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SPECIALTY BAR ASSOCIATIONS AND THE MARKETING OF ETHICS: THE EXAMPLE OF THE ACADEMY OF ADOPTION ATTORNEYS

MALINDA L. SEYMORE*

ABSTRACT

In a world of lawyer jokes, memes of sleazy lawyers, and the ubiquity of bad lawyers in television shows and movies, lawyers have reason to push back against negative public perceptions of lawyers' ethics. This article examines the role of specialty bar associations, by using the example of the Academy of Adoption Attorneys, in marketing ethics to the public.

Specialty bar associations have been seen as sites of lawyer socialization and professionalism. Though there are thousands of specialty bar associations with aspirational ethical codes, the Academy of Adoption Attorneys is unusual among such associations in having a mandatory ethics code and a grievance procedure that leads to written decisions sanctioning members. Ethical lawyering in adoption cases is particularly important given the high stakes involved in cases implicating the best interests of the child and the constitutionally protected rights of parents. The Academy promises enhanced ethical standards in its members, but it faces a number of barriers, common to other specialty bar associations, in fulfilling that promise. This article examines the role of specialty bar associations in ethical compliance by focusing on ethical issues common to adoption attorneys and the role that the Academy of Adoption Attorneys plays in the profession.

INTRODUCTION

In adoption, individuals or couples ask the courts to create their legal family.¹ Leading adoption historian Wayne Carp describes the process of “successfully negotiating the legal and bureaucratic maze” as follows:

A host of state laws govern every aspect of legal adoptions: who may adopt, who may be adopted, the persons who must consent to the adoption, the form the adoption petition must take, the notice 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. 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. See CYNTHIA HAWKINS DEBOSE, *MASTERING ADOPTION LAW AND POLICY* 3 (Russell Weaver ed. 2015); see also 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).

investigation and formal hearing of the adoption petition, the effect of the adoption decree, the procedure for appeal, the confidential nature of the hearings and records in adoption proceedings, the issuance of new birth certificates, and the payment of adoption subsidies.²

A lawyer is indispensable in negotiating the maze of adoption.³ Even today, when much of adoption matching and placement is accomplished by prospective adoptive parents and birth parents who have found each other in cyberspace or elsewhere,⁴ an adoption eventually has to be formalized in court.⁵ And given the complexities of legal adoption, it is not generally something that laypeople can handle on their own.⁶

Attorneys in adoption cases are required to be knowledgeable about the complexities of adoption law. And in addition to following the complex network of laws relating to adoption, lawyers are also obligated to follow the rules of professional conduct designed to ensure ethical lawyering.⁷ Many scholars have written about the ethics of adoption as an institution, approaching the issues from theoretical and practice perspectives in a variety of professional settings.⁸ Adoptees, birth parents, and adoptive parents have also opined about

2. E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 2 (1998). The analogy of a maze is common in talk about the adoption process. *See, e.g.*, ADAM PERTMAN, ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA 27 (2000).

3. *See* JOAN HEIFETZ HOLLINGER, 1 ADOPTION LAW AND PRACTICE § 1.06 (2015) (describing the multifaceted tasks of lawyers in adoptions). *See also* *Why You Need an Attorney*, ACAD. ADOPTION & ASSISTED REPROD. ATT'YS, <https://adoptionart.org/find-an-attorney/why-you-need-an-attorney/> (last visited Oct. 16, 2020).

4. *See* Mark T. McDermott, *Agency Versus Independent Adoption: The Case for Independent Adoption*, 3 FUTURE OF CHILDREN, Spring 1993, at 146 (explaining that in 1993, independent adoptions exceeded agency adoptions for the first time). *See also* HOLLINGER, *supra* note 3, at § 1.05 (“The overwhelming majority of healthy infants are adopted through private placements.”); Michelle M. Hughes, *Internet Promises, Scares, and Surprises: New Realities of Adoption*, 41 CAP. U. L. REV. 279, 279–83 (2013) (discussing how the internet allows direct matching between prospective adoptive and birth parents).

5. *See* HOLLINGER, *supra* note 3, at § 1.05.

6. *See* *Why You Need an Attorney*, *supra* note 3. It is an axiom that lawyers hold the key to the courthouse door. *See, e.g.*, John R. Tarpley, *You Hold the Key to the Courthouse*, 40 TENN. BAR J. 3 (2004).

7. *See* Malinda L. Seymore, *Ethical Blind Spots in Adoption Lawyering*, 54 U. RICH. L. REV. 461, 471 (2020) [hereinafter Seymore, *Ethical Blind Spots*].

8. *See* MADELYN FREUNDLICH, THE MARKET FORCES IN ADOPTION: ADOPTION AND ETHICS (2000); HAWLEY FOGG-DAVIS, THE ETHICS OF TRANSRACIAL ADOPTION (2002); BRID FEATHERSTONE, ANNA GUPTA & SUE MILLS, THE ROLE OF THE SOCIAL WORKER IN ADOPTION – ETHICS AND HUMAN RIGHTS: AN ENQUIRY (2018); Sandra Patton-Imani, *Redefining the Ethics of Adoption, Race, Gender, and Class*, 36 LAW & SOC’Y REV. 813 (2002); Harvey Schweitzer & Daniel Pollack, *Ethical and Legal Dilemmas in Adoption Social Work*, 44 FAM. CT. REV. 258, 258 (2006); Frederic G. Reamer & Deborah H. Siegel, *Ethical Issues in Open Adoption: Implications for Practice*, 88 FAMILIES. SOC’Y: J. CONTEMPORARY SOC. SERVS. 11 (2007); Janet Farrell Smith, *Analyzing Ethical Conflict in the Transracial Adoption Debate: Three Conflicts Involving*

the ethics of adoption.⁹ Adoption has been critiqued for stripping children permanently from poor women for the benefit of the wealthy.¹⁰ Adoption workers have been accused of using tactics to wrangle consent out of vulnerable women so that children can be placed with adoptive parents for profit.¹¹ It has been criticized as little more than baby selling and baby buying.¹² It is subject to the charge of identity theft, changing children's names and identities, and locking away the information about their origins in secret records and false birth certificates.¹³ It has been called social engineering, playing God to create families that did not exist before and that necessitated dismantling another family to accomplish that goal.¹⁴ All of these critiques are at least partially true, or at least true in some instances.

But lawyers often view adoption as an unmitigated good. Family law practitioners who participate in divorce proceedings, some of the most

Community, 11 HYPATIA 1 (1996); Stephen G. Post & Mary B. Mahowald, *Reflections on Adoption Ethics*, 5 CAMBRIDGE Q. HEALTHCARE ETHICS 430 (1996); Pal Ahluwalia, *Negotiating Identity: Post-colonial Ethics and Transnational Adoption*, 3 J. GLOB. ETHICS 55 (2007).

9. See KATHRYN JOYCE, *THE CHILD CATCHERS: RESCUE, TRAFFICKING, AND THE NEW GOSPEL OF ADOPTION* (2013); Jennifer Gilmore, *The Dark, Sad Side of Domestic Adoption*, ATLANTIC (Apr. 30, 2013), <https://www.theatlantic.com/sexes/archive/2013/04/the-dark-sad-side-of-domestic-adoption/275370/> (adoptive parent); Liz Latty, *Adoption Is a Feminist Issue, but Not for the Reasons You Think*, HUFFINGTON POST (Apr. 25, 2017), www.huffpost.com/entry/adoption-is-a-feminist-issue-but-not-for-the-reasons_b_58fecfe5e4b06c83622e6fe5?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xILmNvbS8&guce_referrer_sig=AQAAADA_ALdJMbuaaOBc-nHeKSTAQxEbEhvwjKILF9mYCMFdzkXrHnQ1W7XSU8IXvL_eQFmldKO5gLSRWPRATMU6U_zMRXqud57oq-wsVzeXEraImhNmVWYhceNz9uIqGV82wLLu9UbNkJ_oPwBLBGiPyXPow3wQ8BgHRZSFCmM_mC (adoptive parent); Molly McCullough, *A Long Journey Home: The Personal Politics of Transnational Adoption*, PACT'S POINT VIEW NEWSL. (2008), <https://www.pactadopt.org/app/servlet/documentapp.DisplayDocument?DocID=179> (transnational adoptive parent); Emily Matchar, *Meet the New Anti-Adoption Movement: The Surprising Next Frontier in Reproductive Justice*, NEW REPUBLIC (Sept. 1, 2013), <https://newrepublic.com/article/114505/anti-adoption-movement-next-reproductive-justice-frontier> (birth mother's perspective); Jen Hatmaker, *Examining Adoption Ethics: Part One*, JEN HATMAKER BLOG (May 14, 2013), <http://jenhatmaker.com/blog/2013/05/14/examining-adoption-ethics-part-one> (adoptive parent).

10. Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J. L. & FEMINISM 101, 102 (1998) ("One troubling aspect of both transracial and international adoption is that each often results in the transfer of children from the least advantaged women to the most advantaged.").

11. See Matchar, *supra* note 9.

12. David M. Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 U. LOUISVILLE L. REV. 441 (2010); Trish Maskew, *Child Trafficking and Intercountry Adoption: The Cambodian Experience*, 35 CUMB. L. REV. 619 (2005); Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. THIRD WORLD L.J. 61 (2006).

13. See CARP, *supra* note 2; Malinda L. Seymore, *Openness in International Adoption*, 46 COLUM. HUM. RTS. L. REV. 163 (2015) [hereinafter Seymore, *Openness in International Adoption*].

14. The basic ethical dilemma was expressed by a social worker in one study of adoption: "Adoption always raises ethical issues in relation to social engineering—the removal of a child from a poor family to a better off family." FEATHERSTONE ET AL., *supra* note 8, at 10.

contentious and emotional cases in law, will talk about adoption cases as doing “happy law.”¹⁵ That rose-colored view of adoption may affect the lawyer’s appraisal of the legality and ethics of their practices.

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.¹⁶

That desire to see only the positive side of adoption may also be motivated by the amount of money that flows around adoption. “People assume that adoption is a benevolent, philanthropic response to the needs of orphans, but it’s not always. In some ways, it’s just another giant industry in which people see a way to get rich.”¹⁷ Some estimate that adoption is a \$2 to \$3 billion industry yearly.¹⁸ Lawyers earn a good chunk of that. A newborn adoption using an adoption attorney averages \$37,829, with \$13,780 attributable to attorney fees.¹⁹ Using an adoption agency, the newborn adoption averages \$43,239, with \$4,435 attributable to attorney fees.²⁰ In adoption from foster care, the average cost is \$2,938, with \$947 attributed to attorney fees.²¹ Thus, attorney fees in adoptions can vary widely, but the attorney gets paid for a completed adoption. Since it is adoptive parents who pay the attorney fees, it is generally their interests which predominate in the adoption.²²

“Modern adoption . . . cases present practitioners with particularly challenging ethical dilemmas”²³ But lawyering ethics are not grounded in

15. See, e.g., Deborah M. Hanson, *Law: Adoption*, <https://deborahmhenson.com/professional-services/law-adoption/> (“I call adoption law my ‘happy law’ and I love helping families”) (last visited Oct. 16, 2020); see also *Adoption*, BLUMENSTOCK LAW, <http://www.blumenstocklaw.com/services/adoption/> (“Adoptions are ‘happy law’—we love them!”) (last visited Oct. 16, 2020).

16. 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. LAW. 127, 153 (2017) (discussing both ARTS and adoption cases).

17. PERTMAN, *supra* note 2, at 193 (quoting Maureen Hogan, executive director of the National Adoption Foundation, an organization that supports adoptive families).

18. Michele Goodwin & Naomi Duke, *Parent Civil Unions: Rethinking the Nature of Family*, 2013 U. ILL. L. REV. 1337, 1386 n.293; Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers’ Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509, 518 (2005).

19. Editorial Team, *Adoption Cost and Timing in 2016–2017*, ADOPTIVE FAMILIES (Jan. 2018), <https://www.adoptivefamilies.com/resources/adoption-news/adoption-cost-timing-2016-2017-survey-results/>.

20. *Id.*

21. *Id.*

22. Even when lawyers are representing the birth mother, it is generally still the adoptive parents who pay the fee. See *infra* text accompanying notes 142–146.

23. Prescott & Debele, *supra* note 16, at 141. Incidentally, Gary Debele is a member of the Academy of Adoption and Assisted Reproduction Attorneys. See *Attorney Directory: Gary A.*

ideas of morality or right or wrong; rather, “[i]ncreasingly, lawyers are equating ethical conduct with the minimum standards for avoiding discipline under the professional rules of professional conduct.”²⁴ Rules of professional responsibility for lawyers govern the attorney-client relationship, including its formation and fees;²⁵ obligations for competence,²⁶ loyalty,²⁷ diligence,²⁸ confidentiality,²⁹ and candor;³⁰ the lawyer’s role as counselor³¹ and advocate;³² the lawyer’s conduct with regard to non-clients³³ and other members of the legal community with whom she practices;³⁴ the public at large, including advertising³⁵ and soliciting clients³⁶ and providing pro bono legal services;³⁷ and maintaining the integrity of the profession.³⁸ All of these rules apply in adoption cases, of course, but most writing about ethical lawyering in adoption tends to focus on the issue of loyalty in the context of dual representation of prospective adoptive parents and birth parents.³⁹ There are a handful of cases where lawyers have been disciplined for conduct in adoption cases.⁴⁰ But rules of professional responsibility, though mandatory, “are notoriously under- or unenforced by disciplinary authorities.”⁴¹ They are a one-size-fits-all approach to lawyering ethics, one that often fails to provide concrete guidance to lawyers

Debele, ACAD. ADOPTION & ASSISTED REPROD. ATT’YS, <https://adoptionart.org/find-an-attorney/attorney-directory/#!biz/id/5ae9ebb7f033bf391717d2bf> (member since 1996) (last visited Oct. 16, 2020).

24. Susan Saab Fortney, *Mandatory Legal Malpractice Insurance: Exposing Lawyers’ Blind Spots*, 9 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS 190, 235 (2019); 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.”).

25. MODEL RULES OF PRO. CONDUCT r. 1.2, 1.5 (AM. BAR ASS’N 2012).

26. *Id.* r. 1.1.

27. *Id.* r. 1.7–1.12.

28. *Id.* r. 1.3.

29. *Id.* r. 1.6.

30. *Id.* r. 3.3, 4.1.

31. *Id.* r. 2.1–2.4.

32. *Id.* r. 3.1–3.9.

33. *Id.* r. 4.1–4.4.

34. *Id.* r. 5.1–5.7.

35. *Id.* r. 7.2.

36. *Id.* r. 7.3.

37. *Id.* r. 6.1.

38. *Id.* r. 8.1–8.5.

39. See, e.g., Hope C. Todd, *Speaking to Ethics: Ethical Mandates in Private Adoptions*, WASH. LAW. (Mar. 2014), <https://www.dcbart.org/bar-resources/publications/washington-lawyer/articles/march-2014-speaking-of-ethics.cfm>.

