

## Surrogacy Professionalism

By

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The fertility business generally, and surrogacy<sup>1</sup> in particular, is facing a crossroads. A variety of forces are increasing the returns to scale and the ease of operation across jurisdictional borders.<sup>2</sup> As fertility clinics and their affiliated brokers get larger, they rely more heavily on customers willing to travel to access their services. As a result, they find it easier to evade regulations in their home jurisdiction that may prohibit surrogacy, limit payment, or forbid options such as sex selection.

In the United States, clinics have adjusted to the new environment by consolidating and by creating platforms or enlisting brokers that take advantage of the growing market. The clinics often compete to bring the wealthy of the world to the United States. The percentage of foreign residents using American surrogacy services, for example, has risen steadily in the last decade and now constitutes approximately twenty percent of American surrogacy cases.<sup>3</sup> At the same time, some of the same clinics may

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<sup>1</sup> We are using the term “surrogacy” here to refer to any arrangement in which a woman gives birth to a child pursuant to an agreement with another person who will assume legal responsibility for the child. We use the term “gestational carrier” to refer to a woman “who has agreed to carry a pregnancy created through an in vitro fertilization (“IVF”) which encompasses retrieval and fertilization with the resulting embryo transferred to her uterus through an IVF transfer.” Susan L. Crockin, *Who’s My Client? Recognizing and Avoiding Conflicts of Interest in ART Law Representation*, 34 FAM. ADVOC. 14, 18 (Fall 2011). The embryo may be created through use of donor egg or sperm, or the intended parents’ gametes or a combination of gamete from a donor and one from the intended parents.

<sup>2</sup> See June Carbone & Jody Lyneé Madeira, *Buyers in the Baby Market: Toward a Transparent Consumerism*, 91 WASH. L. REV. 71 (2016) (describing forces producing the consolidation and expansion of large fertility clinics and encouraging operation across jurisdictional lines).

<sup>3</sup> Kiran M. Perkins, et al, *Trends and Outcomes of Gestational Surrogacy in the United States*, 106 FERTILITY & STERILITY 435 (2016).

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arrange for American patients to travel abroad to access cheaper in vitro fertilization (IVF) services or procedures such as three-parent IVF unavailable in the United States.

Given these changes, it is difficult for any single jurisdiction to control the options available to its citizens. This article argues that as the fertility business matures, the opportunities to address ethically questionable practices may come more from the oversight of professionals than from regulation of the process through traditional jurisdiction-based regulations. In the surrogacy context, in particular, lawyers are essential to establishing parenthood and overseeing the agency-client, intended parent-gestational carrier relationships. Professional associations and licensing units can and should establish standards for responsible practices.

This article will examine the changing nature of the fertility business and the opportunities for and need to address professional responsibility for the resulting transactions. Section I will describe how greater opportunities for cross-jurisdictional arrangements create greater regulatory challenges and tradeoffs, concluding that a traditional regulatory approach is intrinsically limited in addressing the potential ethical issues. Section II will discuss the role of contracts – and lawyers who draft such contracts – in structuring surrogacy transactions. Section III will consider the potential role of stronger professional guidance in standardizing surrogacy practice, and offering protection for vulnerable participants in the process.

### **I. The Limits of Regulation**

Jurisdictions that wish to influence fertility developments face a series of tradeoffs. First, they can ban or severely restrict services such as surrogacy, hoping to limit its practice within the jurisdiction, but effectively losing control of residents who go outside the jurisdiction to access it. Second, they can adopt friendly regulations, such as provisions that guarantee intended parents recognition of their legal status if the parents comply with certain procedures. The more lenient the requirements, however, the more likely they are to ensure widespread compliance; the more restrictive they are, the more likely they will encourage evasion that undermines their effectiveness. Finally, the jurisdiction can do nothing. The failure to adopt laws regulating

fertility procedures has two effects. It constitutes a refusal to place the imprimatur of the state on the practices, which is often enough to satisfy religious groups who disapprove of IVF or surrogacy altogether.<sup>4</sup> At the same time, the failure to act leaves prospective parents in limbo in the event of disputes.

None of these approaches, however, comprehensively addresses the full range of surrogacy practices. Even surrogacy friendly jurisdictions that validate core provisions such as the determination of the intended parents' legal status and the promise of payment to gestational carriers do not address a range of other issues, such as the permissibility of abortion provisions, the regulation of conduct during pregnancy, the transfer of multiple embryos or other matters that may affect understandings of the contracting parties.

This section will argue, first, that the reach of the regulations that do exist is necessarily limited. Jurisdictions can exercise authority over providers within their borders, and they can restrict the availability of commercial brokers. Their ability to determine parentage for their residents for a child born outside the jurisdiction, though, is limited,<sup>5</sup> and they are unlikely to be able to prevent wholesale evasion for those willing to travel. The section will then identify the missing aspects of surrogacy regulation.

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<sup>4</sup> See, e.g., *Donum Vitae*, VATICAN (Feb. 22, 1987), [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19870222\\_respect-for-human-life\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html) (determining both heterologous and homologous artificial fertilization to be unacceptable); John M. Haas, *Begotten Not Made: A Catholic View of Reproductive Technology*, U.S. CONFERENCE OF CATHOLIC BISHOPS (1998), <http://www.usccb.org/issues-and-action/human-life-and-dignity/reproductive-technology/begotten-not-made-a-catholic-view-of-reproductive-technology.cfm> (“One reproductive technology which the Church has clearly and unequivocally judged to be immoral is *in vitro* fertilization or IVF.”).

<sup>5</sup> See discussion of the European efforts to restrict recognition of parentage for children born abroad, *infra* in text at notes 47-50. In the United States, the State of Washington has attempted to determine the parentage of its residents even if the child is born in another state, but the validity of the provisions has not yet been tested. See 22 FAMILY AND COMMUNITY PROPERTY LAW HANDBOOK 26.26.021 (Washington Practice 2016 ed.).

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##### A. *The Growth in Cross-Border Surrogacy Practice*

Cross-border travel has spurred surrogacy growth in the United States and elsewhere. Many countries ban surrogacy entirely, limit it to married, heterosexual couples,<sup>6</sup> or restrict it to altruistic arrangements where, for example, a sister agrees to carry a child genetically related to a sibling without payment.<sup>7</sup> For many people, therefore, the ability to gain access to surrogacy requires the ability to travel to a surrogacy friendly jurisdiction, whether within the United States or abroad.<sup>8</sup> Moreover, as international surrogacy restrictions increase, more foreign residents come to the United States to arrange surrogate births.<sup>9</sup> Stuart Bell, the chief executive of Growing Generations, a Los Angeles surrogacy agency, stated that four years ago, “only about 20 percent of its clients came from overseas, but now international clients are more than half.”<sup>10</sup>

In the United States as a whole, gestational carrier cycles have increased from approximately 1% of all IVF cycles in 1999 to approximately 2.5% of all cycles in 2013.<sup>11</sup> During the same period, the number of carrier cycles where the intended parent or parents were not U.S. residents increased from just below 10% to over 18% of all carrier cycles.<sup>12</sup> The overall changes, however, cloak a substantial drop between 1999 and 2005, with the percentage of foreign resident carrier cycle falling to below 3%, but

<sup>6</sup> Cyra Akila Choudhury, *The Political Economy and Legal Regulation of Transnational Commercial Surrogate Labor*, 48 *VAND. J. TRANSNAT'L L.* 1, 7-8 (2015) (observing that India has banned the availability of surrogacy to foreign, unmarried and same-sex couples).

<sup>7</sup> Sarah Mortazavi, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 *GEO. L.J.* 2249, 2271 (2012) (noting, for example, that Canada and Australia criminal commercial surrogacy while permitting altruistic arrangements).

<sup>8</sup> Carbone and Madeira, *supra* note 2 (describing conditions producing cross-border surrogacy).

<sup>9</sup> Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It: Foreign Couples Heading to American for Surrogate Pregnancies*, *N.Y. TIMES* (July 5, 2014), <http://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html> [<https://perma.cc/7X8P-5JWT>]. See also Eric Blyth, *Fertility Patients' Experiences of Cross-Border Reproductive Care*, 94 *FERTILITY & STERILITY* e11 (2010).

<sup>10</sup> Lewin, *supra* note 9, Blyth, *supra* note 9.

<sup>11</sup> Perkins, et al, *supra* note 3, at 437, Figure 1.

<sup>12</sup> *Id.* at 438, Figure 2.

then rising steadily thereafter.<sup>13</sup> The dramatic drop in overall surrogacy rates (and foreign resident rates in particular) came with expanding surrogacy markets abroad, particularly in India. Since then, however, many countries have restricted access, limiting surrogacy to their own citizens or banning it together.<sup>14</sup> As that has happened and with American clinics' increased efforts to recruit abroad,<sup>15</sup> surrogacy in the United States has grown steadily with an increasing portion of the intended parents coming from other countries. Even within the United States, intended parents "shop" on national sites in their search for surrogate friendly jurisdictions.<sup>16</sup>

### B. *Buy-in v. Evasion*

Jurisdiction-based approaches that attempt to regulate individuals and providers within a given jurisdiction have produced wholesale evasion – and are likely to continue to do so. In the face of this evasion, jurisdictions can choose either to accept the practices and regulate them, or to ban them and lose control of the out-of-jurisdiction arrangements. American surrogacy law is confusing, inconsistent, evolving, and difficult to categorize.<sup>17</sup>

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

<sup>14</sup> Danielle Preiss & Pragati Shahi, *Dwindling Options for Surrogacy Abroad*, ATLANTIC (May 31, 2016), <https://www.theatlantic.com/health/archive/2016/05/dwindling-options-for-surrogacy-abroad/484688/>.

<sup>15</sup> See, e.g., Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 LAW & INEQ. 277, 291-92 (2009) (emphasizing that reproductive services take place in a context broader than the doctor-patient relationship). See also *International Programs*, FERTILITY INSTITUTES, <http://www.fertility-docs.com/programs-and-services/international-programs.php> [<https://perma.cc/K6PL-5MF7>] (last visited Feb. 9, 2016) (describing international programs).

<sup>16</sup> See Nicole Grather & Adam May, *Going Global for a Family: Why International Surrogacy Is Booming*, ALJAZEERA AM. (May 12, 2014, 7:30 PM), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/5/12/going-global-forafamilywhyinternationalsurrogacyisbooming.html> [<https://perma.cc/2LUY-U39H>] (describing the role of brokers in the growth of fertility tourism).

<sup>17</sup> See, e.g., Joseph F. Morrissey, *Surrogacy: The Process, the Law, and the Contracts*, 51 WILLAMETTE L. REV. 459, 487 (2015) (describing laws in this area as complicated and subject to change).

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The majority of American states have no surrogacy specific statutes.<sup>18</sup> American jurisdictions split in the following ways:

1. *Some choose to accept the practice and clarify the determination of parentage.*<sup>19</sup>

California, for example, allows the commissioning parents to obtain a parental rights confirmation order before birth that confers parenthood on the intended parents.<sup>20</sup> To obtain such an order, the commissioning parents need to enter into a contract with the gestational carrier before implantation of the embryos in the carrier, insure that the carrier has had legal representation, and specify in the contract how the medical costs associated with the child's birth will be paid.<sup>21</sup>

The California approach provides certainty in the determination of parenthood, tries to insure payment of medical expenses, and mandates legal representation in the contracting process, but does not otherwise dictate contractual terms or procedures.

