Babes and Barristers: Legal Ethics and Lawyer-Facilitated Independent Adoptions

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NOTES

BABES AND BARRISTERS: LEGAL ETHICS AND LAWYER-FACILITATED INDEPENDENT ADOPTIONS

Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula.¹

Mr. Justice Douglas

It is the nature of the lawyer's profession to encounter a wide range of human endeavors. As fiduciaries, lawyers are expected to uphold strong ethical standards when practicing their profession.² Attempts have been made to develop universal ethical guidelines applicable to the many spheres of lawyer conduct. Yet, the attempt to develop ethical guidelines of a general and all-encompassing nature often results in confusion and uncertainty. The field of lawyer-facilitated independent adoptions well illustrates this problematic situation.

The American adoption system is of a dual nature: adoptions may be arranged through authorized public- or private-sector agencies, or may fall within the category of independent or "private" placements.³ While independent adoptions encompass several forms,⁴ this note focuses upon adoptions involving a lawyer as intermediary;


2. "Impress upon yourself the importance of your profession; consider that some of the greatest and most important interests of the world are committed to your care . . . . In all the civil difficulties of life, men depend upon your exercised faculties and your spotless integrity. . . ." S. Smith, Master, What Shall I Do to Inherit Eternal Life?, in THE LAWYER THAT TEMPTED CHRIST (1824), reprinted in 29 CAN. B. REV. 720, 720 (1951).


Certain states are attempting to eliminate the non-agency form of adoptions. See infra notes 32-33 and accompanying text.

4. Stepparent adoptions, direct placement by the natural parent(s) with either relatives or non-relatives, or placements involving the use of some type of "intermediary" are all forms of independent adoptions. See, e.g., L. Wishard & W. Wishard, ADOPTION: THE GRAFTED TREE 101-02 (1979).
specifically, this note deals with the often vague and conflicting area of lawyers' ethics in independent adoptions.

This note begins by briefly describing the different forms of adoption that have developed in the United States. Examination of the ethical aspects of lawyer involvement in independent adoptions follows, beginning with an overview of the often vague and conflicting statutory regulations in this area, and continuing with a review of the pronouncements of various ethics committees regarding lawyer-involved independent adoptions. Through an examination of these opinions and particular cases in this field, the major problem areas for lawyers are detailed.

Generally, these problem areas have originated in the context of the American Bar Association's Model Code of Professional Responsibility (the "Model Code"), since courts and ethics committees have rendered most of their opinions under that ethics system. The legal profession as a whole, however, is still engaged in important and difficult debate regarding the very nature and content of its ethics document—a document that forms the foundation upon which the problems and potential solutions discussed herein are predicated. Even with the recent adoption of the Model Rules of Profes-

5. See infra notes 17-31 and accompanying text.
6. See infra notes 32-42 and accompanying text.
8. See infra notes 52-57, 109-17, 154-86, 192-93 and accompanying text.

The Model Code is divided into three parts: the Canons, described as "axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers," MODEL CODE, supra, at Preliminary Statement; the Ethical Considerations (EC), described as "aspirational in character . . . objectives toward which every member of the profession should strive . . . principles upon which the lawyer can rely for guidance," id.; and the Disciplinary Rules (DR), described as "mandatory . . . stat[ing] the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Id. The Model Code's Preliminary Statement notes that the authority enforcing the Disciplinary Rules of the Code "may find interpretive guidance" in the concepts contained in the Canons and the Ethical Considerations of the Model Code. Id.

10. The American Bar Association Commission on Evaluation of Professional Standards was appointed in 1977 and, shortly thereafter, concluded that further amendment of the Model Code of Professional Responsibility would not produce the comprehensive ethical document desired. The Commission then began work on the creation of the Model Rules of Profes-
sional Conduct (the "Model Rules") by the American Bar Association House of Delegates, the profession finds itself in a period of transition and uncertainty. Since there now exists the possibility of subsequent change in the basic ethical guidelines of the profession, and a corresponding potential for modifications in the treatment of certain ethics issues herein discussed, examination of pertinent aspects of the Model Rules becomes requisite.

While the Model Rules include no specific references to independent adoption, certain Model Rules provisions are capable of specific application to the independent adoption field. Should the current version of the Model Rules be adopted by the individual states, certain changes are signaled in the ethical treatment of lawyer involvement in independent adoption placements. Specifically, the areas of conflicting interests, advertising and solicitation, impropriety/misconduct, lawyer competence, and the very nature of the lawyer’s role are likely to undergo changes due to the Model Rules.


13. While the ABA House of Delegates has adopted the Model Rules as a statement of policy, see Annual Meeting of the American Bar Association, supra note 10, at 2078, the Model Rules will not have a binding effect upon individual lawyers until they are adopted by the individual states. See Quade, New Ethics Code, 69 A.B.A. J. 1365, 1365-66 (1983).

14. It was recently estimated that it would be "three to four years before [the Model Rules are] adopted by any states." Quade, supra note 13, at 1366 (quoting Charles Kettlewell, past president of the National Organization of Bar Counsel).

15. In contrast, a comparison of Model Code and Model Rules provisions regarding fees reveals no significant changes as related to the independent adoption context. Compare Model Code, supra note 9, at DR 2-106 (Fees for Legal Services) with Model Rules, supra note 11, at Rule 1.5 (Fees). For a discussion of the fee issue as a problem in lawyer-involved independent adoptions, see infra notes 151-86 and accompanying text.

Similarly, the Model Rules make little practical change in lawyer specialization requirements and guidelines, largely continuing to repose control over lawyer specialization in the states. Compare Model Code, supra note 9, at EC 2-14 (regarding specialization and limita-
The potential impact of the Model Rules is, therefore, also examined.

After raising various ethics issues with which lawyers involved in the independent adoption field should be concerned, this note concludes by positing some potential solutions to this complex and often confusing area of legal practice.\(^\text{16}\)

I. TYPES OF ADOPTIONS

A. Agency Adoptions

In the typical agency adoption situation a natural mother\(^\text{17}\) surrenders her child to an agency, which then works to place the child with a prospective adoptive couple.\(^\text{18}\) The agency investigates the natural mother, the child, and the prospective adoptive couple for factors that may affect the ultimate success of the adoption.\(^\text{19}\) The natural mother relinquishes her legal rights to the child, transferring legal responsibility for the child to the agency.\(^\text{20}\)

After placing the child in the home of the prospective adoptive couple, the agency conducts a follow-up investigation. After the passage of a particular time period,\(^\text{21}\) the adoptive couple may petition...
to formally adopt the child, and the agency will provide the results of its investigation and a recommendation regarding the desirability of that particular couple's adoption of the child.\(^2\) If the adoption is not approved, the child is removed from the couple's home and responsibility for the child's welfare falls back upon the agency.\(^2\)

**B. Independent Adoptions**

It is more difficult to formulate generalizations regarding independent placements involving intermediaries, since many variations of the practice exist. For purposes of this note, however, certain common patterns will be discussed.\(^2\) In many cases, some combination of doctors and/or lawyers is involved with the independent placement.\(^2\) A prospective adoptive couple or a natural mother may contact a lawyer directly or through the auspices of a doctor or other person, thereby obtaining assistance in the adoption process. The extent of such assistance and the exact nature of the process are discussed in conjunction with the ethics issues that are the major focus of this note.

Independent adoptions have generally been categorized in terms of the "gray market" and the "black market."\(^2\) While "black mar-

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58, 57 n.46, 58 n.49 (1976).


Although the majority of states provide for such a recommendation, it is not a universal practice. *See Adoptions Without Agencies, supra note 20, at 176-77, 178-80; M. Leavy & R. Weinberg, supra note 18, at 43.*


24. For a general discussion of independent adoptions involving intermediaries, see Note, *supra note 21, at 49; Comment, supra note 18, at 715.*


26. Grove, *supra note 19, at 117; Note, supra note 21, at 52-54.*

Uniform definitions of these terms are difficult to achieve. "Gray market" adoptions have been described as "independent placements arranged without profit by well-meaning parents, friends, relatives, doctors, and lawyers." *Comment, supra note 18, at 715; see also id. at 715 n.2* (further discussing the gray market form). A recurring element in the definition of "black market" is the existence of a profit to the intermediary (the concept of "baby-selling"). *See, e.g.,* Note, *supra note 21, at 48 n.2* ("The black market in babies may be defined as that section of the market which seeks to profit from placing a child for adoption.").

This general formula cannot, however, be universally and reliably applied. *See L. McTaggart, supra note 25, at 10-11* (illustrating difficulties in assigning clear-cut, definitional labels to particular adoption conduct); *L. Wishard & W. Wishard, supra note 4, at 105* ("It is difficult to draw the line between the usually legal gray market adoption and the always illegal black market adoption."); Bodenheimer, *New Trends and Requirements in Adoption*
ket" adoption elicits largely negative reactions, Gray market adoption is met with mixed responses. After weighing perceived advantages of independent placement against perceived disadvantages of agency placement, many refuse to support the abolition of the independent placement form. Instead, the continuation of independent placements is often favored, contingent on the elimination of so-called "black market" procedures such as exorbitant fees, "hidden" payments, and questionable interstate transportation of children.

At first glance, this point of view appears to be logical and capable of providing lawyers with clear guidance in determining the propriety of their conduct. An examination of the independent adoption area, however, will illustrate the problems with this viewpoint. Due to the elusive nature of the distinction between "gray market" and "black market" adoption activities, the exact parameters of those "categories" are unclear. As a result, attempts to evaluate lawyer conduct by merely fitting it into one of those "categories" prove unsatisfactory. Therefore, rather than viewing the independent placement issue from the standpoint of arbitrary classifications, this note addresses the fundamental ethical problems associated with lawyer involvement in independent adoptions.

II. REGULATING LAWYER INVOLVEMENT IN INDEPENDENT ADOPTION PLACEMENT

A. Statutory Regulation

While various statutory schemes have been attempted in an effort to regulate lawyer involvement in this area, an examination of the general state of the law often fails to provide lawyers with clear-cut, definitive answers to questions regarding acceptable independent

Law and Proposals for Legislative Change, 49 S. Cal. L. Rev. 10, 107 & n.517 (1975); infra notes 167-86 and accompanying text.

27. See, e.g., N. Baker, Babyselling: The Scandal of Black Market Adoptions (1978); Grove, supra note 19, at 118, 133 (stressing the negative aspects of "black market" adoptions and their lack of positive or "redeeming" factors); id. at 119 ("[I]t existence is obnoxious to the social conscience."); Note, supra note 21, at 48-51; Editorial Notes, Survey of New Jersey Adoption Law, 16 Rutgers L. Rev. 379, 406-07 (1962) (describing the black market in babies as an "ugly and barbaric practice").

28. See infra notes 251-63 and accompanying text.

29. See id.

30. See Adoptions Without Agencies, supra note 20, at 232-33, 235; Bodenheimer, supra note 26, at 108-09; Grove, supra note 19, at 133-34; Leavitt, The California Lawyer's Role in Independent Adoptions, 36 L.A.B.A. Bull. 189, 210 (1961); Note, supra note 21, at 51-52; Comment, supra note 3, at 636-37.

placement activity. A total ban on independent adoptions would eliminate any dilemma confronting lawyers who must decide whether or not to participate in independent adoptions. Commentators have described certain states as having “banned” independent adoption. Yet further examination reveals that total bans do not actually exist, since various “exceptions” in the statutes of even these states allow certain independent placements to continue. Lawyers are thereby confronted with conflicting signals regarding the propriety of the independent placement form of adoption.

Few states have attempted the “total ban” concept. Rather, other statutory means have been employed in attempts to control and regulate independent placements. Examples of such statutory controls include: restricting advertising undertaken to facilitate various phases of adoption placements; restricting attempts to induce natural parents to give up their children for adoption; regulating the exchange or attempted exchange of compensation in connection with a placement; and furnishing reports of expenses and fees asso-

32. See, e.g., Comment, supra note 3, at 630 (“A few states and the District of Columbia, however, have taken a more severe stance and have completely outlawed all private adoptions.” (footnote omitted)); Note, supra note 21, at 54 (a “small number of states have decided to prohibit the placement of children outside agency channels” (footnote omitted)).

33. See CONN. GEN. STAT. ANN. § 45-63(a)(3) (West 1981) (agency adoption procedure not required for adoptions of “minor child[ren] . . . related to the adopting parents”); id. at § 45-63a (in stepparent adoptions, courts may waive all requirements for agency investigations and reports, as well as all notice requirements regarding the commissioner of children and youth services); DEL. CODE ANN. tit. 13, § 904 (Supp. 1984) (independent placement permissible in adoptions by blood relative or stepparent); D.C. CODE ANN. § 32-1005 (1981) (independent placements permitted only by a “parent, guardian, or relative within the third degree”) (part of the “Baby Broker Act”); GA. CODE ANN. §§ 19-8-3(a)-(3), 19-8-8(a)(1), (a)(3)-(5) (1982) (provisions regarding placements with third persons, stepparents, and various named relatives); MASS. GEN. LAWS ANN. ch. 210, §§ 2A(B)-(C) (West 1958 & Supp. 1984-1985) (independent placement permitted in the case of blood relatives or stepparents); MICH. COMP. LAWS ANN. § 722.124 (West Supp. 1984-1985) (a parent, guardian, or person related to child by blood, marriage, or adoption “may place a child in the control and care of another”); MINN. STAT. ANN. § 259.22 (1982) (required placement by “commissioner of public welfare, his agent, or a licensed child-placing agency” does not apply to, inter alia, adoptions by stepparents, relatives within the third degree, or in instances of court waiver “in the best interests of the child or [the adoption] petitioners”); N.M. STAT. ANN. § 40-7-19 (1983) (independent placements permissible in cases of, inter alia, stepparent adoptions and adoptions by relative[s] within the fifth degree of consanguinity).”

