissenting) (“Thus, the attorney who represents the surrendering parent is the only person who is assigned, in the Louisiana statutory scheme, to stand between that parent and those who might seek to influence the adoption decision.”).

G. Self-Interest and Other Conflicts of Interest

*[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . there is a significant risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer.*²⁷⁷

Representation of adverse parties may impair duties of loyalty and independence, but so too may a lawyer's own personal interests that are potentially adverse to a client's interest.²⁷⁸ In *Okla-homa Bar Association v. Stubblefield*, the attorney was approached by a pregnant woman interested in placing her child for adoption.²⁷⁹ He agreed to help her find adoptive parents, and told her that if he did so he would be representing the adoptive parents, not her, in any adoption proceedings.²⁸⁰ The birth mother also retained him to represent her in other legal matters unrelated to the potential adoption.²⁸¹ Stubblefield found a prospective adoptive couple desiring to adopt a male child, but then Stubblefield and his wife decided they wished to adopt the female child instead.²⁸² The birth mother consented to relinquish her parental rights and place the child for adoption, but did not know that Stubblefield and his wife were adopting the child.²⁸³

Shockingly, the court refused to rule retrospectively that Stubblefield should be sanctioned regarding the adoption, finding that "reasonable minds could and do differ regarding an attorney adopting his/her client's child."²⁸⁴ But prospectively, such conduct was a different matter:

277. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2019).

278. MODEL RULES OF PROF'L CONDUCT r. 1.7(a) cmt. 10 (AM. BAR ASS'N 2019).

279. State *ex rel.* Okla. Bar Ass'n v. Stubblefield, 766 P.2d 979, 980 (Okla. 1988).

280. *Id.*

281. *Id.* The other representation was in relation to criminal charges and in seeking custody of a child from a previous marriage. *Id.* She later asked him to help her complete a divorce proceeding that she had commenced with another attorney. *Id.* In preparing documents for the divorce, Stubblefield included in the petition a statement that no children had been born of the marriage and that the petitioner was not pregnant. *Id.* Because he did not disclose the pregnancy in the divorce petition, he "prevented the trial court in the adoption proceeding from determining whether there was a living biological father of the child, from whom consent to adopt was required." *Id.* at 983.

282. *Id.* at 981.

283. *Id.* at 981–82 ("[T]he client purportedly had no knowledge of the adoption until after her consent became irrevocable and the adoption was granted.").

284. *Id.* at 982–83. Justice Simms dissented, writing, "I disagree with the majority

However, we find an attorney, after today, must not adopt the child of his/her client in a private adoption proceeding unless the attorney withdraws from representation and refers the client to another lawyer who can give independent legal counsel. The ramifications of adoption proceedings are broad inasmuch as they affect three distinct interests: the natural parents, the child and the adoptive parents. Potential conflicts do exist between these interests.²⁸⁵

Thus, the court ruled, a relinquishing parent must be afforded independent legal counsel, a lawyer whose legal advice “is not potentially or actually colored by his/her own self-interest in the child.”²⁸⁶ Independent legal counsel ensures the integrity of private adoptions, but more importantly serves “to avoid subsequent emotionally traumatic custodial changes of the adopted child.”²⁸⁷

The idea that it is not sanctionable for a lawyer to adopt the child of a birth mother he is advising or representing is astonishing. When it comes to business transactions with clients, the *Model Rules* recognize that a lawyer’s legal training, together with the trusting relationship between the lawyer and potentially less powerful client, “create the possibility of overreaching.”²⁸⁸ A lawyer cannot enter into business transactions with a client unless the terms are fair and reasonable to the client, and disclosed in a writing transmitting those terms in a manner that can be understood by the client.²⁸⁹ The client must also be advised in writing that they should seek the advice of independent legal counsel and be given a reasonable opportunity to do so.²⁹⁰ Finally, the client must give informed consent in a writing signed by the client that outlines the transaction terms and the role of the lawyer in the transaction.²⁹¹ Stubblefield took none of these steps necessary to protect a client from an overreaching attorney in a business transaction when adopting his client’s child without her knowledge.²⁹² If he had been buying his client’s business or house rather than adopting her

I view respondent’s conduct as a clear and gross conflict of interest. I would have thought it beyond need for any discussion that a lawyer who had this relationship with his client and adopted her child without fully disclosing the facts to her and without her knowledge or consent, was unquestionably guilty of unprofessional conduct and flagrant self-dealing.” *Id.* at 985.

285. *Id.* at 983 (majority opinion).

286. *Id.*

287. *Id.*

288. MODEL RULES OF PROF’L CONDUCT r. 1.8 cmt. 1 (AM. BAR ASS’N 2019).

289. *Id.*

290. *Id.*

291. MODEL RULES OF PROF’L CONDUCT r. 1.8(a)(3) (AM. BAR ASS’N 2019).

292. *Stubblefield*, 766 P.2d at 983.

child, his course of conduct would have clearly run afoul of the *Model Rules*.²⁹³

In another case where a lawyer was sanctioned for adopting the child of the birth mother who approached her about the adoption, the court ruled on grounds of lack of candor that the lawyer violated the rules of ethics.²⁹⁴ But it is quite evident that conflict of interest played a significant part in the lawyer's missteps. A Canadian birth mother reached out to a distant relative, lawyer Ritland, when she desired to place her child for adoption. She asked the Ritlands to consider adopting her baby.²⁹⁵ Since the Ritlands had been trying unsuccessfully to conceive for more than a year, she had become "obsessed" with having a baby.²⁹⁶ Ritland had not handled adoption cases before²⁹⁷ so she began to research and discovered that Canadian children could not be easily placed in American families, that the birth mother was not considered a close enough relative to qualify as a family placement adoption, and that a home study for a nonfamily placement was beyond her financial means.²⁹⁸ The birth mother informed her the birth father was out of the picture,²⁹⁹ so Ritland concocted a scheme whereby her husband would be listed as the birth father on the child's birth certificate, making him the legal father, and then after the requisite

293. See sources cited *supra* note 7.

294. *People v. Ritland*, 327 P.3d 914, 916, 921 (Colo. 2014).

295. *Id.* at 916. The court concluded that Ritland was not representing any client in the matter, not the birth mother and not her husband who she endeavored to make the legal father of the child by falsifying the birth certificate. *Id.* at 921, 927.

296. *Id.* at 918.