Only a relatively small number of states, however, have such express statutory provisions available to all intended parents who might choose to use surrogates to arrange a birth.<sup>22</sup>

2. *A few limit surrogacy, but provide protections for those who comply with state requirements.*

Illinois, for example, limits recognition to intended parents who:

- (1) contribute at least one of the gametes resulting in a pre-embryo that the gestational surrogate will attempt to carry to term;
- (2) have a medical need for the gestational surrogacy as evidenced by a qualified physician's affidavit attached to the gestational surrogacy;

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<sup>18</sup> *Id.* at 485-503 (summarizing state law).

<sup>19</sup> *See, e.g.,* CONN. GEN. STAT. ANN. § 7-48a(b) (West 2011).

<sup>20</sup> CAL. FAM. CODE § 7962 (2016).

<sup>21</sup> *Id.*

<sup>22</sup> *See, e.g.,* DEL. CODE ANN. tit. 13, § 8-807 (2013); D.C. CODE ANN. § 16-407 (2017); ME. REV. STAT. tit. 19-A, § 1933 (2016); N.H. REV. STAT. ANN. § 168-B:11 (2014); NEV. REV. STAT. § 126.710 (2013); UNIF. PARENTAGE ACT, 2018 Wash. Legis. Serv. Ch. 6 (S.S.B. 6037).

- (3) have completed a mental health evaluation; and
- (4) have undergone legal consultation with independent legal counsel regarding the terms of the gestational surrogacy contract and the potential legal consequences of the gestational surrogacy.<sup>23</sup>

The couples who meet these requirements and comply with the statutory procedures receive recognition as parents before birth; those who cannot meet the requirements remain free to secure legal recognition through adoption after the birth.<sup>24</sup>

3. *Some try to discourage surrogacy without explicitly banning it.*

States generally do so in one of two ways. They may ban commercial surrogacy, discouraging agencies who might try to facilitate the process, but allowing altruistic arrangements that do not involve payment.<sup>25</sup> Or, they may, like New Jersey, specify that the woman who gives birth is the legal parent absent adoption. The surrogate who agrees to surrender her child can do so, seventy-two hours after the birth.<sup>26</sup> Even if the birth mother agrees to an adoption, New Jersey allows her a period after the child's birth in which she can change her mind. At the same time, New Jersey may also recognize the man who provided the sperm as a legal parent,<sup>27</sup> even if the gestational carrier is married.<sup>28</sup> This means a commissioning father could find that a gestational carrier will receive custody and can command child support.<sup>29</sup>

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<sup>23</sup> 750 ILL. COMP. STAT. ANN. § 47/20 (2005).

<sup>24</sup> See also FLA. STAT. ANN. § 742.15 (2018); TEX. FAM. CODE § 160-751 through § 160-763 (2018).

<sup>25</sup> June Carbone & Jody Lyneé Madeira, *The Role of Agency: Compensated Surrogacy and the Institutionalization of Assisted Reproduction Practices*, 90 WASH. L. REV. (ONLINE) 7 (2015). Washington, however, which had been the prime example, adopted the Uniform Parentage Act provisions authorizing commercial surrogacy as this article was going to print. See UNIF. PARENTAGE ACT, 2018 Wash. Legis. Serv. Ch. 6 (S.S.B. 6037) (West).

<sup>26</sup> See *A.H.W. v. G.H.B.*, 772 A.2d 948, 954 (N.J. Super. Ct. Ch. Div. 2000).

<sup>27</sup> *Id.*

<sup>28</sup> See Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J.L. & GENDER 67 (2007).

<sup>29</sup> *J.F. v. D.B.*, 879 N.E.2d 740, 742-47 (Ohio 2007) (Cupp, J., dissenting).

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4. *Some prohibit surrogacy outright.*<sup>30</sup>

Michigan has the most draconian laws. It imposes criminal penalties on anyone involved in surrogacy, providing that a woman who agrees to become a surrogate can be prosecuted for a misdemeanor and fined up to \$10,000 and/or imprisoned for up to a year, while anyone involved in making a surrogacy arrangement is subject to a penalty five times greater.<sup>31</sup> It also recognizes the birth mother's husband as a legal parent and makes it relatively difficult to rebut the marital presumption. In the event of a dispute, the surrogate will be deemed the legal parent, and efforts to challenge that result could expose a commissioning couple to prosecution for the violation of state law prohibiting surrogacy.<sup>32</sup> States like New York and Indiana, in contrast, just make surrogacy agreements void as a violation of public policy.<sup>33</sup>

5. *They can do nothing.*

The majority of states have no comprehensive legislation and many have few or no reported cases.<sup>34</sup> Missouri and Minnesota, for example, have almost no laws directly addressing surrogacy. In these states, surrogacy still takes place, and the courts have had to resolve disputes, though often without producing re-

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<sup>30</sup> See, e.g., MICH. COMP. LAWS ANN. §§ 722.851–.863 (2018) (declaring surrogate parentage contracts, as defined by statute, to be “void and unenforceable” and imposing criminal penalties for participation in a “surrogate parentage contract for compensation” or a surrogacy contract involving a surrogate who is an unemancipated minor or who has “a mental illness or developmental disability”).

<sup>31</sup> MICH. COMP. LAWS ANN. § 722.859.

<sup>32</sup> Michigan's law has been described as “arguably the most anti-surrogacy law in the country” and as one offering no recourse to the intended parents in the event of a dispute. See Chelsea VanWormer, *Outdated and Ineffective: An Analysis of Michigan's Gestational Surrogacy Law and the Need for Validation of Surrogate Pregnancy Contracts*, 61 DEPAUL L. REV. 911, 916 (2012).

<sup>33</sup> IND. CODE ANN. § 31-20-1-1 (2016) (“it is against public policy to enforce any term of a surrogate agreement that requires a surrogate to . . . Provide a gamete to conceive a child [ ] Become pregnant . . . Waive parental rights or duties to a child”); N.Y. DOM. REL. LAW § 122 (2016) (“Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable.”).

<sup>34</sup> Morrissey, *supra* note 17, at 485-503.



ported opinions with precedential value.<sup>35</sup> Intended couples in these states are likely to be able to secure parental recognition through an adoption proceeding that terminates the parental status of the birth mother where she consents to the proceeding after birth.

These approaches involve a series of trade-offs. States that ban surrogacy outright to limit it to altruistic arrangements may, in fact, limit use of surrogacy arrangements within their borders, but they effectively lose the ability to oversee the activities of their residents who go elsewhere to secure access to fertility services. Washington, for example, found that the result of its ban on commercial surrogacy was that its residents often went elsewhere or used underground arrangements to access surrogacy services.<sup>36</sup> Like California, Washington now provides for recognition of the intended parents as legal parents if the parties comply with statutory provisions for a surrogacy agreement between parties with independent legal representation.<sup>37</sup> States, like Illinois, that combine protections for those who opt into state-specified procedures but strictly limit those who qualify for such procedures, hope to entice residents into compliance. These jurisdictions depend on something of a tipping point. So long as the majority of those who want such services comply with the procedures, they help establish ethical, as well as legal norms, for the treatment of such cases. On the other hand, if they exclude large populations such as the LGBT community, members of that group may find alternative approaches that undermine the legal regime both ethically (labelling it unfair) and practically (creating alternatives that different sex couples may also prefer). Virginia, for example, attempted to regulate surrogacy following

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<sup>35</sup> See, e.g., *In re Baby Boy A.*, No. A07-452, 2007 WL 4304448, at \*1 (Minn. Ct. App. Dec. 11, 2007) (applying a choice of law clause referring to Illinois law in the absence of applicable Minnesota law).

<sup>36</sup> Lornett Turnbull, *Bill Would Let Parents-to-be Pay Surrogates*, SEATTLE TIMES (Mar. 15, 2011), <https://www.seattletimes.com/seattle-news/bill-would-let-parents-to-be-pay-surrogates/>.

<sup>37</sup> The woman acting as a surrogate and the intended parent or parents must have independent legal representation throughout the surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal consequences of the agreement, and each counsel must be identified in the surrogacy agreement. UNIF. PARENTAGE ACT 2018 Wash. Legis. Serv. Ch. 6 § 703(7) (S.S.B. 6037) (West).

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*Baby M* by adopting comprehensive legislation that required, among other things, listing the identity of the gamete providers, gestational carrier, and intended parents in public records. The idea of public scrutiny discouraged compliance and almost no one complied with the provisions, rendering them largely irrelevant to the development of surrogacy practice within the state.<sup>38</sup> On the other hand, states with minimal or no regulation allow the creation of flourishing surrogacy practices, but with little certainty about what will happen in the event of a dispute and little public oversight or influence on the developing practices.<sup>39</sup>

### C. *Limits on Cross-Border Regulation*

Individual states' provisions rarely address fertility tourism effectively and even those that purport to do so face intrinsic limitations because of constitutional requirements in the United States, and practical ones elsewhere.

In American jurisdictions, the U.S. Constitution imposes limits on the degree to which states can deny recognition of the parental status of intended parents. Several decisions have invalidated provisions that refuse to grant parenthood to a woman who has supplied her own egg to a gestational carrier with the intention she retain parental status. A federal court, for instance, declared a Utah statute unconstitutional in a case in which the intended parents used their own gametes to conceive a child who was carried to term by a gestational carrier.<sup>40</sup> In that case, the courts overturned Utah's insistence that adoption was necessary to recognize the genetic parents' legal status. In a Florida case, a woman transferred an egg to her partner with the intention that

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<sup>38</sup> See Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-Making*, 5 J. L. & FAM. STUD. 1, 62 (2003).

<sup>39</sup> As the Iowa Supreme Court observed:

A majority of states lack statutes addressing surrogacy. As a result, "cases often involve ad hoc procedures attempting to effectuate the parties' intent by analyzing surrogacy issues under the state's statutes for [termination of parental rights], adoption, custody and placement, and the like." Courts adjudicating disputes over the legality of surrogacy agreements in such states "are forced to confront issues of the most difficult nature."

P.M. v. T.B., 907 N.W.2d 522, 531 (Iowa 2018) (citations omitted).