40. See, e.g., *State ex rel. Okla. Bar Ass’n v. Stubblefield*, 766 P.2d 979 (Okla. 1988); *In re Krigel*, 480 S.W.3d 294 (Mo. 2016) (en banc); *In re Hagedorn*, 725 N.E.2d 397 (Ind. 2000); *In re Michelman*, 616 N.Y.S.2d 409 (N.Y. App. Div. 1994).

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

in specific areas.⁴² The rules of professional responsibility, often vague and uncertain, leave much ethical decision-making to a lawyer's own judgement.⁴³ Because the rules of professional responsibility are more black-letter law than aspirational standards,⁴⁴ some specialized voluntary lawyering groups have promulgated rules of enhanced professional responsibility for their members.⁴⁵ For example, the American Academy of Matrimonial Lawyers promulgated its own ethics code in 1991 because it felt that existing codes "ignor[ed] the uniqueness of family law."⁴⁶ There are thousands of specialized bar associations, organized around particular identities or practice areas.⁴⁷ The Academy of Adoption and Assisted Reproduction Attorneys is one such specialty bar association.

This Article will examine the role of specialty bar associations in forming professional identity and ensuring ethical lawyering by focusing on the Academy of Adoption and Assisted Reproduction Attorneys. Part I of the article explores the literature about specialty bars to examine the premise that they enhance professionalism. Part II discusses common ethical issues in adoption practice. Part III outlines the history of the Academy of Adoption and Assisted Reproduction Attorneys, and contains a close read of a wealth of documents from the Academy—its bylaws, grievance procedures, ethics code, and decisions/adjudications disciplining members—to illuminate whether the organization realizes its promise that its members exhibit "the highest standards of . . . ethical conduct" in the industry.⁴⁸ Part IV considers whether a specialty bar association's emphasis on ethics can be meaningful or mere virtue signaling.

I. SPECIALTY BAR ASSOCIATIONS: ROLE IN ETHICS AND PROFESSIONALISM

Michael Ariens notes that at one time the profession venerated the generalist, the "country lawyer [who] must be ready to handle almost any kind

42. *Id.*

43. *Id.*; see also Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1126 (2013).

44. Geoffrey C. Hazard, Jr., *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571, 574 (1982).

45. Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 291 n.9 (2008) [hereinafter Schneyer, *The Organized Bar*]; Leslie C. Levin, *Specialty Bars as a Site of Professionalism: The Immigration Bar Example*, 8 U. ST. THOMAS L.J. 194 (2011); Judith Kilpatrick, *Specialty Lawyer Associations: Their Role in the Socialization Process*, 33 GONZ. L. REV. 501 (1997) [hereinafter Kilpatrick, *Specialty Lawyer Associations*].

46. LYNN MATHER, CRAIG A. McEWEN & RICHARD J. MAIMAN, *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* 113 (2001).

47. Ann Southworth, *Our Fragmented Profession*, 30 GEO. J. LEGAL ETHICS 431, 440 (2017); Schneyer, *The Organized Bar*, *supra* note 45, at 291 n.9; Levin, *supra* note 45, at 194; see also Kilpatrick, *Specialty Lawyer Associations*, *supra* note 45.

48. ACAD. ADOPTION & ASSISTED REPROD. ATT'YS, *ACADEMY CODE OF ETHICS FOR THE ACADEMY OF ADOPTION & ASSISTED REPRODUCTION ATTORNEYS, INC.* (Apr. 2018), https://adoptionart.org/wp-content/uploads/2018/06/Ethics_Code_April2018.pdf [hereinafter *ACADEMY CODE OF ETHICS*].

of case that comes along.”⁴⁹ A lawyer’s professionalism was then defined as their ability to handle all matters, rather than a narrow expertise.⁵⁰ That focus on a general practice has given way to a trend toward specialization. What effect has that trend had on lawyers’ professionalism and ethics? There have been a number of studies seeking to answer that question.

A. Trend Toward Specialization

The history of the American legal profession is one of increased specialization and fragmentation.⁵¹ In one important study of Chicago lawyers, at least a third of respondent lawyers restricted their practice to one field.⁵² In another study, three-fourths of lawyers surveyed worked at least half of their time in a single area of law.⁵³ According to the MacCrate Report, an influential study of lawyers and legal education, “[w]hen asked, the great majority of lawyers now describe themselves as specializing by legal doctrine, lawyering skill or type of client.”⁵⁴

There are obvious advantages to specialization. As law has become increasingly complex a lawyer is “obliged as a practical matter to limit the subjects on which he or she will keep abreast and develop particular competence.”⁵⁵ Specializing allows a lawyer to claim expert status, which is a competitive advantage in seeking clients and asking them to pay more.⁵⁶ That expertise makes lawyers indispensable to their employers and more portable to a new employer.⁵⁷ When large law firms organize themselves into departments that specialize (corporate, litigation, tax, environmental, etc.) there are built-in efficiencies that maximize profits.⁵⁸ In some jurisdictions, a lawyer who

49. Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1005 (1994) (quoting Bellamy Partridge, *Country Lawyer*, in READER’S DIG., Sept. 1939, at 111 (condensed version of BELLAMY PARTRIDGE, *COUNTRY LAWYER* (1939))).

50. *Id.* at 1005–06.

51. Southworth, *supra* note 47, at 432–33; Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559, 561 (2005) [hereinafter Schneyer, *An Interpretation of Recent Developments*].

52. JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 37 (2005).

53. AM. BAR FOUND. & NALP FOUNDATION FOR LAW CAREER RESEARCH & EDUCATION, *AFTER THE JD III: THIRD RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS* 35 (2014).

54. TASK FORCE ON LAW SCHOOLS & THE PROFESSION: *NARROWING THE GAP*, AM. BAR ASS’N, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM* 40–41 (1992).

55. *Id.* at 42; *see also* Ariens, *supra* note 49, at 1009 (noting that starting in the 1950s, “the explosive growth in complexity of law, particularly federal law, ethically (or professionally) required lawyers to place limits on their practices”).

56. TASK FORCE ON LAW SCHOOLS & THE PROFESSION: *NARROWING THE GAP*, AM. BAR ASS’N, *supra* note 54, at 42 (“Consumer surveys confirm that the public feels the need to look for lawyers with specific competencies . . .”).

57. Timothy Hia, *Que Sera, Sera? The Future of Specialization in Large Law Firms*, 2002 COLUM. BUS. L. REV. 541 (2002).

58. *Id.*

specializes can receive special certification of that specialty and advertise accordingly, enhancing the competitive advantage in attracting clients.⁵⁹

Some decry the increased specialization of lawyers. They are concerned that the increased focus on specialization—particularly where there are certification programs—could create barriers to entry that disadvantage those seeking to practice in particular specialty areas.⁶⁰ Specialization can also lead to fragmentation, according to Ann Southworth, making it difficult “to articulate and enforce common professional ideals except at the broadest levels of abstraction.”⁶¹ Ted Schneyer has noted that such a substantial percentage of lawyers are specializing that “their professional identities and reference groups – both at work and in the organized bar – are as bound up with their specialty as with their status as lawyers per se.”⁶² Despite these concerns, the trend toward specialization continues apace.

With increased specialization in the practicing bar has come specialty bar associations. There are thousands of specialized bar associations, organized around particular identities or practice areas.⁶³ Membership in these specialized bars is voluntary, with each having their own membership requirements. Some are inclusive, open to virtually anyone declaring a shared interest.⁶⁴ Others are exclusive, open only to elites within a segment of practitioners.⁶⁵ To become a member of the Texas Women Lawyers Association, for example, one fills out a one-page form and submits a membership fee.⁶⁶ The American Immigration Lawyers Association requires the lawyer to be in good standing for the preceding three years with their licensing authority and in full compliance with the law.⁶⁷ The American Intellectual Property Bar Association requires membership in any bar for at least five years, with a membership fee of \$395.⁶⁸

59. Judith Kilpatrick, *Specialist Certification for Lawyers: What Is Going On?*, 51 U. MIAMI L. REV. 273 (1997). Ted Schneyer notes that the Supreme Court lifting the ban on lawyer advertising, allowing lawyers to hold themselves out to the public as specialists, was one factor that accelerated the trend toward specialization. Schneyer, *An Interpretation of Recent Developments*, *supra* note 51, at 561.

60. Kilpatrick, *supra* note 59, at 280.

61. Southworth, *supra* note 47, at 436. Judith Kilpatrick notes that these fears of a “general breakdown in professional responsibility” from increased specialization and fragmentation have not been realized: specialty bar associations tend to “adhere to a traditional view of the lawyer’s role and responsibilities.” Kilpatrick, *Specialty Lawyer Associations*, *supra* note 45, at 506–07.

62. Schneyer, *An Interpretation of Recent Developments*, *supra* note 51, at 561.

63. See sources cited *supra* note 45; see also Southworth, *supra* note 47, at 440.

64. Kilpatrick, *Specialty Lawyer Associations*, *supra* note 45, at 510.

65. *Id.*

66. 2017–2018 Membership Form, TEX. WOMEN LAWYERS, <https://i1.wp.com/www.texaswomenlawyers.net/wp-content/uploads/2017/03/TWL-MembershipForm-2017-2018.jpg> (last visited Oct. 16, 2020).

67. *Eligibility Requirements and Application Process*, AM. IMMIGR. LAWS. ASS’N, <https://www.aila.org/membership/join/eligibility> (last visited Oct. 16, 2020).

68. *Membership Categories and Annual Dues*, AM. INTELL. PROP. ASS’N, <https://www.aipla.org/members/Membership-Categories-and-Annual-Dues> (last visited Oct. 16, 2020).

Membership in the American College of Real Estate Lawyers requires nomination from another member, and “substantial experience in real estate law or a subspecialty thereof for a period of not less than ten years,” among other requirements.⁶⁹

Specialty bar associations, though espousing the narrow interests of the particular group of lawyers they serve, “tend to espouse the same general goals as traditional associations.”⁷⁰ For example, the mission statement of the State Bar of Texas, a general-membership bar association, reads as follows:

The mission of the State Bar of Texas is to support the administration of the legal system, assure all citizens equal access to justice, foster high standards of ethical conduct for lawyers, enable its members to better serve their clients and the public, educate the public about the rule of law, and promote diversity in the administration of justice and the practice of law.⁷¹

It is a little different from the mission statement of a specialty bar, the American Immigration Lawyers Association: “[t]he American Immigration Lawyers Association is the national association of immigration lawyers established to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members.”⁷² Both mission statements emphasize justice, high standards for lawyers, and the professional development of its members. But not surprisingly, the specialty bar mission statement emphasizes its narrow interest in immigration law and policy, while the general bar association speaks more generally about the rule of law.

Specialty bar associations speak to their specific interests both internally to their members and externally to regulators, lawmakers, and the public. In her examination of specialty bar associations Judith Kilpatrick noted some of those internal efforts include continuing education programs, publications, and other information disseminated to members to keep them up-to-date in specific legal areas.⁷³ Ted Schneyer notes that specialty bar associations can play a role in informing their members about ethical standards by disseminating specialized practice guidelines and codes of ethics.⁷⁴ Outward-facing activities include lobbying efforts to shape law and regulatory practice relevant to the members’ fields, and participation in cases touching on the association’s interests through

69. *Guidelines for Member Selection*, AM. COLL. OF REAL EST. LAWS., <https://acrel.site-ym.com/page/MemberSelectionGuide> (last visited Oct. 16, 2020).

70. Kilpatrick, *Specialty Lawyer Associations*, *supra* note 45, at 508.

71. *Mission Statement*, STATE BAR TEX., www.texasbar.com/AM/Template.cfm?Section=Our_Mission&Template=/CM/HTMLDisplay.cfm&ContentID=41823 (last visited Oct. 16, 2020).

72. *Mission and Goals*, AM. IMMIGR. LAWS. ASS’N, <https://www.aila.org/about/mission> (last visited Oct. 16, 2020).

73. Kilpatrick, *Specialty Lawyer Associations*, *supra* note 45, at 512–22, 528–35.

74. Schneyer, *The Organized Bar*, *supra* note 45, at 335; *An Interpretation of Recent Developments*, *supra* note 51, at 562–63.

amicus curiae briefs.⁷⁵ Specialty bar associations may also reach the public directly, addressing issues relevant to clients, including information on how to find competent counsel.⁷⁶

B. Professionalism & Socialization in Specialty Bar Associations

But what effect do the efforts of specialty bar associations have on their lawyer-members' conceptions of professionalism?⁷⁷ Law has been identified as a learned profession:

Lawyers, like doctors and clergy, are members of a learned profession, distinguishable from employees in nonprofessional jobs. Professions have the following characteristics that differentiate them from other jobs: 1) professions require a substantial period of formal education; 2) professions require the comprehension of a substantial amount of theoretical knowledge; 3) professions are governed by a code of ethics and are self-regulated; 4) persons who seek the services of a professional are often in a state of appreciable concern, if not vulnerability, when they do so; and 5) professions almost always involve at their core a significant interpersonal relationship between the professional and the patient or client.⁷⁸

There has been considerable attention paid to what has often been termed a "crisis of professionalism" among lawyers.⁷⁹ Perhaps the threshold questions should be, what is professionalism and does professionalism matter? As one teacher of a course in professionalism explains:

75. Kilpatrick, *Specialty Lawyer Associations*, *supra* note 45, at 522–27, 535–38. *See also* Schneyer, *An Interpretation of Recent Developments*, *supra* note 51, at 562 (noting that specialty bar associations can become "central players in shaping regulatory policy as it bears on their members' practices").

76. *See, e.g., Know Your Rights Handouts*, AM. IMMIGR. LAWS. ASS'N, <https://www.aila.org/advo-media/tools/psas/know-your-rights-handouts-if-ice-visits> (American Immigration Lawyers Association handouts explaining rights in ICE raids) (last visited Oct. 16, 2020).

77. Professionalism or professional identity might be conceptualized as "the process by which ideas about the appropriate role of lawyers in society and the proper methods of conducting and organizing the practice of law are constructed." Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 177, 180 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992).

78. Malinda L. Seymore, *Attorney-Client Sex: A Feminist Critique of the Absence of Regulation*, 15 *YALE J.L. & FEMINISM* 175, 176 (2003).

79. Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925–1960*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 144, 144 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992); Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 *N.C. L. REV.* 411, 413 (2005); W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 *NOTRE DAME L. REV.* 1, 3 (1999).