297. Taking on a matter without the competence to do so is another potential violation. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2019). Indeed, Ritland argued that her lack of experience should be viewed in mitigation of punishment, but the court rejected her argument. *Ritland*, 327 P.3d at 923–24 (quoting *In re Cleland*, 2 P.3d 700, 705 (Colo. 2000) ("[I]nexperience does not go far in our view to excuse or to mitigate dishonesty, misrepresentation, or misappropriation. Little experience in the practice of law is necessary to appreciate such actual wrongdoing.")).

298. *Ritland*, 327 P.3d at 918.

299. *Id.* at 916. She readily believed the birth mother who said that the birth father had ordered her to have an abortion and threatened to kill both her and the baby if she did not have an abortion. *Id.* at 917–18. She also related that he had "taken off," leaving no contact information. *Id.* at 917. She believed the birth mother because her professional background in domestic violence led her to believe the birth mother was genuinely in fear. *Id.* at 917–18. It is, of course, quite possible that her desire for a child caused her to accept this explanation too readily.

waiting period, Ritland would adopt the child in a stepparent adoption.³⁰⁰ The plan was carried out, with Ritland creating false affidavits and false pleadings which were filed in court.³⁰¹ The biological father eventually filed for custody in Canada, leading to the falsehoods being revealed.³⁰²

Although none of the sanctions in *Ritland* involved conflicts of interest, the court did recognize that the attorney acted with self-interest.³⁰³ But quixotically the court excused her selfish motivation because it “arose in part from a deep yearning for a child, genuine concern that [the birth mother] could not properly care for a baby, and a desire to protect [the child] from upheaval, consistent with her professional commitment to serving children in need.”³⁰⁴ But it is precisely these motivations that created a conflict of interest that allowed her to systematically disregard the interests of the birth father and generate falsehoods for the court. The court also considered Ritland’s struggles with infertility, leading to “feelings of desperation” and “heartbreak.”³⁰⁵ The court further stated: “[W]e believe that Respondent’s desire to have a child exerted a powerful emotional pull over her and that this yearning helps to explain Respondent’s decision to engage in the misconduct at issue.”³⁰⁶ The court also relied on Ritland’s “unwavering professional dedication to helping children in need” in her other professional endeavors.³⁰⁷

It was all of these “pulls” on her judgment that led Ritland into error. The basis of all the conflict of interest rules requires lawyers to be able to identify when conflicts of interest impair their judgment, recognizing that when a lawyer’s interests are at play, “it may be difficult or impossible for the lawyer to give a client detached advice.”³⁰⁸ Ritland should have been able to objectively recognize that her personal interests could have been coloring her perspective on the case. She should have referred the birth mother to an independent lawyer, someone who did not have a stake in the outcome of the case.

300. *Id.* at 918.

301. *Id.* at 918 n.7.

302. *Id.* at 918–19.

303. *Id.* at 915, 923.

304. *Id.* at 923.

305. *Id.*

306. *Id.* at 923–24.

307. *Id.* at 924–25.

308. MODEL RULES OF PROF’L CONDUCT r. 1.7 cmt. 10 (AM. BAR ASS’N 2019).

As *Ritland* illustrates, conflicts of interest may materially impair a lawyer's representation of a client simply because the lawyer's personal beliefs that may be relevant to adoption.³⁰⁹ As the influential *Restatement of the Law Governing Lawyers* states, a conflict may be altruistic rather than financial and may "result from a lawyer's deeply held religious, philosophical, political, or public-policy beliefs."³¹⁰ In *In re J.M.P.*, the court addressed a potential conflict when attorney Perez became involved in the adoption because of his anti-abortion views.³¹¹ The birth mother was given his name at a health clinic as an "anti-abortionist attorney."³¹² He handled this adoption case, without charging a fee to either birth family or adoptive family, in line with his anti-abortion views.³¹³ Although the court upheld the adoption on other grounds, making it unnecessary to address the conflict-of-interest issue raised by Perez's anti-abortion views, it noted that "his representation may have been materially limited by his own interest in preventing abortions by promoting adoptions."³¹⁴ One justice dissented to upholding the adoption, believing that attorney Perez did have a conflict surrounding his anti-abortion views:

The record demonstrates that Perez was personally biased in favor of the adoption, to the point that he believed that the adoption should go forward even after he learned from [birth mother's mother] that [birth mother] had expressed the desire to keep her child. Although Perez testified at the adoption hearing that his primary interest was

309. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 125 (AM. LAW INST. 2000).

310. *Id.* at § 125 cmt. c; see also Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635, 640 (1997) (discussing the propriety of rejecting representation on moral or religious grounds); Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEG. ETHICS 19, 37 (1997) (explaining a lawyer may not make decisions to achieve objectives defined by the lawyer's personal moral or religious beliefs when they conflict with the client's wishes).

311. 528 So. 2d 1002, 1004 (La. 1988). As one commentator noted in reference to the issue of counsel appointed to represent minor girls seeking abortions,

the irresolvable conflict of interest confronting any pro-life attorney required to assist a girl in obtaining an abortion. Such representation would place the attorney's belief in the sanctity of human life in direct opposition to her professional commitment to loyally seek her client's objectives. A conflict involving such fundamental beliefs would necessarily impact the attorney-client relationship and should be avoided.

Collett, *supra* note 310, at 642. Seeking to encourage adoption in order to avoid abortion could present the same conflict.

312. *In re J.M.P.*, 528 So. 2d at 1004.

313. *Id.*

314. *Id.* at 1012.

in seeing the child born, and that once the birth occurred he had no personal interest in encouraging [birth mother] to go through with the adoption, the majority overlooks the fact that Perez admitted that he did not advise Roberts about [birth mother's] reservations because he personally believed that the adoption was in the child's best interests.³¹⁵

Other parts of the rules of professional conduct recognize that a lawyer's personal feelings might impair representation so as to create a conflict of interest. For example, the *Model Rules* permit a lawyer to withdraw from a case when "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."³¹⁶ A lawyer may also avoid a court-appointed case if "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client."³¹⁷ Thus, when a client wishes to decline further appeals and accept the death penalty, an attorney "to whom the death penalty is 'repugnant,' may seek leave to withdraw from the representation."³¹⁸ And in a case discussing appointed counsel for minors seeking abortion, one court opined that an attorney who "had strongly held religious or moral beliefs about the wrongfulness of abortion" would be expected not to accept a court appointment.³¹⁹ These requirements are motivated, at least in part, by avoidance of exactly the kind of conflict of interest that arises when a lawyer represents a client despite a lawyer's deeply held religious, philosophical, political, or public policy beliefs.