<sup>40</sup> J.R. v. Utah, 261 F. Supp. 2d 1294, 1296-1298 (D. Utah 2002).

the two women would jointly raise the child. In this case, as well, the Florida courts invalidated a statute that failed to recognize the intended genetic mother as a legal parent.<sup>41</sup> These decisions limit the effectiveness of efforts to regulate surrogacy through insistence that the woman who gives birth is necessarily the legal mother in all circumstances absent adoption or adoption-like procedures.<sup>42</sup>

In addition, intended parents who arrange for the birth of a child in another jurisdiction with friendlier surrogacy provisions can ordinarily secure parentage there. In *Berwick v. Wagner*, for example, a Texas couple married in Canada, registered as domestic partners in California, and arranged for a California gestational carrier to give birth to one of the two men's biological son. After the child's birth, the couple secured a California declaration of parentage recognizing both men as legal parents. When the couple, who lived in Texas, later separated, the biological father argued that the Texas courts should not recognize his partner as a legal parent. The Texas courts, however, found that the California parentage declaration was entitled to full faith and credit even though Texas could not have recognized the partner as a parent under Texas law.<sup>43</sup> Following *Obergefell v. Hodges*,<sup>44</sup> the U.S. Supreme Court has also held that the states must grant full faith and credit to out-of-state adoptions involving same-sex couples.<sup>45</sup> In *V.L. v. E.L.*, a lesbian couple living in Alabama temporarily moved to Georgia so that one of the women could adopt the biological child of the other woman. When the parents later separated, the Alabama Supreme Court held that the Geor-

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<sup>41</sup> *T.M.H. v. D.M.T.*, 79 So. 3d 787 (Fla. Dist. Ct. App. 2011). *See also* *Soos v. Super. Ct. ex rel. County of Maricopa*, 897 P.2d 1356 (Ariz. Ct. App. 1994) (finding that the statute violated the Equal Protection Clause of the Fourteenth Amendment by granting the intended father an opportunity to establish legal parentage but denying that same chance to the intended mother).

<sup>42</sup> *See, e.g.*, UNIF. PARENTAGE ACT Art. 8 (2002), [http://www.uniformlaws.org/shared/docs/parentage/upa\\_final\\_2002.pdf](http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf). Article 8 of the 2017 Uniform Parentage Act has changed that provision, recognizing the parental status of intended parents without adoption-like procedures.

<sup>43</sup> *See* Jeffrey A. Parness, *Choosing Among Imprecise American State Parentage Laws*, 76 LA. L. REV. 481, 495 (2015) (citing *Berwick v. Wagner*, No. 01-12-00872-CV, 2014 WL 4493470 (Tex. App. Sept. 11, 2014)).

<sup>44</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>45</sup> *V. L. v. E.L.*, 136 S. Ct. 1017 (2016).

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gia court lacked jurisdiction over adoption because the Alabama court read the Georgia statute not to permit adoption by a second parent of the same-sex without terminating the parental rights of the first mother. The Supreme Court held that statutory construction of the Georgia adoption law was not a jurisdictional issue, and that Alabama must give full faith and credit to the Georgia adoption decree.<sup>46</sup> This allows parents using a surrogate to use a court order from the state where the child was born to secure a parentage judgment, and then return home with an order that the courts of their home state must recognize.

Some European countries, which ban surrogacy outright or recognize the woman giving birth as the mother, have attempted to deny citizenship to children born to surrogates abroad. The French, however, appear to have relented,<sup>47</sup> and the British courts, which adhere to a best interest of the child approach, have generally recognized the parental status of the intended parents even where the result appears to conflict with British law.<sup>48</sup> To do otherwise would effectively leave the child with no legal parents, particularly where the commissioning parents used anonymous gamete donors or foreign gestational carriers with no continuing contact with the child.<sup>49</sup> The German Supreme Court, also recognizing the rights of the child, has similarly held that

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<sup>46</sup> *Id.*

<sup>47</sup> In a case that attracted international attention, the French recognized the parentage of a French couple who arranged for a child to be born to a surrogate in the United States, but did not grant the child citizenship. See Cour de cassation [Cass.] [supreme court for judicial matters] le civ., Apr. 6, 2011, Bull. civ. I, No. 370 (Fr.), [http://www.courdecassation.fr/jurisprudence\\_2/premiere\\_chambre\\_civile\\_568/370\\_6\\_19628.html](http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/370_6_19628.html). The European Court of Human Rights, however, ruled that the French decision violated the rights of the child. See Kirsty Oswald, *France to Recognise Surrogate Children*, BIONEWS (July 6, 2015), [http://www.bionews.org.uk/page\\_540529.asp](http://www.bionews.org.uk/page_540529.asp).

<sup>48</sup> See, e.g., *L (A Minor)* [2010] EWHC 3146 (Fam.), <http://www.family-lawweek.co.uk/site.aspx?i=ed74241> (recognizing intended British parents who used a surrogate in Illinois as legal parents despite payments to the surrogate).

<sup>49</sup> *Id.* In this case, the British intended father had provided sperm, the gestational carrier had surrendered the child, and an American decision had affirmed the British couples' parentage. Between 2012 and 2016, the number of parentage orders in surrogacy cases in England and Wales has almost doubled and the government issued its first surrogacy guidance. See *First Surrogacy Guidance Issued in England and Wales*, BBC (Feb. 28, 2018), <http://www.bbc.com/news/health-43225867>.

Germany's desire to discourage surrogacy was not a sufficient reason to refuse to recognize the parentage of a same-sex couple who were raising a child in Berlin born to a California surrogate and subject to a California judgement confirming the two men's legal parenthood.<sup>50</sup> While foreign countries do not necessarily recognize American parentage judgments or adoption decrees, they cannot effectively refuse to recognize the legal status of the intended parents without harming the child.

These results do not just leave the home jurisdiction with no way to enforce provisions outlawing surrogacy, limiting payment, or prohibiting practices such as sex selection. They also leave these jurisdictions with few ways to oversee the practices to prevent exploitative practices or protect children's health and well-being. Effective solutions accordingly require thinking in different ways about regulations of the fertility business.

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The ability to cross jurisdictional lines to access surrogacy allows intended parents "to shop" for the legal regime that accommodates their preferences. Home jurisdictions have limited ability to police their developments. Even surrogacy friendly jurisdictions stay that way by leaving many of the provisions in surrogacy contracts to the wishes of the parties.

As a practical matter, therefore, no jurisdiction comprehensively oversees the development of surrogacy practice. Instead, private contracting shapes the parties' understandings, and the evolving norms underlying such agreements. Even states like California, with supportive legislation, do not comprehensively address the validity of contract terms. And some contract provisions, such as clauses dealing with abortion, are not subject to specific enforcement anywhere (no woman may be compelled to have an abortion against her will), but may trigger financial consequences of varying degrees of enforceability in the different states. These practices influence the parties' expectations about their agreements as much, if not more, than formal legal regulation.

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<sup>50</sup> *German Supreme Court Recognizes Same-Sex Parents after Californian Surrogacy*, EUROPEAN SEXUAL ORIENTATION LAW (Jan. 11, 2015), <http://www.sexualorientationlaw.eu/102-german-supreme-court-recognizes-same-sex-parents-after-californian-surrogacy-germany>.

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In the face of the limited effectiveness of state regulation, and wholesale ability to evade restrictive laws by traveling to a different jurisdiction, it is time to consider a new approach – the regulation of the professionals involved in the practice. Foremost among those professionals are the lawyers who draft surrogacy contracts.

## **II. Contracts as the Legal Structure for Both Domestic and Cross-Border Surrogacy Arrangements**

Contracts provide the legal structure for surrogacy arrangements, whether they occur within a single jurisdiction or across jurisdictional boundaries. This is true whether or not all of the contract provisions are enforceable.<sup>51</sup> In every jurisdiction, the contracts shape the parties' expectations about the transaction, and serve as the default arrangements so long as no one contests them.<sup>52</sup> In jurisdictions without controlling statutes or precedent, many courts defer to the contracts to establish the parties' intentions and often a framework for decision-making.<sup>53</sup> Contract terms establish the basis for the surrogacy exchange – including payment and provisions to secure the intended parents' legal status, expectations about the conduct of the pregnancy, and governing documents to deal with the relationships not only between

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<sup>51</sup> In the vast majority of surrogacy transactions, things go smoothly in accordance with the voluntary agreement of the parties. See Mark Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate*, ABA J. (Mar. 2011), [http://www.abajournal.com/magazine/article/as\\_surrogacy\\_becomes\\_more\\_popular\\_legal\\_problems\\_proliferate/](http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate/).

<sup>52</sup> In those jurisdictions that criminalize surrogacy arrangements or ban commercial brokers, commercial agencies arranging such transactions may not operate within the state. Even then, private arrangements may still take place, and the parties may still look to contracts to structure their agreements. For an example of such an arrangement involving a brother and sister in New York, see Stephanie Saul, *Building a Baby, with a Few Ground Rules*, N.Y. TIMES (Dec. 13, 2009), <http://www.nytimes.com/2009/12/13/us/13surrogacy.html?pagewanted=all>.

<sup>53</sup> See, e.g., *P.M.*, 907 N.W.2d at 540 (holding gestational surrogacy agreements to be enforceable under existing Iowa law.); *In re Paternity of F.T.R.*, 833 N.W.2d 634, 643 (Wis. 2013)(presuming that it is in the child's interest to enforce a surrogacy agreement even in traditional surrogacy cases).

the prospective parents and the surrogate, but also with respect to the agencies and others involved in the birth.

#### A. *Establishing Parenthood*

For intended parents, the most important parts of such a contract are the provisions establishing parentage. These provisions can never be solely a matter of contract; that is, background state law establishes principles that guide recognition of parental status and contracts cannot unilaterally change these principles. Nonetheless, surrogacy friendly jurisdictions establish ways to recognize the intended parents' legal status. California, for example, allows intended parents to petition for a judgment establishing their parental status before the child's birth. Doing so requires that the parents be a party to "a properly executed assisted reproduction agreement for gestational carriers" completed before the transfer of embryos to the gestational carrier and comply with statutory provisions for independent counsel for each party, notarization of the agreement, and the inclusion of certain mandated provisions.<sup>54</sup> Even in jurisdictions without explicit surrogacy recognition, contracts will typically require the parties to comply with the steps necessary to establish the intended parents' parentage. These steps may include, for example, surrender of the child to the intended parents at birth and completion of the necessary paperwork for an adoption, if necessary to establish parentage.

In traditional surrogacy cases, however, where the birth mother is genetically related to the child, many jurisdictions, even those otherwise supportive of surrogacy agreements, will uphold the birth mother's parental status absent a voluntary relinquishment in the context of an adoption proceeding that gives the mother an opportunity to change her mind after the child's birth.<sup>55</sup> Even in these cases, however, where the mother has

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<sup>54</sup> 2012 Cal. Legis. Serv. Ch. 466 (A.B. 1217) (West), codified at CAL. FAM. CODE § 7962.

<sup>55</sup> *In re Baby*, 447 S.W.3d 807, 837-40 (Tenn. 2014) (where a biological surrogate mother refuses to consent to a parentage action, the only basis for termination of rights is through the government by state statutes and not by the contractual provisions). The California provisions cited above further provide for recognition of the intended parents only in the gestational surrogacy cases. *See supra* note 21.

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sought to retain her parental status, some courts have deferred to the contract provisions in determining custody.<sup>56</sup> The failure to terminate the biological parent's legal status in these cases would nonetheless complicate recognition of the intended parents in another jurisdiction, should the intended parents chose to take the child elsewhere.