Professionalism, as generally defined, means simply the set of qualities that are characteristic of a particular profession. For lawyers, the word has an aspirational quality as well as a descriptive one. Lawyers and law students are exhorted to act with something called professionalism in the hope that certain qualities will remain, or become, characteristic of the legal profession. The word itself, however, does not convey what those qualities are or what they should be.⁸⁰

Professor Longan identifies five components of lawyer professionalism: 1) competence; 2) fidelity to the interests of clients; 3) service to the public; 4) service to justice and the rule of law; and 5) civility.⁸¹ Rayman Solomon identified similar “symbolic rhetorical and normative concepts” in his study of notions of professionalism from 1925–1960.⁸² He identified themes in bar speeches and articles starting in the 1920s that focus on the public interest over commercial concerns and partisan politics.⁸³

Though Solomon identifies similarities in notions of professionalism through the decades, Robert Nelson and David Trubek argue that professionalism “is not a fixed, unitary set of values, but instead consists of multiple visions of what constitutes proper behavior by lawyers.”⁸⁴ They have identified four “arenas of professionalism” where there are “systematic and regular production of ideas about lawyers’ conduct.”⁸⁵ One arena—collective action by the profession (e.g., by bar associations)—would include specialty bar associations.⁸⁶ Robert Gordon and William Simon agree, and identify bar associations as one of the major institutions, together with law schools, assigned the role of inculcating professional values.⁸⁷ They argue forcefully for the importance of “alternative organizations” to traditional bar associations for “lawyers concerned with the professionalism project.”⁸⁸

In a study of the immigration bar, Leslie Levin found that “[m]any immigration lawyers derive and construct their understanding of what it means to be a professional, in part, from membership in [the American Immigration Lawyers Association].”⁸⁹ The “socialization effect” of specialty bar associations—the process of educating members “by teaching them appropriate role behaviors, developing their work skills and abilities, and helping them

80. Patrick E. Longan, *Teaching Professionalism*, 60 MERCER L. REV. 659, 665 (2009).

81. *Id.* at 666–69.

82. Solomon, *supra* note 79, at 145.

83. *Id.*

84. Nelson & Trubek, *supra* note 77, at 179.

85. *Id.* at 185.

86. *Id.*

87. Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, in *LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 230, 235 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992).

88. *Id.* at 244.

89. Levin, *supra* note 45, at 220.

adjust to the work group's norms and values"⁹⁰—is undeniable. That is especially so for practice areas populated mainly by solo and small-firm practitioners who may have fewer opportunities in the workplace for individual mentorship.⁹¹ And modern law practice, with increased competition and financial pressures, “has meant less ‘mentor’ time and less formal in-firm instruction for young lawyers.”⁹² “One who joins and becomes active in a legal association will tend to absorb the goals and values of that organization”⁹³

A second arena of professionalism identified by Nelson and Trubek is disciplinary enforcement.⁹⁴ State bar authorities enact rules of professional responsibility for lawyers and enforcement through disciplinary procedures where lawyers may be sanctioned in a variety of ways, including disbarment.⁹⁵ But rules of professional conduct have been criticized for creating only minimum standards of conduct, and thus wholly inadequate to inform ethical lawyering.⁹⁶ Further, the fact that they are “addressed to lawyers generally often seem to specialists to offer little more guidance than ‘valentine cards [provide] to heart surgeons.’”⁹⁷ There have been developments at the intersection of these two arenas—collective bar action and disciplinary enforcement—in specialty bar associations. “When new professional associations are born, promulgating ethics codes or guidelines is often their first order of business.”⁹⁸ In describing the potential importance of alternative lawyering organizations Gordon and Simon note that an alternative bar association might “promulgate its own norms of ethical practice,” and they use as an example the organized tax bar's actions

90. Kilpatrick, *Specialty Lawyer Associations*, *supra* note 45, at 504.

91. *Id.* at 549; Levin, *supra* note 45, at 221. Levin speculates that it is this condition of immigration practice that enhances the role of the specialty bar association in the socialization of immigration lawyers.

92. Kilpatrick, *Specialty Lawyer Associations*, *supra* note 45, at 546.

93. *Id.* at 549–50.

94. Nelson & Trubek, *supra* note 77, at 185.

95. See MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 1 (AM. BAR ASS'N 2012) (“Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct . . .”). The Model Rules are not binding on attorneys, and they 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, 637 (2005). As of 2013, 46 jurisdictions had adopted the 2002 ABA Model Rules of Professional Conduct. *Status of State Review of Professional Conduct Rules*, AM. BAR ASS'N, (last updated Sept. 20, 2013), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics_2000_status_chart.pdf.

96. Barton, *supra* note 79; Saab Fortney, *supra* note 24, at 235 (“Increasingly, lawyers are equating ethical conduct with the minimum standards for avoiding discipline under the professional rules of professional conduct.”).

97. Schneyer, *An Interpretation of Recent Developments*, *supra* note 51, at 563; see also Bruce A. Green, *Should There Be a Specialized Ethics Code for Death-Penalty Defense Lawyers?*, 29 GEO. J. LEGAL ETHICS 527 (2016).

98. Schneyer, *The Organized Bar*, *supra* note 45, at 335.

“to specify when avoidance becomes evasion and to set ethical standards for tax opinions.”⁹⁹

C. Specialty Bars and Lawyering Ethics

While the ethical guidelines promulgated by specialty bar associations are not binding,¹⁰⁰ and cannot subject a lawyer to discipline affecting their licensure as an attorney, “such guidelines may eventually influence practice in the relevant specialties more than the traditional ethics codes do.”¹⁰¹ These ethics codes passed by specialty lawyering groups are only “soft law,” as one commentator terms them, but because they are “[a]ddressed to a community of lawyers with common practice interests and experiences, such guidelines stand a good chance of being internalized.”¹⁰² By addressing specific issues frequently faced by practitioners in a particular field, ethics codes of specialty bars can avoid the level of abstraction often found in general codes of ethics.¹⁰³ The shared interests of the members may also avoid the need for compromise that often waters down general ethics code so as to satisfy a more diverse membership.¹⁰⁴ For these reasons, many scholars have proposed specific ethical codes designed for particular practice areas.¹⁰⁵ Gordon and Simon express concern, however, with the ability of specialty bar associations, “especially true of groups identified in terms of a particular area of practice and clientele,” to broadly affect ethical norms because “[s]uch groups have a tendency both to

99. Gordon & Simon, *supra* note 87, at 244.

100. Mather & Levin, *supra* note 41, at 12.

101. Schneyer, *An Interpretation of Recent Developments*, *supra* note 51, at 563.

102. Schneyer, *The Organized Bar*, *supra* note 45, at 335.

103. Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149, 149 (1993); Schneyer, *An Interpretation of Recent Developments*, *supra* note 51, at 562–63; *see also* Ted Schneyer, *Professionalism as Bar Politics: The Making of a Modern Legal Ethics Code*, 14 LAW & SOC. INQUIRY 677, 679–80 (1989) (describing an “ethical pluralism” in the ABA that gets erased in the Model Rules, “which like all codes strives for at least a surface coherence”) [hereinafter Schneyer, *Professionalism as Bar Politics*].

104. Schneyer, *Professionalism as Bar Politics*, *supra* note 103, at 734–35; *see also id.* at 709 (noting that specialty groups involved in the development of the ABA Model Rules of Professional Conduct “found it easier to reach a consensus on ethics than the general-purpose state and local bars did”). Schneyer also discusses the process of compromise and the accommodation of “special interests” necessary to secure sufficient support for the Model Rules. *Id.* at 715–17.

105. *See, e.g.*, Green, *supra* note 97; Sporkin, *supra* note 103, at 149 (corporate and securities lawyers); Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45 (1998); Richard E. Crouch, *The Matter of Bombers: Unfair Tactics and the Problem of Defining Unethical Behavior in Divorce Litigation*, 20 FAM. L.Q. 413 (1986) (family and divorce practice); *see also* William H. Simon, *Who Needs the Bar?: Professionalism Without Monopoly*, 30 FLA. ST. U. L. REV. 639, 657 (2003) (calling for “alternative ethical codes,” which could be promulgated by specialty bar associations, addressed to specific practice areas).

focus on matters of narrow self-interest and to be associated in the minds of outsiders with such matters to the exclusion of other, broader questions.”¹⁰⁶

Further, when specialty bar associations create aspirational ethics codes and ethical guidelines for their members they may conflict with the mandatory rules of professional conduct that licensed members of the bar must follow.¹⁰⁷ In their important study of divorce lawyers, Lynn Mather, Craig McEwen, and Richard Maiman note that most divorce lawyers have rejected the norm of “unabashed advocacy . . . as learned in law school and reinforced by codes of professional responsibility.”¹⁰⁸ That new norm is reflected in the ethical guidelines promulgated by the American Academy of Matrimonial Lawyers, entitled the *Bounds of Advocacy*.¹⁰⁹ Professor Fred Zacharias notes the potential tension between the Model Rules of Professional Conduct and the Matrimonial Lawyers’ ethical code:

[C]onsider the prominent example of matrimonial lawyers bound by the universal obligation of lawyers to be loyal to the client who hires them. May matrimonial lawyers involved in a bitter custody dispute take into account the interests of the unrepresented children? Many matrimonial lawyers will do so even when their clients resist. The nonbinding standards promulgated by the Academy of Matrimonial Lawyers sanction this approach. Yet because the professional codes in virtually all states decline to differentiate among lawyers, clients, and types of practice, the conduct of these matrimonial attorneys technically is improper.¹¹⁰

The conflict is, perhaps, more illusory than real given the fact that the special codes do not have the force of rules of professional responsibility that can lead to attorney discipline. The American Academy of Matrimonial Lawyers carefully explains the limits of their suggested ethical guidelines:

The Goals here established for matrimonial lawyers use the terms “should” and “should not,” rather than “must,” “shall,” “must not” and “shall not.” Because the *Bounds of Advocacy* aspires to a level of practice above the minimum established in the [ABA Rules of Professional Conduct], it is inappropriate to use the Goals to define

106. Gordon & Simon, *supra* note 87, at 245.

107. Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829, 841–42 (2002).

108. MATHER ET AL., *supra* note 46, at 116.

109. See AM. ACAD. MATRIM. LAWS., BOUNDS OF ADVOCACY: GOALS FOR FAMILY LAWYERS (2012), https://cdn.ymaws.com/aaml.org/resource/resmgr/bookstore/bounds_of_advocacy.pdf.

110. Zacharias, *supra* note 107, at 841–42. The American Academy of Matrimonial Lawyers promulgated BOUNDS OF ADVOCACY: GOALS FOR FAMILY LAWYERS in 1987 and revised them in 2000. The current version is available at https://cdn.ymaws.com/aaml.org/resource/resmgr/bookstore/bounds_of_advocacy.pdf.

the level of conduct required of lawyers for purposes of malpractice liability or state bar discipline.¹¹¹

While membership in the Academy requires adherence to these suggested ethical goals, there is no enforcement mechanism provided by the Academy.¹¹² Thus, a member of the Matrimonial Academy would not risk their membership if they followed mandatory ethics rules rather than the suggested Bounds of Advocacy. Gordon and Simon suggest that specialty associations should “seek to enforce [their ethics codes] . . . through internal sanctions and the threat of expulsion,”¹¹³ but few do.

Some might argue that special ethics codes are “ineffective because less ethically ambitious lawyers will lure clients away with promises of greater willingness to serve the clients’ selfish interests.”¹¹⁴ Gordon and Simon respond that clients might instead find value in lawyers with high ethical standards:

Clients might value high ethical standards in lawyers because they themselves have such standards and prefer to associate with people who share their views. They may value high standards because they believe such standards are associated with an especially sophisticated type of legal judgment that is less likely to sacrifice the client’s long-term interests to short-term gain. They may value them because association with lawyers with a reputation for high standards lends the client valuable status or credibility with third parties with whom the client has to deal.¹¹⁵

Specialty bar associations are an important site of professionalism and socialization for attorneys in specialty practice areas. They can also aid in the promulgation of ethical standards beyond the bare minimums outlined in general ethics code. The Academy of Adoption Attorneys provides an interesting case study of the effect of a specialty bar association’s ethical code. Unlike the American Academy of Matrimonial Lawyers, the Adoption Academy has a grievance procedure and discipline process for its members which can include expulsion from membership. The Adoption Academy also promulgates written decisions to explain the application of its rules to disciplined members.

II. ETHICAL ISSUES IN ADOPTION LAWYERING

Adoption cases are always emotionally fraught for prospective adoptive parents and prospective birth parents. No one approaches adoption dispassionately. Prospective adoptive parents often come to adoption after

111. BOUNDS OF ADVOCACY, *supra* note 109, at iii.

112. *AAML Pre-Applicant Form*, AM. ACAD. MATRIM. LAWS., <https://aaml.org/page/pre-applicantform> (last visited Oct. 16, 2020).

113. Gordon & Simon, *supra* note 87, at 244. This is one area where the Academy of Adoption Attorneys differs from other specialty bars—its ethics code is mandatory, and a member risks being sanctioned or terminated from membership if she fails to follow the code. *See infra* text accompanying notes 194–204.

114. Gordon & Simon, *supra* note 87, at 244.

115. *Id.* at 245.

years of infertility and attempts and failure at conception,¹¹⁶ leading to grief and stress.¹¹⁷ Uncertainty surrounds the adoption process, adding to typical transition-to-parenthood stress.¹¹⁸ Prospective adoptive parents fear that agencies or birth parents will not choose them to adopt or that a birth mother may choose to parent her child rather than place the child for adoption.¹¹⁹ Because the demand for adoptable infants exceeds the supply,¹²⁰ seeking a child to adopt can be hotly competitive, “a business in which hopeful parents need to market themselves as ultimate providers of the best environment in which to raise a child.”¹²¹ Prospective birth mothers are usually experiencing a crisis pregnancy, and will experience emotional issues in adjusting to pregnancy, as well as difficulties in making complex decisions regarding relinquishment.¹²² Mothers considering relinquishment report “conflicting feelings of shame, pride, desolation, excitement, fear, terror, and denial,” which can be overwhelming and disruptive.¹²³ As one scholar put it, “[t]he decision to place the baby for adoption does not in itself achieve the *emotional* relinquishment of parental rights.”¹²⁴

It is within this emotional context that attorneys navigate ethical adoption lawyering. The most common issues of legal ethics in adoption tend to be issues of competence, conflict of interest, and candor.¹²⁵ Adoption law can be complex. Cases may involve the law of multiple jurisdictions if birth parents and adoptive parents reside in different states, and trigger the requirements of the Interstate Compact on the placement of children across state lines.¹²⁶ International adoption requires compliance with multiple bodies of law: foreign

116. ADAM PERTMAN, *ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA* 172 (2000); Madelyn Freundlich, *Supply and Demand: The Forces Shaping the Future of Infant Adoption*, 2 *ADOPTION Q.* 13, 15 (1998).

117. See e.g., Jesus Palacios & Yolanda Sanchez-Sandoval, *Stress in Parents of Adopted Children*, 30 *INT’L J. BEHAV. DEV.* 481 (2006); Judith C. Daniluk & Joss Hurtig-Mitchell, *Themes of Hope and Healing: Infertile Couples’ Experiences of Adoption*, 81 *J. COUNS. & DEV.* 389 (2003); David M. Brodzinsky, *Adjustment to Adoption: A Psychosocial Perspective*, 7 *CLINICAL PSYCHOL. REV.* 25, 30–31 (1987) (infertility complicates transition to adoptive parenthood).