34. See CAL. CIV. CODE § 224p (West 1982); GA. CODE ANN. § 19-8-19(a) (1982); KY. REV. STAT. § 199.590(1) (Supp. 1984); OKLA. STAT. ANN. tit. 21, § 866(4) (West 1983).

35. See GA. CODE ANN. § 19-8-19(b) (1982).

associated with the placement to a court or other governmental agency.\textsuperscript{37} Other methods that states have employed in an effort to reduce the excesses and negative aspects of the adoption placement field include requiring official permission to place or receive a child,\textsuperscript{38} requiring the reporting of an intention to place a child for adoption,\textsuperscript{39} and requiring court approval of certain fees paid to intermediaries.\textsuperscript{40}

While the existence of such statutory regulations must influence lawyers’ decisions concerning their involvement in independent placements, problems do surface with a statutory approach. Adoption placement legislation lacks uniformity among the various jurisdictions.\textsuperscript{41} Additionally, problems of interpreting such legislation often create confusion for lawyers involved in independent placements.\textsuperscript{42}

### B. Ethics Codes and their Interpretations

For a well-meaning lawyer whose aim is to act with propriety in this area, the most logical place to turn for guidance, when state law fails to provide clear assistance, is the appropriate ethics code.\textsuperscript{43} These codes, formulated in an attempt to guide and regulate the members of the legal profession, are interpreted in opinions issued by the particular committee charged with that responsibility within


\textsuperscript{41} \textit{Compare}, e.g., \textit{Cal. Civ. Code} § 224q (West 1982) (except for a parent, placement by other than a licensed adoption agency is a criminal offense) and \textit{Ill. Ann. Stat.} ch. 40, § 1526 (Smith-Hurd 1980) (prohibiting the direct or indirect receipt or payment of any compensation for adoption placement, other than by a child welfare agency) \textit{with Tex. Penal Code Ann.} § 25.06 (Vernon Supp. 1984) (although giving or accepting any “thing of value” for an adoption placement constitutes an offense, lawyers’ fees are specifically excepted).

\textsuperscript{42} See Leavitt, \textit{supra} note 30, at 191-205 (detailing confusion and conflict regarding interpretation of California adoption placement laws). For a further illustration of the difficulties associated with interpreting adoption legislation, see the majority and dissenting reports of the California State Bar Committee on Adoptions, 36 J. St. B. Cal. 970, 970-96 (1961) [hereinafter cited as Report of the Cal. State Bar Comm. on Adoptions].

In addition to creating confusion, such interpretation problems invite abusive conduct. \textit{See Adoptions Without Agencies, \textit{supra} note 20, at 142-43 (survey of intermediaries concludes that weaknesses in adoption laws result in continued “for-profit” placement activities); \textit{id.} at 42 (“vague” laws and “unclear definitions” cited by agencies as factors which allow “black market” adoption activities to continue).

\textsuperscript{43} A lawyer’s conduct is generally governed by the particular ethics code in force in the jurisdiction in which he practices. For a discussion of the various ethics codes and their interrelationships, see \textit{supra} notes 9, 10 & 13.
Ethics opinions dealing specifically with the lawyer's role in independent adoption placements are few. Among those that do exist, however, no consensus of opinion has emerged either for or against lawyer involvement in independent adoptions. Of nine ethics opinions issued by the ethics committees of four states, one county, and one city between 1953 and 1975, five of the opinions adopted a favorable tone toward lawyer involvement in various independent adoption situations, four adopted a negative tone, and one provided a "split" decision.

Various developments in California illustrate the confusion engendered in the area of lawyer-involved independent adoptions. In 1955, the chairman of the American Bar Association ("ABA") Standing Committee on Professional Ethics and Grievances, while stating that the ABA Committee had issued no formal opinion regarding a lawyer representing both sides of an independent adoption, advised a California attorney that, in the view of the Commit-

44. See O. MARU, DIGEST OF BAR ASS'N ETHICS OPINIONS 1 (1970). Ethics opinions are generally promulgated in response to questions posed by members of the bar and serve to provide guidance to lawyers in conforming their specific conduct to the requirements of the ethics codes. See id. at 2, 6, 13-15. Although the opinions generally do not have the force of law, see id. at 2, they "have . . . considerable informal force." id. at 2, and in many cases are given weight by the courts in the area of lawyer discipline. Cf. id. at 1-3 (discussing the interplay between courts, ethics codes, and ethics opinions).

While not unaware that the ethics codes of bar associations may vary in some respects from the American Bar Association Model Code of Professional Responsibility, see G. HAZARD, supra note 9, at 19, when discussing ethics code provisions this note will refer to the language and numbering of the American Bar Association Model Code of Professional Responsibility.


48. This dual representation situation would most likely occur when one party approaches or is referred to a lawyer for assistance in securing or relinquishing a child through the mechanism of an independent adoption. An attempt would then be made to make a
tee, "it would be a violation of Canon 6" of the Canons of Professional Ethics for a lawyer to engage in such a practice. Following the ABA letter came a 1956 California Continuing Education of the Bar publication, entitled "Family Law for California Lawyers," which adopted a positive view of "dual representation" in the independent adoption area.

The Supreme Court of California, in 1959, ruled on the issue in the case of Arden v. State Bar, a disciplinary proceeding against a lawyer who represented both the natural mother and the prospective adoptive couple in an independent adoption placement. While the court agreed with the decision of a bar association committee that dual representation in that case was proper, its decision was strongly influenced by the presence of disclosure and consent, as well as factors that eliminated confidentiality of communications

"match" with either an available natural mother or prospective adoptive couple. This may be accomplished in one of several ways: by the direct action of the lawyer, conduct which can possess its own attendant problems, see infra notes 118-31 and accompanying text; through action by the clients themselves; or through the use of another person, such as a friend, relative, doctor, or other lawyer. Once found, the other side will often be represented by the same lawyer, even to the extent of an actual face-to-face meeting of all the parties.

49. Canon 6, as cited in the ABA letter, provided as follows:

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

CANONS OF PROFESSIONAL ETHICS Canon 6 (1908) ("Adverse Influences and Conflicting Interests").


52. 52 Cal. 2d 310, 341 P.2d 6 (1959).

53. Id. at 313-14, 341 P.2d at 8.

54. Id. at 318-19, 341 P.2d at 11.

55. See id. at 317, 341 P.2d at 10-11. For a discussion of the disclosure and consent issue, see infra notes 95-104 and accompanying text.
from the particular lawyer-client relationship. The court, therefore, did not deliver a blanket approval of dual representation in independent adoptions, continuing:

It is suggested that the mere representation of both parties to an adoption, even with consent, may constitute a violation of the rules of professional conduct. On this issue the members of the Bar have expressed opposite views. In . . . "Family Law for California Lawyers" it was urged that such dual representation was permissible. In [a 1957 issue of the California State Bar Journal] opinions to the contrary were published. The issue is a highly debatable one. No clear-cut rule on the subject has been announced. It is not proper to discipline an attorney for a violation of a claimed principle that was and is so highly debatable.

Subsequently, a 1961 Los Angeles Bar Bulletin article, citing the Continuing Education of the Bar publication and Arden, concluded that “[s]ince the Supreme Court considered, cited and rejected the views of the American Bar Committee, it must be taken as settled, at least in California, that such dual representation by an attorney is proper in adoption matters.” Yet, less than four years after that article appeared, Opinion No. 284 of the Committee on Legal Ethics of the Los Angeles County Bar Association declared that a lawyer’s representation of both sides in an adoption proceeding is ethically improper. Interestingly, the opinion included the following statement:

In rendering this opinion, this Committee and the Committee on Adoptions are not unmindful of the statements contained in the Continuing Education of the Bar publication “Family Law for California Lawyers” and of the case of Arden v. State Bar . . . . This case, however, only holds that as of that date an attorney should not be disciplined for such dual representation and does not establish that such representation is ethical.

The Los Angeles Committee also indicated that the California Supreme Court’s Arden decision was strongly influenced by the fact that there was a dispute within the Bar regarding the ethical propri-

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56. See Arden, 52 Cal. 2d at 318-19, 341 P.2d at 11-12. For a discussion of the issue of client confidences, see infra notes 105-17 and accompanying text.
57. Arden, 52 Cal. 2d at 319, 341 P.2d at 11.
58. Leavitt, supra note 30.
59. Id. at 207 (emphasis added).
60. L.A. Opinion 284, supra note 46, at 247.
61. Id. (citations omitted).
ety of the dual representation in question. In addition, the Los Angeles County opinion referred specifically to a Michigan State Bar Association opinion issued three years prior to the Continuing Education of the Bar publication, six years prior to the Arden decision, and eight years prior to the Los Angeles Bar Bulletin article, and cited that opinion as being "in line with the opinion here rendered." The Michigan opinion had held that "[a] lawyer may not, ethically, represent both the natural parents and the adoptive parents in an adoption proceeding." Finally, the Los Angeles County Ethics Committee returned to the 1955 ABA letter and cited it as additional support for its opinion. Upon review, it becomes apparent that the ethics pronouncements in the independent adoption field have often differed in their ultimate conclusions.

III. PROBLEMS RAISED BY LAWYER INVOLVEMENT IN INDEPENDENT ADOPTION PLACEMENTS

Despite the inconsistencies among the ethics opinions, certain themes are common. An examination of various ethics opinions dealing with lawyer-related independent adoption placements, particularly those opinions assuming a "negative" outlook toward the practice, reveals a number of ethical problems with which lawyers should be concerned. A study of these underlying problems can assist lawyers with decisions bearing on their involvement in, and conduct during, independent adoption placements, and will ultimately lead to the development of potential solutions to the lawyer-related independent adoption problem.

A. Conflicting Interests

The primary issue raised in the ethics opinions is that of conflicting interests. Focusing specifically on Canon 5 of the Model Code, and its associated Disciplinary Rules ("DR") and Ethical

62. See id.
64. L.A. Opinion 284, supra note 46, at 248.
65. Mich. Opinion 156, supra note 46, at 205 (emphasis added). The Michigan opinion prohibited a lawyer from acting as a "broker," "middle-man," or "child placement agency" in adoptions. Id. at 207 (holding such activity to be both "professionally unethical" and "morally wrong"). For further discussion of Michigan Opinion 156, see infra notes 73-75 and accompanying text, note 151 and accompanying text & note 131.
66. ABA Letter, supra note 50.
68. See infra notes 247-89 and accompanying text.
69. "A Lawyer Should Exercise Independent Professional Judgement on Behalf of a Cli-
Considerations ("EC"), the issue centers on the propriety of a lawyer representing both the natural mother and the prospective adoptive couple in an adoption proceeding.\(^70\)

The ethics committees that disapprove of lawyer involvement in this area express the belief that the desires, interests, and needs of the various sides of an independent placement are different and/or conflicting.\(^71\) The usual counterargument advanced by independent adoption proponents is that the 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.\(^72\) This argument is addressed in Michigan Ethics Opinion 156,\(^73\) which quotes the Canons of Professional Ethics "definition" of "represent[ing] conflicting interests"\(^74\) and states: "[w]hile the Committee recognizes that, in an adoption proceeding, the interests of the natural parents and of the adoptive parents are not necessarily 'conflicting' in the usual sense . . . the interests of the two sets of parents are not identical, and there may be a wide divergence of interest at times."\(^75\) This distinction was also noted in the 1955 ABA Ethics Committee letter,\(^76\) which stated that "it is inherent in the proceeding itself that the interest of these two sets of parents are not identical, but are legally separate and distinct."\(^77\) The letter further explained that a lawyer in such a dual role "would be representing conflicting interests"\(^78\) in that "[h]e could not render singleness of representation to one set of parents without subordinating the inter-
ests of the other set of parents." It is important to note that the Model Code Disciplinary Rule dealing with this theme speaks in terms of "differing interests," which are defined as "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." Consequently, the Model Code does not require that a direct conflict exist before its conflicting interests provisions are triggered. The mere existence of differing interests in the independent adoption context would be sufficient to call these Model Code provisions into play.