In contrast, use of anonymous gametes creates different issues. Where the intended parents bear no genetic relationship to the child, some jurisdictions require adoption to transfer parenthood to the intended parents, and surrogacy contracts will ordinarily provide for the gestational carrier's voluntary relinquishment of any parental rights following birth as a step facilitating adoption or a parentage action by the intended parents.<sup>57</sup> If the intended parents adopt in the jurisdiction in which the child is born, the adoption will sever the parental status of the surrogate and the gamete donors. If the adoptive parents then take the child to another jurisdiction, that jurisdiction will have no basis on which to recognize anyone else as legal parents.<sup>58</sup> The only practical solutions will be to accept the adoptive parents' legal status or to place the child in foster care.<sup>59</sup>

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<sup>56</sup> See *F.T.R.* 833 N.W.2d at 651 (finding a traditional surrogate to be a legal parent, but finding that contract provisions granting the biological father's custody are to be accorded a presumption that they are in the child's best interests).

<sup>57</sup> See, e.g., *Raftopol v. Ramey*, 12 A.3d 783 (Conn. 2011) (involving a gestational agreement under which the surrogate mother agreed to "terminate her putative parental rights and to consent to adoption of any resulting children by father's domestic partner.").

<sup>58</sup> For a discussion of bringing children born abroad into the United States, see *State Recognition of Intercountry Adoptions Finalized Abroad*, Child Welfare Information Gateway, Children's Bureau, <https://www.childwelfare.gov/pubpdfs/intercountry.pdf> (last visited Apr. 9, 2018).

<sup>59</sup> The Italian courts have in fact removed a child born to a Russian surrogate, and placed the child in foster care rather than allow the Italian intended parents, who born no genetic relationship to the child, to retain custody. The European Court of Human Rights, however, condemned the action. *Italy Wrong to Take Child Born to Surrogate*: ECHR, Local (Jan. 27, 2015), <https://www.thelocal.it/20150127/echr-italy-wrong-to-take-child-born-to-russian-surrogate>.



### B. Payment

From the gestational carrier's perspective, payment is a critical aspect of the surrogacy transaction. Well-drafted agreements typically require that the intended parties make payments in advance.<sup>60</sup> The agency may then distribute the payments to the surrogate in installments specified by the contract.<sup>61</sup> The contract provisions governing payment may be enforceable even if other provisions of the contract are not. In addition, some contracts insert a provision that permits the intended parents to stop financial payments to the carrier in the event she breaches a termination or other provision of the contract. Moreover, where the intended parents and the gestational carrier reside in different jurisdictions, the law that governs the financial terms of the contract may differ from the law that governs parentage.<sup>62</sup>

### C. Agency Relationship

Often there are two or even three contracts involving the parties, depending on whether a surrogacy agency is involved, and whether the parties are utilizing the services of an independent escrow agent. Where an agency is involved, both the carrier and intended parents typically sign separate agreements with the agency, which may have a heightened duty of care to the intended parents and surrogate.<sup>63</sup> The duty of care comes from the nature of a relationship arranging for the birth of the child and includes insuring that the surrogate meets medical and psychological criteria. Even where the attorney is acting solely through an agency or matching service, the attorney, as an agency owner, may accordingly have a duty to act in the client's best interest in providing non-legal services.

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<sup>60</sup> Carbone & Madeira, *supra* note 21, at 22.

<sup>61</sup> See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993) (noting that the surrogate was paid in installments over the course of the pregnancy, with the final installment scheduled for six weeks after birth).

<sup>62</sup> In *J.F.* 879 N.E.2d 740, for example, when a Pennsylvania trial court ruled on the gestational carrier's behalf, the intended father successfully sued in Ohio to enforce other parts of the surrogacy agreement.

<sup>63</sup> Susan L. Cronkin, *Whose My Client? Recognizing and Avoiding Conflicts of Interest in ART Law Representation*, 34 FAM. ADVOC. 14, 16 (Fall 2011).

#### D. *Terms of the Pregnancy*

Surrogacy contracts typically address many conditions that might arise during the embryo transfer and potential pregnancy.<sup>64</sup> Provisions in the contract may attempt to resolve controversial issues, such as the conditions under which the parties agree to termination of the fetus in the event of a genetic abnormality or other contingencies.<sup>65</sup> In addition, such contracts often involve conduct during the pregnancy, including agreements not to smoke, to have regular medical checkups, to avoid activities that may injure the fetus, and other matters.<sup>66</sup> The enforceability of these provisions is questionable;<sup>67</sup> yet, such clauses may help establish the parties' expectations.<sup>68</sup> For example, many intended parents wish to be able to attend doctors' appointments and to view ultrasound images.<sup>69</sup> In addition, given the potential impact of smoking on the developing fetus, prospective parents may wish to exclude from consideration a potential gestational carrier who smokes. And pro-life prospective parents and carriers may wish to have an agreement ruling out abortion from the beginning of the pregnancy. Discussions about such clauses may help establish expectations about how to handle such matters should they arise. They also help the parties find others who share their own values and expectations.

#### E. *Cross-jurisdictional Effects*

Surrogacy contracts often create "facts on the ground" that may make it difficult to challenge the results later. Challenges to the enforceability of surrogacy agreements are relatively rare; voluntary compliance is the norm.<sup>70</sup> Moreover, when a conflict occurs in a jurisdiction where the matter is one of first impres-

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<sup>64</sup> *F.T.R.*, 833 N.W.2d at 644-45.

<sup>65</sup> See generally Deborah L. Forman, *Abortion Clauses in Surrogacy Contracts: Insights from a Case Study*, 49 *FAM. L.Q.* 29 (Fall 2015).

<sup>66</sup> See Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 *IND. L.J.* 1223, 1260 (2013).

<sup>67</sup> Forman, *supra* note 65, at 39-42.

<sup>68</sup> Gestational carriers, for example, overwhelmingly indicate that they see the abortion decision as one that should be made by the intended parents. Laufer-Ukeles, *supra* note 66.

<sup>69</sup> The failure to agree on these provisions in advance can be a source of tensions. See, e.g., *P.M.*, 907 N.W.2d 522.

<sup>70</sup> *Id.* See also Laufer-Ukeles, *supra* note 66, at 30-31.

sion, courts often defer to the agreement in the absence of other law. The American trend has been to enforce gestational carrier agreements,<sup>71</sup> although courts continue to struggle over specific contractual issues.<sup>72</sup>

For jurisdictions that oppose surrogacy, the facts on the ground create a dilemma. Surrogacy contracts often document the violation of surrogacy laws outside the jurisdiction by providing evidence of the transaction, its commercial nature, and the amount of payment. Many of these jurisdictions find some or all of these factors to violate public policy.<sup>73</sup> Where the jurisdiction in which the surrogacy occurs severs the parental status of gamete donors or gestational carriers by operation of law or protects their anonymity, this leaves the intended parents as the child's only possible legal parents. In the United Kingdom, for example, which prohibits commercial surrogacy, the courts in a number of surrogacy cases have ultimately recognized surrogacy arrangements that arguably violate UK law, but only after substantial litigation and expense.<sup>74</sup> For the intended parents, the result cre-

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<sup>71</sup> C.M. v. M.C., 213 Cal. Rptr. 3d 351, 363 (Cal. Ct. App. 2017) (surrogacy contracts are consistent with the public policy of California); *P.M.*, 907 N.W.2d 522 (surrogacy contracts do not violate public policy of Iowa); *In re Baby Boy A*, 2007 WL 4304448 \*5-7 (Minn. Ct. App. Dec. 11, 2007) (unpublished); *J.F.*, 879 N.E.2d 740; *In re Baby S*, 128 A.3d 296 (Penn. Super. Ct. 2015); *Baby*, 447 S.W.3d at 823 (holding that the Tennessee's legislature's failure to restrict surrogacy compels the conclusion that it is not against the state's public policy); *F.T.R.*, 833 N.W.2d at 648-50 (the public policy of Wisconsin is embodied in the "best interests of the child" standard, which supports enforcement of surrogacy agreements that create stability for the child).

<sup>72</sup> *Raftopol v. Ramey*, 12 A.3d 783,795 (Conn. 2011) (assuming without deciding that an agreement between Romanian intended parents and a Connecticut surrogate was valid in affirming that the intended parents were entitled to a declaratory judgment of parentage); *Baby*, 447 S.W.3d 807 (generally enforcing an agreement but severing portions defining the status of the parties as contrary to Tennessee state law); *F.T.R.*, 833 N.W.2d at 634 (same result under Wisconsin law).

<sup>73</sup> Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799, 800 (2012).

<sup>74</sup> Charles P. Kindregan & Danielle White, *International Fertility Tourism: The Potential for Stateless Children in Cross-Border Surrogacy Arrangements*, 36 SUFFOLK TRANSNATIONAL L. REV. 527, 559-75 (2013) (describing cases where UK courts granted parentage only after significant litigation and uncertainty as to the result).

ates a great deal of uncertainty about surrogacy outcomes, but for the courts it creates a painful choice between the child's interests, which ordinarily lie in recognition of the intended parents' status, and upholding the law.<sup>75</sup>

Accordingly, lawyers advising clients with respect to surrogacy arrangements must be able to properly counsel their clients with respect to the potentials risks that could arise if a dispute were to arise and a court were to conclude that some or all of the contract is not legally enforceable. With that in mind, we turn to a review of the ethical rules most commonly encountered by transactional lawyers in general, and then apply those rules to representation of parties to both domestic and cross-border gestational carrier agreements.

#### **IV. Professional Responsibilities**

Given the role of contracts in structuring surrogacy transactions, the lawyers' role is a critical one. Yet, attorneys' ethical obligations in contract drafting generally,<sup>76</sup> much less in surrogacy contracts as a specialized field, have received relatively little attention. The ethical framework that does exist tends to address either the adversarial litigation context<sup>77</sup> or specific issues such as lawyers' ethical obligations not to assist their clients in committing fraud or the duties owed to persons other than the lawyers' own client.<sup>78</sup> Other lawyers have defended the use of traditional or form contract language, warning of the risks from unanticipated contractual interpretations and subsequent malpractice claims.<sup>79</sup> There is only minimal work evaluating issues in compe-

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<sup>75</sup> In the European Union, it also creates tensions between the rulings of the European Court of Human Rights, which has adopted a best interest of the child approach, and various national approaches that refuse to recognize the citizenship of children born to surrogates abroad. *Id.* at 552 (noting that the German government has refused to issue passports to children of German intended parents born to surrogates abroad).

<sup>76</sup> See, e.g., Lisa L. Dahm, *Practical Tips for Drafting Contracts and Avoiding Legal Issues*, 46 TEX. J. BUS. L. 89 (2014); Gregory M. Duhl, *The Ethics of Contract Drafting*, 14 LEWIS & CLARK L. REV. 989 (2010); Lori D. Johnson, *The Ethics of Non-Traditional Contract Drafting*, 84 U. CIN. L. REV. 595 (2016).

<sup>77</sup> Johnson, *supra* note 76, at 596-97.

<sup>78</sup> Duhl, *supra* note 76, at 998-1001, 1004-1008, 1017-1019.

<sup>79</sup> Dahm, *supra* note 76, at 96-97; Johnson, *supra* note 76, at 614-615.

tence, client communication, conflicts of interest, fees, and other “traditional” ethical issues that are more often evaluated in the litigation context.