118. Brodzinsky, *supra* note 117, at 30–31; see also Palacios & Sanchez-Sandoval, *supra* note 117.

119. ELINOR B. ROSENBERG, *THE ADOPTION LIFE CYCLE: THE CHILDREN AND THEIR FAMILIES THROUGH THE YEARS 63–64* (1992).

120. Freundlich, *supra* note 116, at 20–21; see also Elisha Marr, *U.S. Transracial Adoption Trends in the 21st Century*, 20 *ADOPTION Q.* 222, 223 (2017).

121. Kristen M. Norwood & Leslie A. Baxter, “Dear Birth Mother”: *Addressivity and Meaning-Making in Online Adoption-Seeking Letters*, 11 *J. FAM. COMM’N* 198, 198 (2011).

122. Mary O’Leary Wiley & Amanda Baden, *Birth Parents in Adoption: Research, Practice, and Counseling Psychology*, 33 *THE COUNSELING PSYCHOL.* 13, 16 (2005).

123. *Id.*; see also Linda Theron & Nadine Dunn, *Coping Strategies for Adolescent Birth-Mothers Who Return to School Following Adoption*, 26 *S. AFR. J. EDUC.* 491 (2006).

124. ROSENBERG, *supra* note 119, at 25.

125. For a more thorough treatment of the topic of ethical lawyering in adoption, see Seymore, *Ethical Blind Spots*, *supra* note 7, at 464.

126. See HOLLINGER, *supra* note 3, at § 3-A.09 (describing scenarios that may or may not trigger the Interstate Compact).

law of the jurisdiction of the child, immigration law of the United States, and state law of the new residence of the child.¹²⁷ Federal law may come into play in other cases, including the Indian Child Welfare Act.¹²⁸ Birth father rights can be especially confounding given their constitutional dimension and the legal ambiguity in what it takes to be legally recognized as the father entitled to some say in an adoption case.¹²⁹ And while open adoption is the modern trend in adoption, enforceability of open adoption agreements is another area of significant complexity.¹³⁰

The Model Rules of Professional Conduct provide: “A lawyer shall provide competent representation to a client. The Model Rule regarding competent representation requires lawyers to have the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹³¹ What is reasonably necessary depends on the complexity and specialized nature of the matter, as well as the lawyer’s general experience. But that standard is not one of specialized expertise; “[i]n many instances, the required proficiency is that of a general practitioner.”¹³² At its core, however, competence “includes the ability to discern when an undertaking requires specialized knowledge or experience that a lawyer does not have.”¹³³ When lawyers view adoption law as “happy law,” they may miss how intricate legal requirements can be.

127. JOAN HEIFETZ HOLLINGER, 2 ADOPTION LAW AND PRACTICE § 11.01 (2015) (“Prospective parents have to navigate through an extraordinarily complex, time-consuming, personally and financially costly process, which involves at least three separate governments, each with their own laws and procedures relevant to intercountry adoption and immigration: (1) the child’s country of origin; (2) the federal government of the United States, and specifically, the U.S. Citizenship and Immigration Services . . . ; and (3) the state where the adoptive parent(s) reside.”).

128. Indian Child Welfare Act (“ICWA”) of 1978, 25 U.S.C. §§ 1901–1963. ICWA imposes additional requirements in adoptions involving Indian children and grants the child’s tribe jurisdiction. One court has held that attorneys failed to 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. *Doe v. Hughes*, 838 P.2d 804, 807 (Alaska 1992).

129. Malinda L. Seymore, *Grasping Fatherhood in Abortion and Adoption*, 68 HASTINGS L.J. 817, 819 (2017) [hereinafter Seymore, *Grasping Fatherhood*]; 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.”); see, e.g., *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641–42 (2013); *Lehr v. Robertson*, 463 U.S. 248, 261 (1983); *Caban v. Mohammed*, 441 U.S. 380, 391 (1979); *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

130. Malinda L. Seymore, *Sixteen and Pregnant: Minors’ Consent in Abortion and Adoption*, 25 YALE J.L. & FEMINISM 99, 151–53 (2013) [hereinafter Seymore, *Sixteen and Pregnant*].

131. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS’N 2012).

132. *Id.* r. 1.1 cmt. 1.

133. ELLEN J. BENNETT, ELIZABETH J. COHEN & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 27 (8th ed. 2015); 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 . . .”).

The problem of dual representation—when an adoption attorney represents both the prospective adoptive parents and the prospective birth mother—is extraordinarily common in adoption cases.¹³⁴ These intermingled relationships can present a multitude of issues in adoption cases. The Model Rules of Professional Conduct prohibit dual representation when such representation would create a conflict of interest.¹³⁵ An adoption lawyer seeking to represent both the prospective adoptive parents and the prospective birth mother will often face such conflicts. 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.”¹³⁶ In accord with the ABA opinion, a number of states, including New York, explicitly prohibit dual representation in adoption cases.¹³⁷ But a number of jurisdictions permit dual representation of birth parent and prospective adoptive parents in at least some circumstances.¹³⁸ But a number of jurisdictions permit dual representation of birth parent and prospective adoptive parents in at least some circumstances.¹³⁹ California permits an attorney to represent both the prospective adoptive parents and the birth parents so long as written consent is obtained. The attorney must first inform the birth parents that they are entitled to representation by independent counsel paid for by the adoptive parents, and they must waive the right to that representation.¹⁴⁰

134. 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. *In re Adoption of Vincent*, 602 N.Y.S.2d 303 (N.Y. Fam. Ct. 1993). 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 re Petrie*, 742 P.2d 796 (Ariz. 1987). Dual representation of the birth mother and the birth father may also be problematic. HOLLINGER, *supra* note 3, at § 5.04 (2015).

135. MODEL RULES OF PRO. CONDUCT r. 1.7(a) (AM. BAR ASS’N 2012). 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. *Id.* r. 1.7(b).

136. ABA Comm. on Ethics & Pro. Resp., Informal Op. 87-1523 (1987).

137. HOLLINGER, *supra* note 3, at § 6.01. In *In re Michelman*, attorney 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. 616 N.Y.S.2d 409 (N.Y. App. Div. 1994)

138. Amanda Tamayo, *A State Survey—Dual Representation in Adoption*, 27 J. AM. ACAD. MATRIM. LAW. 481, 483 (2015) (“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, *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.”).

139. Tamayo, *supra* note , at 483.

140. CAL. FAM. CODE § 8800(c)–(d) (West 1995); *see also* Arden v. State Bar, 341 P.2d 6 (Cal. 1959) (dual representation of birth mother and adoptive parents permitted because both

Conflicts of interest arise in other contexts as well. A lawyer may seek to avoid dual representation by securing separate counsel for the birth mother, with the adoptive parents paying the fee for birth mother's attorney. This pattern frequently occurs in adoption cases,¹⁴¹ though such arrangements can be problematic: "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."¹⁴² The adoptive parents are likely only willing to pay for legal services related to the consent and relinquishment of parental rights, for example, but not any attempt to revoke that consent.¹⁴³ This fee arrangement can also sow confusion about who the lawyer is actually representing, additional confusion on top of the dual representation problem.¹⁴⁴ Nonetheless, courts have approved arrangements whereby the adoptive parents pay legal fees for the birth parent.¹⁴⁵

Attorneys may also have personal interests that create conflicts with the interests of clients. Consider Lawyer Stubblefield.¹⁴⁶ A prospective birth mother, Sherrie Smith, approached him for help in placing her child for adoption, and later sought his help in other legal matters.¹⁴⁷ Stubblefield's wife, who worked for him, transported Smith to medical and counseling appointments

consented, though the lawyer was sanctioned 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).

141. Statutes in a number of states permit this practice. *See, e.g.*, KAN. STAT. ANN. § 59-2115 (1990); CAL. FAM. CODE § 8800(d) (West 1995).

142. MODEL RULES OF PRO. CONDUCT r. 1.8(f) cmt. 11 (AM. BAR ASS'N 2012).

143. An analogous issue was presented in *In re Adoption of N.A.P.*, 930 P.2d 609, 614 (Kan. Ct. App. 1997). There, the birth mother was represented by independent counsel as required by Kansas law for minors relinquishing parental rights. 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. The court held that the statute requiring independent counsel was satisfied by the initial representation, and did not guarantee representation throughout the adoption proceeding. Such a limited scope of representation would have to be adequately explained and consented to by the client. *See* MODEL RULES OF PRO. CONDUCT r. 1.2(c) (AM. BAR ASS'N 2012) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

144. *See* Nancy J. Moore, *Ethical Issues in Third-Party Payment: Beyond the Insurance Defense Paradigm*, 16 REV. LITIG. 585, 602-11 (1997) (noting the importance of clarifying client identification).

145. *See, e.g., In re Adoption of Banda*, 559 N.E.2d 1373 (Ohio Ct. App. 1988). The court noted, however, "[t]he 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." *Id.* at 1383; *see also* Fam. Law Advisory Comm. of the Kan. Jud. Council, cmt. 5 to S.B. 431 [1990], quoted in *In re Adoption of N.A.P.*, 930 P.2d at 614-15.

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

147. *Id.* at 980. Those other matters included a pending criminal proceeding and attempting to gain custody of a child from a previous marriage. Later, the mother sought help in finalizing her divorce.

and purchased maternity clothes for her.¹⁴⁸ The Stubblefields looked for and found a set of prospective adoptive parents, but then decided shortly before the baby's birth that they wanted to adopt the baby. Though the judge before whom Smith signed her consent to the adoption knew the Stubblefields were adopting the child, Smith "had no knowledge of the adoption until after her consent became irrevocable and the adoption was granted."¹⁴⁹

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."¹⁵⁰ But prospectively, such conduct was a different matter—the court recognized that potential conflicts existed between the prospective birth mother and the attorney who wanted to adopt her child.¹⁵¹ The court was clearly correct in finding that the lawyer's self-interest conflicted with his client's interest here. 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.¹⁵² 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.¹⁵³ 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.¹⁵⁴ Stubblefield took none of these necessary steps to protect a client from an overreaching attorney in a business transaction when adopting his client's child without her knowledge.¹⁵⁵ 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 rules.¹⁵⁶

Stubblefield's self-interest may also have motivated another problem for which he was sanctioned: lack of candor with the tribunal. In handling the birth mother's divorce, he lied about whether she was pregnant at the time of the divorce and thereby prevented her husband, the legal father, from asserting a parental interest that might have complicated the adoption proceeding in which

148. *Id.* at 982.

149. *Id.*

150. *Id.* at 982–83. Justice Simms dissented, writing, "I disagree with the majority . . . 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 (Simms, J., dissenting).

151. *Id.* at 983.

152. MODEL RULES OF PRO. CONDUCT r. 1.8(a)(1) (AM. BAR ASS'N 2012).

153. *Id.* r. 1.8(a)(2).

154. *Id.* r. 1.8(a)(3).

155. *State ex rel. Okla. Bar Ass'n v. Stubblefield*, 766 P.2d 979, 983 (Okla. 1988).

156. *See, e.g., LK Operating, LLC v. Collection Grp., LLC*, 279 P.3d 448 (Wash. Ct. App. 2012) (purchasing interest in client's business without appropriate disclosures violated Rule 1.8); *In re Lupo*, 851 N.E.2d 404 (Mass. 2006) (purchasing real estate from relative/client for less than market value violated this rule).

Stubblefield was keenly interested.¹⁵⁷ 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.¹⁵⁸ Lawyer Ritland had been trying unsuccessfully to conceive for more than a year when a distant relative reached out to her to find adoptive parents for the baby.¹⁵⁹ 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 waiting period, Ritland would adopt the child in a step-parent adoption.¹⁶⁰ The plan was carried out, with Ritland creating false affidavits and false pleadings that were filed in court.¹⁶¹ The birth father eventually filed for custody in Canada, leading to the falsehoods being revealed.¹⁶² Lack of candor designed to foreclose the interests of the birth father was also sanctioned in *In re Krigel*.¹⁶³

While carefully following the rules of professional conduct related to competency, candor, and conflicts of interest is necessary to protect a lawyer's license, in adoption cases it is also necessary to protect potential challenges to the legality of the adoption.¹⁶⁴ High ethical standards in adoption practice are also necessary to effectuate the promise of adoption: that it be in the best interest of the child. The next Part examines the role the Academy of Adoption Attorneys plays in ethical lawyering.

III. THE ACADEMY OF ADOPTION ATTORNEYS

Two researchers studying specific specialty bar associations—the American Trial Lawyers Association, the American College of Real Estate Lawyers, and the American Immigration Lawyers Association—have outlined their history and purpose, educational and outreach efforts, and effects on their members.¹⁶⁵ In many respects, the Academy of Adoption and Assisted

157. *Stubblefield*, 766 P.2d at 983. Stubblefield said that his client told him her husband was not the father of the child; nevertheless, he was legally the father since the child was conceived during their marriage.

158. *People v. Ritland*, 327 P.3d 914 (Colo. 2014).

159. *Id.* at 917–18.

160. *Id.* at 918.

161. *Id.*

162. *Id.* at 919.

163. *In re Krigel*, 480 S.W.3d 294 (Mo. 2016) (en banc). It is often the case that adoption lawyers take steps to cut out the birth father out of concern that he will seek to block the adoption. Seymore, *Sixteen and Pregnant*, *supra* note 129, at 819–20. (“[A]doption law regularly ignores the biological father. He is viewed as the spoiler, the person destined to spoil the adoption plans of the birth mother and prospective adoptive parents, not as the parent. The standard for legal fatherhood seems to rest on an assumption that fathers are generally uninterested in their children.”).

164. Conflicts of interest present in cases of dual representation, for example, may provide grounds for challenging the validity of the birth mother's consent. *See, e.g., In re Adoption of Alexander S.*, 235 Cal. Rptr. 761 (Cal. Ct. App. 1987), *vacated*, 750 P.2d 778 (Cal. 1988). Ignoring the potential interests of the birth father may lead to legal challenges late in the adoption proceedings. Brandt, *supra* note 129, at 222.

165. *See* Levin, *supra* note 45; *see* Kilpatrick, *Specialty Lawyer Associations*, *supra* note 45.

Reproduction Attorneys is similar to those other specialty bar associations. In one respect—their emphasis on ethical standards with an actual enforcement mechanism—they are a bit different from the other specialty bars that have been studied.