The conflicting interests provisions of the Model Rules, while differing in outlook and scope from those of the Model Code, fail to provide a greater degree of clarity when applied to the substantial ethical problem of dual representation of clients in an independent adoption. While both Rule 1.7 of the Model Rules and Model Code DR 5-105 reflect general opposition to the representation of multiple clients, each provides for different exceptions. Disciplinary Rule 5-105(C) permits the representation of multiple clients—which would ordinarily be barred under the provisions of DR 5-105(A) and (B)—only "if it is obvious that [the lawyer] can adequately represent the interest of each and if each consents . . . after full disclosure." Ethical Consideration 5-15 of the Model Code advises the lawyer to "resolve all doubts against the propriety of the representa-

79. Id.
80. MODEL CODE, supra note 9, at DR 5-105(A)-(B) (a lawyer may neither accept nor continue employment "if it would be likely to involve him in representing differing interests" or if such acceptance or continuance would or would be likely to adversely affect "the exercise of his independent professional judgment in behalf of a client").
81. Id. at Definitions (I) (emphasis added).
82. For further discussion of conflicting interests problems in the context of the Model Code, see supra text accompanying notes 69 & 80-81, infra text accompanying notes 95-97, 102-03, 106-08 & 117.
83. Note particularly the "shall not represent . . . unless" format of Rule 1.7, MODEL RULES, supra note 11, at Rule 1.7, and the "shall decline . . . except"/"shall not continue . . . except" format of DR 5-105, MODEL CODE, supra note 9, at DR 5-105(A)-(B).
84. See supra note 80.
85. MODEL CODE, supra note 9, at DR 5-105(C) (emphasis added). It should be noted that the "obvious" nature of adequate representation of both clients has been interpreted as a threshold requirement for representation of multiple clients under Model Code Disciplinary Rules 5-105(A) and (B). See Mass. Bar Ass'n Comm. on Professional Ethics, Op. 76-19 (1976), reprinted in 61 MASS. L.Q. 171 (1976). In its opinion, the Massachusetts ethics committee had occasion to interpret the "obviousness" requirement of DR 5-105 as "a pre-condition to a lawyer's representing multiple clients, even after full disclosure under DR 5-105(C)." Id. at 171 (emphasis added).
In contrast, Rule 1.7 of the Model Rules contains an exception that permits representation of a client even when such representation will be "directly adverse to another client," as long as "(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation." The comment to Rule 1.7 explains that "[a] possible conflict does not itself preclude the representation," lending support to the view that restraints on lawyer involvement in independent adoptions based on dual representation/conflicting interests restrictions may be weakened by the Model Rules.

In contrast to the Model Code's generally negative outlook on representation of even "differing interests," there is no specific prohibition against the representation of "differing interests" in Rule 1.7. Rather, the general conflicting interests provision of the Model Rules deals in the narrower terms of "directly adverse" and "materially limited" representation, thereby failing to prohibit multiple client representation in situations that fall short of substantial conflict. Additionally, the comment to Rule 1.7 states that "a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even

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86. MODEL CODE, supra note 9, at EC 5-15.
87. MODEL RULES, supra note 11, at Rule 1.7(a)(1)-(2) (emphasis added).
88. Id. (emphasis added).
89. Id. at Terminology.
90. But cf. id. at Rule 1.7 comment (Consultation and Consent) ("[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."). This comment needs to be interpreted, however, in order to isolate the types of circumstances under which a lawyer will be considered "disinterested" and to assess the likelihood of effective administration of such a guideline.
91. See MODEL CODE, supra note 9, at EC 5-14, DR 5-105(A)-(B); supra notes 80-81 and accompanying text, note 83 and accompanying text, note 86 and accompanying text.
92. MODEL RULES, supra note 11, at Rule 1.7.
though there is some difference of interest among them." This statement's lack of clarity further diminishes the impact of the Model Rules conflicting interests provisions, particularly in view of the controversy as to whether or not the parties to an independent adoption proceeding have either "differing" or "conflicting" interests.

B. Disclosure and Consent

When studying Canon 5 of the Model Code and Rule 1.7 of the Model Rules, independent adoption proponents may well cite certain provisions that permit "dual representation" provided there is full disclosure to all parties and client consent to such representation. The disclosure and consent provision, however, does not obviate the problem of conflicting interests, primarily because the consent of all parties cannot be obtained. There are other "parties" to an adoption proceeding in addition to the natural mother and the prospective adoptive couple: specifically, the public and the child. Opinion No. 284 of the Los Angeles County Bar Association interposes yet another roadblock—difficulty in obtaining the natural father's consent to the dual representation. As a result of these com-

93. *Id.* at Rule 1.7 comment (Other Conflict Situations) (emphasis added).
94. See supra notes 71-81 and accompanying text.

Additionally, the very placement and title of the ethics guidelines regulating this subject area indicate that the Model Rules require more of a direct conflict than the Model Code before prohibiting certain representation. The Model Code provisions governing the issue are contained in Canon 5 and the Disciplinary Rules that deal with "[i]mpair[ing the lawyer's] [i]ndependent [p]rofessional [j]udgment," MODEL CODE, supra note 9, at DR 5-101, 5-105; see *id.* at Canon 5. Thus, the Model Code provisions contain more general and all-encompassing terminology than the Model Rules, which place the applicable provisions under a "Conflict of Interest" title, MODEL RULES, supra note 11, at Rule 1.7 (emphasis added).

96. MODEL RULES, supra note 11, at Rule 1.7.
97. See MODEL CODE, supra note 9, at DR 5-105(C); cf. MODEL RULES, supra note 11, at Rule 1.7(a)(2), (b)(2) (consultation and consent provisions). The Model Rules concede that, on occasion, it may be impossible to provide the disclosure necessary for proper consent. *Id.* at Rule 1.7 comment (Consultation and Consent). Additionally, the Model Rules provide that, in certain situations, a lawyer may not seek consent and may not represent a client even if the client has given his consent. *See id.*

98. See L.A. Opinion 284, supra note 46, at 247-48; Mich. Opinion 156, supra note 46, at 206; see also ABA Letter, supra note 50, at 344 ("[T]his [disclosure and consent] exception cannot be satisfied where the public is involved. It is impossible to obtain public 'consent,' and it certainly cannot be presumed.").
100. In the fact pattern presented for an ethics decision in L.A. Opinion 284, the interests of the natural mother included no notification to the child's presumptive father regarding
plexities, the Los Angeles County opinion concluded that, in the situation presented to it for a decision, a lawyer attempting to represent both the natural mother and the prospective adoptive couple could not properly provide both sides with the necessary representation.\textsuperscript{101}

Questions also arise concerning the exact nature and required degree of disclosure and consent. The natural mother, who may well be under tremendous emotional stress, may be unable to comprehend the potential problems that may arise when her lawyer attempts to represent not only her interests, but also those of persons whose interest is in permanently obtaining her child for themselves. The prospective adoptive couple may be unable to fully comprehend the situation and the problems lurking ahead of them in such a relationship, since they also are in an inherently stressful situation. It is difficult to be sure how much the lawyer must “disclose.”

An exhortation to “explain fully . . . the implications of the common representation”\textsuperscript{102} may be insufficient to advise a lawyer of exactly what to disclose. In addition, a lawyer unfamiliar with the independent adoption process may not be totally aware of the various problems that can occur and may be unable to objectively assess the degree to which representation of multiple clients in this area will affect “the exercise of his independent professional judgment.”\textsuperscript{103} If the parties do “consent,” it may not actually be a knowing, informed, carefully thought-out consent. The parties may merely be complying with a formality to move the process along to its conclusion swiftly and with as few impediments as possible. They may not be aware of the potential problems and may not consider to what extent they could be losing the total dedication to their individual interests which would be forthcoming from a lawyer who was not also representing the other side of the proceeding.\textsuperscript{104}

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\item[a] a sole custody hearing that was to be held to determine whether his consent would be required for the adoption. \textit{Id.} at 247, 248. At the same time, the Los Angeles County Ethics Committee stated that the interests of the prospective adoptive couple should favor the provision of such notice, in an effort to forestall later claims on the child by the presumptive father. \textit{See id.} at 248.
\item[101] \textit{See id.} at 248.
\item[102] \textbf{Model Code}, \textit{supra} note 9, at EC 5-16.
\item[103] \textit{Id.} at DR 5-105(C).
\item[104] For a related observation on the general issue of conflicting interests, see the language of the Connecticut Supreme Court of Errors in Grievance Comm. v. Rottner, 152 Conn. 59, 65, 203 A.2d 82, 84 (1964) (“When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his
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Providing a disclosure and consent option does not accomplish the task of eliminating independent adoption problems, particularly those of conflicting interests. In fact, an examination of the ramifications of disclosure and consent reveals that these provisions often generate problems for each party associated with a lawyer-facilitated independent adoption.

C. Client Confidences

A corollary to the disclosure and consent issue, and hence of conflicting interests, is the issue of client confidences, a potential problem that has figured prominently in at least one independent adoption case.¹⁰⁶

A long-standing policy of the legal profession¹⁰⁶ provides that lawyers should preserve the confidences and secrets of their clients.¹⁰⁷ This general policy is supplemented and reinforced by the various Ethical Considerations and Disciplinary Rules of Canon 4 of the Model Code and by Rule 1.6 of the Model Rules.¹⁰⁸

*Arden v. State Bar*¹⁰⁹ illustrates the relationship between the issues of disclosure and consent and client confidences. In *Arden*, with the consent of the natural mother, the lawyer represented both the natural mother and the prospective adoptive couple.¹¹⁰ One result of this dual representation was the loss of client confidentiality regarding communications between the natural mother, the prospective adoptive couple, and the lawyer.¹¹¹ The California Supreme Court discussed the rationale underlying two prior California deci-

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¹⁰⁶. See, e.g., CANONS OF PROFESSIONAL ETHICS Canon 11 (1908); ABA Comm. on Professional Ethics and Grievances, Formal Op. 250 (1943).
¹⁰⁷. MODEL CODE, supra note 9, at Canon 4.
¹⁰⁸. For example, EC 4-5 states:

A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. . . . Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

¹⁰⁹. Id. at EC 4-5 (footnotes omitted); see, e.g., id. at DR 4-101(B)(1)-(3); see also MODEL RULES, supra note 11, at Rule 1.6 (Confidentiality of Information). For the Model Code's definitions of "confidence" and "secret," see MODEL CODE, supra note 9, at DR 4-101(A).
¹¹⁰. 52 Cal. 2d 310, 341 P.2d 6 (1959).
¹¹¹. Id. at 313-14, 341 P.2d at 8.
¹¹². See id. at 319, 341 P.2d at 11.
that the lawyer's "common employment . . . removed the communications of the parties to one another and to the attorney from the privileged category"—and determined that the rule of the prior cases was applicable to Arden. This determination was a significant factor in the court's decision that the lawyer had not violated Rule 5 of the state Rules of Professional Conduct, which provided that:

a member of the State Bar shall not accept employment adverse to a client or former client, without the consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client.

The court found that the dual representation in Arden had served to eliminate confidentiality of communications between the parties and, accordingly, held that Rule 5 had not been violated.

The Arden case raises the question of whether the parties to an independent adoption are cognizant of the fact that they may be consenting to loss of the confidential status of their communications relating to the adoption. The ultimate question then becomes how a lawyer in these situations, even with "consent," can adhere to the Model Code's prohibition against using client confidences or secrets to the client's disadvantage or for the advantage of a third person.

D. Advertising and Solicitation

Historically, it has been considered unethical for lawyers to directly solicit employment. While this viewpoint still generally

113. Arden, 52 Cal. 2d at 318, 341 P.2d at 11.
114. Id. at 318-19, 341 P.2d at 11.
115. Id. at 318, 341 P.2d at 11; cf. MODEL CODE, supra note 9, at EC 4-5 ("Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure." (footnote omitted)). But cf. MODEL RULES, supra note 11, at Rule 1.6(a) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . . .").
116. See Arden, 52 Cal. 2d at 318-19, 341 P.2d at 11.
117. MODEL CODE, supra note 9, at DR 4-101(B).
prevails,\textsuperscript{119} confusion has pervaded the area, prompted in large part by the 1977 United States Supreme Court decision in \textit{Bates v. State Bar}\textsuperscript{120} and its progeny.\textsuperscript{121} As an outgrowth of these decisions, and in an attempt to fulfill dual goals of providing the public with both legal information and the opportunity to make informed judgments regarding the selection of legal counsel,\textsuperscript{122} lawyer advertising is now permitted, albeit with certain restrictions.\textsuperscript{123} General information concerning the lawyer and his practice, disseminated to the public at large, is usually acceptable.\textsuperscript{124} In contrast, information directed toward specific persons in an effort to appeal to their particular legal needs, with the ultimate goal of securing them as clients, usually falls within the area of improper solicitation.\textsuperscript{125} Disciplinary Rule 2-103(A) of the Model Code prohibits a lawyer from recommending the employment of his services to laymen who have not sought legal advice or representation.\textsuperscript{126} Lawyers have also been restricted in

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\item \textit{Professional Conduct, Op. 72-2} (1972);
\item \textit{Canon of Professional Ethics} Canon 27 (1967) ("It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations."); id. at Canon 28 ("It is disreputable . . . to breed litigation by seeking out those with . . . grounds of action in order to secure them as clients, or to employ agents or runners for like purposes . . .").
\item See, \textit{e.g.}, \textit{Model Code, supra} note 9, at EC 2-3, EC 2-4, DR 2-103(A); \textit{infra} notes 141-42 and accompanying text.
\item 433 U.S. 350, 384 (1977) (lawyers' "truthful advertis[ing] concerning the availability and terms of routine legal services" has first amendment protection, subject to "reasonable restrictions on . . . time, place, and manner of advertising").
\item \textit{In re Primus}, 436 U.S. 412, 424, 432-33, 434, 437-39 (1978) (reversing a South Carolina Supreme Court decision that disciplined an ACLU-affiliated lawyer who, after advising persons of their legal rights, communicated to one of those persons an offer of available free legal representation through the ACLU; solicitation on behalf of nonprofit organizations engaging in litigation for "political expression and association" is constitutionally-protected "expressive and associational conduct" that may be regulated only with "narrow specificity" (citations omitted)); \textit{Ohralik v. Ohio State Bar Ass'n}, 436 U.S. 447, 449, 459, 468 (1978) ("[T]he State . . . constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent"; such conduct by lawyers "is subject to regulation in furtherance of important state interests").
\item See \textit{Model Code, supra} note 9, at EC 2-1, EC 2-3, EC 2-8; \textit{see also} \textit{Bates v. State Bar}, 433 U.S. 350, 377 (1977) ("allowing restrained advertising would be in accord with the bar's obligation" embodied in EC 2-1).
\item See \textit{Model Code, supra} note 9, at DR 2-101 to 2-105. \textit{See generally id.} at EC 2-8 to 2-14 (provisions dealing with the issue of lawyer advertising).
\item \textit{See id.}
\item \textit{Model Code, supra} note 9, at DR 2-103(A); \textit{cf.} N.J. State Bar Ass'n Advisory
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their utilization of persons or organizations that would serve to recommend the lawyers to laymen.  