Many lawyers who handle adoption cases have some relationship to adoption, with many of them being adoptive parents. Even those without a personal connection to adoption have a positive view of adoption, perhaps to the extent of presenting a conflict of interest that may bias their lawyering advice in adoption cases. As two long-time adoption practitioners note,

315. *Id.* at 1021 (Calogero, J., dissenting).

316. MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(4) (AM. BAR ASS'N 2019).

317. MODEL RULES OF PROF'L CONDUCT r. 6.2(c) (AM. BAR ASS'N 2019).

318. *Red Dog v. State*, 625 A.2d 245, 247 (Del. 1993) (per curiam).

319. *Ind. Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1137 (7th Cir. 1983). *But see* Bd. Prof'l Responsibility Supreme Court Tenn. Formed Ethics, Op. 96-F-140 (1996) (intimating that a lawyer cannot refuse appointment in such a case, even where "[t]he religious beliefs are so compelling that counsel fears his own personal interests will subject him to conflicting interests and impair his independent professional judgment").

It is also too easy for attorneys to become caught up in the view that family formation work always exemplifies goodness and morality, possibly causing them to disregard the interests of the other parent as the lawyer marches toward the goal of creating a new and legally recognized parent/child relationship.³²⁰

Adoption lawyers need to guard against allowing their personal views to skew their objective, independent advice in adoption cases.

H. *Dealing with Unrepresented Persons*

*In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.*³²¹

“An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client.”³²² That is the crux of the problem when a birth mother interacts with the adoptive parents’ attorney. Despite the limitations of Rule 4.3, the language does not express a complete prohibition on dealing with unrepresented persons, leading one commentator to declare, “[t]he professional ethics of the American bar overtly permit attorneys to knowingly exploit the ignorance and inexperience of unrepresented litigants.”³²³ This is so, so long as the lawyer explains to the nonclient that he is not a disinterested party, and he offers no conflicted legal advice beyond the advice to seek counsel.³²⁴

320. Prescott & Debele, *supra* note 18, at 153.

321. MODEL RULES OF PROF'L CONDUCT r. 4.3 (AM. BAR ASS'N 2019).

322. MODEL RULES OF PROF'L CONDUCT r. 4.3 cmt. 1 (AM. BAR ASS'N 2019).

323. Haneman, *supra* note 40, at 707.

324. MODEL RULES OF PROF'L CONDUCT r. 4.3 (AM. BAR ASS'N 2019).

Because very few states mandate that a birth parent be represented by counsel in an adoption, they are commonly unrepresented.³²⁵ Birth parents are often confused on this point, believing that the lawyer representing the adoptive parents is, in fact, their attorney. There is every reason for that confusion—the birth mother may have approached the lawyer herself, seeking help in placing the child.³²⁶ That initial contact can create the impression that the lawyer is “her” lawyer. He will explain to her the laws concerning adoption, outline her legal rights, and discuss the steps in the legal process of adoption that pertain to her. Then the lawyer will prepare documents for the birth mother’s signature—the relinquishment of parental rights affidavit, the adoption consent, etc.—furthering the impression that he is doing legal work for her. One court has held that actions of this type in fact created an attorney-client relationship between the lawyer and the birth mother:

In addition, it may be noted that, while the appellant maintained that he never represented the petitioner and her parents and acted only for his anonymous clients, it is our view that actually the appellant represented both sides of the transaction in which he acted. At times when the petitioner had no attorney of her own, the appellant not only acted for his clients but he also prepared papers for the petitioner’s signature and advised her of her right to appear and object in the proposed adoption proceedings.³²⁷

But in Tammy Lemley’s case, a court found that the lawyers were not representing the birth mother despite similar actions.³²⁸ The court conceded that Tammy might have believed the lawyers were representing her, but held that the law firm “engaged in no representations or conduct which could reasonably induce [Tammy] to believe they represented her.”³²⁹

Best practices in adoption would be for each party to be represented by independent counsel, but if a lawyer representing adop-

325. Samuels, *supra* note 67, at 75 (“In practice, when separate representation is not required by law, birth parents generally are unrepresented.”); Seymore, *Sixteen & Pregnant*, *supra* note 29, at 101.

326. See, e.g., *People v. Ritland*, 327 P.3d 914, 923 (Colo. 2014); *State ex rel. Okla. Bar Ass’n v. Stubblefield*, 766 P.2d 979, 980, 983 (Okla. 1988); *Lemley v. Barr*, 343 S.E.2d 101, 102–03 (W. Va. 1986).

327. *Tierney v. Flower*, 302 N.Y.S.2d 640, 644 (N.Y. App. Div. 1969).

328. *Lemley v. Kaiser*, No. 1804, 1987 Ohio App. LEXIS 6674, at *13 (Ohio Ct. App. Apr. 30, 1987).

329. *Id.*

tive parents acquires consent or relinquishment from the birth parents, he must carefully explain that he is not the birth parents' lawyer. Even that may not be sufficient to avoid unethical lawyering. Given the significant potential for conflict of interest,³³⁰ a lawyer can still violate the *Model Rules* if giving legal advice other than advice to secure counsel.³³¹ Further, an attorney may find himself subject to liability for legal malpractice, despite the usual rule that a lawyer cannot be liable for breaches of duty to nonclients.³³² "[A]ttorneys may owe a duty of care to nonclients when the attorneys know, or should know, that nonclients will rely on the attorney's representations and the nonclients are not too remote from the attorneys to be entitled to protection."³³³

I. Confidentiality

*A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.*³³⁴

"A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."³³⁵ When there is dual representation of a birth parent and an adoptive parent, the duty of confidentiality can be a concern. Joint representation may prevent the attorney-client confidentiality privilege from attaching, making any confidences shared with the lawyer admissible in court.³³⁶ A desire by one jointly represented party to prevent disclosure to another party creates a conflict of interest, potentially requiring withdrawal of the lawyer from representing both parties.³³⁷

330. See discussion *supra* Section II.F.

331. MODEL RULES OF PROF'L CONDUCT r. 4.3 (AM. BAR ASS'N 2019).

332. See *Lemley*, 1987 Ohio App. LEXIS 6674, at *11–13.

333. 7 AM. JUR. 2D *Attorneys at Law* § 221 (2017).

334. MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2019).

335. MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 2 (AM. BAR ASS'N 2019).

336. MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 30 (AM. BAR ASS'N 2019).

337. *Id.*; see also discussion *supra* notes 218–28 and accompanying text.