A. History & Membership

The Academy of Adoption Attorneys was founded in 1989, and “is a selective fellowship of adoption attorneys who must be invited to join that organization after demonstrating significant adoption law expertise and high ethical standards.”¹⁶⁶ Karen Lane, an adoption attorney in California, first conceived of the organization “to improve the adoption bar through the sharing of knowledge and ethical guidelines, to form a referral network of experienced adoption attorneys across the country, and to better the adoption industry through regulatory, legislative, and judicial advocacy.”¹⁶⁷ A small cadre of adoption attorneys recruited others throughout the United States, and in 1990 the first meeting of ninety adoption attorneys culminated in the formation of the American Academy of Adoption Attorneys.¹⁶⁸ For its first twenty years of existence, the Academy was, as in the title, focused exclusively on adoption attorneys. As many members also began to practice in the area of assisted reproductive technology (“ART”), “a movement developed to create an affiliated academy called the American Academy of Assisted Reproduction Attorneys (AAARTA).”¹⁶⁹

AAARTA was created in 2009, sharing many members with the Academy of Adoption Attorneys. Two long-time members have written about the sometimes-uneasy alliance between attorneys practicing in the adoption arena and those practicing in assisted reproduction:

The birth of AAARTA was not without its challenges, reflecting the uneasy relationship that had been growing between adoption attorneys and ARTs attorneys. Many adoption practitioners felt that ARTs should not be encouraged by adoption attorneys, contending that it detracted from efforts to find parents for hard-to-adopt children, and further, from a sense that the two methods of family creation involved vitally different legal procedures and interests and were ultimately incompatible with each other. Other adoption

166. Susan L. Crockin & Gary A. Debele, *Ethical Issues in Assisted Reproduction: A Primer for Family Law Attorneys*, 27 J. AM. ACAD. MATRIM. LAW. 289, 294 (2015).

167. *History*, ACAD. ADOPTION & ASSISTED REPROD. ATT’YS, <https://adoptionart.org/about-aaaa/history/>. (last visited Aug. 13, 2020).

168. *Id.*

169. Crockin & Debele, *supra* note 166, at 294. The authors of this article are both long-time members of the Academy of Adoption and Assisted Reproduction Attorneys. See *Attorney Directory: Susan L. Crockin*, ACAD. ADOPTION & ASSISTED REPROD. ATT’YS, <https://adoptionart.org/find-an-attorney/attorney-directory/#!biz/id/5ae9ebb6f033bf391717d2b7> (last visited Aug. 3, 2020) (member since 1991); *Attorney Directory: Gary A. Debele*, ACAD. ADOPTION & ASSISTED REPROD. ATT’YS, <https://adoptionart.org/find-an-attorney/attorney-directory/#!biz/id/5ae9ebb7f033bf391717d2b2f> (last visited Aug. 3, 2020) (member since 1996).

attorneys felt that there was a clear symbiotic relationship between the two methods of family creation and that the skill sets required of the lawyers and the professionals involved were somewhat similar. . . . [I]t seemed inevitable that ARTs were here to stay and many adoption attorneys determined that they would add ARTs to their adoption law practices already focused on family building.¹⁷⁰

The American Academy of Adoption Attorneys merged with the American Academy of Assisted Reproduction Attorneys in 2017, and is now the Academy of Adoption and Assisted Reproduction Attorneys (“AAAA”).¹⁷¹

There are almost 500 members, denominated “Fellows,” in the Academy.¹⁷² A Fellow may be accepted as an adoption fellow or as an ART fellow, or as both.¹⁷³ The Academy would be categorized as an exclusive, rather than inclusive, specialty bar association.¹⁷⁴ Membership is limited to those who have “at least five years of legal practice, at least 50 adoption or assisted reproductive technology (ART) matters, a referral for admission by a current AAAA member, and rigorous review for high ethical standards and competency by the AAAA Board of Trustees.”¹⁷⁵ A certain number of the adoption cases that an attorney has handled need to involve interstate or international placements.¹⁷⁶ The membership application asks for detailed information about adoption cases handled and other members of the Academy with whom the applicant has worked or consulted; continuing legal education courses concerning adoption that the applicant has attended or presented; history of criminal conviction, bar discipline or legal malpractice suits; and references who can fill out an applicant questionnaire giving information about the applicant’s competence and character.¹⁷⁷

In soliciting members to join, the Academy emphasizes both competency and ethical standards. Members are described as “credentialed,” “thoroughly vetted,” with “extensive experience,” and possessing “high ethical standards and competency.”¹⁷⁸ Thus, the Academy presents itself as an elite group, and offers these descriptions as reasons to hire Academy members. The touted benefits of membership include marketing and client solicitation, the ability to cross-refer cases to other members, and marketing of one’s practice through the

170. Crockin & Debele, *supra* note 166, at 294.

171. *History*, *supra* note 167.

172. *About AAAA*, ACAD. ADOPTION & ASSISTED REPROD. ATT’YS, <https://adoptionart.org/about-aaaa/> (last visited Aug. 13, 2020).

173. ACAD. ADOPTION & ASSISTED REPROD. ATT’YS, BYLAWS OF THE ACADEMY OF ADOPTION AND ASSISTED REPRODUCTION ATTORNEYS, INC. art. IV (2017), https://adoptionart.org/wp-content/uploads/2018/04/BylawsRevised_May2017.pdf.

174. See Kilpatrick, *Specialty Lawyer Associations*, *supra* note 45, at 510.

175. *Join AAAA*, ACAD. OF ADOPTION & ASSISTED REPROD. ATT’YS, <https://adoptionart.org/about-aaaa/join/> (last visited Aug. 13, 2020).

176. ACAD. ADOPTION & ASSISTED REPROD. ATT’YS, BYLAWS OF THE ACADEMY OF ADOPTION AND ASSISTED REPRODUCTION ATTORNEYS, INC. art. IV § 1(a)(3) (2017), https://adoptionart.org/wp-content/uploads/2018/04/BylawsRevised_May2017.pdf.

177. *Id.* §§ 1–5.

178. *Join AAAA*, *supra* note 175.

Academy, including enhancing internet presence via the Academy's Attorney Directory.¹⁷⁹ The Attorney Directory makes a member "readily available to the public and to adoption agencies and/or ART programs who look online for adoption and/or ART attorneys."¹⁸⁰ A member can also cross-link their firm website with the Academy's Attorney Directory.¹⁸¹

B. Educational Programs

In line with their stated goal "to improve the adoption bar through the sharing of knowledge and ethical guidelines,"¹⁸² the Academy offers its members a number of educational opportunities. For example, members have access to a listserv that offers regular posts of "recent developments in the law and in the adoption and ART industries at large."¹⁸³ Each year there is an annual conference and a midyear meeting.¹⁸⁴ In addition to opportunities for networking, the meetings offer continuing education sessions; for the 2019 annual meeting, topics included *Google: A Gateway to a Match—How Adopting Parents & Birth Parents Safely Find Each Other and You Online*; *Intercountry Adoption: Has Accreditation Changed*; *ICWA—Never a Dull Moment*; and *Prenatal Alcohol and Drug Exposure in Adoption*, among others.¹⁸⁵ The midyear meeting advertises itself as follows: "The 2019 AAAA Midyear Conference includes both an advanced and introductory track offering various educational opportunities covering both fundamental and advanced legal topics, interdisciplinary case management, legislative and case law trends, ethical issues and dilemmas, international law perspectives and medical/scientific developments."¹⁸⁶ The organization also offers a variety of webinars, which are available for purchase and which are open to non-members of the Academy.¹⁸⁷

179. *Id.*

180. *Id.*

181. *Id.*

182. *History*, *supra* note 167.

183. *Join AAAA*, *supra* note 175. Legal listservs "have proliferated since the early 1990's and have become a very important source of information for lawyers." Leslie C. Levin, *Lawyers in Cyberspace: The Impact of Legal Listservs on the Professional Development and Ethical Decisionmaking of Lawyers*, 37 ARIZ. ST. L.J. 589, 589 (2005). In one study of attorneys' information-seeking, listservs and other informal sources were preferred by attorneys seeking to fill information gaps over formal sources like Westlaw. Jootaek Lee, *Legal Informatics: Metamorphosing Law Students into Legal Professionals Based on Empirical Evidence of Attorneys' Information Seeking Behaviors*, 39 INT'L J. LEGAL INFO. 1, 20 (2011).

184. *Events*, ACAD. OF ADOPTION & ASSISTED REPROD. ATTY'S, <https://adoptionart.org/about-aaaa/events/#!event-list> (last visited Aug. 13, 2020).

185. *See, e.g., Annual Conference CLE Schedule*, ACAD. OF ADOPTION & ASSISTED REPROD. ATTY'S, <https://adoptionart.org/wp-content/uploads/2019/04/CLESchedule-DraftApril22.pdf> (last updated Apr. 22, 2019).

186. *Mid-year Conference*, ACAD. ADOPTION & ASSISTED REPROD. ATT'YS, <https://adoptionart.org/about-aaaa/events/mid-year-conference/#!form/AnnapolisSponsorships> (last visited Aug. 11, 2020).

187. *Webinars*, ACAD. ADOPTION & ASSISTED REPROD. ATT'YS, <https://adoptionart.org/about-aaaa/events/webinars/#!form/Webinars> (last visited Aug. 11, 2020).

C. Bettering the Industry

The Academy's outward-facing goal of "better[ing] the adoption industry through regulatory, legislative, and judicial advocacy"¹⁸⁸ is accomplished in a variety of publications and policy positions publicly promulgated. The website contains summaries of amicus curiae briefs filed in a variety of state courts on adoption and assisted reproduction issues, ranging from Indian Child Welfare Act ("ICWA") to sperm donor rights.¹⁸⁹ The Academy also adopts "resolutions that are official positions of AAAA."¹⁹⁰ Its most recent resolution was in response to the forcible separation of parents and children at the southern U.S. border, and expresses opposition to "the adoption, establishment of permanent guardianship or any other permanent or intended long term relationship between any migrant child forcibly separated from his or her parent, unless with a relative or with the express consent of one or both of the parents."¹⁹¹ The Academy also issues statements about adoption issues; recently it issued a statement concerning declining international adoption.¹⁹²

D. Emphasis on Ethics

The Academy of Adoption and Assisted Reproduction Attorneys has issued a Code of Ethics for its members.¹⁹³ On its website, the Academy asserts that a "mandatory Code of Ethics sets AAAA apart from many other professional organizations. Because of this requirement, clients, constituent groups, and the general public can expect AAAA Fellows to adhere to the highest ethical standards in the industry."¹⁹⁴ Of course, the ethics requirements of the Academy "do not have the force of law that the ABA ethics codes attain when state supreme courts adopt them (with amendments) as disciplinary standards."¹⁹⁵ An examination of the Academy's 2018 Ethics Code¹⁹⁶ and

188. *History*, *supra* note 167.

189. *Amicus Briefs*, ACAD. ADOPTION & ASSISTED REPROD. ATT'YS, <https://adoptionart.org/about-aaaa/publications/amicus-briefs/> (last visited Aug 14, 2020).

190. *Resolutions of AAAA*, ACAD. ADOPTION & ASSISTED REPROD. ATT'YS, <https://adoptionart.org/about-aaaa/publications/resolutions/> (last visited Aug. 14, 2020).

191. *Resolution Regarding Migrant Children*, section of *Resolutions of AAAA*, ACAD. OF ADOPTION & ASSISTED REPROD. ATT'YS (June 9, 2018), <https://adoptionart.org/about-aaaa/publications/resolutions/>.

192. Press Release, AAAA, Academy of Adoption and Assisted Reproduction Attorneys Reacts to State Department's Intercountry Adoptions Report Highlighting 82% Decline in Number of Intercountry Adoptions Since 2004 (Mar. 20, 2019), <https://adoptionart.org/wp-content/uploads/2019/03/AAAA-Response-to-DOS-Report-on-International-Adoption.pdf>.

193. See ACADEMY CODE OF ETHICS, *supra* note 48.

194. *Ethics Code*, ACAD. ADOPTION & ASSISTED REPROD. ATT'YS, <https://adoptionart.org/about-aaaa/governing-documents/ethics-code/> (last visited Aug. 14, 2020).

195. Schneyer, *The Organized Bar*, *supra* note 45, at 335.

196. See ACADEMY CODE OF ETHICS, *supra* note 48.

comparison to its previous Ethics Code,¹⁹⁷ as well as its grievance procedures and decisions imposing sanctions, may tell us something about the adoption lawyer community's standards of professionalism.

i. Academy Grievance Procedures

The Academy's ethics code is enforced through grievance procedures that appoint a Grievance Board to investigate grievances, negotiate discipline by consent in lieu of a formal investigation, and produce an investigative report.¹⁹⁸ Misconduct that can merit discipline includes disbarment in the state in which a member is licensed, conviction of felonies or misdemeanors involving moral turpitude, failing to cooperate with investigations of grievances, violating the Academy's Bylaws or Ethics Code, or "[c]onduct which interferes with the administration of justice or otherwise brings the Academy into serious public disrepute."¹⁹⁹ A violation must be supported by a preponderance of the evidence.²⁰⁰ Before discipline can be imposed, a two-thirds vote of the Board of Trustees is required.²⁰¹ Discipline can range from private reprimand to termination of membership.²⁰² A lawyer who has been disbarred will also have her membership terminated.²⁰³

ii. The Academy Ethics Code

The 2018 Ethics Code is brief, with three pages devoted to both adoption and assisted reproduction practice,²⁰⁴ an additional half-page addressed specifically to adoption practice,²⁰⁵ and an additional three and a half pages devoted to assisted reproduction legal practice.²⁰⁶ Much of the code is organized around issues common to all lawyers—advertising, legal fees, and trust fund disbursements.²⁰⁷ Other provisions are more specific to adoption practice. The ethical provisions do little to supplement existing mandatory rules of professional conduct, but their inclusion in this voluntary code may serve as a helpful reminder of ethical requirements specific to adoption cases.

197. American Academy of Adoption Attorneys, *Code of Ethics*, in FAMILIES BY LAW: AN ADOPTION READER 43 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004) [hereinafter *Code of Ethics*]

198. *Grievance Procedures*, ACAD. OF ADOPTION AND ASSISTED REPROD. ATT'YS, arts. III, IV (2018), <https://adoptionart.org/wp-content/uploads/2018/04/Grievance-Procedures.pdf>.

199. *Id.* art. IV.

200. *Id.* art. V.F.

201. *Id.* art. VI.B.

202. *Id.* art. VII.A.

203. *Id.* art. VII.B.

204. See ACADEMY CODE OF ETHICS, *supra* note 48, at paras. 1–12.

205. *Id.* at paras. 13–14.

206. *Id.* at paras. 15–18.

207. *Id.* at para. 8 (advertising); *id.* at para. 6 (legal fees); *id.* at para. 7 (trust funds).