When applying these general guidelines to specific day-to-day practices of lawyers, it becomes difficult to ascertain exactly what conduct will cross the border to become "improper solicitation rather than permitted advertising." The outer limits of the area may be relatively easy to envision: a lawyer making general announcements regarding his practice is engaged in acceptable conduct, while a lawyer who directly contacts a pregnant woman with an offer to represent her in securing an independent adoption of her baby would likely be acting improperly. Yet other forms of lawyer contact with the public in the independent adoption process are more difficult to classify. For example, the result is unclear when a lawyer himself does not directly contact a client, but is "known" in the community as a lawyer who arranges for independent adoption placements. If no compensation passes for such "referrals" and the

Comm. on Professional Ethics, Op. 487 (1981), reprinted in 4 OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS (E. Wypyski ed. Dec. 1983) ("The thrust of DR 2-103(A) is that professional employment must be initiated by the client.").

127. See MODEL CODE, supra note 9, at DR 2-103(A)-(D).


129. These announcements may extend to mentioning areas of the law in which he practices, or even to which he limits his practice, provided that the DR 2-105 form and content requirements specified by the applicable governing agency in each state are met. See infra notes 271-73 and accompanying text.


131. See id.; cf. In re Slater, 8 A.D.2d 169, 186 N.Y.S.2d 558 (1st Dep't 1959). In Slater, a lawyer, inter alia, "inserted advertisements in . . . newspapers soliciting adoptive parents as well as babies to be placed for adoption." Id. at 171, 186 N.Y.S.2d at 560. After a finding that the lawyer was "guilty of acts involving professional misconduct, malpractice and conduct prejudicial to the administration of justice," he was disbarred. Id.

Note also the opinion of the Committee on Professional and Judicial Ethics of the State Bar of Michigan: "A tradesman who represents a prospective buyer may properly seek out an owner, persuade him to sell and negotiate a sale. However, a decision regarding the welfare of children must be made on an entirely different and higher level." Mich. Opinion 156, supra note 46, at 207.

132. Cf. In re Sheaffer, 530 S.W.2d 231 (Mo. 1975). In Sheaffer, the lawyer in an independent placement situation had admitted being involved in previous independent placements from several different states, being contacted by out-of-state lawyers about his handling of independent placements, and being contacted by persons who wanted him to find a baby in return for a substantial sum of money (although the lawyer claimed that he had not and would not participate in baby-selling). Id. at 235. The bar committee and the master appointed in the case urged the Missouri Supreme Court to hold that the lawyer had violated state law, and thereby various canons of professional responsibility, in that he "[held] himself out" as a child-placing agency without being so licensed. Id. at 232, 234-35.
lawyer does not formally "request" another person or group to refer persons to him, the lawyer may not run afoul of prohibitions against improper solicitation.

The Model Code's positive viewpoint on "lawyer referral systems" engenders still more confusion. Despite the fact that DR 2-103(D) limits the use of such "referrals" to particular types of organizations, it might be possible, for example, for a community home for unwed mothers to provide "referrals" to lawyers who could represent the women in independent adoption placements and yet technically fall within the bounds of DR 2-103(D)(1)(b).

With regard to the types of permissible advertising media, the Model Code and the Model Rules are basically similar. However, the type of information that may be included in permitted advertising, while described in a lengthy and detailed Model Code Disciplinary Rule, is treated in a very general manner in the Model Rules, which confine any enumeration of specifics to a paragraph in a comment accompanying Rule 7.2. The Model Rules permit advertising "through written communication not involving solicitation." It urged that it would strain credulity to the utmost to believe that lawyers from distant states would seek out respondent in such matters 'unless he had held himself out and became known as one who could place or find homes for children, and who assisted in causing their change of custody.' Id. at 235. The court, nevertheless, concluded that the charges could not be sustained, in view of the "very general testimony, completely lacking in any details as to what respondent did in those instances, or who the attorneys were, or how they knew of respondent." Id.

Such a decision fails to inhibit, and may in fact encourage, the participation by certain lawyers in unscrupulous independent adoption activities.

133. For the applicable Model Code Disciplinary Rule, see MODEL CODE, supra note 9, at DR 2-103(B).
134. For the applicable Model Code Disciplinary Rule, see id. at DR 2-103(C).
135. See id. at EC 2-15.
136. Such organizations include legal aid or public defender offices operated by various groups and associations, see id. at DR 2-103(D)(1), "military legal assistance office[s]," id. at DR 2-103(D)(2), a lawyer referral service linked to a bar association, id. at DR 2-103(D)(3), or "any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries" so long as certain specified conditions are met, id. at DR 2-103(D)(4) (footnote omitted).
137. "A legal aid office or public defender office: . . . (b) Operated or sponsored by a bona fide nonprofit community organization." Id. at DR 2-103(D)(1)(b).
138. Compare MODEL CODE, supra note 9, at DR 2-101(B) ("publish or broadcast . . . information in print media . . . or over television or radio") with MODEL RULES, supra note 11, at Rule 7.2(a) ("public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through written communication not involving solicitation").
139. MODEL CODE, supra note 9, at DR 2-101(B).
140. MODEL RULES, supra note 11, at Rule 7.2 comment.
the term "solicit" is then "defined" in Rule 7.3.\textsuperscript{142} It is in this area of the Model Rules that confusion can arise. "[C]ontact . . . by letter or other writing, or by other communication directed to a specific recipient" would be included within the general concept of solicitation and could therefore be prohibited.\textsuperscript{143} Yet, "letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful" would not be prohibited as improper solicitation according to Rule 7.3.\textsuperscript{144} This appears to draw a fine distinction that may make it difficult to determine exactly what conduct is prohibited.

Based upon the Model Rules concept, lawyers seeking a "match" for a client in an independent adoption context may simply move toward the wider dissemination of more general materials, as opposed to the specific targeting of potential clients.\textsuperscript{145} It remains to be seen, however, whether this action will prove more difficult to police than the more detailed and specifically enumerated factors in the Model Code. Whenever such a lack of clarity exists, the potential for unscrupulous activity arises. Possible checks on the use of wider advertising campaigns to obtain "matches" may be found, however, in laws of various jurisdictions governing "brokerage" activities and/or advertising to place a child.\textsuperscript{146}

A related factor is the absence in the Model Rules of the geographic controls on advertising that are contained in the Model Code. In order for advertising to be permissible under the Model Code, it is restricted to dissemination only in a lawyer's area of residence or area(s) in which he conducts a significant part of his business.\textsuperscript{147} While the change may have the effect of reducing the adequacy of monitoring and control over the dissemination of advertising materials, it may also make lawyers more cautious about overstepping ethical bounds should they disseminate advertising into states whose laws frown upon certain advertising, solicitation, and/or...
independent placement activities.

In examining and evaluating the Model Rules advertising and solicitation provisions and their potential impact upon lawyers in the independent adoption field, it is important to note that solicitation is prohibited only "when a significant motive for the lawyer's [soliciting professional employment] is the lawyer's pecuniary gain."\footnote{148} Such words of limitation introduce the element of intent into the prohibition against solicitation. Under such a limitation, a lawyer might argue that his activities in seeking a "match" for a client desirous of an independent adoption were undertaken mainly as a helpful service, rather than solely with an eye toward pecuniary gain. Such a position would acquire greater validity in the case of a lawyer whose professional relationship with the client had been a long-standing one. While unscrupulous lawyers may be tempted to utilize this provision to justify solicitation activities, the most likely result of the provision is to militate against undesirable "baby-selling" practices, in which the independent adoption transaction is viewed solely as a business proposition.\footnote{149} If a lawyer arranges an independent placement primarily to obtain pecuniary benefits, Rule 7.3 should limit his ability to reach potential "matches."

As in other legal fields, lawyers engaging in independent adoptions should utilize advertising methods in order to enhance the legal knowledge of the public and to assist the public in making an informed decision in the selection of legal counsel. They should not, however, utilize advertising methods in order to facilitate acting as "brokers," providing more intermediary services than legal advice.\footnote{150} Applying the fundamental principles upon which advertising and solicitation guidelines are based may assist individual lawyers in making a decision as to whether or not they would want to become actively involved in independent adoption placement. It may not, however, be the ultimate solution for others to use in judging a law-

\footnote{148} Model Rules, supra note 11, at Rule 7.3.

\footnote{149} For a discussion of certain undesirable solicitation practices associated with independent placements, see N. Baker, supra note 27, at 1-5, 7; L. Wishard & W. Wishard, supra note 4, at 105; Note, supra note 21, at 48-51; Klemesrud, Adoption Costs Soar as Births Decline, N.Y. Times, Feb. 20, 1973, at 1, col. 6, reprinted in 121 Cong. Rec. 12209 (1975).

\footnote{150} Belief that the latter situation exists may provide an impetus for the utilization of outside services, in order to limit a lawyer's contribution in the area of independent adoptions to strictly legal services. See infra notes 278-83 and accompanying text. For a discussion of basic principles underlying advertising and solicitation guidelines, see supra notes 118-23 and accompanying text.
yer's conduct, since it requires at least some examination of a lawyer's motives and intent, which are difficult areas in which to apply easily workable standards.

E. Fees

The question of independent placement fees is a complex and nebulous one which appears deceptively simple when first examined. The Committee on Professional and Judicial Ethics of the State Bar of Michigan has stated that "[t]here is no place in this kind of a situation for finder's fees, commissions or bonuses," declaring that it is "not only professionally unethical, but morally wrong" for such a practice to prevail in the context of the adoption of children.\textsuperscript{151} The view of the Chicago Bar Association Committee on Professional Responsibility, as expressed in their Opinion 75-35,\textsuperscript{152} is that a lawyer for the adopting parents may not properly "accept or receive a fee or other consideration from the natural parents for any advice or service provided to them."\textsuperscript{153}

These seemingly clear-cut positions of disapproval regarding the passage of money in lawyer-facilitated independent adoptions have been echoed in several cases.\textsuperscript{154} In a 1976 New York independent adoption case, \textit{In re Adoption of E.W.C.},\textsuperscript{155} a natural mother sought
dismissal of an adoption proceeding based, *inter alia*, upon her claim that the adoptive parents' attorney illegally "placed out" her child in return for compensation. While the court ultimately dismissed the natural mother's petition, the opinion embodied strong language of disapproval concerning the passage of money in independent adoptions. The court cited a report of a special committee of the New York State Legislature which stated:

> Where [independent adoption placements] involve the payment of money in consideration of the placement, they are commonly referred to as 'black market' or 'bootleg' placements.

. . . .

Insofar as the activities of intermediaries are concerned . . . where they involve the payment or receipt of money they are unjustifiable and should be prohibited. The buying and selling of human beings was supposed to have been stopped in this country in 1865. Your Committee can see no justification for permitting trafficking in babies.

The *E.W.C.* court declared that the dangers associated with independent placements multiply with the increase in profit.

The court in a later New York case, *People v. Michelman*, also attempted to assume a strict posture in opposing the passage of monies in independent adoptions. In *Michelman*, a lawyer was indicted for illegally placing out children for adoption and receiving

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156. "The term 'place out' means to arrange for the free care of a child by a family other than the child's parent, stepparent, grandparent, brother, sister, uncle or aunt or legal guardian for the purpose of adoption or for the purpose of providing care." *Id.* at 75, 389 N.Y.S.2d at 751 (citation omitted).

157. *Id.* at 68, 75, 389 N.Y.S.2d at 746, 751. Although the attorney himself indicated that "a considerable amount of money had been paid," exact figures were not provided. *Id.* at 67, 389 N.Y.S.2d at 746.

158. The court found that the potential law violation involved would be grounds for criminal sanctions, but not for disallowing the adoption. *Id.* at 76, 389 N.Y.S.2d at 752. *But cf. In re Anonymous*, 46 Misc. 2d 928, 261 N.Y.S.2d 439 (Dutchess County Fam. Ct. 1965) (independent placement by attorney in violation of "placing out" provisions resulted in disapproval of adoption).


161. The dangers, as viewed by the court, consist of "the lack of any social concern for the rights of the mother and the failure to select proper adoptive parents for the child." *E.W.C.*, 89 Misc. 2d at 76, 389 N.Y.S.2d at 751.