The importance of contracts in establishing the legal framework for surrogacy justifies a more systematic examination of attorney obligations. The ethical framework for surrogacy lawyers will ordinarily come from the same principles that govern other professional obligations. The surrogacy context, however, may involve heightened ethical obligations where the attorney is in effect shaping the practice in accordance with the attorney’s rather than the client’s preferences. Even in dealing with sophisticated parties, the attorney’s duties may increase where the primary attorney role is to insure informed consent to the agreement, particularly if the agreement includes provisions that may not be legally enforceable, but that are important to the clients’ relationship to each other. Attorney obligations should also become greater when the clients come from abroad or where they have relatively little understanding of the process and of their ability to negotiate surrogacy terms.<sup>80</sup>

In addition, lawyers may serve as gatekeepers. Intended parents seeking to arrange a surrogacy transactions may involve lawyers as go-betweens who help identify surrogacy agencies, as brokers who help recruit gestational carriers, gamete donors or other participants, as advisers who help navigate the process of negotiating a contract or establishing parenthood, or as guarantors who put their personal imprimatur on the legitimacy or validity of the arrangement. These roles may help guard against surrogacy abuses, but they also raise questions about potential conflicts of interest or heightened duties to communicate effectively with clients.

In each of the sections below, we start with assessment of traditional ethical considerations as they apply in the surrogacy context, then address issues particular to surrogacy transactions, and finish with an examination of how interested jurisdictions might strengthen the process.

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<sup>80</sup> *In re Totten*, 993 N.Y.S.2d 741, 745 (N.Y. App. Div. 2014) (disciplining a criminal attorney who represented limited English proficiency clients in a real estate transaction).

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### A. *Competence and the Creation of a Surrogacy Bar*

Participants in the surrogacy process often look to attorneys for the same type of legal advice lawyers provide in other circumstances. They may also look to attorneys, however, as guarantors of the legitimacy of the process. This role is a trickier one for a lawyers. It involves negotiating what in many jurisdictions is an uncertain process for securing legal recognition of the intended parents' parental status. Moreover, it may require anticipating not only the legal requirements in the jurisdiction in which the surrogate gives birth, but the legal requirements for establishing parenthood in the intended parents' home jurisdiction.

In negotiating legal uncertainty, the most basic issue is competence. In jurisdictions with relatively little law governing surrogacy agreements, competence may involve not just knowledge of the law but an understanding of how individual judges in the jurisdiction approach surrogacy matters. This may be a function of local experience and networks.<sup>81</sup> Legal ratification of parenthood, whether through a judicial declaration of parentage or an adoption proceeding, is often faster, more certain, and less expensive when the judge has experience with surrogacy cases and is supportive of the transaction.<sup>82</sup> While the assignment of judges is sometimes unpredictable,<sup>83</sup> experienced lawyers may be better able to insure that cases come before such judges, particularly where the action is uncontested.

The basic rules of professional responsibility require competence to represent the client with respect to the specific matters for which she is being retained. ABA Model Rule 1.1 defines competence as “the legal knowledge, skill, thoroughness and

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<sup>81</sup> Securing legal recognition for LGBT clients has long involved using networks to identify judges supportive of the clients' families. *See, e.g.,* AMANDA K. BAUMLE & D'LANE R. COMPTON, *LEGALIZING LGBT FAMILIES: HOW THE LAW SHAPES PARENTHOOD* 178 (2017) (describing use of attorneys or personal professional networks to insure that adoption proceedings are brought before the right judge). For an example of how a judge skeptical of surrogacy can affect an otherwise uncontested parentage determination, see *In re Paternity of J. W. O. T.*, 900 N.W.2d 344 (Wis. Ct. App. 2017), *review denied sub nom. R. B. O. v. Knutson*, 905 N.W.2d 840 (Wis. 2017).

<sup>82</sup> BAUMLE & COMPTON, *supra* note 81, at 178 (discussing the role of individual judges in the speed of adoption proceedings).

<sup>83</sup> *See, e.g.,* J. W. O. T., 900 N.W.2d 344.

preparation reasonably necessary for the representation.”<sup>84</sup> Competence includes the knowledge and ability to review all relevant documents to the transaction and to properly advise the client as to whether the documents are sufficient to comply with the law and achieve the clients’ needs.<sup>85</sup> A lawyer representing an unsophisticated client in a transaction may have a heightened duty to understand the nature and risks of the transaction in order to be able to effectively communicate these risks to the client.<sup>86</sup> Lack of experience in a specialized area of the law may give rise to questions of competence.<sup>87</sup>

Mere neglect often does not rise to a violation of Rule 1.1 (although it may violate other rules), but an attorney must act in a reasonable manner given the complexity and nature of the representation.<sup>88</sup> “Rule 1.1 mandates that a general practitioner must identify areas in which the lawyer is not competent and acquire sufficient knowledge about the specific area of law in which the lawyer is practicing in order to avoid harm to the client.”<sup>89</sup> While a lawyer who is new to a field may be just as competent as an experienced lawyer, an attorney who has not practiced in a specific field previously must ensure that she is keenly aware of all relevant law and procedure.<sup>90</sup> Further, a lawyer may need to disclose her lack of experience to the client.<sup>91</sup>

At the outset, a lawyer practicing assisted reproductive technology law must have a good working knowledge of the medical procedures and terminology involved in surrogacy, without

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<sup>84</sup> MODEL RULES OF PROF’L CONDUCT R. 1.1 (2016).

<sup>85</sup> See *In re Goldstein*, 990 A.2d 404 (Del. 2010) (disciplining attorney who failed to properly review a contract under Rules 1.1 and 1.4).

<sup>86</sup> *In re Totten*, 993 N.Y.S.2d 741, 745 (N.Y. App. Div. 2014) (disciplining a criminal attorney who represented limited English proficiency clients in a real estate transaction).

<sup>87</sup> *Id.*

<sup>88</sup> *Iowa Sup. Ct. Attorney Disciplinary Bd. v. Baldwin*, 857 N.W.2d 195, 205 (Iowa 2014) *but see In re Owen*, 306 P.3d 452, 455 (N.M. 2013) (inaction can lead to finding of a lack of competence).

<sup>89</sup> *In re Richmond’s Case*, 872 A.2d 1023, 1028 (N.H. 2005).

<sup>90</sup> *Attorney Grievance Comm’n of Maryland v. Narasimhan*, 92 A.3d 512, 519 (Md. Ct. App. 2014)

<sup>91</sup> *Id.* at 531 (concluding that a lawyer violated Rule 8.4 by misrepresenting her level of experience in addition to demonstrating a lack of competence under Rule 1.1).

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which a lawyer cannot competently draft a surrogacy contract.<sup>92</sup> For example, a lawyer must generally understand the types of medical testing and screening that should be done prior to the transfer in order to craft accurate representations and warranties in any agreement. The lawyer must also understand the nature and consequences of different transfer protocols to be able to anticipate potential health risks that may affect the parties.<sup>93</sup> And given the increasing emphasis on identifying the source of medical payments as part of the surrogacy agreement, a lawyer should be able to determine whether the parties' existing health insurance covers the surrogates' health care costs, which can be an uncertain and contentious issue in itself.<sup>94</sup> This is only a small example of the extensive background information a surrogacy lawyer might need to possess to avoid drafting issues.

The problem in surrogacy cases, particularly in a jurisdiction with relatively little law, is that contract drafting often reflects lawyers' knowledge of the things that can go wrong. Surrogacy contracts tend to be lengthy in large part because lawyers try to anticipate the full range of complexities that could occur, and to provide for such eventualities in the agreement.<sup>95</sup> In contrast, state-prescribed form agreements are much shorter.<sup>96</sup> The law-

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<sup>92</sup> See Fernando Zegers-Hochschild, et al. *The International Glossary on Infertility and Fertility Care*, 32 HUM. REPRODUCTION 1786 (2017).

<sup>93</sup> While an attorney may not be held responsible for advising a client on the risks that come with higher order births, for example, an experienced attorney may want to insure that the clients have been advised about the risks both to the fetuses and the gestational carrier if the parties contemplate transferring multiple embryos. See, e.g., Nancy S. Green, *Risks of Birth Defects and Other Adverse Outcomes Associated with Assisted Reproductive Technology*, 114 PEDIATRICS 256 (2004).

<sup>94</sup> See, e.g., Debra E. Guston & William Singer, *A Well-Planned Family How LGBT People Don't Have Children by Accident*, N.J. LAW., June 2013, at 36 ("Participants in the use of ART also must deal with insurance coverage regulations.").

<sup>95</sup> In a contested case involving selection reduction of triplets, for example, the surrogate indicated that the surrogacy agreement was 75 pages long. Michelle Goldberg, *Is a Surrogate a Mother?*, SLATE (Feb. 15, 2016), [http://www.slate.com/articles/double\\_x/doublex/2016/02/custody\\_case\\_over\\_triplets\\_in\\_california\\_raises\\_questions\\_about\\_surrogacy.html](http://www.slate.com/articles/double_x/doublex/2016/02/custody_case_over_triplets_in_california_raises_questions_about_surrogacy.html).

<sup>96</sup> See, e.g., 2 CALIFORNIA TRANSACTIONS FORMS: FAMILY LAW § 7:45 (1998) (artificial insemination surrogacy agreement between an intended father and a surrogate couple).



yer for the intended parents typically drafts the agreement, and these attorneys have a particular duty to be prepared to advise the client how a contract can protect their position. Lawyers for the surrogate, as we will discuss below, need to be in a position to explain lengthy proposed agreements to their clients.<sup>97</sup>

Competence issues can also arise in representing foreign clients in a transactional matter. One can easily imagine a situation in which a foreign national would inquire about the effect of the transaction or enforcement of a provision of a contract in the client's own country. In Europe, recognition may involve not only that country's parentage laws, but European Union human rights provisions.<sup>98</sup> Accordingly, it may be necessary to consult with or advise the client to retain a lawyer in her own country to provide competent advice on these issues. The ability of the intended parents to receive recognition in their home jurisdiction may also depend on the provisions of the contract. In jurisdictions that ban commercial payment, for example, it may help to characterize payments as compensation for loss of work, discomfort and inconvenience, or other matters.<sup>99</sup> Within the United States, it may be important to secure a court order before the child leaves the jurisdiction given the fact that such an order will be entitled to full faith and credit in all U.S. jurisdictions.<sup>100</sup>

A number of state bars have certification programs that grant attorneys recognition as specialists in a given field.<sup>101</sup> Cali-

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<sup>97</sup> See, e.g., Goldberg, *supra* note 95, indicating that the in contested California case, the gestational carrier gave the 75 page agreement only a cursory reading, and was not aware of the provision addressing selection reduction.

<sup>98</sup> See, e.g., Oswald, *supra* note 47.

<sup>99</sup> For a discussion of the role of compensation, for example, under U.K. law, see Re L (A Minor) [2010] EWHC 3146 (Fam); Re S (Parental Order)[2009] EWHC 2977 (Fam). See also Emily Jackson, Jenni Millbank, Isabel Karpin & Anita Stuhmcke, *Learning from Cross-Border Reproduction*, 25 MED. L. REV. 23, 29 (2017) (describing how Canadian payments are acceptable in Australia because they are described as reimbursement for expenses).