Because of the frequency with which issues related to dual representation arise in adoption cases,²⁰⁸ it is unsurprising that there is a provision relating to multiple representation in the Academy's ethics code. However, the provision adds little to existing ethical codes, as it only disallows multiple representation "where such representation is prohibited."²⁰⁹ It does require disclosure and waiver when a jurisdiction permits dual representation,²¹⁰ but even that does not seem to add an additional duty—the ABA rules of professional conduct also require that "each affected client gives informed consent, confirmed in writing."²¹¹

The Academy's Ethics Code also addresses situations in which the lawyer's fee is paid by someone other than the client, a circumstance that happens frequently when prospective adoptive parents pay for the representation of the birth mother. The code provision says:

A Fellow may not accept or retain compensation for representing a client from someone other than the client unless: (1) the client has given written informed consent; (2) the payment arrangement and terms do not interfere with the Fellow's independent professional judgment nor with the attorney-client relationship; and (3) the Fellow maintains and respects all client confidences under this Code and all other applicable legal ethical rules.²¹²

Again, the Ethics Code adds very little to the ABA's Model Rules, which also require that the fee arrangements not interfere with the lawyer's independent judgment or keeping of confidences and that the client give informed consent.²¹³ The only difference is that the Academy requires the client's consent be in writing, while the Model Rules provision does not.²¹⁴ The

208. Dual representation often entails representing both the prospective adoptive parents and the birth parents. Because of the significant risk that there will be conflicts between the interests of these parties, the ABA has issued an ethics opinion disapproving of such joint representation. ABA Comm. on Ethics & Pro. Resp., Informal Op. 87-1523 (1987); *see also In re Michelman*, 616 N.Y.S.2d 409 (N.Y. App. Div. 1994) (disapproving of joint representation of birth parents and adoptive parents). Other jurisdictions permit joint representation. *See, e.g., Tamayo, supra* note 138, at 483. Dual representation of a birth father and the birth mother could also create a conflict of interest. HOLLINGER, *supra* note 3, at § 5.04 (2015). Dual representation may present problems if an attorney is representing two sets of competing adoptive parents, *In re Petrie*, 742 P.2d 796 (Ariz. 1987), or representing both an adoption/foster agency and prospective adoptive parents, *In re Vincent*, 602 N.Y.S.2d 303, 305 (N.Y. Fam. Ct. 1993).

209. ACADEMY CODE OF ETHICS, *supra* note 48, at para. 3. *See* discussion of jurisdictions that permit dual representation, despite the ABA's position banning such representation, *supra*, text accompanying notes 138–140.

210. ACADEMY CODE OF ETHICS, *supra* note 48, at para. 3.

211. MODEL RULES OF PRO. CONDUCT r. 1.7(b)(4) (AM. BAR ASS'N 2012).

212. ACADEMY CODE OF ETHICS, *supra* note 48, at para. 6(c).

213. MODEL RULES OF PRO. CONDUCT r. 1.8(f) (AM. BAR ASS'N 2012).

214. *Id.* r. 1.0(e) cmt. 7 (noting that only some of the rule provisions require that informed consent be accompanied by a writing, and that it can be oral or inferred from conduct).

Academy's Code also differs from the ABA rules by requiring a retainer agreement be in writing.²¹⁵

One interesting aspect of the 2018 Code is the change in some provisions from what appear to be heightened ethical requirements in the previous version of the Academy's Ethics Code. For example, the previous code imposed on members a duty to investigate "representations made to the Member by prospective birth parents and prospective adoptive parents" if the member had reason to question the truthfulness of statements.²¹⁶ The rule specifically mentioned "a birth mother's claims about the whereabouts or name of the biological father," as a matter that might require investigation.²¹⁷ That provision is now missing from the 2018 version of the rule, which provides: "A Fellow may ethically rely upon reasonable representations made by legal, medical and/or mental health professionals, *as well as the Parties to an adoption or ART Matter.*"²¹⁸ Thus, under the new rules, the attorney is relieved of the obligation to investigate claims made by the client. The new rule reverts to the traditional rule of legal ethics: "The bar's legal ethics rules don't require a lawyer to investigate the client's story . . ." ²¹⁹ A lawyer can accept the facts as the client presents them, refrain from pressing the client for additional information, and not seek to corroborate what the client claims as truth.²²⁰ So after a brief flirtation with an ethical standard higher than that required by traditional bar rules, the Academy has reverted to a code provision that adds nothing to the ethical standards imposed on all lawyers.

The same pattern is replicated in provisions about payments to birth parents. Except for payment of reasonable pregnancy-related expenses, the earlier version of the Ethics Code provides as follows:

A Member shall not assist or cooperate in any adoption in which the Member has reason to believe that the birth parent or parents are being paid, or given anything of value, in exchange for the placement for adoption, for the consent to an adoption, for a relinquishment for adoption, or for cooperation with the adoption of his or her child, without first making full disclosure to the appropriate court.²²¹

The current version of the Academy's code does not require any disclosure to the court, providing simply, "[a] Fellow shall not assist or cooperate in any adoption or ART Matter in which the Fellow has reason to believe that the birth parent, parents, or parties are being paid or given anything of value contrary to law."²²²

While the provision requiring disclosure to the court certainly imposed a higher ethical standard of candor, it might well have violated ABA rules

215. See ACADEMY CODE OF ETHICS, *supra* note 48, at para. 6(c).

216. *Code of Ethics*, *supra* note 197, at 44.

217. *Id.*

218. See ACADEMY CODE OF ETHICS, *supra* note 48, at para. 11 (emphasis added).

219. David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957, 967 (1999).

220. *Id.* at 976.

221. *Code of Ethics*, *supra* note 197, at 43.

222. ACADEMY CODE OF ETHICS, *supra* note 48, at para. 5.

regarding confidentiality. A lawyer would have an obligation to correct any misleading statements to a court,²²³ but if there was no affirmative misleading statement to the court, the obligation to disclose may not exist.²²⁴ Only if it is necessary to prevent assisting a client's crime or fraud in the proceeding (e.g., witness-tampering, bribing a juror, etc.) would there be a duty to disclose a material fact.²²⁵ And that disclosure would be limited by the requirements of Rule 1.6, which prevents disclosure of information relating to the representation of a client.²²⁶ While "outright lying, intentional deceit, and misrepresentation are not and never have been" permitted, "[k]eeping clients' confidences and one's own counsel is still considered permissible, even laudatory."²²⁷

The Ethics Code curates rules of professional conduct that are especially relevant to adoption practitioners, but does not appear to add enhanced ethical requirements beyond the mandatory ethics codes applicable to all lawyers. Perhaps the Academy interprets their code in a way that imposes additional obligations; perhaps an examination of their ethical decisions and sanctions will reveal the enhanced ethical standards it promises.

iii. Academy Ethics Decisions

In enforcing the Ethics Code, the Academy's Board of Trustees publishes its decisions, which are to include a summary of facts, the findings that constitute misconduct, and the discipline imposed.²²⁸ Decisions since 2008 are posted on the Academy's website.²²⁹ Since 2008, although there are almost 500 members of the Academy,²³⁰ there are only nine listed entries, involving eight attorneys; two of the lawyers practiced together and were disciplined for identical conduct.²³¹ Low rates of discipline for attorneys is common in the official bar; in most states, the percentage of formal charges, as compared to the

223. MODEL RULES OF PRO. CONDUCT r. 3.3(a) (AM. BAR ASS'N 2012); see *supra* text accompanying notes 157–163.

224. See Bruce A. Green, *Deceitful Silence*, 33 LITIG. 24, 26 (2007).

225. MODEL RULES OF PRO. CONDUCT r. 3.3(b) (AM. BAR ASS'N 2012).

226. *Id.* r. 1.6(a). While the rule permits, but does not require, disclosure of certain financial frauds, these exceptions do not appear to apply to situations where birth parents are being paid illegal expenses. *Id.* r. 1.6(b)(2) & (3). The only crimes for which disclosure may be permitted involve those that pose "reasonably certain death or substantial bodily harm." *Id.* r. 1.6(b)(1).

227. Green, *supra* note 224, at 24–25.

228. *Grievance Procedures*, ACAD. OF ADOPTION AND ASSISTED REPROD. ATT'YS, *supra* note 198, at art. XI.

229. *Grievance Decisions*, ACAD. ADOPTION & ASSISTED REPROD. ATT'YS, <https://adoptionart.org/about-aaaa/governing-documents/grievance-procedures/> (last visited Aug. 14, 2020).

230. *About AAAA*, *supra* note 172.

231. See Press Release, Karen K. Greenberg, President, Am. Acad. Adoption Att'ys Board of Trustees, Grievance Decision Against John Terry Bado and Barbara Bado (Feb. 12, 2009), adoptionart.org/wp-content/uploads/2018/04/John-Terry-Bado-OK.pdf.

active attorney population, is less than 1%.²³² And then only a fraction of those facing formal charges are sanctioned for misconduct.²³³

The decisions of the Academy set out the discipline imposed on the members. Three attorneys received private reprimands, four received public reprimands, while one attorney is listed twice, once involving an indefinite suspension in 2008 and then termination of membership in 2012.²³⁴ Not all the conduct involves what is traditionally thought of as unethical behavior by attorneys and have seemingly little to do with protecting clients, and some of the documents are silent about what conduct led to discipline. For example, two of the cases involved improper use of the Academy's Listserv used to communicate with Academy members. One, a private reprimand, does not give details about that misuse, but directs the member to cease and desist deviating from published guidelines for use of the communications system.²³⁵ The other, a public reprimand, involved a lawyer who disparaged another Academy member by insinuating illegal or immoral conduct, and disparaged a birth mother with accusations of drug use.²³⁶ Disparaging remarks would not ordinarily violate rules of professional responsibility unless they were false,²³⁷ but many state bars assert aspirational standards for lawyers to avoid disparaging other lawyers and clients.²³⁸ These decisions could be characterized more as cartel-protecting decisions than client-protecting decisions.

232. Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PRO. 209, 215 (2011).

233. *Id.*

234. *Special Meeting of the Board of Trustee Minutes*, AM. ACAD. ADOPTION ATT'YS, <https://adoptionart.org/wp-content/uploads/2018/04/Steven-G.-Dubin-PA.pdf> (last visited Oct. 16, 2020).

235. Press Release, Kathleen Hogan Morrison, President, Am. Acad. Adoption Att'ys Board of Trustees, *Grievance Decision Against Unnamed Member A* (Apr. 15, 2009), adoptionart.org/wp-content/uploads/2018/04/Unnamed-Member-A.pdf.

236. Press Release, Kathleen Hogan Morrison, President, Am. Acad. Adoption Att'ys, *Grievance Decision Against Mikal W. Grass* (Oct. 22, 2009), adoptionart.org/wp-content/uploads/2018/04/Mikal-W.-Grass-FL.pdf. Grass was also suspended by the State Bar of Florida, though it is unclear why. See Mikal Winston Grass Member Profile, FLORIDA BAR, <https://www.floridabar.org/directories/find-mbr/profile/?num=807885> (last visited Oct. 16, 2020). The suspension occurred a little over a month before the discipline imposed by the Academy, but the suspension is not mentioned in the Academy's discipline decision. While suspension or disbarment can lead to termination of membership, Grass received only a public reprimand from the Academy.

237. MODEL RULES OF PRO. CONDUCT r. 4.1 (AM. BAR. ASS'N 2019) (false statements of material fact); *id.* r. 8.2 (false statements about judges' qualifications or integrity); *id.* r. 8.4 (conduct involving dishonesty, fraud, deceit or misrepresentation).

238. See, e.g., *Texas Lawyer's Creed*, TEX. SUPREME CT. & TEX. CT. CRIM. APPEALS (Nov. 7, 1989), <https://txbf.org/about-us/texas-lawyers-creed/> ("I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses."); *Professionalism Expectations*, FLORIDA BAR (Jan. 30, 2015), <https://www.floridabar.org/wp-content/uploads/2017/04/professionalism-expectations.pdf> ("Social media must not be used to disparage opposing parties, lawyers, judges, and members of the public. (See R. Regulating Fla. Bar 4-8.2(a) and 4-8.4(d)).").

The public reprimand of another member also seems suggestive of self-protection more than client protection. Stanton E. Phillips was sanctioned for his conduct in serving as an expert witness in a federal lawsuit by a birth father against attorneys and an adoption agency who were involved in placing his child for adoption without his notice or consent.²³⁹ Phillips had served as the birth father's attorney in Virginia court to secure custody of the child, and when the child was nonetheless placed with a Utah adoptive couple, Phillips served as a consultant and advisor to Utah counsel.²⁴⁰ He was also listed as "Of Counsel" on the petition for certiorari to the United States Supreme Court when the birth father lost in the Utah courts. When the birth father, through other counsel, sued for money damages in federal court, Phillips agreed to serve as an expert witness on Virginia adoption law.²⁴¹ According to the Board's decision, during a deposition where Phillips testified as an expert witness:

. . . Mr. Phillips repeatedly refused to, or was unable to testify or to provide opinions in the case because of his representation of the plaintiff in the related state court proceedings, although he was identified as an expert to do just that at trial. He presented as completely unprepared to render opinions, despite having submitted a written expert report. Although Mr. Phillips insisted upon being paid for his time before submitting to the deposition he subsequently asserted that he was not testifying as an expert. His participation in the federal case including his conduct during this deposition was unprofessional and interfered with the administration of justice.

In the course of the deposition, Mr. Phillips admitted that if the birth father prevailed in the federal case, Mr. Phillips would have a better likelihood of recovering his outstanding legal fee. Mr. Phillips' testimony as an expert under these circumstances creates an obvious and improper appearance of a financial stake in the outcome of the federal lawsuit where money damages were sought.²⁴²

This case is unusual in lawyer discipline. The Model Rules address the role of an attorney as a fact witness in a case in which she is an advocate, generally prohibiting the lawyer from taking on the role of advocate when a necessary witness.²⁴³ The usual remedy, however, is to disqualify the lawyer as advocate, permitting the lawyer to testify as a witness.²⁴⁴ Since Phillips was not

239. Press Release, Donald C. Cofsky, President, Am. Acad. Adoption Att'ys, Grievance Against Stanton E. Phillips (Apr. 10, 2014), adoptionart.org/wp-content/uploads/2018/04/Stanton-E.-Phillips-VA.pdf.

240. *Id.* at 2.

241. *Id.*

242. *Id.* at 2–3.

243. MODEL RULES OF PRO. CONDUCT r. 3.7 (AM. BAR. ASS'N 2018). Cases where an attorney becomes an expert witness while also acting as advocate are also rare. *See, e.g.*, Warrilow v. Norrell, 791 S.W.2d 515, 521 (Tex. Ct. App. 1989) (attorney disqualified); FDIC v. Sierra Res., Inc., 682 F. Supp. 1167 (D. Colo. 1987) (attorney disqualified).

244. BENNETT ET AL., *supra* note 133, at 406 ("Advocate-witness issues are normally resolved at the trial court level in the context of motions to disqualify, but are sometimes the subject of disciplinary proceedings.").

-serving as advocate in the federal case in which he was a witness, his testimony as a witness would not have violated the advocate-witness rule.