Confidentiality and adoption traditionally go hand in hand, with a long history of secrecy in adoption.³³⁸ Wayne Carp, noted adoption historian, quotes a family court judge rebuking a birth mother seeking access to information about her child placed for adoption: “secrecy is the foundation underlying all adoptions and if this secrecy is not to continue this great work must suffer.”³³⁹ While forced secrecy is changing today, with the advent of open adoption and access to original birth certificates and adoption records in some jurisdictions,³⁴⁰ the lawyer’s promise of confidentiality still applies.

Lawyers in adoption cases have used the obligation of confidentiality to hide the identity of the adoptive parents when birth parents have sought to challenge the adoption. In *Lemley v. Barr*, the prospective adoptive parents directed the attorneys not to reveal their identities when the birth mother sought return of her child:

The Barrs knew about the Ohio habeas corpus proceeding through their discussions with [their lawyer] and through news reports both on television and in print. They discussed whether to appear physically in the Ohio proceedings, whether they should comply with the judgment of the Ohio trial court, and whether they should divulge their identities. The Barrs knowingly and intentionally refused to reveal their names, and directed [their lawyers] to exercise the attorney-client privilege on their behalf.³⁴¹

It took two years and two months after Tammy filed in court before court processes resulted in an order that the names of the prospective adoptive parents be revealed. The prospective adoptive parents utilized that time of secrecy, while well aware of the Ohio court action, to file for adoption in West Virginia.³⁴² Tammy was required to bring further litigation in West Virginia to seek return of her child, and though she prevailed on all legal issues, the West Virginia Supreme Court remanded for further proceedings to decide what was in the best interest of the child, now five years old, who would, in the court’s words, lose “the only family this child has

338. Seymore, *International Adoption*, *supra* note 33, at 168–73.

339. CARP, *supra* note 66, at 106 (internal quotations omitted).

340. Seymore, *International Adoption*, *supra* note 33, at 164. Even the Academy of Adoption and Assisted Reproduction Attorneys have promulgated a resolution advocating open access to adoption records. ACAD. OF ADOPTION & ASSISTED REPROD. ATTORNEYS, RESOLUTION REGARDING ADOPTED PERSONS’ ACCESS TO ADOPTION RECORDS (2018), <https://adoptionart.org/about-aaaa/publications/resolutions/> [<https://perma.cc/3RLL-DTCU>].

341. 343 S.E.2d 101, 103 (W. Va. 1986).

342. *Id.*

ever known” if returned to his legal mother.³⁴³ Thus, the delaying tactic of insisting on confidentiality to hide their identity worked to the benefit of the prospective adoptive parents.³⁴⁴

The tactic was less successful for the prospective adoptive parents in *Tierney v. Flower*.³⁴⁵ As in *Lemley*, the prospective adoptive parents instructed their attorney not to reveal their identities or whereabouts when the birth mother sought return of the child.³⁴⁶ The adoptive parents’ attorney argued in court that such disclosure would violate the obligation of confidentiality.³⁴⁷ The lawyer also declined to state whether the adoption papers had been filed, claiming that “such a response was also of privileged nature since adoption papers were generally sealed so as not to become a matter of public record.”³⁴⁸ The court was unpersuaded, in light of the best interest of the child:

In our opinion, there is no competent reason why the Supreme Court should uphold the claim of confidential relationship between the appellant and his clients to the point of sealing their identity where the safe and proper custody of a child is involved, particularly where, as at bar, the infant is out of the custody of his mother and is not lodged in the custody of persons who have any legal authorization for their assumption of control over the infant. The Supreme Court’s overriding concern with the welfare of the infant as a ward of the court overbalances any interest of technical claim on the appellant’s part with respect to the confidential relationship between him and his clients.³⁴⁹

343. *Id.* at 104–05, 109.

344. Advising delay, so long as the prospective adoptive parents are in possession of the child, is a familiar tactic in adoption cases. An Associated Press story quotes an adoption attorney advising delay, saying the longer the child can bond with the prospective parents before an adoption notice is filed, the better. “‘Time is your friend,’ [attorney] Dove had said.” Allen G. Breed, *A Dying Man’s Race To Adopt—and a Small Miracle*, NBC NEWS.COM, (Sept. 25, 2011, 11:51:40 AM ET), http://www.nbcnews.com/id/44597789/ns/health-health_care/t/dying-mans-race-adopt-small-miracle/#.XO2CHaROlhE [<https://perma.cc/3X42-DXWH>]. Justice Sotomayor has warned of the danger of the parent-in-possession scenario, strongly suggesting that the law should not reward them: “[T]he law cannot be applied so as automatically to ‘reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.’” *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 692 (2013) (Sotomayor, J., dissenting) (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 54 (1989)). And in that case, where the birth father was actually the parent in possession, the majority had no trouble returning the child to the prospective adoptive parents. *Id.* at 645–46, 651.

345. 302 N.Y.S.E.2d 640, 643–45 (N.Y. App. Div. 1969).

346. *Id.* at 641–42.

347. *Id.* at 642.

348. *Id.*

349. *Id.* at 643.

The court further opined that, as beneficent as the requirement of confidentiality might be in the usual case, “the surreptitious withholding of the petitioner’s child by the anonymous clients and their failure so far to proceed with the proposed adoption proceeding wherein the petitioner could register her present objection to adoption and demand the return of her child might be a cloak for wrongdoing.”³⁵⁰

In the context of other legal processes involving children—child custody in divorce, for instance—commentators have noted that confidentiality rules may be incompatible with the best interests of the child.³⁵¹ In zealously representing the singular interest of the client, the lawyer must respect rules of confidentiality that hide potentially relevant information from the fact finder which may make a true determination of best interests difficult.³⁵² Rules of confidentiality also prevent adult adoptees and birth parents from reuniting. States seal original birth certificates and adoption records,³⁵³ and though the lawyer in the case would have possession of all the information, the *Model Rules* surrounding confidentiality would prevent their disclosure, absent a waiver by the client.³⁵⁴

The legal profession places the obligation of confidentiality high in importance, while adoption is trending away from its history of secrecy and suppression. Increased openness offers many benefits for all members of the adoption triad and also shines light on potential adoption corruption which flourishes in darkness. Thus, the rules of confidentiality enforced by legal ethics may well have negative consequences in the long run.

350. *Id.* at 643–44; *cf.* Seymore, *International Adoption*, *supra* note 33, at 168 (arguing that “openness in international adoption is a practical solution to fraud, corruption, and trafficking in international adoption by using the ‘sunlight as disinfectant’ method”).