162. *Id.*

compensation for the placements. The indictments dealt with three separate independent placements, in which the prospective adoptive parents paid the defendant-lawyer sums ranging from $7000 to $9000.164 The Michelman court's view that "[t]he defendant [-attorney]'s status as an 'intermediary' is tainted by the 'fees' charged"165 is an outlook which has been reflected in the opinions of other courts.166

Upon an initial examination of these court opinions, one might conclude that the courts echo the ethics opinions' clear-cut negative stance on fees. If that were true, the fee issue would at least acquire clarity, irrespective of whether or not one believed the conclusion to be desirable; such a definitive conclusion, however, has not actually materialized. A closer examination of the case law illustrates that the fee issue is far from clear.

A number of courts have determined that certain fees are permissible, rather than prohibiting the passage of any and all monies in independent adoptions.167 In light of the necessity for lawyers to be compensated for the performance of their services, the many variables that must be examined in the evaluation of a "proper" lawyer's fee,168 and the fact-sensitive nature of independent placement activities on the part of intermediaries, courts have found themselves grappling with the nature and extent of permissible fees.

The Superior Court of New Jersey left room for the passage of some monies when the court interpreted a state law on independent adoption placements as allowing the payment of "medical or hospital bills related to the birth or any illness of the child."169 Nevertheless,

164. Id. at 298, 403 N.Y.S.2d at 418.
165. Id. at 300, 403 N.Y.S.2d at 419.
166. See In re Slater, 8 A.D.2d 169, 186 N.Y.S.2d 558 (1st Dep't 1959) (lawyer engaged in the unauthorized placement of children for adoption and the receipt of compensation for same; in two particular placements, sums of $1750 and $1800 were received; lawyer disbarred). In Slater, the referee found the lawyer to have "barter[ed] children for profit." Id. at 171, 186 N.Y.S.2d at 560. See also In re Markowitz, 393 Mich. 6, 222 N.W.2d 504 (1974) (lawyer acted as "middleman" in adoption proceedings; $500 fee received in connection with one proceeding; lawyer suspended for two years for various acts of misconduct stemming from independent adoptions). In Markowitz, the court stated: "[The defendant] has profited from his position as an attorney by acting as a[n adoption] middleman . . . . He has abused the process in a piratical fashion." Id. at 10, 222 N.W.2d at 504.
167. See infra notes 169-77 and accompanying text.
168. Some of these variables are: the effort and time expended by the lawyer; the lawyer's skill and reputation; the fee generally charged in the area; the results obtained; and the particular lawyer-client relationship involved. See Model Code, supra note 9, at DR 2-106 (A)-(B); Model Rules, supra note 11, at Rule 1.5(a).
the New Jersey court characterized the lawyer's fee in the case before it as "more like a broker's fee or finder's fee." An Illinois court ruled that a state statute "[did] not prohibit the receipt of compensation for legitimate legal services performed in an adoption case." Certain medical and hospital charges, as well as certain legal fees, were ruled to be "allowable" under the statute. The court concluded:

[W]here a lump sum is paid to an attorney in an adoption case a certain amount may legitimately represent attorney fees and expenses and costs which will be disbursed through the attorney. Thus, the entire amount requested may not represent compensation paid for the placing out of the child . . . . [I]f the entire fee fell within the exempted categories no violation of the statute would exist.

Even the court in In re E.W.C., opposed as it was to "the profit motive in adoptions," definitively recommended referral to criminal or disciplinary authorities only in the event that the fees received by the lawyer were "clearly excessive and . . . not related to the lawyer's actual services."

Such attempts to build flexibility into the issue of independent adoption fees create more problems than they solve. While in many independent adoption placements it may be possible to clearly differentiate between "medical bills" and a "broker's fee," it is not diffi-

170. The lawyer itemized $2000 as an "attorney's fee," following deductions for expenses associated with the adoption. Id. at 594-95, 398 A.2d at 939.
171. Id. at 596, 398 A.2d at 940.
172. People v. Schwartz, 64 Ill. 2d 275, 284, 356 N.E.2d 8, 12 (1976) (emphasis added) (statute proscribing persons other than agencies from requesting, receiving, or accepting compensation for placing out a child held not unconstitutionally vague or overbroad), cert. denied, 429 U.S. 1098 (1977). In light of the previous discussion of Chicago Opinion 75-35, see supra notes 152-53 and accompanying text, it is interesting to note that Schwartz came to the Illinois Supreme Court on appeal from the Circuit Court of Cook County, 64 Ill. 2d at 279, 356 N.E.2d at 10, which county encompasses the city of Chicago.
173. Schwartz, 64 Ill. 2d at 284-85, 356 N.E.2d at 12 (emphasis added).
174. Id.
176. Id. at 77, 389 N.Y.S.2d at 752.
177. Id. The court declared that such a fee would constitute a violation of the Code of Professional Responsibility. Id.
cult to conceive of cases in which monies paid might not be applied solely to such “legitimate” purposes, particularly in cases involving unscrupulous lawyer-intermediaries. One must consider that the existence of a “broker’s fee” may not always be ferreted out of situations as potentially murky as independent adoption placements. When a “professional fee” is charged, it is often difficult to ascertain whether the fee went toward “professional services” or actually went for the adoption placement activity (or, as perhaps most frequently happens, went for some combination of the two).

A 1965 decision of the Supreme Court of Florida, Florida ex rel. Lee v. Buchanan, stands as a microcosm of the difficulties associated with attempts to draw such fine distinctions in this area. It was the opinion of the Buchanan majority that a statute which classified as illegal the assessment or receipt of compensation for the placement of a child for adoption, while at the same time exempting “reasonable charges or fees for hospital or medical services . . . or for legal services,” was “too vague and indeterminate to establish for guidance of attorneys an ascertainable standard of guilt.” Consequently, the statute was declared void, on the ground that it deprived any lawyer convicted under it of due process of law. The court examined constitutional factors underlying vagueness standards, as well as the tendency of lawyers to be “individualistic” in the determination of legal fees. This examination led the court to emphasize the inconsistency and confusion, both in the judicial system and in the legal profession, that such a statute would engender.

178. Grove, supra note 19, at 126; see also id. at 129 ("[F]ees . . . solely for professional . . . services' is subject to many interpretations.") (quoting S. 624, 89th Cong., 1st Sess. (1965)).
179. The E.W.C. court itself acknowledged the intricacy involved in definitively classifying a lawyer's independent adoption fee as "clearly excessive" and "not related to the lawyer's actual services," in that the "placement" versus "professional services" distinction is often a difficult one to draw. See E.W.C., 84 Misc. 2d at 77, 389 N.Y.S.2d at 752.
180. 191 So. 2d 33 (Fla. 1966).
181. Id. at 34 n.1 (quoting FLA. STAT. ANN. § 72.40(2)(a) (repealed 1973)).
182. Id. at 37.
183. Id.
184. Id. at 34-36.
185. Id. at 37.
186. Id. In the words of the court:
One jury and judge, applying the statute, could find as unreasonable a given fee, while another jury and judge under identical circumstances could conclude that a larger fee was proper. . . . An attorney, searching earnestly for precedents in an effort to keep to what is safe, could not possibly know but could only speculate as to
Even with these apparent contradictions and inconsistencies, the issue of monies paid and compensation rendered in independent adoption placements will likely continue to be utilized by courts as a significant factor in their attempts to demarcate "good" versus "bad" independent placement practices. Unfortunately, the vagueness of the issue and the lack of clear boundaries for acceptable lawyer conduct may frequently create problems for lawyers.

F. Lawyer Competence

The Model Code provisions regarding lawyer competence, as embodied in Canon 6 ("A Lawyer Should Represent a Client Competently"), raise an additional issue for the lawyer involved in the independent adoption field. Since an independent adoption placement may well involve a relatively small degree of legal skills, and a large degree of behavioral science, social work, counseling, and investigatory skills, questions arise concerning the competence of a lawyer to deal with an independent adoption placement. These questions are prompted by Model Code DR 6-101(A)(1), which prohibits

why one lawyer was adjudged a felon and the conduct of another deemed not violative, when the fee charged by the latter was perhaps considerably in excess of the one charged by the former under a seemingly parallel situation.

187. Commentators have raised serious questions as to whether or not any lawyer is "competent" to handle such a complex situation, which is often beyond the scope of the legal profession. See, e.g., S. Katz, When Parents Fail 122 (1971) ("even 'a lawyer who is well equipped to handle the legal aspects of adoption may not be qualified to decide many questions included in placing a child which properly lie within the realm of specialized social knowledge" (emphasis added in original) (quoting Hearings on Juvenile Delinquency Before a Subcomm. of the Senate Comm. on the Judiciary, 84th Cong., 1st Sess. 3 (1955) (remarks of Sen. Kefauver)); Beral & Beral, The Case for Agency Adoptions, 41 L.A.B.A. Bull. 452, 454-55 (1966); Elson & Elson, Lawyers and Adoption: The Lawyer's Responsibility in Perspective, 41 A.B.A. J. 1125, 1125-26 (1955).

The overriding importance of the competence of a lawyer was discussed in Professional Responsibility: A Guide for Attorneys, which stated that the trust a client must place in his lawyer "gives rise to an ethical obligation on the part of lawyers to perform competently" and continued:

Unlike shoddy merchandise, poor legal advice or advocacy cannot be returned. The consequences of poor legal advice are far more serious than a disappointed or angry client disenchanted with the profession. There may be an irreparable loss of life, liberty, or property. Moreover, incompetent or slovenly performance or failure to protect a client's interest necessarily reflects discredit on the profession as a whole. The concern of the profession transcends the vindication by litigation of the rights of clients wronged by lawyers.


188. See, e.g., S. Katz, supra note 187, at 122; Beral & Beral, supra note 187, at 452, 454-55; Elson & Elson, supra note 187, at 1126.
a lawyer from handling "a legal matter which he knows or should know that he is not competent to handle."\(^{189}\)

Ethical Consideration 6-3 is more flexible, permitting a lawyer to accept employment in an area of the law in which he is unqualified if the lawyer "expects to become qualified through study and investigation."\(^{189}\) This provision, however, may in fact have no application to the independent adoption field, based on the view that independent adoptions are simply beyond the scope of the legal profession. Belief in that view would lead to the conclusion that a lawyer cannot simply study social welfare skills and thereby gain the necessary proficiency to become competent in the field.\(^{191}\) This view was echoed in the case of \textit{In re Anonymous},\(^{192}\) wherein the court, in refusing to approve an independent adoption arranged by a lawyer, stated: "The motivation and professional approach which welfare departments and authorized adoption agencies can give cannot be substituted for one unskilled in social work, no matter how benevolent his motives, in investigating and evaluating the material elements of an adoption proceeding in placing a child in a family unit."\(^{193}\)

Both the Model Code and the Model Rules state that a lawyer not competent in a legal matter may meet competence requirements if he associates himself with another lawyer who is so competent.\(^{194}\) Yet one must question whether any lawyer could acquire compe-

\(^{189}\) \textit{Model Code}, \textit{supra} note 9, at DR 6-101(A)(1). The Model Code does include a provision for "associating with him a lawyer who is competent to handle [the legal matter]." \textit{Id. But see supra} note 187.

\(^{190}\) \textit{Model Code}, \textit{supra} note 9, at EC 6-3 (emphasis added).

In the Model Rules, the general tone of the Comment to Rule 1.1 centers around the permissibility of a lawyer accepting a matter even if he is unfamiliar with that type of matter and has no "special training or prior experience," if he can "through necessary study" and "reasonable preparation" acquire an adequate degree of competence. \textit{See Model Rules, supra} note 11, at Rule 1.1 comment (Legal Knowledge and Skill). \textit{But see supra} note 187.

\(^{191}\) \textit{See supra} notes 187-88 and accompanying text.

General support for this view may be inferred from the following Model Code language: "Proper preparation and representation may require the association by the lawyer of professionals in other disciplines." \textit{Model Code, supra} note 9, at EC 6-3.

Additionally, the specific language of the Model Code provisions regarding "legal matter," \textit{id.} at DR 6-101(A)(1) (emphasis added), and "any area of the law," \textit{id.} at EC 6-3 (emphasis added), may add fuel to the argument of opponents to lawyer involvement in independent adoption placement; specifically, as to whether placing or assisting in the placement of a child via independent means is actually a legal matter or whether the legal components of the transaction are but a minor part of a larger, more social-work-related process.

\(^{192}\) 46 Misc. 2d 928, 261 N.Y.S.2d 439 (Dutchess County Fam. Ct. 1965).

\(^{193}\) \textit{Id. at} 930, 261 N.Y.S.2d at 442.

\(^{194}\) \textit{See Model Code, supra} note 9, at DR 6-101(A)(1); \textit{Model Rules, supra} note 11, at Rule 1.1 comment (Legal Knowledge and Skill).
tency sufficient to satisfy such an "associate's" role. Particularly relevant to the issue of independent adoption competence is the Model Code EC 6-3 declaration that "[p]roper preparation and representation may require the association by the lawyer of professionals in other disciplines." This declaration must stand as a reference point for evaluating the length to which lawyers in independent adoptions may need to go in order to fulfill competence requirements. This interpretation is compelled by the fact that the Model Code fails to provide an actual definition of "competence," particularly for conduct in a field not strictly "legal" in nature.