The Board concluded, however, that:

Mr. Phillips' willingness to serve as an expert witness in a lawsuit stemming from the family law case where he also represented the birth father, is an ethically risky proposition at best – it is a scenario fraught with conflicts, potential conflicts, and the appearance of impropriety. The Board does not believe a reasonable and prudent attorney would venture into such an arrangement, let alone believe that by doing so Mr. Phillips maintained the highest standards of professional and ethical conduct as required by the Academy's Code of Ethics.²⁴⁵

It is certainly true that the prior relationship with the birth father for whom he was testifying would make Phillips a less credible witness; a factfinder could conclude that his expert opinion was colored by his representation of his client. An independent expert would likely have more weight with the jury.²⁴⁶ A lawyer cross-examining Phillips would have been able to expose a financial motive to testify favorably for the birth father in light of the unpaid attorney fees.²⁴⁷ Thus, it is possible that by acting as an expert witness, rather than an independent expert testifying, Phillips disadvantaged the birth father. But that issue is not one of conflict of interest since he was not acting as counsel in that case—it was the lawyer who called Phillips who might have done a disservice to the client. Nor would there be an appearance of impropriety if the relationship was fully disclosed to the court. There was also no suggestion that Phillips might have revealed client confidences during his deposition testimony.²⁴⁸ This appears to be a case where the Academy sanctioned a member for conduct that would not lead to sanction under the Model Rules of Professional Conduct. But in doing so, it does not appear that the higher ethical standards espoused by the Academy protected the rights of the lawyer's client. The Academy's concern seems driven less by harm to the client—the birth father calling Phillips as a witness—and more by protecting the image of the Academy. Phillips' conduct, says the Board, drew “the Academy into Mr. Phillips' constellation of personal behavior and professional conduct” and “brought the reputation of the Academy into serious public disrepute and brought discredit upon the Academy.”²⁴⁹

Two private reprimands involved issues related to representation of clients. In one case, the lawyer would “withhold release of birth parent surrenders or consents if counsel fees remain due and owing to the Fellow from

245. Press Release, Donald C. Cofsky, *supra* note 239, at 3.

246. *Warrilow*, 791 S.W.2d at 521; *FDIC*, 682 F. Supp. at 1167.

247. Michael H. Graham, *Impeaching the Professional Expert Witness by a Showing of Financial Interest*, 53 IND. L.J. 35 (1977).

248. MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR. ASS'N 2019).

249. Press Release, Donald C. Cofsky, *supra* note 239, at 3.

the proposed adoptive parent(s) or other responsible party.”²⁵⁰ The Board found that such a practice “interferes with the administration of justice and may bring the Academy into serious public disrepute.”²⁵¹ The Board was concerned that by using this tactic to induce the payment of attorney fees, the lawyer was delaying proceedings for termination of parental rights and finalization of adoption, “to the detriment of the child and all parties to the matter.”²⁵² Retaining a client’s papers as security for payment of fees is not expressly prohibited by the Model Rules: “The lawyer may retain papers relating to the client to the extent permitted by other law.”²⁵³ If state law permits attorneys’ liens, then there ordinarily would not be a violation of ethical rules in a lawyer retaining a client’s documents to induce payment of fees.²⁵⁴ But as an Oklahoma court put it, there needs to be a balance between the attorney’s right to be paid and the attorney’s ethical obligations to the client:

The rule imposes a mandatory obligation on an attorney to mitigate the consequences of the severed attorney-client relationship, and requires the attorney to “surrender” the client’s papers. The rule also permits an attorney to retain the client’s papers to secure payment of earned and unpaid fees, but only as allowed by law. The contrast between the mandatory obligation to surrender the client’s papers, and the permissive retention right, suggests to us that, all other things being equal, the right of the client to possession of his or her books and papers prevails over the attorney’s retaining lien rights in the case of conflict between the two. This must be so because the assertion of a retaining lien that causes prejudice to a client is inconsistent with the lawyer’s continuing duty to his client, particularly since other legal methods are available to collect the fee. So, in a conflict between an attorney’s retained possession and prejudice to the client, a balancing of the competing rights must be undertaken.²⁵⁵

Thus, jurisdictions may find an ethical violation when the client is prejudiced by the lawyer’s failure to turn over the papers.²⁵⁶

250. Press Release, Debra Guston, Grievance Chair, Am. Acad. Adoption Att’ys, Grievance Decision Against Unnamed Member C (Jan 13, 2017), adoptionart.org/wp-content/uploads/2018/04/Unnamed-Member-C.pdf.

251. *Id.*

252. *Id.*

253. MODEL RULES OF PRO. CONDUCT r. 1.16(d) (AM. BAR ASS’N 2011); *see also id.* r. 1.8(i)(1) ([A] lawyer “may . . . acquire a lien authorized by law to secure the lawyer’s fee or expenses . . .”).

254. John Leubsdorf, *Against Lawyer Retaining Liens*, 72 *FORDHAM L. REV.* 849, 849 (2004) (“Despite the retaining lien’s flaws, authority in all but a few states upholds it, and lawyers continue to use it.”).

255. *Britton & Gray, P.C. v. Shelton*, 69 P.3d 1210, 1214–15 (Okla. Civ. App. 2003).

256. *Campbell v. Bozeman Invs.*, 964 P.2d 41, 47 (Mont. 1998) (retaining client files when the case is still pending failed to protect the client’s interest, despite valid lien); *Acad. of Cal. Optometrists, Inc. v. Superior Court*, 124 Cal. Rptr. 668 (Cal. Ct. App. 1975) (retaining lien void where client cannot bring the case to trial without records retained by lawyer); *Miss. Bar, Ethics*

Retaining the birth parent surrender or consent forms would undoubtedly prevent the prospective adoptive parents from proceeding in their case in a timely manner. It appears likely that even a jurisdiction that permits lawyer retaining liens would find that retaining this particular paperwork to induce payment of fees would violate ethical standards.²⁵⁷ There are other ways to collect lawyer fees without causing prejudice to the client. The Academy's decision to reprimand the member in this case is in accord with conventional rules of legal ethics.

The second private reprimand involving attorney-client relations would implicate issues of competence and diligence under the Model Rules. Residents of State B hired a member attorney in State A, where the baby they sought to adopt would be born.²⁵⁸ They also hired an attorney in State B, where they expected to file and finalize the adoption.²⁵⁹ The State A attorney told them, however, that because of a new law in State A the adoption could be finalized in State A.²⁶⁰ That was an incorrect interpretation of the law, and the court in State A rejected the petition for adoption.²⁶¹ To exacerbate the problem, the attorney failed to communicate with his clients for over six months, believing that his staff was staying in contact; their communication with the clients was inadequate.²⁶² Another lawyer from State A was hired to successfully terminate birth parents' rights in State A and the adoption was finalized in State B.²⁶³ The attorney was sanctioned because of the incorrect interpretation of the statute, the failure to communicate with the clients, and neglect of the adoption petition.²⁶⁴ The Board imposed the lightest possible sanction, however, because the attorney accepted responsibility and worked diligently toward successful completion of the adoption after the errors were discovered.²⁶⁵ Further, a witness indicated that the misinterpretation of the law was an understandable confusion between agency adoption and independent adoption.²⁶⁶

This conduct leading to Academy discipline is quite similar to cases where lawyers are sanctioned by their bar authority. Indeed, the most common

Op. 144 (1988) (retaining file violates ethics rules when it prevents client from proceeding with case in a timely manner).

257. *Cal. Optometrists, Inc.*, 124 Cal. Rptr. at 672 [The lawyer] is in the untenable position of insisting upon the exercise of his contractual right to damage his client's cause (the same cause which he hitherto espoused and which generated fees to him, both disputed and undisputed), unless the client pays him the disputed fees in full and foregoes his right to honestly litigate the dispute. The client's cause, sacred as it is to a member of the legal profession, may not be so abused."].

258. Press Release, Kathleen Hogan Morrison, President, Am. Acad. Adoption Att'ys, Grievance Against Unnamed Member B (May 5, 2009), adoptionart.org/wp-content/uploads/2018/04/Unnamed-Member-B.pdf.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

complaints that bar authorities receive about lawyers involve neglect and the failure to communicate.²⁶⁷ The case bears marked similarities to *In re Hagedorn*, where the lawyer in an adoption case was disciplined for failure to provide competent representation.²⁶⁸ While representing prospective adoptive parents, that lawyer failed to arrange for a required pre-placement evaluation of the prospective adoptive parents, and in fact, seemed not to realize the evaluation was necessary.²⁶⁹ She also failed to terminate the parental rights of the birth mother, telling the clients it had been done when it had not been.²⁷⁰ And because of the failure to deal with the father's rights, the lawyer had to belatedly notify the birth father by publication in order to terminate his rights.²⁷¹ Finally, the lawyer failed to prepare or file a petition for adoption, despite having represented to the clients that she had done so.²⁷² 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.²⁷³ The clients had to terminate the lawyer and hire a new one to finalize the adoption.²⁷⁴ The sanction in that case was far more serious—a six-month suspension from practice—but there were also two other cases of neglect joined with the adoption case, as well as issues involving misuse of client funds and failure to return documents and unearned fees.²⁷⁵ The misconduct of Unnamed Member B, though described by the Board as failing to “maintain the highest standard of professional conduct,” merited only the lightest sanction.²⁷⁶

Two attorneys, John Terry Bado and Barbara Bado, were publicly reprimanded for their misconduct in representation of prospective adoptive parents.²⁷⁷ Although a complaint was filed against them with the Oklahoma State Bar, that complaint was dismissed without discipline.²⁷⁸ The Bados were long-time practitioners, having joined the Academy in 1993. They practiced together in the firm of Bado & Bado, and responded jointly to the grievance

267. Stephen E. Schemenauer, *What We've Got Here . . . Is a Failure . . . to Communicate: A Statistical Analysis of the Nation's Most Common Ethical Complaint*, 30 HAMLINE L. REV. 629, 651–52 (2007) (listing neglect and failure to communicate as the most common ethical complaints).

268. *In re Hagedorn*, 725 N.E.2d 397 (Ind. 2000).

269. *Id.* at 399.

270. *Id.*

271. *Id.*

272. *Id.* at 400.

273. *Id.* 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 PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2012) (“A lawyer shall act with diligence and promptness in representing a client.”). The court in *Hagedorn* found a violation of Rule 1.3 as well. *Hagedorn*, 725 N.E.2d at 400.

274. *Hagedorn*, 725 N.E.2d at 400.

275. *Id.*

276. Press Release, Kathleen Hogan Morrison, *supra* note 258.

277. Press Release, Karen K. Greenberg, *supra* note 231.

278. *Id.*

filed with the Academy. Though their discipline is listed individually on the Academy website,²⁷⁹ identical letters listing them both are linked there.²⁸⁰

The prospective adoptive parents called the Bados' office, but never understood that the law firm was not an adoption agency because their communication with the parents was not clear in this regard.²⁸¹ Their call to the office was returned by a person identified to them as an "independent caseworker."²⁸² That caseworker became extensively involved in meetings between the birth mother and the adoptive parents, despite complaints from them and the birth mother about unwanted contact and interference.²⁸³ Although the Bados said they were representing only the adoptive parents, and the birth mother was eventually represented by independent counsel, they worked with the birth mother before she obtained independent counsel.²⁸⁴ They advised the birth mother and performed social-work functions with the birth mother.²⁸⁵

The child was an Indian child within the meaning of ICWA,²⁸⁶ and the tribe required that the child be enrolled before it would consent to the adoption.²⁸⁷ But the firm failed to complete the paperwork to do so "because the forms were confusing."²⁸⁸ The adoptive family finally had to contact the tribe themselves and complete the paperwork.²⁸⁹ The Bados did refund part of their fee because of their failure to secure tribal enrollment.²⁹⁰ The adoption was further delayed because office policy was that all accounts had to be paid in full before a case would be scheduled for finalization, but the firm did not send an itemized bill as requested by the clients.²⁹¹ The adoption was delayed again, according to the Bados, because of a new court system for scrutinizing adoption-related attorneys' fees.²⁹² The adoption was not finalized until seventeen months after the birth of the child.²⁹³

The Board concluded that the Bados neglected the adoption matter, failed to keep the clients informed, charged a fee without advancing the case, did not communicate effectively that they were not an adoption agency but were a law

279. *Grievance Decisions*, *supra* note 229.

280. Press Release, Karen K. Greenberg, *supra* note 231.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. Indian Child Welfare Act, 25 U.S.C. §§ 1901–63. The ICWA imposes additional requirements in adoptions involving Indian children and grants the child's tribe jurisdiction.

287. Press Release, Karen K. Greenberg, *supra* note 231, at 2.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

firm, and allowed the caseworker, a nonlawyer, to do legal work.²⁹⁴ Much like the private reprimand of Unnamed Member B,²⁹⁵ the reprimand of the Bados mirrors typical bar discipline for neglect and failure to communicate.²⁹⁶ It is notable, however, that the State Bar did not discipline the Bados for conduct arising from this case.

The Board also found misconduct in what it characterized as the Bados' "act[ing] in too many capacities."²⁹⁷ They acted as an adoption agency, as well as a law firm. They "crossed boundaries to [provide] social work-type services with the birth mother."²⁹⁸ They advised both the birth mother and the adoptive parents on legal matters, violating provision three of the Code of Ethics which provides: "A member shall not purport to represent both the prospective adopting parent(s) and one or both birth parents, where such representation is specifically prohibited."²⁹⁹ But as previously discussed, dual representation is not specifically prohibited in all jurisdictions.³⁰⁰ An Academy lawyer in California,³⁰¹ or Kansas,³⁰² would not violate the Code of Ethics in jointly representing multiple parties to the adoption, because dual representation is permitted—and thus not specifically prohibited. An Academy member in New York,³⁰³ or Michigan,³⁰⁴ on the other hand, would violate both state rules and the Academy's Code of Ethics. Although Oklahoma did not discipline the Bados for their conduct in this case, the *Stubblefield* case suggests that dual representation would violate the rules: "[a] relinquishing natural parent who retains a lawyer must be afforded *independent* legal counsel."³⁰⁵ Because the Ethics Code is keyed to what is permitted ethically in a Member lawyer's

294. *Id.* at 3.

295. Press Release, Kathleen Hogan Morrison, *supra* note 258.

296. Schemenauer, *supra* note 267. See MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2012) ("A lawyer shall act with diligence and promptness in representing a client."); *id.* r. 1.4 ("A lawyer shall . . . keep the client reasonably informed about the status of the matter; promptly comply with reasonable requests for information . . .").

297. Press Release, Karen K. Greenberg, *supra* note 231, at 3.

298. *Id.*

299. *Id.* The provision in effect at the time of the Bados' discipline is recited in the discipline letter, and is similar to the current version, which now reads: "[a] Fellow shall not simultaneously represent multiple parties with potentially conflicting or competing interests where such representation is prohibited." ACADEMY CODE OF ETHICS, *supra* note 48.

300. See *supra* text accompanying notes 134–40.

301. CAL. FAM. CODE § 8800(d) (West 1995); *Arden v. State Bar*, 341 P.2d 6, 11–12 (Cal. 1959).

302. *In re Adoption of Baby Boy Irons*, 684 P.2d 332, 340 (Kan. 1984); *In re Adoption of Baby Girl T*, 21 P.3d 581, 589 (Kan. 2001).

303. HOLLINGER, *supra* note 3; *In re Michelman*, 616 N.Y.S.2d 409 (N.Y. App. Div. 1994).

304. MICH. COMP. LAWS ANN. § 710.55a (West 2015) ("An attorney or law firm shall not serve as the attorney for, or provide legal services to, both a parent or guardian and a prospective adoptive parent.").