351. Mary Kay Kisthardt, *Working in the Best Interest of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 RUTGERS L. REC. 1, 3 (2007); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 136–38 (1997).

352. Weinstein, *supra* note 351, at 90.

353. Seymore, *International Adoption*, *supra* note 33, at 173.

354. *See* MODEL RULES OF PROF’L CONDUCT r. 1.6 (AM. BAR ASS’N 2019).

III. THE CONTOURS OF ETHICAL LAWYERING IN ADOPTION

A. *Child-Centered Versus Client-Centered Lawyering*

Adoption is presented as a child-centered process of finding families for children in need of them, operating in the best interests of children.³⁵⁵ But the rules of legal ethics require attorneys to approach it as a client-centered process, where the attorney seeks the ends of the client without consideration of the interests of the child or any other party.³⁵⁶ A case may be couched in terms of the best interests of the child, but “[b]ecause the adversary process limits parties to fighting for their own interests, arguments made about the best interests of the child can be seen as mere manipulations to benefit the positions of the parties making them.”³⁵⁷ And in adoption, there are many missing parties—the birth father is often absent³⁵⁸ and the child, the subject of the adoption, is rarely given a voice or protection of counsel.³⁵⁹ The birth mother may be off stage by the time the case makes it to court, having waived all notice of continuing proceedings by relinquishing her parental rights.³⁶⁰ Extended family is generally ignored altogether.³⁶¹ Because adoption is usually viewed as a positive development for all—a birth parent unable or unwilling to parent, an adoptive family eager to welcome a much-wanted child, and a needy child desperate for family—sometimes little care is taken to determine if

355. See sources cited *supra* note 66 (explaining the widespread use of the best interest of the child standard).

356. Wasserstrom, *supra* note 64, at 5–6. *Contra* Katherine R. Kruse, *Engaged Client-Centered Representation and the Moral Foundations of the Lawyer-Client Relationship*, 39 HOFSTRA L. REV. 577, 586–91 (2011) (arguing that the client-centered approach should include the consequences client decisions may have on others whose well being is valued by the client).

357. Weinstein, *supra* note 351, at 90.

358. Seymore, *Grasping Fatherhood*, *supra* note 30, at 826 (citing *Caban v. Mohammed*, 441 U.S. 380, 392 (1979)).

359. Maryland is one of the few states that require the child be represented by counsel. See MD. FAM. LAW CODE ANN. § 5-338(a)(3).

360. See, e.g., *In re Hagedorn*, 725 N.E.2d 397, 399 (Ind. 2000) (per curiam) (sanctioning attorney in adoption case where birth mother consented to adoption, but attorney failed to file the proper paperwork to finalize the adoption).

361. Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649, 1652 (1995). The Supreme Court has recognized some limited rights in extended families. See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000) (acknowledging states can grant grandparents’ statutory visitation rights but reversing trial court visitation order for unconstitutionally infringing on parental rights). But even that very limited right does not extend to biological families when the birth parents’ rights are terminated.

the child is really needy or if the birth parent is really unable to parent.³⁶² Adoption may not, in a particular case, be a win-win-win.

With the current client-centered approach to legal ethics, the lawyer's role as counselor is particularly important in considering the best interests of the nonclient child. The *Model Rules* conduct make clear that "a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation."³⁶³ The *Model Rules* recognize that advice that is narrowly legal may well be inadequate; "practical considerations, such as . . . effects on other people," may predominate.³⁶⁴ A lawyer may need to offer even unwanted advice, and "may initiate advice to a client when doing so appears to be in the client's interest."³⁶⁵ An understanding of the psychosocial aspects of adoption illustrates certain realities that lawyers must consider in adoption cases.³⁶⁶

Professor Katherine Kruse has argued that client-centered lawyering should not focus on the client's legal interests, narrowly understood, but should consider all of the client's interests:

As a result of their legal professional training, lawyers have a tendency to over-value their clients' legal rights and interests relative to the weight that their clients might assign to the protection of those rights and interests when the clients compare[] them to the other things that the clients value. If a lawyer is not careful, a client's human problem can disappear, and the client can appear instead as a bundle of legal rights and interests walking around in a human body. The client's important non-legal interests—the client's relationships

362. Prescott & Debele, *supra* note 18, at 152–53 ("It is also too easy for attorneys to become caught up in the view that family formation work always exemplifies goodness and morality, possibly causing them to disregard the interests of the other parent as the lawyer marches toward the goal of creating a new and legally recognized parent/child relationship.").

363. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2019); see Kim Diana Connolly, *Elucidating the Elephant: Interdisciplinary Law School Classes*, 11 WASH. U. J.L. & POL'Y 11, 13 (2003) (arguing that "in order to understand legal problems, lawyers often need to examine them from the perspective of multiple disciplines"); Rhode, *supra* note 48, at 1318.

364. MODEL RULES OF PROF'L CONDUCT r. 2.1 cmt. 2 (AM. BAR ASS'N 2019).

365. MODEL RULES OF PROF'L CONDUCT r. 2.1 cmt. 5 (AM. BAR ASS'N 2019).

366. For review of psychosocial literature relevant to adoption, see Seymore, *International Adoption*, *supra* note 33, at 166–67 (examining psychosocial literature regarding openness in adoption); Seymore, *Grasping Fatherhood*, *supra* note 30, at 847–50 (reviewing psychosocial literature regarding birth fathers), and Seymore, *Sixteen & Pregnant*, *supra* note 29, at 138, 144–45 (discussing psychosocial literature regarding birth mothers, similar literature regarding adoptees).

with others, reputation and standing in the community, values, and commitments that the client wants to honor—can fade into the background as the client's legal rights and interests come more sharply into focus.³⁶⁷

She argues that lawyers have “a responsibility to shape legal representation around a more robust and holistic understanding of client objectives,” obviating the singular focus that disregards the interests of others.³⁶⁸ Stephen Ellmann posits that Carol Gilligan's “ethic of care,” which “focuses not on abstract rights and duties, but rather on the connections between people,” can inform lawyers of their ethical obligations.³⁶⁹ Ellmann concedes that a lawyer owes a greater duty of care to her client than to others, and “need not care equally for all involved in any given situation.”³⁷⁰ But he argues that a lawyer need not follow a client's directions when they are inconsistent with the ethic of care, as in when there are concerns for third parties.³⁷¹ In accord with Kruse, Ellmann believes that the lawyer should, instead, seek to “try to reshape her client's decision making rather than permit him to make a putatively independent, but uncaring, choice.”³⁷²

367. Kruse, *supra* note 356, at 584.

368. *Id.* at 586.

369. Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665, 2665 (1993) (citing CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982)). In another article, I described Gilligan's work as follows:

Gilligan discovered that psychological theory about the moral development of humans was developed from tests and observations of boys and men. When she began to explore how girls and women resolved moral dilemmas she discovered “a different voice,” one heretofore ignored in psychological literature. Gilligan reported that boys resolved conflicts by employing a “hierarchical ladder of values,” while girls used a very different reasoning process, an “ethic of care,” focused on preserving relationships. Gilligan argues that girls and women see “a world comprised of relationships rather than of people standing alone, a world that coheres through human connection rather than through systems of rules.” The relevance of this psychological work to law is obvious. Feminist legal scholars have used Gilligan's work to argue that law is an essentially male discourse, with the woman's voice marginalized. Law operates within Gilligan's male-identified “hierarchy of rights” instead of the female identified “ethic of care.”

Malinda L. Seymore, *Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032, 1068 (1996) (footnotes omitted) (first quoting Gary Minda, *Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 626–29 (1989); and then quoting CAROL J. GILLIGAN, IN A DIFFERENT VOICE 24–63 (1982)).

370. Ellmann, *supra* note 369, at 2681–82.

371. *See id.* at 2708–09.

372. *Id.* at 2709.

But is an ethic-of-care approach to lawyering consistent with existing codes of ethics? Ellmann believes so, grounding his argument in the rules of professional responsibility governing the role of lawyers as advisors and counselors.³⁷³ But he cautions that the existing rules provide “no overt authorization or encouragement of intervention into client decisions to the degree the ethic of care would sanction.”³⁷⁴ The experience of collaborative lawyering also suggests that an ethic of care is consistent with the *Model Rules* for lawyers. Collaborative lawyering, utilized in family dispute resolution—in particular in divorce cases—offers the promise of a more cooperative and less contentious approach.³⁷⁵ “[Collaborative lawyering] encourages spouses to honor the positive connections between them so that they can divorce respectfully and maintain good relationships with children and other relatives.”³⁷⁶ Bar authorities have found that collaborative lawyering is consistent with rules of professional ethics.³⁷⁷ While collaborative lawyering is utilized frequently in divorce,³⁷⁸ other issues of family law, including adoption, seem ideal for a collaborative lawyering approach that centers the interest of the child.

B. *Ensuring a Successful Adoption*

Ethical adoption lawyering requires adherence to all of the rules of professional responsibility, of course. Not only is this adherence

373. *Id.*

374. *Id.* at 2709–10.

375. See generally John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315 (2003) (assessing the state of collaborative law negotiation and how it interacts with legal ethical issues); Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL’Y & L. 967 (1999) (discussing the benefits offered by a collaborative law approach to the traditionally adversarial field of family law).

376. Lande, *supra* note 375, at 1318.

377. See, e.g., UNIF. COLLABORATIVE LAW RULES & UNIF. COLLABORATIVE LAW ACT Prefatory Note (UNIF. LAW COMM’N 2010), reprinted in 48 FAM. L.Q. 55, 79–80 (2014) (“Numerous bar association ethics committees have concluded collaborative law is generally consistent with the Model Rules of Professional Conduct and the obligations of lawyers to clients.”); Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 289, 305–10 (2008) (“The state legislatures and courts that have taken notice of [collaborative law] to date are uniformly encouraging its use in divorce cases and other family disputes.”). Only the Colorado Bar has opined that collaborative law may violate ethics rules. Colo. Bar Ass’n Ethics Comm., Formal Op. 115 (2007). However, that position was rejected by the American Bar Association. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 04-447 (2007).

378. UNIF. COLLABORATIVE LAW RULES & UNIF. COLLABORATIVE LAW ACT, *supra* note 377, at 69–70.

necessary to prevent disciplinary measures by the bar licensing authorities, it is also important in achieving a legally enforceable adoption that can withstand legal challenges. Finally, it is important in effectuating the promise of adoption, that it be in the best interest of the child.

When representing prospective adoptive parents, the lawyer's first concern may well be that the adoption proceeds to final judgment. Some believe the best way to achieve that goal is to push the birth mother to sign relinquishment paperwork as quickly as the law allows and to ignore the birth father in the hopes that he will not assert any rights he may have. This approach, however, is risky. This course of conduct sets up potential challenges to the adoption.³⁷⁹ Even if the challenges fail, they increase the costs of adoption, result in delays in finalization, and cause emotional trauma to all parties involved. Rather, it is in the best interest of the prospective adoptive parents to ensure that both prospective birth parents are making fully informed and voluntary decisions. Fully informed decisions can be made only after consultation with independent counsel, counsel who is not representing the adoptive parents or the adoption agency.³⁸⁰ It is only slightly better when the independent counsel is paid by the adoptive parents; I have proposed previously that courts should appoint and pay for counsel for minor birth parents in the same manner in which they appoint counsel for parents in cases involving the involuntary termination of parental rights.³⁸¹ In advising the birth mother, ensuring the finality of the adoption requires careful advice to affirm that her consent is voluntary. Advising the mother of services available to help her parent—eligibility for state and federal welfare assistance for her and the child, available state services to determine paternity and enforce child support orders, for instance—will help her consider whether adoption placement is what she wants rather than an act of desperation.³⁸² Many states require similar information about resources available to help parents be informed before an abortion decision, so it would not be onerous to require it before an adoption placement decision.³⁸³

379. See discussion *supra* notes 158–65, 234–42 and accompanying text.

380. See discussion *supra* notes 216–76 and accompanying text.

381. Seymore, *Sixteen & Pregnant*, *supra* note 29, at 154–56.

382. *Id.* at 154–55.

383. See *id.* at 155; *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion>

Some might argue that this proposal is asking lawyers to be social workers, and it is true that there may be a fine line between “where lawyering ends and social work begins.”³⁸⁴ Yet, it is well-understood in child welfare cases that lawyers need to understand social work practice and vice versa.³⁸⁵ If adoption law is truly designed to focus on the best interest of the child, then that interdisciplinary approach should extend to adoptions as well. A lawyer handling adoptions needs to be aware of the psycho-social realities of adoption and adoption relationships so that she can effectively counsel the client beyond legal technicalities. A lawyer may consider collaborating with a social worker if he feels limited in serving this important function.