The potential need for utilization of outside professionals in order to meet competence requirements is conspicuously absent from the Model Rules competence provisions. In contrast to the Model Code, therefore, the Model Rules' favorable attitude toward acquiring competence through study and preparation is not tempered by a warning that study and preparation may sometimes be insufficient without the involvement of non-legal professionals. The Model Rules rely more upon legal expertise and personnel, a view that may be dangerous when applied to such a complex and multi-dimensional field as independent adoption. While the comment governing the role of a lawyer as an "advisor" acknowledges that "[m]atters that go beyond strictly legal questions may also be in the domain of another profession," the Model Rules treat the involvement of outside professionals as a mere recommendation to be given to a client if a lawyer believes that other lawyers would do so when acting in an advisory role. In contrast to the Model Rules, the Model Code

195. See supra notes 187-93 and accompanying text. On the other hand, proponents of lawyer involvement assert that many issues dealt with by lawyers involve at least some, and often extensive, specialized knowledge in non-legal areas placed into an overall legal framework. See Gerberding, Advisors or Technicians?, 24 RES GESTAE 97, 97 (1980) (Message of the President of the Indiana State Bar Association) ("In fact, frequently, our counseling tempts us to stray beyond what is strictly the legal field. In domestic relation matters we come close to psychology and in representing business clients or in estate planning we are often asked to give investment advice.").

196. MODEL CODE, supra note 9, at EC 6-3 (emphasis added).

197. See MODEL RULES, supra note 11, at Rule 1.1.

198. See supra note 190.

199. MODEL RULES, supra note 11, at Rule 2.1 comment.

For a discussion of the role(s) of a lawyer in the context of the Model Rules, see infra notes 223-46 and accompanying text.

200. MODEL RULES, supra note 11, at Rule 2.1 comment (Scope of Advice).

201. Id. (Scope of Advice) (emphasis added). It is interesting to note that the Model Rules, rather than framing the use of outside professionals in the context of a lawyer meeting competence requirements, merely place a general mention of such utilization within the Com-
militates in favor of an increased utilization of outside professionals and exhibits greater willingness to acknowledge a point at which a lawyer's legal expertise may be insufficient to assure a client of competent representation.\textsuperscript{202}

G. Impropriety/Misconduct

A lawyer's participation in independent adoptions may also implicate the wide-ranging and interrelated issues of impropriety and misconduct. In the area of misconduct, the Model Code provisions include general statements of standards\textsuperscript{203} and principles,\textsuperscript{204} and a disciplinary rule comprised of six categories of prohibited conduct.\textsuperscript{205} Broad generalities regarding their relationship to independent adoption activities are difficult to formulate since the boundaries of these categories are not clear-cut. Consequently, lawyers must continually view their specific conduct in light of these provisions and make factsensitive judgments regarding the point at which their conduct enters the realm of misconduct.

While an assessment of the Model Rules provisions governing misconduct\textsuperscript{206} reveals substantial similarities to the Model Code,\textsuperscript{207} certain key divergences are evident. For example, the Model Code prohibition on "[e]ngag[ing] in any other conduct that adversely reflects on [the lawyer's] fitness to practice law"\textsuperscript{208} has undergone an important modification in the Model Rules. While the Model Rules do stress that a lawyer's conduct should be judged in terms of the extent to which it impugns the lawyer's fitness to practice,\textsuperscript{209} an im-

\textsuperscript{202} See MODEL Code, supra note 9, at EC 6-3.

\textsuperscript{203} See id. at Canon 9 (provisions governing the avoidance of professional impropriety or its appearance).

\textsuperscript{204} See id. at EC 1-5 (dealing with the principles of conduct to be maintained by a lawyer).

\textsuperscript{205} Id. at DR 1-102.

\textsuperscript{206} MODEL Rules, supra note 11, at Rule 8.4.

\textsuperscript{207} Compare id. at Rule 8.4(a) with MODEL Code, supra note 9, at DR 1-102(A)(1)-(2) (regarding violation of a disciplinary rule, either personally or through the actions of another); compare MODEL Rules, supra note 11, at Rule 8.4(e) with MODEL Code, supra note 9, at DR 1-102(A)(4) (regarding "conduct involving dishonesty, fraud, deceit, or misrepresentation"); compare MODEL Rules, supra note 11, at Rule 8.4(d) with MODEL Code, supra note 9, at DR 1-102(A)(5) (regarding "conduct . . . prejudicial to the administration of justice").

\textsuperscript{208} MODEL Code, supra note 9, at DR 1-102(A)(6) (footnote omitted).

\textsuperscript{209} See MODEL Rules, supra note 11, at Rule 8.4(b); id. at Rule 8.4 Comment. The Comment rejects a system of judging conduct based upon the Model Code concept of "moral turpitude." MODEL Code, supra note 9, at DR 1-102(A)(3). The Comment declares that this
portant limitation appears: such conduct must be "criminal" in order for it to be actionable as "professional misconduct" under Rule 8.4(b) of the Model Rules.211

This difference between the ethics documents may prove significant in the independent adoption context. Since "gray market" adoption placements are characteristically viewed as technically not illegal,212 curbs on lawyer involvement in "gray market" placements appear to be more difficult to obtain under the Model Rules scheme.213 Under the Model Rules, unless a lawyer involved in independent placements has committed a violation of a specific Rule, has engaged in dishonesty, fraud or misrepresentation, or has committed a crime which reflects on his fitness to practice, the chances for reaching his conduct as an act of "professional misconduct" would appear to be minimal. The Model Rules' retention of the concept of "engag[ing] in conduct that is prejudicial to the administration of justice"214 may prove useful to opponents of lawyer involvement in independent adoption placement, but only if those opponents are successful in placing certain independent placement conduct within the category of actions which can be classified as detrimental or injurious to administering justice.215

concept "can be construed to include offenses concerning some matters of personal morality." MODEL RULES, supra note 11, at Rule 8.4 comment. For further discussion of this issue, see infra note 213.

210. MODEL RULES, supra note 11, at Rule 8.4(b).

211. See id. This limitation does not form a part of DR 1-102(A)(6) of the Model Code; note the Model Code language regarding "any other conduct." MODEL CODE, supra note 9, at DR 1-102(A)(6) (emphasis added); see supra note 208 and accompanying text.

212. See L. McTAGGART, supra note 25, at 3-4; J. PLUMEZ, supra note 19, at 70, 71; L. WISHARD & W. WISHARD, supra note 4, at 104-05; Comment, supra note 3, at 629-30, 630 n.7.

213. The Model Code provides opportunities for disciplining lawyers based on moral judgments of their conduct, even if such conduct is technically legal. See MODEL CODE, supra note 9, at DR 1-102(A)(6); id. at EC 1-5 ("[A lawyer] should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct." (footnote omitted)). Yet, the Model Rules criticize professional disciplining for activities involving "personal morality." See MODEL RULES, supra note 11, at Rule 8.4 comment ("offenses . . . hav[ing] no specific connection to fitness for the practice of law"). The Model Rules instead place their emphasis on discipline for conduct which would adversely affect a lawyer's fitness to practice, declaring that "a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice." Id.

214. MODEL RULES, supra note 11, at Rule 8.4(d); cf. MODEL CODE, supra note 9, at DR 1-102(A)(5) (corresponding Model Code provision).

215. Independent placements, particularly those in which compensation is involved, have been criticized for their ability to obtain children for certain couples when other couples, unable or unwilling to utilize independent placement, cannot obtain children. See In re N.P., 165 N.J. Super. 591, 597, 398 A.2d 937, 940 (Super. Ct. 1979) ("[Plaintiffs] have used their
Impropriety is perhaps the most amorphous category of conduct in the ethics area. It has been embodied in the interrelated Model Code precepts of avoiding even the appearance of professional impropriety and avoiding conduct which, in the eyes of the public, reflects negatively upon the ethics of the profession. Because the legal profession seeks to avoid not only impropriety in its many manifestations, but also the very appearance of impropriety, this segment of the Model Code often serves to control conduct that may not be reached under other ethics categories. This function was specifically noted by a Task Force of the Indiana State Bar Association: "The ingenious minds of lawyers from time to time find ways to evade the spirit of the [Model] Code while complying with the letter of the [Model] Code except for Canon 9 [A Lawyer Should Avoid Even the Appearance of Impropriety]."

It is significant, therefore, that the Model Rules no longer specifically stress the "appearance of impropriety" concept. The absence of this concept leads to the conclusion that opportunities for controlling lawyers' questionable independent placement conduct will
be fewer under the Model Rules than under the Model Code. When such an absence is combined with the Model Rules misconduct provisions\textsuperscript{222}, the result may well be a substantial decrease in control opportunities under the Model Rules.

H. The Role(s) of a Lawyer

While not falling within the technical category of “problems” heretofore discussed\textsuperscript{223}, the view of the lawyer’s role prevailing at any particular time serves as an underlying framework for evaluating the propriety and/or extent of lawyer involvement in the independent adoption field. The dramatic distinction between the postures of the Model Code and the Model Rules with regard to the role(s) of a lawyer must, therefore, be discussed.

Although the Model Code never specifically rejects the notion of multiple roles for lawyers, its references to non-adversary roles are limited\textsuperscript{224}. Additionally, unlike the Model Rules, the general organization of the Model Code does not formally recognize multiple roles. The Model Rules unequivocally reflect the growing view that lawyers have multiple roles, functions, and responsibilities and are no longer confined to a strictly adversary role\textsuperscript{225}. The drafters’ different perception of the various roles of a lawyer is embodied in the very structure of the Model Rules. The document is divided into eight major topic areas, with a general heading beginning each. In addition to a topic area entitled “Advocate,”\textsuperscript{226} there is a separate topic area entitled “Counselor.”\textsuperscript{227} This important role distinction is further emphasized by the descriptions of two of the rules located under the “Counselor” heading: Rule 2.1 is captioned “Advisor” and Rule 2.2 is captioned “Intermediary.”\textsuperscript{228} These role distinctions are partic-

\textsuperscript{222.} Model Rules, supra note 11, at Rule 8.4; see supra text accompanying notes 209-15.

\textsuperscript{223.} See supra notes 69-222 and accompanying text.

\textsuperscript{224.} See Model Code, supra note 9, at EC 5-20 (lawyer acting as “impartial arbitrator or mediator” should not act as counsel to either party); see also id. at EC 7-3, 7-5. In addition, the EC 7-3 and EC 7-5 references specifically discuss the “advisor” role in the context of advising on the law, rather than a more wide-ranging concept of an “advisor.”


\textsuperscript{226.} Model Rules, supra note 11, at Rules 3.1 to 3.9.

\textsuperscript{227.} Id. at Rules 2.1 to 2.3.

\textsuperscript{228.} Id. at Rules 2.1, 2.2. While the view that a lawyer may have roles other than that of an advocate is not a new one, see Model Code, supra note 9, at EC 7-3; Bowman, supra note 225, at 296-98, the Model Rules’ treatment emphasizes and formalizes the concept. See id. at 298.
ularly relevant to the conduct of lawyers in independent placements. It is helpful, therefore, to examine the content of these provisions of the Model Rules in order to isolate areas that forbode change in the independent adoption field.

Rule 2.1 of the Model Rules specifies that “a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors” in providing a client with “advice.”\footnote{229} The comment to Rule 2.1 declares, however, that “[a] lawyer ordinarily has no duty to initiate investigation of a client’s affairs or to give advice that the client has indicated is unwanted,”\footnote{230} but merely “may initiate advice to a client when doing so appears to be in the client’s interest.”\footnote{231} This provision may discourage lawyers from properly investigating their clients and giving important non-legal advice.\footnote{232}

Under Rule 2.2 of the Model Rules, an intermediary role between clients is permitted under certain specified conditions.\footnote{233} The role of intermediary is said to exist “when the lawyer represents two or more parties with potentially conflicting interests.”\footnote{234} Yet, while

\footnote{229.} \textit{Model Rules}, \textit{supra} note 11, at Rule 2.1; \textit{see also} id. at Rule 2.1 comment (Scope of Advice) (“When [a request for purely technical advice] is made by a client inexperienced in legal matters . . . the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.”).

\footnote{230.} \textit{id.} at Rule 2.1 comment (Offering Advice) (emphasis added).

\footnote{231.} \textit{id.} (emphasis added).

\footnote{232.} Such advice might include medical, psychological, social or financial counseling, all of which are appropriate in adoption placement situations. Yet clients might indicate an unwillingness to be “burdened” with details regarding potential complications, although such complications may include the natural mother's decision to keep her child after its birth, potentially inadequate or nonexistent counseling services, involvement of the natural father, and complications occasioned by the birth of an unhealthy child. \textit{See} J. \textit{McNamara}, \textit{supra} note 21, at 78-79.

\footnote{233.} \textit{Model Rules}, \textit{supra} note 11, at Rule 2.2(a). The lawyer must disclose the various pros and cons of such an arrangement and obtain the consent of all parties. \textit{id.} at Rule 2.2(a)(1). In addition, he must “reasonably [believe] that the matter can be resolved on terms compatible with the clients' best interests,” that “adequately informed decisions” can be made by all parties and that, in the event of lack of success in the matter, “there is little risk of material prejudice to the interests of any of the clients.” \textit{id.} at Rule 2.2(a)(2). Finally, the lawyer must “reasonably [believe] that the common representation can be undertaken impartially” and that it will not impact in an “improper” way on any “other responsibilities” the lawyer may have with regard to any of the clients. \textit{id.} at Rule 2.2(a)(3).

