

Comment,  
A STATE SURVEY—DUAL  
REPRESENTATION IN ADOPTION

Dual representation is a subject that creates potential conflicts in many different legal contexts. A controversial topic regarding dual representation is when an attorney attempts to represent both the birth parents and potential adoptive parents in an adoption. This dual representation can result in a conflict of interest.<sup>1</sup> In the United States, with so many children seeking permanent homes and adults choosing to adopt them, the problem of dual representation is a frequent dilemma.<sup>2</sup> Ensuring adequate representation is a necessity for all parties involved, the birth parents, the adoptive parents, and most importantly, the child.

The American Bar Association (ABA) recognized the potential conflict in regards to dual representation in adoptions. The ABA issued an Informal Opinion 87-1523 on February 14, 1987, concluding that dual representation of the birth parents and adoptive parents, in an adoption, is unethical.<sup>3</sup> The ABA opinion stated “that the rights surrendered by the birth parent upon signing a consent to adoption and the rights assumed by the adoptive parents are in potential conflict, and that the birth parent’s right to revoke the consent is in ‘direct conflict’ with the interests of the adoptive parents.”<sup>4</sup> The ABA informal opinion is only a recommendation and not a mandatory requirement.

Several states have followed the ABA recommendation and prohibited dual representation in adoption proceedings. However, a handful of states continue to allow attorneys to represent both the birth parents and the adoptive parents. And many states still remain silent on the issue.

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<sup>1</sup> Kristi N. Saylor, *Conflicts of Interest in Family Law*, 28 FAM. L.Q. 451, 452 (1994).

<sup>2</sup> Suzanne Herman, *The Revised Michigan Adoption Code: The Reemergence of Direct Placement Adoptions and the Role and Duties of the Attorney*, 74 U. DET. MERCY L. REV. 583, 589 (1997).

<sup>3</sup> Mary E. Cedarblade, *Dual Representation of Adoptive and Birth Parents: Conflict of Interest or Ethical Expedience?*, 4 LEGAL MALPRACTICE REP. 12, 12-15 (1993).

<sup>4</sup> *Id.* at 12-13.

## **I. States Permitting Dual Representation**

States that run contrary to the ABA informal opinion offer several reasons in support of allowing dual representation of the birth parents and adoptive parents in an adoption.

### *A. Adoption Agencies Work with Both Parties*

Dual representation is acceptable because adoption agencies are allowed to work with both sets of parents. Adoption agencies commonly “work on behalf of the adoptive parents as well as the biological parents; and . . . attorneys are capable of doing the same.”<sup>5</sup> Typically, the main interest in adoption is protecting the best interests of the child in finding her or him a permanent home.<sup>6</sup> Adoption agencies, in working on behalf of the birth parents and the adoptive parents, can seek a permanent home for the child. Attorneys are able to work to achieve permanency for the child in the same way an adoption agency does, in turn effectively representing both the birth parents and the adoptive parents.

### *B. Dual Representation Is Permitted by the Model Rules of Professional Conduct*

Dual representation in adoption proceedings is permitted by the Model Rules. Model Rule 1.7 provides an exception that allows dual representation in some instances if a client is not adversely affected and with informed consent.<sup>7</sup> The fact that both parties are “usually in strong favor of the adoption” removes the potential for adversely affecting either side.<sup>8</sup> The exception found in Rule 1.7 lends support for allowing dual representation because it provides a single attorney, representing a biological parent and adoptive parent, to waive the prohibition if the attorney obtains informed consent from both parties and either client is not adversely affected.

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<sup>5</sup> THOMAS A. JACOBS, 1 *CHILDREN & THE LAW: RIGHTS AND OBLIGATIONS* § 4:29 (2015).

<sup>6</sup> Karen D. Laverdiere, *Content over Form: The Shifting of Adoption Consent Laws*, 25 *WHITTIER L. REV.* 599, 612 (2004).

<sup>7</sup> Saylor, *supra* note 1, at 455.

<sup>8</sup> Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants*, 72 *TENN. L. REV.* 509, 536 (2005).

### Arizona

In the *Matter of Petrie*,<sup>9</sup> the court held that parties to an adoption do not have a truly adversarial relationship. The court thus allowed dual representation after disclosure and consent of both parties.