Employing the “passive strategy” of the *In re Krigel* case with the birth father, ignoring him or shutting him out in the hopes that he will not do what is necessary to assert parental rights, is also risking a later challenge to the adoption from the birth father.³⁸⁶ Going beyond passive to actively thwarting the birth father may not only risk the finality of the adoption, but it may lead to legal liability for tortious interference with parental rights as well as bar discipline as in *In re Krigel*.³⁸⁷ The concern seems to be that if the attorney reaches out to the birth father, he may assert his rights, so it is better to ignore him and hope that he does not resurface at a critical time. But available research suggests that birth fathers who are involved in the adoption placement decision are more likely to be cooperative than otherwise.³⁸⁸ Several states have simplified procedures that allow a disinterested birth father to easily bow out of the case.³⁸⁹

[<https://perma.cc/T9JX-EMST>].

384. See Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-examining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123, 2125 (1999).

385. Kathleen Coulborn Faller & Frank E. Vandervort, *Interdisciplinary Clinical Teaching of Child Welfare Practice to Law and Social Work Students: When World Views Collide*, 41 U. MICH. J.L. REFORM 121, 121–22 (2007).

386. See discussion *supra* notes 162–77 and accompanying text.

387. See *supra* note 177 and accompanying text.

388. Deykin et al., *supra* note 179, at 243; see also Brandt, *supra* note 70, at 223–24. (“Moreover, the secrecy with which these cases move forward may, in itself, result in polarization and mistrust leading to litigation that might not otherwise take place.”).

389. Joan Heifetz Hollinger & William M. Schur, *Releases, Consents, Relinquishments, Surrenders, Entrustment Agreements, Disclaimers, and Waivers* § 4.11, in 1 ADOPTION LAW AND PRACTICE (Joan Heifetz Hollinger ed., 2019) (“In some jurisdictions, alleged biological fathers and other persons who have or may claim a legal interest in a child are permitted to execute special documents through which they disclaim or quitclaim whatever legal rights they might otherwise have with respect to a child.”); see, e.g., TEX. FAMILY CODE § 161.106

The perceived downside of actually securing valid consent from the prospective birth parents is that they may choose to parent rather than relinquish their parental rights. Though that may not be the end desired by the prospective adoptive parents, it is the end to be desired in adoption. Adoption is for children who do not already have parents. If a child has a willing and able parent, then adoption is not in the child's best interest.³⁹⁰ After all, "[a]doption is about finding families for children, not about finding children for families."³⁹¹

Psychosocial research also suggests that what is in the best interests of a child in a completed adoption is continuing relationships between the adopted child and birth family.³⁹² Ethical lawyering requires an attorney to advise parties to the adoption of the long-term consequences of adoption and of the benefits of preserving on-going relationships. An ethical adoption attorney advises clients to avoid the winner-take-all litigation strategy that shuts out the interests of others, especially the interests of the child. When I read a case like *Lemley v. Barr*³⁹³ or *In re Krigel*,³⁹⁴ I wonder how the prospective adoptive parents would explain their conduct to their adopted children as they reach adulthood: "Though your birth parent wanted to parent you, were quite capable of doing so, and fought at every turn to do so, I asked the lawyer to employ every trick and stratagem available to cut them out of your life. I won! Aren't you lucky to be my child?!" Adopted children grow up to be adopted adults, and their views of their adoptions may not be quite as rose-colored as their adoptive parents believe.

C. Solutions from Behavioral Ethics

"The problems that descriptive work on unintentional unethical behavior identified have been difficult to address, given that people are unaware that their biases underlie them."³⁹⁵ The unconscious

("A man may sign an affidavit disclaiming any interest in a child and waiving notice or the service of citation in any suit filed or to be filed affecting the parent-child relationship with respect to the child.").

390. The court in *In re Krigel* recognized that it was in the child's best interest to remain with his natural father, rather than to be placed for adoption. 480 S.W.3d 294, 298, 300 (Mo. 2016) (en banc).

391. JOYCE MAGUIRE PAVAO, *THE FAMILY OF ADOPTION* 24 (2005).

392. For a review of relevant literature, see sources cited *supra* note 366.

393. 343 S.E.2d 101 (W. Va. 1986).

394. 480 S.W.3d 294.

395. Sezer et al., *supra* note 46, at 78.

nature of most unethical decision making makes the usual prescription, educating attorneys about ethical rules and punishing them for breaking them, alone insufficient.³⁹⁶ Indeed, there is some evidence that a system like the current attorney-sanction regime, with low rates of sanction, actually increases unethical behavior rather than improving behavior.³⁹⁷ Instead, lawyers need to learn about behavioral psychology to help them understand and avoid ethical blind spots.³⁹⁸ Tigran Eldred describes incorporating lessons from behavioral legal ethics in the professional responsibility courses he teaches³⁹⁹ and given that students in every law school must take that class, it provides a natural home for lessons about the dangers of ethical blind spots.

Sezer, Gino, and Bazerman suggest that actors can avoid ethical blind spots by “moving from System 1 to System 2 processing.”⁴⁰⁰ System 1 processing is “fast, automatic, effortless, and emotional,” and results in processing that is far more biased than System 2 processing, which is “slow, deliberate, effortful, and reason based.”⁴⁰¹ Framing decisions so that decision makers can take more time and enable the shift from System 1 to System 2 processes,⁴⁰² as lack of time is a cognitive stressor that can result in unethical decisions.⁴⁰³ Joint decision making can also result in more deliberative, less automatic, decision making.⁴⁰⁴ This may be difficult for adoption lawyers, who often engage in solo practice, but that simply means that they must plan ahead to develop trusted networks of others with whom they can consult.⁴⁰⁵

When decision makers are prompted to look for problems with a decision they have made, they are more likely to engage in System 2 processing.⁴⁰⁶ Focusing on counterfactuals before decisions are

396. Robbennolt & Sternlight, *supra* note 14, at 1156.

397. Sezer et al., *supra* note 46, at 80 (“[W]eak sanctioning systems—those with both a small probability of detecting unethical behavior and small punishments—actually increase unethical behavior relative to having no sanctioning system.”).

398. See Robbennolt & Sternlight, *supra* note 14, at 1157.

399. See generally Eldred, *supra* note 15.

400. Sezer et al., *supra* note 46, at 78.

401. *Id.*; Bazerman & Sezer, *supra* note 44, at 103.