<sup>100</sup> Such orders can only be challenged on jurisdictional grounds, which also makes it important to insure that parties have complied with the jurisdictional requirements necessary to grant the order. See *V. L. v. E.L.*, 136 S. Ct. 1017.

<sup>101</sup> See, ABA Center for Professional Responsibility, *Sources of Certification*, [https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/specialization/resources/resources\\_for\\_lawyers/sources\\_of\\_certification.html](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/specialization/resources/resources_for_lawyers/sources_of_certification.html) (last visited Mar. 3, 2018).

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for example, certifies family law specialists, who must pass a written exam in the specialty area and have been in practice “for at least five years, spending at least 25 percent of the time given to occupational endeavors practicing in the specialty area.”<sup>102</sup> To insure competence and public confidence in surrogacy lawyers, a state requiring legal representation could require representation by such a certified family law specialist. Alternatively, brokers or travel agencies arranging representation for their client could use such certifications as part of their efforts to insure competent representation. There is a clear need for a surrogacy practice group to develop a specialty certification program that could be accredited by the American Bar Association, and whose members agree to abide by the ABA’s ethical guidelines.

### B. *Conflicts of Interest*

Many clients, particularly those coming from outside the jurisdiction, may look to attorneys not just for legal advice, but for assurances about the probity of the surrogacy agency or the reliability of the gestational carrier herself. Many attorneys will view a request for such assurances as outside the scope of legal representation and should so inform the client. Experienced attorneys, however, may interact on a regular basis with IVF centers, surrogacy clinics, and brokers who recruit gamete donors. It is therefore not surprising that the best practices for doctors adopted by the American Society for Reproductive Medicine require that both the intended parents and carrier have ongoing independent legal representation by an “appropriate legal practitioner who is experienced with gestational carrier contracts.”<sup>103</sup> These attorneys will fall into two categories raising the question of potential conflicts and ethical responsibilities.

First, some attorneys run surrogacy or gamete donor agencies. Having a licensed professional run such agencies may encourage greater confidence in the agency. Licensed profes-

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<sup>102</sup> State Bar of California, *Legal Specialization*, <http://www.calbar.ca.gov/Attorneys/Legal-Specialization> (last visited Apr. 3, 2018).

<sup>103</sup> Practice Committee of the American Society for Reproductive Medicine and Practice Committee of the Society for Assisted Reproductive Technology, *Recommendations for Practices Utilizing Gestational Carriers: A Committee Opinion*, 103 FERTILITY & STERILITY E1, E4-5 (2014).

sionals, after all, can be expected to have greater knowledge about the underlying legal requirements, and they can have more to lose – their professional licenses – in the event of fraud or abusive conduct. In addition, lawyers who both run agencies and oversee contracts and other legal documentation may be able to reduce the costs to intended parents.

Second, attorneys often develop less formal relationships with such agencies. They may handle legal work for the agency on a regular basis, or regard the agency as a regular source of referrals for clients seeking legal representation in entering into surrogacy contracts. In these cases, the attorneys can be expected to acquire information about the agency's procedures and reliability.

In both cases, the closer the attorney's relationship with a particular agency, the greater the potential for conflicts of interest.<sup>104</sup> These conflicts are clearly the greatest if an attorney is also running a surrogacy agency or recruiting gamete donors. Even attorneys who simply receive referrals on a regular basis from certain agencies may have a conflict, however; attorneys who complicate the contracting process by raising objections or adding custom-crafted terms to protect individual clients may find that their referrals disappear. In addition, while attorneys who know less about the operation of such agencies will ordinarily have fewer potential conflicts of interest, the question arises about whether they should have a duty to inquire into the reliability of the agency if they are in a position to do so. The more that attorneys became gatekeepers, referring clients to particular agencies, increasing the likelihood that contracts will be viewed as enforceable because of their representation, or reassuring clients about the reliability of the surrogacy process, the greater their obligations should be.

We start with the most difficult of the scenarios: attorneys who personally own or oversee a surrogacy agency, then discuss the role of referrals in creating conflicts in the following section on fees.

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<sup>104</sup> See, e.g., *In re* Conduct of Spencer, 330 P.3d 538, 543 (Or. 2014) (serving as the client's real estate broker while representing the client in a bankruptcy was both a business transaction and an adverse pecuniary interest falling under Rule 1.8).

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Attorneys who both own agencies and oversee legal representation of intended parents start with an intrinsic conflict of interest. Agencies earn their income by matching prospective parents with surrogates and gamete donors. As agency owners, they accordingly have an interest in having the transaction go through, and in seeking to seek to allay the concerns potential customers may have about the process. Lawyers, in contrast, generally advise clients about what can go wrong, and how to position themselves to deal with potential problems. Simply raising the issues may persuade clients not to go ahead with a transaction. In addition, giving the client accurate information may involve calling attention to contract provisions, such as provisions dealing with a carrier's promise not to smoke, that may be effectively unenforceable. Because these conflicts are inevitable, it is possible to argue that attorneys should not both own agencies and provide legal advice to the agency's clients.<sup>105</sup> In this section, we remain agnostic, evaluating the pros and cons of the different approaches, but maintaining that the greater the conflicts, the greater the attorney obligations become to inform the client and to insure that the client's interests are protected.

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<sup>105</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2016) (providing that unless the conflicts can be and are waived, a lawyer may not represent two clients whose interests are materially adverse to each other or where there is a significant risk that the lawyer's ability to represent one client will be limited by her duties to another client, a former or prospective client, another person, or the lawyer's own interests).

1. *Ethical obligations for attorneys who own surrogacy agencies*

Rule 1.8<sup>106</sup> applies to business transactions related or unrelated to the representation.<sup>107</sup> “The commentary to ABA Rule 1.8(a) establishes that the first part of that rule serves as a general prophylactic against lawyers entering into business transactions with clients.”<sup>108</sup> Further, the lawyer has an adverse pecuniary interest any time her interest might be financially opposed to that of the clients.<sup>109</sup> Thus, a lawyer who benefits from the successful negotiation of a contract in which the lawyer represents a client has an adverse pecuniary interest in the outcome of the matter and must strictly comply with Rule 1.8(a).

Several courts have held that a lawyer must comply with Rule 1.8(a) when the lawyer simultaneously represents the client and is involved in offering the client a non-legal product or service, regardless of whether the product or service is related to the representation.<sup>110</sup> Such a duty is heightened, and severe sanctions have been imposed where a lawyer obtains a personal financial benefit for the outcome of a transaction without making

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<sup>106</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(a) (2016) provides that:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

<sup>107</sup> *Spencer*, 330 P.3d at 543.

<sup>108</sup> *Id.* at 542.

<sup>109</sup> *In re Fisher*, 202 P.3d 1186, 1196 (Colo. 2009) (holding that a lawyer who received a security interest in a client's property without complying with waiver requirements violated Rule 1.8).

<sup>110</sup> *Florida Bar v. Doherty*, 94 So.3d 443 (Fla. 2012) (disbarring a lawyer who sold securities to a client without complying with Rule 1.8(a)); *Spencer*, 330 P.3d at 54.

adequate disclosures and complying with Rule 1.8(a). In disbarring a lawyer who represented a client in estate planning while simultaneously selling the client securities, the Florida Supreme Court held:

The evidence demonstrates that Doherty's conduct created a clear conflict of interest in that there was a substantial risk that his representation of the client would be limited by his own interests. Doherty acted purposefully to make his personal, pecuniary interests at least as important as those of his client and her estate. He advised his client to select various means of estate planning and wealth management that would earn him a personal financial benefit. Additionally, Doherty participated in a business transaction with his client and failed to disclose his substantial interest in the transaction. We believe his actions amount to egregious misconduct.<sup>111</sup>

If the lawyer has any interest in the transaction, Rule 1.7, including the informed consent waiver provisions, applies. A lawyer engaging in a business transaction with his own client or holding an adverse pecuniary interest must obtain enhanced informed consent to waive the conflict, including a disclosure of how the lawyer may benefit by consummation of the transaction and the lawyer's precise role.<sup>112</sup> The client must be advised by the lawyer of the desirability of having the transactions reviewed by independent outside counsel, and must be given a reasonable opportunity to do so.<sup>113</sup>

## 2. *Establishing the attorney-agency-client relationship*

The intended parents, surrogates, and gamete donors will ordinarily initiate contact with the surrogacy agency.<sup>114</sup> At this initial stage, there will be no attorney-client relationship and, indeed, the parties may not be thinking about or seeking formal legal representation. A potential agency customer, particularly one aware that a lawyer runs the agency, may nonetheless rely on the agency's brochures, oral representations, website, or written information in making decisions about legal matters.

Lawyers have a duty under Rules 4.1 and 4.3 to avoid making misstatements, as well as the duty to make reasonable efforts

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<sup>111</sup> *Doherty*, 94 So.3d at 450.

<sup>112</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(a)(3) (2016).

<sup>113</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(a)(2) (2016).

<sup>114</sup> The ethics of an attorney referring a client to his own surrogacy agency may raise a different set of issues outside the scope of this article.

to ensure that their non-lawyer assistants (staff) avoid such statements as well under Rule 5.3(a). Where a lawyer runs an agency, these obligations may extend to the agency even if the attorney does not personally speak to or represent the interested parties.

Attorneys should keep in mind that at the intake stage, the clients are unrepresented by counsel and have interests that are adverse to the owners or managers of the agency. Therefore, lawyers who own, manage, or work directly for agencies or have affiliates who perform such matching services need to ensure that their agency client intake procedures, including training for non-lawyer assistants, are robust and avoid the possibility that any material misstatements will be made during the initial intake and promotion of the agency's services. The risk of misinformation needs to take into account the potential inexperience or naiveté of potential agency customers.

Once the interested parties decide to enter into a relationship with the surrogacy agency, the next step typically involves signing a contract between the agency and the intended parents, gestational carrier, or gamete donors. These documents typically involve the payment of fees (particularly from the intended parents to the agency) or provisions for medical or psychological testing (particularly from prospective donors or surrogates). A lawyer who owns such an agency may wish to draft these contracts. In this case, the lawyer's client is the agency itself,<sup>115</sup> a party whose interests are adverse to those of the other signatories to such agreements.<sup>116</sup>

The agency and its attorney owners can protect themselves by counseling the agency customer<sup>117</sup> to obtain independent legal representation to avoid potential conflicts under Rule 1.8(a)(2). If the customer declines to do so, the agency should have the

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<sup>115</sup> Any potential conflicts between the attorney and the agency are beyond the scope of this article.

<sup>116</sup> In fact, similar concerns underlie the formation of the attorney-client relationship, and the rules of professional conduct consider this by limiting the ability of the lawyer to insert certain provisions into an engagement agreement without enhanced disclosure. *See* MODEL RULES OF PROF'L CONDUCT 1.8, cmt. 14 (2016); *see also* Snow v. Bernstein, Shur, Sawyer & Nelson, P.A., 176 A.3d 729, 734-37 (Me. 2017).