### C. Adoption Is a Cooperative Process

Dual representation is permitted because both parties share similar goals resulting in a cooperative process that supersedes a conflict of interest. The ultimate goal is to provide permanency for the child. The adoption process is not adversarial which also deters the creation of a conflict of interest.<sup>10</sup> If a conflict of interest should arise, the attorney must cease representation immediately.<sup>11</sup> The attorney has the ability to represent both clients without creating a conflict of interest as they cooperatively work towards a common goal of adoption.

### California

In *Arden v. State Bar of California*,<sup>12</sup> the court held that the birth mother consented to dual representation of the adoptive parents therefore no conflict of interest existed which permits the attorney to represent both parties. California permits dual representation void of any conflict of interest.

### Kansas

In the *Matter of Adoption of Baby Boy Irons*,<sup>13</sup> the court held that dual representation is allowed in adoption proceedings as long as no conflict arises between the parties. The court stated that if a conflict arises, the attorney must notify the parties and make a decision regarding which interest he will continue to represent.

In *In re Adoption of Baby Girl T.*,<sup>14</sup> the court reiterated that an attorney is permitted to represent both parties to an adoption

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<sup>9</sup> 742 P.2d 796 (Ariz. 1987).

<sup>10</sup> Cedarblade, *supra* note 3, at 12.

<sup>11</sup> *Id.* at 13.

<sup>12</sup> 341 P.2d 6, 10 (1959). See also CAL. FAM. CODE § 8800 (West 2011).

<sup>13</sup> 684 P.2d 332, 340 (1984).

<sup>14</sup> 21 P.3d 581, 589 (2001).

if consent is given after the attorney discloses the potential for a conflict of interest.

*D. Dual Representation Decreases Costs*

Permitting dual representation in adoptions decreases the costs assigned to the parties. Utilizing one attorney minimizes costs because “work is not duplicated on both sides and negotiations are likely to be far less adversarial and contentious. In some situations, the savings result from the lawyer’s familiarity with the subject matter of the representation.”<sup>15</sup> Decreasing costs in turn increases access to adequate legal services. Dual representation is one of the only options that allow a birth parent to obtain legal representation that would otherwise be unaffordable.<sup>16</sup> In addition, dual representation guards against “inferior representation” by attorneys who receive lower fees from birth parents.<sup>17</sup> The benefit in regards to cost and access to legal fees provides support for states that choose to permit dual representation.

*E. Client Autonomy in Choosing an Attorney*

Birth parents and adoptive parents also have the right to choose whomever they wish to represent them in the adoption proceeding. States that permit dual representation guard the autonomy of the parties to choose their counsel.<sup>18</sup> If a birth parent or adoptive parent is familiar or comfortable with an attorney or has chosen the attorney because of his or her knowledge of adoption proceedings, dual representation allows the parties to obtain the counsel they want.

*F. No Specific Rationale*

The following state permits dual representation in adoption but does not provide an explicit rationale.

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<sup>15</sup> John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 747.

<sup>16</sup> Avi Braz, *Out of Joint: Replacing Joint Representation with Lawyer-Mediation in Friendly Divorces*, 78 S. CAL. L. REV. 323 (2004).

<sup>17</sup> Samuels, *supra* note 8, at 536.

<sup>18</sup> Dzienkowski, *supra* note 15, at 747-48.

*New Hampshire*

New Hampshire permits an attorney to represent the adoptive parent and biological parent with permission of the court. Although permitted, dual representation is only limited to a situation in which the court finds good cause shown.<sup>19</sup>

## **II. States Prohibiting Dual Representation**

There are many states that follow the ABA recommendation regarding prohibiting dual representation in adoption proceedings. Several reasons offer support for prohibiting dual representation.

### *A. Inherent Conflict of Interest*

Dual representation is unethical in the following states because of the inherent conflict of interest that arises when an attorney attempts to represent the interests of both the birth and adoptive parents.<sup>20</sup> Consent and disclosure do not cure the conflict of interest issue in this view. There are many points where a conflict of interest arises between the parties and threatens the attorney's ability to provide adequate representation.<sup>21</sup> The birth parent has the ability to revoke his or her consent throughout the adoption process which poses a risk for the adoptive parents and the attorney. If the biological parent revokes consent to the adoption, the attorney comes to represent parties with opposing interests.<sup>22</sup>

The birth parent also has the right to give consent without duress or fraud. Prohibiting dual representation ensures the birth parent's consent is given to his or her own attorney without undue influence guarding against creating conflicts of interest. Other issues that raise a conflict include, "issues of financial support, the timing of consents and placements, and if contemplated by the parties, the nature and extent of future contact."<sup>23</sup> Adoption creates inherent conflicting interests that make dual representation unethical.