402. Sezer et al., *supra* note 46, at 78; see also Robbennolt & Sternlight, *supra* note 14, at 1162.

403. Robbennolt & Sternlight, *supra* note 14, at 1162.

404. See Sezer et al., *supra* note 46, at 78–79.

405. Robbennolt & Sternlight, *supra* note 14, at 1162.

406. Bazerman & Sezer, *supra* note 44, at 103 (noting that “we need research to discover

finalized, deliberately taking positions opposite to one's first instincts, and actively considering an outsider's perspective can move a decision maker toward System 2 processes.⁴⁰⁷ Adoption lawyers should consider that different members of the adoption triad may have different views of adoption, both now and in the future. Consider how a particular action during the adoption process might appear later to an adoptee as an adult, for example. It may be that the lawyer's client is the one pushing for unethical treatment of another party; as Deborah Rhode notes, "[t]he stress, acrimony, and financial pressures that can accompany legal disputes often compromise clients' ability to perceive their own long-term interests or the ethical implications of self-serving behavior."⁴⁰⁸ The lawyer's role, then, is to "provide a useful reality check for individuals whose judgment is skewed by self-interest or cognitive biases."⁴⁰⁹

Since much of bounded ethicality is driven by unconscious self-interest, one way to alleviate the effect of self-interest may be "to change the ways that . . . lawyers calculate self-interest."⁴¹⁰ Reframing the outcome goal also allows the lawyer to protect against potential unethical conduct by the client who may seek to push beyond ethical bounds to ensure that they successfully gain the child. A lawyer can cast ethical advice to respect the interests of all of the triad in more pragmatic terms:

Conduct that attorneys find ethically objectionable can be more diplomatically packaged as unduly risky, as something that will not play well with jurors, government regulators, the media or the general public. By the same token, the moral high road can also be portrayed as desirable for prudential reasons. In the long term, attorneys can often argue, "ethics pays."⁴¹¹

In an adoption case, the lawyer representing prospective adoptive parents should see as the best outcome one that ensures that the adoption will be in the best interests of the child and will survive all potential legal challenges. Thus, rather than rushing the birth mother to a decision or erecting barriers to the birth father's

the conditions that prompt System 2 thinking so that individuals will notice unethical behavior more often").

407. Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333, 389–90 (2013).

408. Rhode, *supra* note 48, at 1320.

409. *Id.*

410. See Eldred, *supra* note 407, at 388.

411. Rhode, *supra* note 48, at 1318–19.

involvement, the lawyer's self-interest would be to take all steps necessary to ensure that the interests of these parents are respected.

Social scientists also argue for institutional "fixes" to ethical blind spots by designing institutions and changing the design of existing institutions to promote ethical behavior.⁴¹² One institutional fix, the institution of ethics codes, has been seen as successful by some social scientists, as ethics codes can assert ethical values that decision makers can aspire to.⁴¹³ But ethical codes alone are not enough to change behavior, as other incentives may create pressures to behave unethically.⁴¹⁴ Perhaps the best-known proponents of "nudging" actors toward better behavior through nearly invisible design changes are Cass Sunstein and Richard Thaler.⁴¹⁵ Nancy Rapoport has suggested that lawyers can be nudged toward better behavior by changing incentive structures and imposing default rules.⁴¹⁶ The adoption arena, especially the almost wholly unregulated area of private adoption, has default rules and incentive structures that allow faulty and unethical decision makers to flourish.⁴¹⁷

Policymakers could certainly consider changes to the substantive law of adoption to rework some default rules. In the area of conflict of interest, for example, rather than relying on attorneys to correctly appraise whether they can appropriately represent both prospective birth parents and adoptive parents, dual representation should be banned altogether, as in New York.⁴¹⁸ Legislatures should require independent legal counsel for prospective birth parents and fund court-appointed attorneys for them, avoid-

412. Sezer et al., *supra* note 46, at 79–80.

413. *Id.* at 79.

414. *Id.*

415. See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (Penguin Books rev. ed., 2009) (expounding a theory of motivating human behavior through "nudges" or "any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options").

416. Nancy B. Rapoport, "Nudging" Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms, 4 SAINT MARY'S J. LEGAL MALPRACTICE & ETHICS 42, 68 (2014).

417. See Susan A. Munson, Comment, *Independent Adoption: In Whose Best Interest?*, 26 SETON HALL L. REV. 803, 809, 814–15, 830 (1996) (decrying the largely unregulated nature of private adoption). But see Pustilnik, *supra* note 24, at 263–64, 266 (arguing that the unregulated nature of private adoption is a positive thing).

418. See discussion *supra* notes 217–34.

ing the potential for divided loyalties when the birth parent's attorney is paid for by the adoptive parents.⁴¹⁹ Further protection for fathers' rights in adoption would avoid the "passive strategy" designed to burden his assertion of rights.⁴²⁰ These are rather large nudges, of course. Absent these fixes, adoption lawyers must create their own incentives to disconnect themselves from the unconscious biases that lead to bad decisions. Anticipating and actively guarding against ethical blind spots, incentivized with the realization that ethical adoption is in the best interests of all of the adoption triad, is a starting place.

CONCLUSION

The best interests of children are to be raised by their biological parents. If that is not possible, the best interests of children are a secure and permanent adoptive placement that respects their connection to their first families. Ethical lawyering in adoption ensures this outcome. But that ethical lawyering must go beyond mechanical adherence to the *Model Rules*. Ethical lawyering in adoption centers the interests of the child, while keeping in mind the interests of all members of the adoption triad. Adoption lawyers need to be competent in both adoption law and the psychosocial aspects of adoption. Best practices for ensuring a successful and legally unchallengeable adoption require cooperation and collaboration between parties, all of whom are represented by independent legal counsel. To guard against personal conflicts, lawyers need to examine their attitudes toward adoption and not allow the rainbows-and-unicorns fantasies of family formation to obfuscate the fact that all adoptions begin with loss—the child loses a first family, the birth family loses a child, the adoptive family often loses their image of a biological child. While adoptive families also gain a child—and the child gains a family—lawyering with loss in mind encourages an adoption attorney to consider the interests of all parties to minimize that loss. Believing that adoption work is purely good can lead to ethical blind spots, to an ends-justifies-means rationalization that can risk both the lawyer's license and the legality of the adoption itself. In a previous article, I argued that "ethical adoption practices should be as simple as doing the

419. See discussion *supra* note 379 and accompanying text.

420. See discussion *supra* notes 149–55 and accompanying text.

right thing because it is right.”⁴²¹ If further incentive is needed, lawyers must be aware that unethical adoption practices may risk civil damages for legal malpractice, risk sanction by the state bar, risk a court invalidating an adoption, and risk the best interests of the child.

421. *Seymore, Adopting Civil Damages*, *supra* note 8, at 961.