<sup>117</sup> At this stage, the intended parents, potential gestational carriers and gamete donors have no legal representation and are therefore not "clients." We use the term "customer" here to avoid confusion.

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customer sign a statement indicating that the agency advised her to seek independent legal representation and the client decided not to do so.<sup>118</sup> If the lawyer or agency or its affiliates are likely to represent the customer in an attorney-client relationship during the surrogacy process, the attorney will be required to insure that the transaction is fair and reasonable to the client.<sup>119</sup>

Further, the agency should explain critical parts of the contractual agreement to its customers. Some agencies, for example, will restrict the amount intended parents can pay a donor or surrogate, and these terms may restrict the intended parents' ability to find donors of their choice.<sup>120</sup> The customers may not understand the implications of these agreements at the time they are signed, particularly where the agreement restricts the terms that will apply to later agreements, agreements where the attorney may then be representing the agency customer.

3. *Negotiating an agreement between intended parents and a gestational carrier*

The greatest potential for conflicts exists when a lawyer who owns an agency also represents the intended parents in drafting contracts with surrogates or gamete donors.<sup>121</sup> Typically, an attorney-owner establishes an attorney-client relationship with intended parents only after the clients have signed a contract with the agency, which will typically mean that the intended parents have made a decision to go ahead with the process. In addition, the agency is not necessarily a party to the agreement between

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<sup>118</sup> The agency should obtain confirmation of the waiver of the right to an independent counsel in writing. This writing should include a statement that the customer was counseled to obtain independent review of the agreement, and a detailed explanation of the disclosures made by the agency, including whether a lawyer affiliated with the agency participated at all in preparing or reviewing the agency agreement with the customer.

<sup>119</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.8(a)(1) (2016).

<sup>120</sup> Intended parents, for example, may find it more difficult to recruit East Asian or Jewish egg donors without paying higher prices. Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 222 (2009).

<sup>121</sup> The conflicts of interest are sufficiently apparent that an attorney who owns an agency should not also represent surrogates or gamete donors either in entering into a contract with the agency, or in entering into a contract with the intended parents.



the intended parents and the surrogate or donors. In this context, the agency and the intended parents both have an interest in having the surrogacy transaction occur, and both have an interest in positioning the intended parents to secure legal recognition of their parental status. In addition, lawyers in such cases will ordinarily propose use of a standard agreement (albeit one drafted by the individual attorney) rather than a custom-negotiated one.<sup>122</sup> Nonetheless, conflicts clearly exist.

ABA Model Rules 1.7, 1.8, 1.9, and 1.18 govern a number of possible conflicts. The most basic involves the lawyers' interest in having the contract go through, a circumstance that clearly involves a conflict.<sup>123</sup> Since the agency has a vested interest often backed by a financial incentive to ensure that the contracting process is completed, lawyers who own or are affiliated with the agency may have their professional judgment, including their absolute duty of loyalty to their client, impaired. They may be tempted, for example, to minimize the legal uncertainties associated with the process or problems with the enforceability of certain contract clauses important to the intended parents. Moreover, if, as we suggest below, the best way to insure against later problems is to have intended parents and surrogates thoroughly discuss issues such as abortion, birth defects, or behavior during pregnancy in advance, lawyers may be hesitant to do so where they have an interest in insuring that the parties reach agreement. And a lawyer who owns an agency may be reluctant to question the client's agency agreement, if that agreement later proves to the client's disadvantage. Even if the agency is not a direct party to a surrogacy contract, it may have independent contractual obligations to all of the parties involved in the agreement, and a direct interest in the outcome and the details of such an agreement.

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<sup>122</sup> See, e.g., Ellen Trachman, *I Want to Put a Baby in You: Triplets Trouble*, ABOVE THE LAW (May 2, 2016), <https://abovethelaw.com/2016/03/i-want-to-put-a-baby-in-you-triplets-trouble/> (describing a surrogate's failure to review the contract, even with legal representation).

<sup>123</sup> Rule 1.7(a)(2) refers to "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2016).

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A lawyer who owns an agency therefore intrinsically has a conflict of interest in such circumstances. The question then becomes whether the conflict is waivable, and if so, how an attorney can minimize potential liability. Conflicts are typically imputed to all members of a lawyer's firm; accordingly, a waiver is needed even if the attorney providing individual representation is simply a member of the same firm as the attorney who owns the agency.<sup>124</sup>

A conflict of interest can be waived generally only where the parties give written informed consent and the lawyer has a reasonable belief that she can diligently and competently complete the representation despite the concurrent conflict.<sup>125</sup> Analyzing whether the attorney can diligently and competently complete the representation requires an analysis of several factors and disclosures related to these factors in the waiver.

One issue is whether the attorney is representing more than one party at a time. As we argued above, agencies should keep the attorney role in preparing the customer's contract with the agency separate from the attorney's role in negotiating a later surrogacy agreement with a surrogate or gamete donors. The attorney should also not represent both the intended parents and either the surrogate or gamete donors.<sup>126</sup> The attorney will still, however, have potential conflicts of interests and should inform the client of those conflicts, and advise the client that if a potential dispute arises with the agency, the client should expect to get separate representation to handle that matter.

Another issue is the attorney's willingness to consider changes to the surrogacy agreement. Given that the attorney is likely to have personally drafted the agreement and to have used it in other transactions, the attorney may be reluctant to consider changes, whether or not conflicts of interest exist. If this is the

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<sup>124</sup> MODEL RULES OF PROF'L CONDUCT R. 1.10(a) (2016).

<sup>125</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7(c). It is unlikely in a transactional representation that the dual representation would be prohibited by law, barring waiver under Rule 1.7(c)(2). Further, Rule 1.7(c)(3) is plainly not applicable to transactional representations.

<sup>126</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 7. *See also* Van Kirk v. Miller, 869 N.E.2d 534, 542-43 (Ind. Ct. App. 2007) (holding that a lawyer retained for the purpose of memorializing a contract already negotiated had a conflict that was waivable, but that the analysis would be different if the contract terms had not already been negotiated).

case, the attorney may want to inform the client at the outset that this is true. In addition, to the extent that the agency may insist on certain contractual provisions, the attorney should explain what those provisions are and their implications at the time that the waiver is signed.

A sophisticated client is much more likely to appreciate the effect of a waiver than an unsophisticated client. Consequently, “the more experienced the client is in legal matters generally and in making decisions of the type involved, the less information and explanation is needed for a client’s consent to be informed.”<sup>127</sup> Conversely, a lawyer who is not convinced that her client appreciates or understands the effects of a waiver cannot be sure the client is giving informed consent and cannot reasonably proceed with the joint representation.

#### 4. *Dealings with third parties such as surrogate and gamete donors*

Attorneys and agencies will ordinarily advise the intended parents to pay for an attorney to represent surrogates because the validity and fairness of the surrogacy agreement may be important to the intended parents’ ability to secure recognition of their status as legal parents. Intended parents may be more reluctant to also pay for attorneys to represent gamete donors, and the donors may not be represented by attorneys at all.<sup>128</sup> In these cases, the donors may rely on an agency’s lawyer’s statements without realizing that the lawyer is representing the intended parents. The lawyer, in that case, will have an obligation to avoid potential misunderstandings and misstatements for the same reasons described above.

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<sup>127</sup> *Galderma Lab., L.P., v. Actavis Mid Atlantic, LLC*, 927 F. Supp. 2d 390, 397 (N.D. Tex. 2013) (citing ABA Model Rules of Professional Conduct R. 1.0 cmt. 6 (2010)).

<sup>128</sup> Many professional organizations, including the American Academy of Assisted Reproductive Technology Attorneys (AAARTA), caution against permitting parties to go unrepresented in connection with an assisted reproductive contract. See AAARTA, *Code of Ethics* § 16(a), <http://www.aaarta.org/aaarta/academy-info/ethics-code> (last visited Feb. 24, 2018). Of course, the lawyer cannot force his client to agree to reimburse the other side’s costs but she can advise the client that it is industry standard and likely in the client’s own best interests to do so.

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Where a client manifests that she doesn't understand the implications of the attorney's conflict of interest with the agency, such as asking the lawyer for advice on whether the client should try to renegotiate her contract with the agency, the lawyer should question whether the client has given informed consent and should decline or terminate the representation.

*C. Professional Judgment and Fee Issues*

There are several potential fee issues that can arise when representing unsophisticated clients in transactional matters. Common problems include avoiding conflicts where fees are paid by the other party or a third party. Further, lawyers who use flat fees must ensure that the overall fee is reasonable and that they comply with rules preventing comingling and ensure that fees are treated properly until they are permissibly deemed earned.

If the client's fees are to be paid by another party, including the opposing side to a transaction, a lawyer must be mindful of her ethical obligations under Model Rule 5.4 and comply with the requirements of Model Rule 1.8(f). Under Rule 5.4(c), a lawyer may not permit a party who pays the lawyer's fees or recommends the lawyer to in any way influence or direct the professional judgment of the lawyer in rendering the services. Rule 5.4(c) completely bars the lawyer from considering or entertaining any input regarding the representation from a non-client payor of her fees.<sup>129</sup>

Where a lawyer accepts a representation paid for by a party other than her client, the lawyer must comply with the requirements of Rule 1.8(f). First, the lawyer must reasonably determine that there will be no interference with the lawyer's exercise of professional judgment or the attorney-client relationship.<sup>130</sup> This includes insuring that the payor does not maintain supervision of the representation and the payor cannot impose conditions on the lawyer's handling of the matter.<sup>131</sup> The attorney must ensure that all parties understand that the attorney-client privilege will apply and that payment by another party does not

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<sup>129</sup> See *In re Rumsey*, 71 P.3d 1150, 1162 (Kan. 2003).

<sup>130</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(f)(2) (2016)

<sup>131</sup> *In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806, 815 (Mont. 2000).

constitute a waiver of the privilege.<sup>132</sup> The client must give informed consent, which must include a discussion of the potential risks in receiving payment from a third party.<sup>133</sup>

Attorneys who review surrogacy contracts have two potential ethical conflicts. First, if they agree to representation in accordance with a flat fee,<sup>134</sup> they may not be paid if they withdraw before a contract is signed. A split of authority exists on whether a lawyer can retain any portion of the flat fee for work performed if the representation is not completed.<sup>135</sup>

Second, even if retention of the flat fee is not tied to the client's signing of the contract, attorneys who question contract provisions, try to renegotiate them, or give advice that persuades the client not to sign are likely to see their referrals decrease. While these attorneys do not have the formal conflicts of interest that agency lawyers who own the agencies have, they also have incentives to not to advise clients in ways that make it less likely that the clients will participate in surrogacy arrangements. A lawyer, for example, could discourage a client's participation in the process simply by providing a full explanation of what the contract entails.

#### D. Communications

Communication is key when representing a client in a transactional matter. It is even more important when a lawyer is representing an unsophisticated client in a complex negotiation or contractual matter and where the client may be a foreign national with minimal exposure to the American legal system. In

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<sup>132</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(a)(3).

<sup>133</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(a)(1).