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<sup>19</sup> N.H. REV. STAT. ANN. § 170-B:19 (2006).

<sup>20</sup> JACOBS, *supra* note 5.

<sup>21</sup> Herman, *supra* note 2, at 603.

<sup>22</sup> Cedarblade, *supra* note 3, at 12-13.

<sup>23</sup> Samuels, *supra* note 8, at 537.

*Florida*

Florida requires attorneys to an adoption to provide a disclosure statement to guard against dual representation. Attorneys are considered an adoption entity in Florida.<sup>24</sup> The disclosure language states that the adoption entity, or attorney, does not provide representation to the biological parents consenting to adoption, recognizing the inherent conflict of interest and avoiding raising such conflict in the adoption process.<sup>25</sup> Florida's statutory language prohibits dual representation in adoptions.

*Kentucky*

Kentucky not only prohibits dual representation in adoptions, it provides a penalty. Any attorney found to perform dual representation in the state will be guilty of a Class A misdemeanor.<sup>26</sup>

*Louisiana*

Louisiana even prohibits dual representation on a broader scale. The surrendering parent must be represented by a separate attorney than the adoptive parents and the state also excludes "an attorney who is an associate, partner, shareholder, or employee of the attorney, law firm, or corporation representing the prospective adoptive parent" from providing legal representation to a surrendering parent.<sup>27</sup>

*Michigan*

Michigan's prohibition of dual representation is similarly broad because the state includes the language "law firm" in the statute excluding any two attorneys within a firm from representing the biological parent and the adoptive parents separately.<sup>28</sup>

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<sup>24</sup> FLA. STAT. ANN. § 63.032 (West 2012).

<sup>25</sup> FLA. STAT. ANN. § 63.085 (West 2012).

<sup>26</sup> KY. REV. STAT. ANN. § 199.492 (West 2011).

<sup>27</sup> LA. CHILD CODE ANN. art. 1121 (2008).

<sup>28</sup> MICH. COMP. LAWS ANN. § 710.55a (West 2015).

*New York*

New York prohibits both law firms and attorneys as well from providing dual representation in adoptions.<sup>29</sup>

*Ohio*

Ohio mandates an adoptive parent to use an attorney or an agency to facilitate an adoption. That attorney can only represent the adoptive parent or the biological parent, not both.<sup>30</sup>

*Oklahoma*

The court, in *State ex rel. Oklahoma Bar Ass'n v. Stubblefield*,<sup>31</sup> held that dual representation in an adoption is not ethical because of the conflict of interests that exist between the parties, and independent legal counsel is necessary to guard these interests.

*Oregon*

The Oregon State Bar addressed the issue of dual representation in an ethics opinion. The opinion recommends that dual representation in adoptions not be permitted because parties have conflicting interests and attorneys are unable to adequately represent such interests.<sup>32</sup>

*Pennsylvania*

Pennsylvania has also utilized ethics opinions to address the issue of dual representation in adoptions. The state bar recommended that dual representation in adoptions is unethical even if the parties consent because there is an inherent conflict of interest.<sup>33</sup>

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<sup>29</sup> N.Y. SOC. SERV. LAW § 374(6) (McKinney 2015).

<sup>30</sup> OHIO REV. CODE ANN. § 3107.011 (West 2015).

<sup>31</sup> 766 P.2d 979, 982-83 (1988).

<sup>32</sup> CONFLICTS OF INTEREST, CURRENT AND FORMER CLIENTS: REPRESENTING BOTH SIDES IN ADOPTION, Formal Op. No. 2005-28, 2005 WL 5679614 (Aug. 2005).

<sup>33</sup> Pa. Ethics Op. 95-59, Apr. 17, 1995 (Pa. B. Ass'n. Comm. Leg. Ethics Prof. Resp.), 1995 WL 935666.