305. *Okl. Bar Ass'n v. Stubblefield*, 766 P.2d 979, 983 (Okla. 1988). *Stubblefield* went further than mere dual representation, however, since *Stubblefield* actually adopted his client's child.

jurisdiction, it offers no more protection against dual representation than the existing rules of professional conduct do.

Though the Board was concerned with the traditional problem of dual representation—offering legal advice and legal counsel to birth parents while representing adoptive parents—they were equally concerned with what they described as “involving themselves excessively with birth mothers whom they do not represent.”³⁰⁶ The Bados told the Board that they believed offering support to birth mothers was important, including working with birth mothers “‘intensely’ regarding medical care, housing, and food, so that there is someone to care about them.”³⁰⁷ The Board concluded, after having met with the Bados, that they “do not understand the problem with this degree of involvement, particularly with a party they do not represent, and that they intend to continue their practices in that regard.”³⁰⁸

The Bados’ involvement with birth mothers appears benign, even beneficent. But the expressed concerns for a birth mother may actually be coercive, causing consent to relinquishment and adoption to be involuntary and void. Weaponizing concern and caring is a well-known tactic employed by some to induce birth mothers to remain committed to placing their child for adoption:

Another factor that compromises genuine parental consent is subtle and/or overt coercion, whether from parents, friends, religious or school communities, or the adoption professionals themselves. Adding the ingredient of financial profit to the equation increases the prospect of pressure from some adoption practitioners. Indeed, there are unscrupulous facilitators (and others) who have analyzed the factors that increase the likelihood of relinquishment and try to implement them; for instance, they sometimes persuade an expectant mother to relocate to another state – where she doesn’t know anyone and has no support system – or to accept inflated reimbursement for living expenses to increase the chance that she will feel obliged to relinquish. Overt coercive tactics should be barred in law and practice; furthermore, ethical practitioners need to be alert to even unintended, subtle forms of pressure – so, for instance, they need to help an expectant mother understand explicitly that accepting financial aid or developing bonds with the potential adoptive parents does not obligate her to go through with the placement if she decides it isn’t right for her or her child.³⁰⁹

306. Press Release, Karen K. Greenberg, *supra* note 231, at 5.

307. *Id.* at 4.

308. *Id.*

309. SUSAN LIVINGSTON SMITH, EVAN B. DONALDSON ADOPTION INST., SAFEGUARDING THE RIGHTS AND WELL-BEING OF BIRTHPARENTS IN THE ADOPTION PROCESS 8 (Adam Pertman ed., 2007).

Birth mothers are often vulnerable and lacking in support as they are experiencing a crisis pregnancy.³¹⁰ As a birth parent support group, Concerned United Birthparents, warns: “If your friends and family are not being supportive, the hopeful adoptive parents might be the only ones who are kind to you during your crisis. You may find yourself wanting to please them.”³¹¹ The same could be said when the attorney is the only individual with whom the birth parent is interacting, and appears to be kind and supportive. An excess of kindness, like an excess in payment of medical and living expenses, may act as an incentive “to persuade ambivalent pregnant women to relinquish their children.”³¹² Although the case involves an adoption agency, rather than an adoption law firm, *In re Perry* is instructive.³¹³ Like the Bados, the agency involved itself in the birth mother’s life to such an extent that it “created an influence which was overpowering and suggestive of no options regarding relinquishment,” such that it “created in Miss Perry’s mind an obligation, without option, to repay the agency’s expenses by relinquishing her rights to her child.”³¹⁴ The court in *Stubblefield* also suggested there was impropriety when the lawyer’s wife “assisted the client throughout her pregnancy by taking her to counseling sessions, doctors’ appointments, prenatal classes and purchasing her maternity clothes on behalf of the adoptive parents.”³¹⁵ An attorney representing adoptive parents owes a duty of loyalty to those adoptive parents, and expressed concern for the birth mother may be influenced by that duty of loyalty while masked as genuine concern for the wellbeing of the birth mother. Intrusive involvement, expressions of concern and apparent kindness in that way can actually work to the detriment of the adoptive parents if a court later finds the birth mother’s consent invalid.

Finally, one Member lawyer, Steven G. Dubin, was reported as disciplined twice by the Academy, and is the only one who received the ultimate sanction of termination of membership.³¹⁶ There is no explanatory decision for the termination of membership in 2012, and the indefinite suspension in 2008 is announced via minutes of a special board meeting that imposes the discipline

310. ELISSA MADDEN, SCOTT RYAN, DONNA AGUINIGA & MARCUS CRAWFORD, UNDERSTANDING OPTIONS COUNSELING EXPERIENCES IN ADOPTION: A QUANTITATIVE ANALYSIS OF FIRST/BIRTH PARENTS AND PROFESSIONALS 8–9 (2016).

311. Heather Lowe, *What You Should Know if You’re Considering Adoption for Your Baby*, CONCERNED UNITED BIRTHPARENTS, INC., <https://www.cubirthparents.org/docs/39%20What%20You%20Should%20Know%20if%20Youre%20Considering%20Adoption.pdf>; see also Dawn Davenport, *Are Friendships Between Adoptive & Expectant Moms Coercive?*, CREATING A FAM. (Feb. 3, 2015) (interview between adoption therapist Dr. Marcy Axness and Nancy Verrier, author of *THE PRIMAL WOUND: UNDERSTANDING THE ADOPTED CHILD*), <https://creatingafamily.org/adoption-category/friendships-adoptive-expectant-moms-coercive/>.

312. PERTMAN, *supra* note 2, at 193.

313. *In re Perry*, 641 P.2d 178 (Wash. Ct. App. 1982).

314. *Id.* at 180.

315. Okla. Bar Ass’n v. *Stubblefield*, 766 P.2d 979, 982 (Okla. 1988).

316. *Grievance Decisions*, *supra* note 229.

of suspension “in accordance with the seriousness of the misconduct”³¹⁷ without describing what the misconduct was. It is likely that the termination of membership in 2012 was because of Dubin’s disbarment by the State of Pennsylvania in that year,³¹⁸ since Academy rules provide for termination of membership upon disbarment.³¹⁹ In 2017, he was indicted for wire fraud in continuing to take clients and accepting fees for adoptions after he was disbarred.³²⁰ By that point, he was no longer a member of the Academy, and there, accordingly, is no mention of further discipline.

The ethics decisions of the Academy paint an interesting picture of the organization. The very fact of ethics decisions shows a seriousness of purpose that other specialty bar associations do not illustrate. But given how few there are, it is hard to square the Academy’s posture of enhanced ethics obligations with the reality of results. The ethics opinions are a mixed bag, with several admonishing attorneys for conduct that appears technical rather than unethical and several appearing to sanction attorneys for conduct that would not usually result in bar sanction. In at least one case, involving the Bados, the Academy sanctioned members for the kind of traditional dual-representation problem that often causes issues in adoption cases.³²¹ Yet, the Academy ethics code permits dual representation in states where it is not illegal.³²² In another case, the Academy’s opinion protects prospective adoptive parents from the unfair fee-collection practice of withholding the client’s urgently-needed documents until paid.³²³ Yet, it is difficult to envision that as an *enhanced* ethical requirement when the conduct would likely have been sanctioned under traditional bar authorities as well.

Taken together, the Academy’s ethics code and mandatory enforcement illustrate an organization that wants to take ethics seriously. The emphasis on violations that, as they said in the *Phillips* grievance, “brought the reputation of the Academy into serious public disrepute and brought discredit upon the Academy.”³²⁴ The Academy’s ethics adjudications bring to mind Deborah

317. *Special Meeting of the Board of Trustees Minutes*, *supra* note 234. In the following post, a prospective adoptive parent says he made the complaint to the Academy that led to the board meeting that suspended Dubin’s membership: *Failed Adoption*, POUND PUP LEGACY (May 01, 2007), <http://poundpuplegacy.org/node/45584> (last visited Oct. 16, 2020).

318. *Steven G. Dubin*, DISCIPLINARY BD. SUP. CT. PA., <https://www.padisciplinaryboard.org/for-the-public/find-attorney/attorney-detail/29562> (last visited Oct. 16, 2020).

319. *Grievance Procedures*, *supra* note 198, at art. VII.

320. Jeff Blumenthal, *Prosecutors Say Local Adoption Lawyer Was Disbarred, but Kept Collecting Fees from Hopeful Parents*, PHILA. BUS. J. (Apr. 7, 2017), <https://www.bizjournals.com/philadelphia/news/2017/04/07/steven-dubin-adoption-attorney-charged-fraud.html>; *see also* Press Release, U.S. Dep’t Just., U.S. Att’y’s Office, E. Dist. Pa., Former Adoption Attorney Charged with Wire Fraud (Apr. 6, 2017), <https://www.justice.gov/usao-edpa/pr/former-adoption-attorney-charged-wire-fraud>.

321. Press Release, Karen K. Greenberg, *supra* note 231, at 4.

322. ACADEMY CODE OF ETHICS, *supra* note 48, at para. 3.

323. Press Release, Debra Guston, *supra* note 250.

324. Press Release, Donald C. Cofsky, *supra* note 239, at 3.

Rhode's criticism that the purpose of lawyer regulation is "to protect their members' economic and psychological stake in public esteem."³²⁵

CONCLUSION: LESSONS FOR SPECIALTY BARS

The Academy of Adoption and Assisted Reproduction Attorneys promises enhanced ethical standards in its members. But it faces a number of barriers, common to other specialty bar associations, in fulfilling that promise. One barrier is its exclusivity, in limiting membership to lawyers that already have considerable experience in adoption practice. Specialty bar associations can be valuable as a community of practice that models professional behavior for lawyers in a particular practice field, but its value is especially high for new lawyers who are looking to other lawyers to learn professional norms. When a specialty bar is selective in membership, reaching only experienced lawyers, it offers little in the way of mentoring opportunities.³²⁶ The requirement that candidates for membership in the Academy have already five years of practice experience and have handled at least fifty adoption matters, including ones of relative complexity, means that the organization may have limited ability to influence ethical norms in the area. Lawyers are highly influenced by the communities within which they practice, and "lessons learned from the community when the individual is a relative newcomer may have an especially strong impact."³²⁷ The Academy loses the ability to influence new adoption lawyers toward more ethical practice by reaching them only after they have formed ethical norms without that influence. As Levin notes: "Not surprisingly, the early experiences of lawyers in practice can also have a powerful impact on their ethical decision-making. . . . The ethical decisions made early in practice may not be re-examined."³²⁸ Having formed notions of appropriate practice in early years before eligibility for membership has been reached, adoption lawyers' position may well have hardened, and lessons about enhanced ethics may not reach that lawyer. Though the Academy may achieve its goal of enhanced competence through exclusivity, its goal of improving the adoption industry suffers from that same exclusivity. One possible solution would be to have different classes of membership, one that allowed less-experienced attorneys to have an apprentice-like status in the organization.

Another barrier to inculcating enhanced ethical standards in its members is the potential for conflict between the general ethical rules of the legal profession and the rules of the Academy. While that is not a significant problem when a specialty bar's rules are merely aspirational, with the Academy's mandatory rules a member may face the choice to risk membership in the Academy in order to satisfy the ethical rules of the mandatory bar. It appears that the Academy struggled somewhat with this issue, with its earlier version of

325. Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 692-93 (1981).

326. Kilpatrick, *Specialty Lawyer Associations*, *supra* note 45, at 552.

327. 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, 1557 (2009).

328. *Id.*

their Ethics Code that required a member to investigate factual assertions from a client and disclose to the court improprieties in payment of birth parent expenses.³²⁹ Given that those provisions could have required conduct that conflicted with mandatory bar rules, it is unsurprising that those provisions were changed in later years.

Does membership in the Academy really promote higher ethical standards, or is it mere virtue-signaling? Virtue-signaling generally has a negative connotation, as “actions . . . that send the message ‘I’m a good person’ — though they might not be accompanied by doing anything good at all.”³³⁰ The Academy’s emphasis on high ethical standards is an important element of its value to members as a marketing center. Maintaining high public esteem can be a valuable marketing position for specialist lawyers,³³¹ and that seems to be the Academy’s goal. Rather than utilizing a strategy where “less ethically ambitious lawyers will lure clients away with promises of greater willingness to serve the clients’ selfish interests,”³³² the Academy’s ethics code allows its members to offer “association with lawyers with a reputation for high standards” that will “lend the client valuable status or credibility.”³³³

That posture of high ethical standards may be particularly valuable in adoption, where continuing relationships within the adoptive and birth families are often in the best interests of children.³³⁴ Adopted children grow up to be adopted adults, and adoptive parents should consider how they will explain their actions in the course of an adoption. In cases like *Lemley v. Barr*³³⁵ or *In re Krigel*,³³⁶ where prospective adoptive parents go to extremes to secure the adoption, one wonders how the prospective adoptive parents would explain their conduct to their adopted children as they reach adulthood. Adoptive parents should want to say, “I wanted what was in your best interests, so I did everything I could to make sure the adoption was not just legal, but morally and ethically above-board.” Membership in the Academy can be virtue-signaling to prospective adoptive parents, adoption agencies and other adoption attorneys, but it need not have an exclusively negative connotation—membership signals that ethical practice is valuable to that member-attorney.

329. See *supra* text accompanying notes 216–22.

330. Mark Peters, *Virtue Signaling and Other Inane Platitudes*, BOS. GLOBE (Dec. 24, 2015, 2:45 PM), <https://www.bostonglobe.com/ideas/2015/12/24/virtue-signaling-and-other-inane-platitudes/YrJRcvxYMofMcCfGORUcFO/story.html>; see also James Bartholomew, *Easy Virtue*, SPECTATOR, (Apr. 18, 2015), <https://www.spectator.co.uk/2015/04/hating-the-daily-mail-is-a-substitute-for-doing-good/>.

331. Gordon & Simon, *supra* note 87, at 245.

332. *Id.*

333. *Id.*

334. For a review of relevant literature, see Seymore, *Grasping Fatherhood*, *supra* note 129, at 138–40, 144–46 (psychosocial literature regarding birth mothers, similar literature regarding adoptees); Seymore, *Sixteen and Pregnant*, *supra* note 130, at 847–50 (psychosocial literature regarding birth fathers); Seymore, *Openness in International Adoption*, *supra* note 13, at 178–82 (psychosocial literature regarding openness in adoption).

335. *Lemley v. Barr*, 343 S.E.2d 101 (W. Va. 1986).

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

The role of specialty bar associations in socializing attorneys and developing a sense of professional identity has been studied by Judith Kilpatrick, Leslie Levin, and others. The Academy of Adoption Attorneys offers an opportunity to examine the role that ethical standards play in socialization and professionalism, as it is unusual in having a mandatory ethics code. The Academy expresses its values in resolutions and statements regarding adoption, amicus briefs, continuing legal education courses and podcasts, and in its ethics code. The mandatory nature of the ethics code, together with a complex grievance procedure that culminates in written decisions on violations, illustrates that in adoption practice, ethics are an important component of an adoption attorney's professional identity.