Withdrawal is required by Rule 2.2(c) in the event that any of the above conditions cannot be met (or upon the request of any of the clients). \textit{id.} at Rule 2.2(c).

The lawyer's function when acting as intermediary is to “establish or adjust a relationship between clients on an amicable and mutually advantageous basis” and to “resolve potentially conflicting interests by developing the parties' mutual interests.” \textit{id.} at Rule 2.2 comment.

\footnote{234.} \textit{id.} at Rule 2.2. comment.
the rule allows for lawyers to act as intermediaries under certain prescribed conditions, the tone of the comment to the rule is cautious. It acknowledges that, in certain situations, the risks involved make intermediation "plainly impossible."\textsuperscript{236}

Should intermediation be attempted, the lawyer-intermediary must keep each client adequately informed and must preserve confidentiality regarding information related to the representation.\textsuperscript{236} The comment acknowledges that this involves "a delicate balance" in the intermediary role and declares that intermediation is improper when a lawyer cannot maintain such a balance.\textsuperscript{237} If a lawyer assumes such dual representation, but is subsequently unable to maintain the required balance, a number of problems arise. For example, it may be difficult to ascertain the specific situations that would serve to trigger the withdrawal requirements of Rule 2.2(c).\textsuperscript{238} If the lawyer must withdraw completely from representation of all clients in the independent adoption matter, the creation of such a void cannot help but have negative effects on the parties.\textsuperscript{239} Severe disruptions in the placement process may be the end result of adhering to these Model Rules.

Finally, the Model Rules provisions governing the intermediary role may have a strong impact upon the area of client confidences.\textsuperscript{240}

\textsuperscript{235.} \textit{Id.} Certain factors to be considered when deciding the propriety of intermediation include "whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one." \textit{Id.} In addition, the exact form which the intermediation assumes may be important with regard to its propriety, with the decision based largely upon the particular circumstances of the case. It may be noted, however, that "common representation where the clients' interests are substantially though not entirely compatible" is recognized in the comment to Rule 2.2 of the Model Rules as one form of intermediation. \textit{Id.} Whether such a form of intermediation would be "appropriate" in an independent adoption context must await experience with and interpretation of the Model Rules and their associated comments. In forming a conclusion, however, attention must be paid to the problems of independent placement discussed in this note, particularly the issue of conflicting interests; note, for example, Model Rule 1.7 comment (Other Conflict Situations).

\textsuperscript{236.} \textit{Id.} at Rule 2.2 comment (Confidentiality and Privilege).

\textsuperscript{237.} \textit{Id.} For a discussion of the interrelated issues of client confidences, disclosure and consent, and conflicting interests, see \textit{supra} notes 69-117 and accompanying text.

\textsuperscript{238.} MODEL RULES, \textit{supra} note 11, at Rule 2.2(c).

\textsuperscript{239.} Such withdrawal may be required if the lawyer merely is unable to maintain the requisite standard of impartiality between the parties. \textit{See id.} at Rule 2.2(a)(3), (c).

\textsuperscript{240.} The Model Rules' treatment of confidentiality and privilege in an intermediation context is even more relevant to lawyer-involved independent placements in view of the issues previously discussed in the client confidences section of this note, \textit{see supra} text accompanying notes 105-17, particularly if subsequent litigation should result regarding the placement. For an example of the issues of privilege and client confidences in a lawyer disciplinary context, see \textit{supra} text accompanying notes 109-17.
The comment to Rule 2.2 declares that "the prevailing rule is that as between commonly represented clients the [attorney-client] privilege does not attach."\textsuperscript{241} The drafters' formal acknowledgement of the loss of confidentiality and privilege in an intermediary relationship may negatively affect the parties in a lawyer-involved independent adoption. This result may be partially mitigated, however, by the duty imposed on the lawyer to explain to each client the particular effects of the "common representation" upon the attorney-client privileges.\textsuperscript{242} While the Model Rules give lesser protection to client confidences in an intermediary situation than does the Model Code, the requirement of notice to the parties at least serves to apprise them of what they stand to lose. They may then make a more knowing and rational decision as to whether they wish to take that risk.

It is not clear what effect Rule 2.2 will have on independent adoptions. The detailed nature of the rule, the greater attention paid to the concept of lawyer as intermediary, and the generally favorable light in which the drafters appeared to view the concept may combine to open the door for further use of the intermediary role by lawyers and, consequently, for an increase in the number of independent adoption placements engaged in by lawyer-intermediaries.\textsuperscript{243} It is possible, however, that the rule may actually represent a more restrictive attitude toward the lawyer-intermediary role than that found in the Model Code,\textsuperscript{244} since a substantial amount of Model Rules material illustrates and regulates intermediation, and specifically enumerates requirements to be met by a lawyer seeking to begin or continue as an intermediary.\textsuperscript{245}

The Model Rules provide substantially greater control and regulation over the lawyer-intermediary than does the Model Code.\textsuperscript{246}

\textsuperscript{241} \textit{MODEL RULES, supra} note 11, at Rule 2.2 Comment (confidentiality and privilege) (emphasis added).

\textsuperscript{242} \textit{Id.} at Rule 2.2(a)(1).

\textsuperscript{243} \textit{Cf. id.} at Rule 2.2 code comparison ("There is no direct counterpart to Rule 2.2 in the Disciplinary Rules of the [Model] Code."). \textit{But cf. MODEL CODE, supra} note 9, at EC 5-20 (a lawyer may "serve as an impartial arbitrator or mediator in matters which involve present or former clients" if the lawyer "first discloses such present or former relationships").

With regard to the Code Comparison portion of the Model Rules, the following explanatory statement should be noted: "Research notes were prepared to compare counterparts in the [Model Code] . . . . The notes have not been adopted, do not constitute part of the Model Rules, and are not intended to affect the application or interpretation of the Rules and Comments." \textit{MODEL RULES, supra} note 11, at Scope.

\textsuperscript{244} For a discussion of intermediation and multiple roles in the context of the Model Code, see \textit{supra} notes 224-25 and accompanying text, \textit{infra} note 246 and accompanying text.

\textsuperscript{245} \textit{See supra} note 233.

\textsuperscript{246} With the exception of general provisions relating to multiple employment, see
The greater emphasis in the Model Rules on guidelines governing the parameters of the intermediary role may indicate both a recognition of new potential and a certain wariness. One might, therefore, interpret the Model Rules as reflecting the view that lawyers acting as intermediaries should be regulated to a greater degree than has previously been done.

IV. RECOMMENDATIONS AND POTENTIAL SOLUTIONS

The subject of lawyer involvement in independent adoption placements is complex and often unclear. Guidance is needed to ease the dilemmas faced by well-meaning lawyers involved in private placement adoptions and to prevent unscrupulous lawyers from continuing their activities. Since clear-cut guidelines are not forthcoming from statutes, ethics opinions, or the ethics codes of the profession, other approaches must be examined.

A. Total Bans

As an outer limit on lawyer conduct, some have suggested a total ban on all independent adoptions. As a corollary to such a total ban, another suggestion has been a total prohibition on lawyer involvement in independent adoption placements. While jurisdictions might consider implementing these policies in an effort to inject some element of definitiveness into the field, total bans are not a panacea.

Numerous commentators have recognized that there is a perceived need on the part of the public for independent adoption placements and a desire to have them remain available in some form.

MODEL CODE, supra note 9, at DR 5-105, the Model Code's closest reference to an intermediary role merely advises that a lawyer seeking to act as "an impartial arbitrator or mediator" make prior disclosure of the particular relationships between the involved clients. See id. at EC 5-20.

248. See Beral & Beral, supra note 187, at 452, 454, 456.
250. See, e.g., ADOPTIONS WITHOUT AGENCIES, supra note 20, at 38-39 ("[O]lder couples, or couples with children already in the home, or where the women must continue to work, or where infertility had not been established, or couples who resent the many references the agency requires, etc., have only the independent route to enlarge their families."); N. Baker, supra note 27, at 6; R. Lasnik, supra note 18, at 81; Grove, supra note 19, at 24-25; Leavitt, supra note 30, at 210 (most attorneys in the independent adoption field are responsible and ethical and "have rendered an honorable and invaluable service to children, parents
The main reasons for such public sentiment stem from a dissatisfaction with the agency method of adoption, based on the public's perception of several major problems associated with adoption agencies. Common complaints about agencies from the standpoint of prospective adoptive couples include: long waiting lists with consequently prolonged waits for a child; intricate procedures requiring disclosure of very personal information; overly restrictive criteria for adoption; and a shortage of particular types of children. Natural mothers often fear that agency adoptions will lack privacy, will allow them no opportunity to offer input into the placement, and will fail to provide them with sufficient assistance during their pregnancy and delivery. There is often the additional fear that an agency will not promptly place the child in a good adoptive home and may cause the child to remain in foster care for lengthy periods of time. Those who desire to meet the other parties to an adoption placement, or to learn detailed information about them, often find agency placement inferior to private placement and the community; see also Report of the Cal. State Bar Comm. on Adoptions, supra note 42, at 971-72 (Majority Report) ("Independent adoptions generally are very desirable and necessary procedures.").

251. The perceived problems are general in nature and do not necessarily refer to all adoption agencies, nor to any one agency in particular. Nevertheless, it is significant to note that, in a nationwide study of both public and voluntary adoption agencies, ADoptions Without Agencies, supra note 20, at 16, sixty percent of the agencies "felt that there were problems within their agencies that might deter adopting parents from using their service." Id. at 35. Even if such problems do not actually exist to the degree believed, the public perception of adoption agency problems often leads to the view that independent placement is more desirable.

252. See id. at 35-36; T. Festinger, Why Some Choose Not to Adopt Through Agencies 43 (Metropolitan Applied Research Center, Inc. Monograph No. 1, 1972); L. McTaggart, supra note 25, at 5; L. Wishard & W. Wishard, supra note 4, at 101-02; Keerdoja, Shirley, Shapiro, Buckley, Greenberg & Rotenberk, Adoption: New Frustration, New Hope, Newsweek, Feb. 13, 1984, at 80 (noting a current "severe baby shortage—with 40 waiting couples for every available healthy infant").

253. See T. Festinger, supra note 252, at 43-44; R. Lasnik, supra note 18, at 81.

254. See Adoptions Without Agencies, supra note 20, at 37-39; L. McTaggart, supra note 25, at 9-10.

255. See L. McTaggart, supra note 25, at 4-5. The children most often sought for adoption are usually infants, the very group which is in the shortest supply. See J. McNamara, supra note 21, at 28, 29; Keerdoja, Shirley, Shapiro, Buckley, Greenberg & Rotenberk, supra note 252, at 80.

256. See Adoptions Without Agencies, supra note 20, at 40-41, 43, 109, 111-12.

257. Id. at 43, 109; R. Lasnik, supra note 18, at 83.

258. Financial and medical assistance concerns are particularly strong. See Adoptions Without Agencies, supra note 20, at 39-40, 43, 111-13; L. McTaggart, supra note 25, at 5, 10.

259. Adoptions Without Agencies, supra note 20, at 41, 43, 112.
since agencies usually prohibit or strongly discourage significant contact between the parties.260

A significant portion of the general public believes that the plight of children awaiting adoption, particularly those children termed "hard-to-place,"261 militates against placing impediments in the way of adoptions.262 Many persons believe that the largest possible number of children should be placed, and assert that agencies and their adoption criteria serve to inhibit such a policy while independent placements facilitate that policy.263

Similarly, prohibiting lawyer involvement in independent adoptions may not be the best solution. Persons interested in independent adoption placement very often have no effective means of securing one without the assistance of some intermediary. In order to complete the legal phases of adoption, lawyers must be involved to some extent; they are often viewed, therefore, as logical persons to approach as intermediaries.264 Additionally, as the lawyer's role evolves from one of pure advocacy to one embodying elements of advisor and counselor,265 lawyers are more likely to be approached as logical participants in the independent adoption process.

While the current state of lawyer participation in independent adoptions is often undesirable, total bans, in either form, are not a

260. See id. at 43, 110; J. Plumez, supra note 19, at 70, 73-74. The restrictive agency atmosphere regarding contact may be moderating to some extent, however. See Keerdoja, Shirley, Shapiro, Buckley, Greenberg & Rotenberk, supra note 252, at 83.

Controversy still exists regarding the desirability of providing direct contact or extensive information, since debate continues concerning possible effects on the parties, including the children. For further discussion of this controversy, see A. Sorosky, A. Baran & R. Pannor, THE ADOPTION TRIANGLE: THE EFFECTS OF THE SEALED RECORD ON ADOPTEES, BIRTH PARENTS, AND ADOPTIVE PARENTS (1978); Keerdoja, Shirley, Shapiro, Buckley, Greenberg & Rotenberk, supra note 252, at 83.

261. See L. McTaggart, supra note 25, at 5 ("racially mixed, black, older or handicapped children").

262. See, e.g., Comment, supra note 3, at 636-37, 648.

263. See id.

264. See L. McTaggart, supra note 25, at 3-4.

265. See, e.g., Bowman, supra note 225, at 296-98; Gerberding, supra note 195; see also supra notes 226-28 and accompanying text.
cure-all. Consequently, a middle ground must be reached. Solutions are available to strike a balance between total prohibition and the current problematic state of lawyer involvement.