### *South Carolina*

South Carolina requires certain parties, including attorneys, to witness consent to relinquish a child for adoption. The attorney is prohibited from witnessing the consent of the biological parent if he or she also represents the prospective adoptive parents. The state guards the consent process by prohibiting dual representation.<sup>34</sup>

### *B. Confidentiality Issues*

Confidentiality issues argue against dual representation. In an adoption, the birth parent occasionally wishes to withhold his or her identity. Dual representation “results in a waiver of the attorney-client privilege, which may subject both the natural and adoptive parents to the unwanted revelation of their identities.”<sup>35</sup> Exposing the identity of a birth parent who wishes to remain anonymous is adverse to that party’s interest. An attorney cannot ethically represent both parties in such a case.

### *C. Power Imbalance*

Some states determine that dual representation is not ethically possible in adoptions because of the power imbalances that exist for the birth parents.<sup>36</sup> The imbalance stems from the fact that birth parents are typically economically and educationally poorer than adoptive parents which allows one party to have an advantage in the proceeding.<sup>37</sup> The unequal dynamic gives the higher income and more educated adoptive parents the upper hand. In such a case, one attorney is not able to ethically provide adequate representation to both parties.

### *D. The Emotional Nature of Adoption*

Prohibiting dual representation also protects the birth parent in an emotional and stressful time. Adoption can be a very difficult time for the birth parent that has chosen to relinquish his or her parental rights. During this time the emotion and stress

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<sup>34</sup> S.C. CODE ANN. § 63-9-340 (2012).

<sup>35</sup> Saylor, *supra* note 1, at 456.

<sup>36</sup> Madelyn Freundlich, *Transracial & Transcultural Adoptions A Look at the Ethical Issues*, 27 FAM. ADVOC. 40, 41 (Fall 2004).

<sup>37</sup> Samuels, *supra* note 8, at 538.



can inhibit the birth parent from understanding the potential conflicts and detriment that can exist in dual representation.<sup>38</sup> Prohibiting dual representation protects the rights of an emotionally burdened birth parent in the adoption proceeding.

E. *Attorneys' Fees*

Dual representation potentially provides attorneys an opportunity to gain financially. Prohibiting dual representation keeps attorneys' fees in check. An attorney that represents both parties could be tempted to take advantage of the situation and receive payment from each party resulting in dual compensation.<sup>39</sup> In addition, barring dual representation provides the presence of two attorneys to protect against charging inflated fees. The opportunity for financial abuse provides support for prohibiting dual representation.

F. *No Specific Rationale*

The following states prohibit dual representation but do not provide an explicit rationale.

*Maine*

In Maine, the biological parent is entitled to an attorney even if he or she is unable to afford representation, however, that attorney may not represent the adoptive parents.<sup>40</sup>

*Maryland*

Maryland addresses dual representation in private and independent adoptions separately. The state prohibits an attorney from representing both the biological parent and the prospective adoptive parent in either situation.<sup>41</sup>

*Minnesota*

Minnesota is aggressive regarding representation in direct placement adoptions. The state prohibits dual representation

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<sup>38</sup> *Id.* at 537.

<sup>39</sup> Herman, *supra* note 2, at 603.

<sup>40</sup> ME. REV. STAT. tit. 18-A, § 9-106 (2015).

<sup>41</sup> MD. CODE ANN., FAM. LAW § 5-3A-07 (West 2013); MD. CODE ANN., FAM. LAW § 5-3B-06 (West 2013).

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while requiring the prospective adoptive parent to pay for the biological parent's legal representation.<sup>42</sup>

*Montana*

Montana is similar in that it allows adoptive parents to pay for the legal counsel for birth parents. Biological parents can elect joint representation but dual representation of the adoptive and biological parents is prohibited by statute.<sup>43</sup>

*Wisconsin*

Wisconsin expressly prohibits dual representation of adoptive parents and biological parents in regards to the adoption process.<sup>44</sup>

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<sup>42</sup> MINN. STAT. ANN. § 259.47 (West 2014).

<sup>43</sup> MONT. CODE ANN. § 42-7-102 (2014).

<sup>44</sup> WIS. STAT. ANN. § 48.837 (West 2015).