B. Lawyer Specialization

One possible solution is lawyer specialization in the independent adoption field. In order to eliminate the problem of lack of lawyer competence, lawyers who wish to become involved with independent adoption placements could be required to undergo particular training and education. The acquisition of such training would qualify a lawyer to hold himself out as a specialist in independent adoptions. Specialized skills would enable lawyers to provide counseling and support services to the parties involved in the adoption. Special training could also facilitate a more adequate preadoption evaluation of the involved parties, since lawyers could be trained to recognize potential problems which could render a particular adoption "match" undesirable.

The lawyer specialization solution could also be of assistance to lawyers in determining proper fees. Lawyers qualified as specialists could, as an outgrowth of their training in the field, provide relatively uniform types of services. Compensation paid in an independent adoption situation might thereby be more easily allocated to those specific services, rather than rendered in an amorphous "lump sum."

In training lawyers for this specialty, provisions should be included to apprise lawyers of the various potential problems they may

266. See supra notes 187-202 and accompanying text.


268. This solution may also assist authorities in overseeing the charging of proper fees. For a discussion of problems associated with lawyer's fees in independent placement, see supra notes 151-86 and accompanying text.

269. Provisions could still be made for cost ranges, depending upon factors such as the length of time in which the lawyer has been involved in independent placement and the geographical area involved.

While the fee determination and oversight systems would operate basically as they do at present, see Model Code, supra note 9, at DR 2-106, and would still be somewhat "self-policing" in nature, the uniformity in services provided by the specializing lawyers should make it easier to establish a "range" within which a fee would be considered "proper."
encounter.\textsuperscript{270} Such information would assist lawyers in deciding whether to become involved in the independent adoption field and, if so, how to best serve the public with a minimum of complications.

The viability of this proposed solution depends upon state regulation of lawyer specialization. Model Code EC 2-14 disapproves of a lawyer claiming to be a specialist "[i]n the absence of state controls to insure the existence of special competence."\textsuperscript{271} In general, DR 2-105 prohibits a lawyer from "hold[ing] himself out publicly as a specialist"\textsuperscript{272} unless the lawyer has been certified in a specific field of practice by a state authority having jurisdiction over lawyer specialization.\textsuperscript{273}

The disciplinary rule charges each individual state with the responsibility of dealing with lawyer specialization and certification. The inevitable result of this state-based concept is a lack of uniformity from jurisdiction to jurisdiction. Some states provide for lawyer specialization in certain fields, individually developing their own categories, requirements, authorities, and regulations.\textsuperscript{274} Experimental lawyer specialization programs for certain fields of law have been instituted in other states.\textsuperscript{275} Yet many jurisdictions have no formal specialization programs currently in operation.\textsuperscript{276} A solution to this lack of uniformity would involve a general change in the lawyer specialization aspect of the model ethics document, in the hope that states would be more likely to adopt an ABA-generated specialization model as their own.\textsuperscript{277}

\begin{itemize}
  \item \textsuperscript{270} See supra notes 68-246 and accompanying text.
  \item \textsuperscript{271} Model Code, supra note 9, at EC 2-14. Exceptions are included, however, for "the fields of admiralty, trademark and patent law" on the basis of historical precedent. Id.
  \item \textsuperscript{272} Id. at DR 2-105(A).
  \item \textsuperscript{273} Id. at DR 2-105(A)(3). But see id. at DR 2-105(A)(1) (exceptions provided for the field of patent law).
  \item \textsuperscript{274} See, e.g., Legal Specialization Plan Aids Public & Attorneys, 42 Tex. B.J. 434 (1979) (discussing Texas plan for certifying specialists in six fields of law); see also A.B.A. Special Comm. on Specialization, Legal Specialization 24-25 (Specialization Monograph No. 2, 1976); Bond, Formal Legal Specialization in Oklahoma, 53 Okla. B.J. 1285, 1285-86 (1982) ("There are now at least ten states with some form of de jure specialization or certification, and approximately nine more are considering the question.").
  \item \textsuperscript{275} See, e.g., A.B.A. Special Comm. on Specialization, supra note 274, at 22-24; Chief Justice Burger Proposes First Steps Toward Certification of Trial Advocacy Specialists, 60 A.B.A. J. 171, 172, 173 (1974).
  \item \textsuperscript{276} See R. Zehnle, Specialization in the Legal Profession 23-28 (1975); Bond, supra note 274, at 1285-86.
  \item \textsuperscript{277} It appears that the lawyer specialization concept has been receiving a warmer reception in recent times. Even the Chief Justice of the United States Supreme Court, Chief Justice Warren Burger, has expressed a positive outlook regarding the concept. See Chief Justice Burger Proposes First Steps Toward Certification of Trial Advocacy Specialists, supra
\end{itemize}
C. Lawyer Utilization of Outside Professionals

This concept would permit lawyers to continue their involvement in independent adoption placements, but would limit their activity to strictly legal elements. In order to provide for the non-legal elements inherent in these placements, organizations could be created to work hand-in-hand with lawyer-intermediaries, providing the parties with services that lawyers are unwilling or unable to provide.

If such organizations were created, lawyers would not have to undertake to provide such services as medical, psychological, social or financial counseling—services they might not be capable of providing as a result of their lack of competence or their lack of time to devote to such activities. Lawyers could hire outside organizations to provide these needed services. These organizations could also relieve the lawyer of concerns regarding the suitability of a particular placement. Because these organizations could specialize in services geared to the independent adoption situation, a better quality of investigation and counseling would most likely result. This solution, if adequately monitored and regulated, would substantially reduce problems of lawyer competence.

The utilization of outside organizations would also help to miti-

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note 275 (specifically recommending certification of trial advocacy specialists). The Chief Justice took note of the many existing state specialization projects and expressed the view that those states without such projects should, before beginning ones of their own, "evaluate" those "pilot" projects already in existence. Id. at 172. Chief Justice Burger did express the view that, prior to the start of new "broad and comprehensive specialty certification" programs, a study of specialization in trial advocacy be undertaken. Id. at 171.

Nevertheless, it should be noted that the Model Rules of Professional Conduct, recently adopted by the ABA House of Delegates, see supra note 12, make no substantial change in the essentially state-based treatment of lawyer specialization. See supra note 15. For a discussion of the current state-based nature of lawyer specialization, see supra notes 271-76 and accompanying text.

278. Such organizations could be formed by private service organizations or by social work organizations under the auspices of the professional association that oversees the social work profession, rather than on a strictly for-profit basis.

279. The monitoring and regulation of such organizations could most effectively be handled by the professional society with which social workers are associated, since much of the work of these organizations would be social-work-related. Standards for various facets of an organization's operation—such as standards for adequate staffing and training of employees and the specific services to be furnished—could be developed and a concept similar to an accreditation process could be instituted to maintain control and regulation over the organizations.

280. See supra notes 187-202 and accompanying text. This concept would also appear to be in line with Model Code EC 6-3 regarding utilization of outside professionals to achieve competence. See supra text accompanying note 196.
gate the lawyer's problems in the area of conflicting interests. A lawyer would be able to take advantage of the expertise and impartiality of outside, independent voices specializing in the counseling and assessment of prospective parties to an independent adoption. Consequently, the lawyer could more easily maintain impartiality while furthering the interests of both the natural mother and the prospective adoptive couple.

Outside professionals would also have a positive impact in the disclosure and consent area. The outside counseling organization and the lawyer would work together to provide enhanced information to the parties about the emotional, psychological, and legal effects of an independent adoption handled by the lawyer-intermediary. A more informed, considered, and rational consent would likely result.

Utilization of outside professionals would have the effect of making the lawyer responsible mainly for the legal aspects of the independent adoption. Other equally necessary aspects of the process would be performed by professionals better trained to handle them. Placing the lawyer in a more strictly legal-oriented role would serve to reduce the number of ethical difficulties triggered by lawyer involvement in independent placements.

D. Adoption Registry System

In addition to utilizing outside services in the independent adoption field, the legal profession might undertake a study to determine the feasibility of utilizing a registry of prospective adoptive couples. The registry would not operate as a full-service organiza-

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281. See supra notes 69-94 and accompanying text.
282. See supra notes 95-104 and accompanying text.
283. Such a proposal may also help to alter the negative perspective from which many social work and adoption professionals view lawyer involvement in the field. See, e.g., Beral & Beral, supra note 187, at 454, 456; Elson & Elson, supra note 187, at 1125, 1126, 1128, 1177. Many social work professionals decry a lack of competence on the part of lawyers in the non-legal aspects of independent adoption placements. See, e.g., Beral & Beral, supra note 187, at 454-55; Elson & Elson, supra note 187, at 1125, 1126, 1177. The use of such specialized outside organizations to provide those services may help to improve the image of the lawyer, both in the eyes of the professionals and of the public in general, while encouraging a more effective relationship between lawyers involved in independent adoptions and professionals in the adoption field. Cf. Keith-Lucas, "Speaking for the Child": A Role Analysis and Some Cautions, in The Rights of Children: Emergent Concepts in Law and Society 218, 225 (A. Wilkerson ed. 1973) (suggesting the creation of a "socio-legal bureau" to ensure professional input into child welfare proceedings by providing impartial, competent witnesses in areas in which lawyers lack experience).
284. Cf. N.Y. Soc. Serv. Law § 372-c (McKinney 1983) (statewide adoption service serving all authorized adoption agencies in the state by providing descriptions, photographs,
tion such as an adoption agency, but rather as a pool of potential "matches" for independent adoptions. In addition to assisting persons desirous of securing an independent adoption, a major function of the registry would be to assist the participating lawyers, both by helping them to provide their clients with independent adoption services and by ameliorating several ethical problems.

A registry system could lessen the ethical problems faced by lawyers in the area of advertising and solicitation. A provision could be instituted which would require couples included in the registry to be associated with or prepared to contact their own lawyer to represent them in the independent adoption proceeding; the couples would then be aware that they would be contacted by a lawyer regarding an independent placement, but that the lawyer would not be seeking to be in their employ. A lawyer's utilization of such a registry would not appear to fall within the traditional concept of solicitation. In addition, a lawyer utilizing the registry to contact a pro-

See supra notes 118-50 and accompanying text.

Due to the difficulties associated with establishing a registry of natural mothers, see supra note 284, the registry concept would provide such assistance most effectively when a natural mother contacted her lawyer, who, in turn, utilized the registry of prospective adoptive couples to locate a potential "match."

The lawyer utilizing the registry might also be required to contact the couple's lawyer, rather than the couple, in order to avoid any problems involving the Model Code restrictions on communications with persons represented by a lawyer. MODEL CODE, supra note 9, at DR 7-104(A)(1).
spective adoptive couple would represent only the natural mother, thereby reducing any conflicting interests problems as well.\textsuperscript{288}

If lawyer-facilitated independent adoptions do not succumb to total bans, potential solutions such as lawyer specialization, utilization of outside professionals, and creation of adoption registry services should be explored to ensure a more effective and ethical system.\textsuperscript{289}

V. CONCLUSION

The field of independent adoption generates few clear-cut ethical answers to guide lawyers. A number of key issues, questions, and problems emerge from an examination of ethics opinions and cases. The examination in this note has been conducted within the framework of the American Bar Association Model Code of Professional Responsibility, with an associated study of potential changes foretold by the newly drafted American Bar Association Model Rules of Professional Conduct.

Chief among the problems are those of conflicting interests and the related issues of disclosure and consent and client confidences. These problems stem from the precarious status of the parties in a lawyer-facilitated independent adoption and lawyers' attempts to represent all sides in the adoption placement situation.

The lawyer's very attempt to effectuate an independent adoption, by bringing together a natural mother and a prospective adoptive couple, may conflict with the legal profession's various advertising and solicitation guidelines. The many possible gradations in lawyer conduct provide opportunities for inconsistency and uncertainty, as well as a dearth of "bright-line" rules for the advertising and solicitation aspect of independent adoptions. The same lack of precision, coupled with the traditional public abhorrence of "baby-selling," permeates the issue of fees in lawyer-facilitated independent adoptions. The potential presence of impropriety or misconduct and the question of whether the required level of lawyer competence can ever exist in the independent adoption sphere also stand as perplex-

\textsuperscript{288} For a discussion of conflicting interests and related problems, see supra notes 69-117 and accompanying text.

\textsuperscript{289} Improving the agency adoption system may also provide at least a partial, indirect solution to the problems associated with lawyer involvement in independent placements. By reducing the negative aspects of agency adoptions, see supra text accompanying notes 251-63, as well as undertaking certain measures to inform the public of such changes, agency adoptions may be made more attractive, leading to a decrease in the number of persons seeking independent adoptions and a corresponding reduction in the number of lawyers involved.
ing issues. Each of these issues ultimately implicates the very view of the proper role of a lawyer in today’s society.

Despite many difficulties and potential pitfalls, much of the public believes that independent adoptions serve an important function. If lawyer-facilitated independent adoptions are to remain a viable option, efforts should be made to create the most workable and definitive system possible. Toward that end, this note posits certain possible solutions.

By highlighting the issues and suggesting steps toward possible answers to the problems and questions, this note should help lawyers in the independent adoption field to be more aware of the point at which they may be in danger of overstepping the bounds of ethical conduct. It is hoped that, as a result, the legal profession will be better able to construct a workable independent adoption system that incorporates the best features of ethical practice with effective modes of providing needed assistance to all parties in the independent adoption context.

_Linda Jean Davie_