<sup>134</sup> *In re Kendall*, 804 N.E.2d 1152, 1157 (Ind. 2004) (noting that as of 2002, the ABA Commission on Billable Hours reported that 51% of all transaction work was billed on a flat fee basis and flat fees were commonly used by solo or small firms). It is likely that the use of flat fees has only increased. See Robert E. Hirshon, *The Billable Hour Is Dead. Long Live . . .?*, 30 GPSOLO (Jan./Feb. 2013), [https://www.americanbar.org/publications/gp\\_solo/2013/january\\_february/billable\\_hour\\_dead\\_long\\_live.html](https://www.americanbar.org/publications/gp_solo/2013/january_february/billable_hour_dead_long_live.html).

<sup>135</sup> *Compare* *Disciplinary Counsel v. Summers*, 967 N.E.2d 183, 187 (Ohio 2012) (holding that an attorney who withdrew before completion of case was not entitled to hourly recovery), *with* *Matter of Gilbert*, 346 P.3d 1018, 1023-27 (Colo. 2015) (deciding that an attorney was entitled to quantum meruit recovery where terminated by a client).

the surrogacy context, communications are particularly important because the lawyer must communicate about the fact that, in most jurisdictions, the law is uncertain, important parts of the contract are unenforceable but still important to the parties, and to a large degree the process depends on the voluntary compliance of the parties.<sup>136</sup>

Model Rule 1.4 governs communications between the lawyer and her own client.<sup>137</sup> Specifically relevant to transactional matters are the duties of the attorney to keep the client reasonably informed about the status of the matter,<sup>138</sup> and the duty to explain to the client relevant information about the matter in a way that permits the client to make informed decisions about how to proceed.<sup>139</sup> In the surrogacy context, this raises the question of whether an attorney who owns an agency can be charged with knowledge of information available to the agency. For example, if the agency discovers information in the context of screening a potential donor or gestational carrier, would the attorney-owner be charged with knowledge of that information? Would the lawyer's duty to disclose such information be different from the agency's duty to disclose such information?<sup>140</sup> The answer depends on separating the agency obligation to the client, which is a matter of contract between the agency and the intended parents and may limit the information the agency agrees to provide,<sup>141</sup> from the attorney's obligation. The obligation of the attorney to the client will ordinarily be greater, and if the attorney and the agency wish to restrict the information pro-

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<sup>136</sup> Cross-border transactions may involve even greater uncertainty. *See, e.g.*, Jackson, et al, *supra* note 93, 33-36 (describing attitudes of Australians who use surrogacy abroad, recognizing that the contracts are unenforceable, but expecting to be able to receive recognition as parents). Jackson, et al described the process "as one of law and not-law. *Id.* at 34.

<sup>137</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4 (2016).

<sup>138</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(3).

<sup>139</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4(b).

<sup>140</sup> *See, e.g.*, Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J.L. & GENDER 67, 90 (2007) (observing that agency screening indicated that the surrogate mother in the *Baby M* case, Mary Beth Whitehead, would have difficulty giving up the baby, but the agency ignored the information).

<sup>141</sup> The agency of course still has various duties such as a duty not to mislead the customer about the information it has in its files.

vided, it should state so expressly not only in the agency agreement but in the attorney-client retention and waiver agreements.<sup>142</sup>

Misrepresentations to the client clearly violate Rule 1.4.<sup>143</sup> Where a client expresses that she is confused about a term or condition, or that she doesn't understand the effect of a decision or outcome, the lawyer has a duty to explain further so that the client can make informed decisions.<sup>144</sup> The explanation must be presented at a level (and in a language) that the client can understand, taking the client's background into account. For example, the lawyer may have an obligation to explain to foreign residents that securing a parentage order in the United States does not guarantee recognition of parentage or citizenship in other countries.<sup>145</sup>

A lawyer must promptly notify the client about significant developments affecting the representation.<sup>146</sup> Undoubtedly, this includes promptly notifying the client about the rejection of a contract offer and the receipt of a contractual counter-offer with changes to the client's original offer in the form of a redlined document. The prudent lawyer should always timely advise the client about all communications received from the other side to a matter, even if the lawyer advises the client that no response to

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<sup>142</sup> In the case of a gestational carrier who fled to Michigan rather than have an abortion, the carrier reported that the only screening done by the agency was done over the phone. CRYSTAL KELLEY & ELIZABETH COLLINS, FIRE WITHIN: A SURROGATE'S JOURNEY 70-71 (Taylor Street Publishing LLC 2014). The interview produced information that should have constituted a red flag, but there was no exploration of the carrier's willingness to abort in accordance with the information in the surrogacy contract. These practices depart from the norm, involve a screener with a clear conflict of interest, and indicate a failure to inquire about Kelley's views on abortion. Forman, *supra* note 65, at 51.

<sup>143</sup> Attorney Grievance Comm'n of Md. v. Steinberg, 910 A.2d 429, 444-45 (Md. Ct. App. 2006) (legitimate counseling might well have revealed Kelley's pro-life views).

<sup>144</sup> *In re Rogers*, 775 S.E.2d 387, 390 (S.C. 2015) (concluding that a lawyer violated Rule 1.4 when the client was confused and the lawyer failed to explain further).

<sup>145</sup> See, e.g., Jackson, et al., *supra* note 99, 33-36 (describing complexities of U.K. and Australian parentage law).

<sup>146</sup> Attorney Grievance Comm'n of Md. v. McLaughlin, 171 A.3d 1205, 1217 (Md. Ct. App. 2017).

the communication is prudent or necessary.<sup>147</sup> Information from the agency that pertains to the individual client, such as information about the availability of a donor, may also be relevant.

Further, lawyers must exercise prudence in communicating with the other side to a matter. Most lawyers are keenly aware that Model Rule 4.1(a) prohibits making false statements to third parties. A third party for the purposes of this rule includes opposing counsel.<sup>148</sup>

In a negotiation, however, counsel may need to tip their hand, and the relevant comment to the rule notes that estimates as to price or value of the transaction or a client's intentions regarding the transactions are not to be considered statements of material fact constituting a violation of the rule.<sup>149</sup> Further, a lawyer need not affirmatively disclose relevant facts unknown to his opposing counsel.<sup>150</sup> However, a lawyer must make certain disclosures fundamental to the matter and which if not made would have the effect of endorsing a material misrepresentation. For example, a lawyer must disclose the death or incapacity of her client during negotiations.<sup>151</sup> A lawyer also likely has a duty to make opposing counsel aware of changes made to a document between versions.<sup>152</sup>

Surrogacy agencies do not necessarily provide surrogates with detailed information about the intended parent or parents. How should a lawyer approach revealing such information? In a recent California case, the gestational carrier reported that she had assumed that the agency had screened the intended parent to determine whether he was capable of caring for the triplets she was carrying. In fact, all the agency did was to run a criminal background check. The carrier discovered only after she became pregnant that the father was a deaf, single parent, living with his

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<sup>147</sup> *In re Snyder*, 232 P.3d 952, 958 (Or. 2010).

<sup>148</sup> *Kentucky Bar Ass'n. v. Geisler*, 938 S.W.2d 578, 580 (Ky. 1997).

<sup>149</sup> MODEL RULES OF PROF'L CONDUCT R. 4.1, cmt. 2 (2016).

<sup>150</sup> *Giesler*, 938 S.W.2d at 580; MODEL RULES OF PROF'L CONDUCT R. 4.1, cmt. 1 (2016).

<sup>151</sup> *Giesler*, 938 S.W.2d at 580; *In re Lyons*, 780 N.W.2d 629, 636 (Minn. 2010);.

<sup>152</sup> See generally *In re Walsh*, 872 N.W.2d 741, 748 (Minn. 2015) (finding that an attorney who served two different versions of a complaint on opposing counsel without alerting counsel to the differences made a material misrepresentation in violation of Rule 4.1).



elderly parents, who had trouble paying for the surrogacy process, and was worried about his ability to care for triplets.<sup>153</sup> If the lawyer became aware of the gestational carrier's misunderstanding about agency screenings, would there be a duty to correct that misimpression? If the lawyer had more information than her client about the prospective parent, would she be obligated to provide that information? At a minimum, the lawyer should be seen as having a duty to respond to an affirmative misstatement about the agency processes or the intended parent.

Model Rule 4.2 prohibits communications with persons known to the lawyer to be represented by counsel regarding the matter, unless such a communication is made with permission of the person's counsel or authorized by law. The rule applies even if the represented person initiates the communication.<sup>154</sup> While a violation of Rule 4.2 would subject the lawyer to discipline, at least one court has held that an agreement negotiated in violation of Rule 4.2 cannot be invalidated based on the alleged ethical violation alone.<sup>155</sup> Nevertheless, best practices would dictate that a lawyer not discuss the matter with an opposing party represented by counsel at all, especially where the party is unsophisticated and may not understand why the lawyer cannot discuss the matter in the absence of the party's counsel.

Lawyers should be especially careful in sending electronic communications, to ensure that all contacts with an opposing party are at a minimum copied to the party's counsel.<sup>156</sup> In practice, lawyers should avoid sending any communication directly to the opposing party without the consent of opposing counsel. However, nothing in Rule 4.2 prohibits the parties from discussing the matter among themselves without any counsel present, and the comments to Rule 4.2 note that an attorney may properly advise her client about communications that the client is permitted to make in the absence of the lawyer.<sup>157</sup>

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<sup>153</sup> Goldberg, *supra* note 95.

<sup>154</sup> MODEL RULES OF PROF'L CONDUCT R. 4.2, cmt. 3.

<sup>155</sup> *In re Estate of Netzorg*, 15 P.3d 926, 930 (Mont. 2000).

<sup>156</sup> *See generally In re Baker*, 758 N.E.2d 56, 58 (Ind. 2001) (disciplining a lawyer for sending a letter to an opposing party which was not copied to the party's counsel).

<sup>157</sup> MODEL RULES OF PROF'L CONDUCT R. 4.2, cmt. 4.

It also likely that in representing an unsophisticated client in a transactional matter, it will be necessary to deal with persons who are unrepresented. Model Rule 4.3 governs interactions between a lawyer and an unrepresented party. A lawyer must ensure that an unrepresented party understands that the lawyer is not impartial and cannot give legal advice to the unrepresented party.<sup>158</sup> When an unrepresented party manifests a misunderstanding or confusion regarding a transactional matter, an attorney for the represented party must advise the unrepresented party to obtain counsel and must correct any material misunderstandings of fact to avoid assisting her client in making a material misrepresentation.<sup>159</sup> Further, an attorney must be especially careful to avoid making misrepresentations where the attorney might benefit financially from the outcome of the matter.<sup>160</sup> In a case in which the attorney owns or has a relationship with an agency and also represents the intended parents, unrepresented parties may believe that the attorney speaks for the agency or at least has information about agency practices.

## V. Advising Clients About Uncertainty in the Law

It cannot be overstated how much uncertainty there is in the practice of ART law. Even if a surrogacy arrangement takes place in a jurisdiction like California that has clear law on the subject, the intended parents cannot rule out the possibility that a gestational carrier will flee to another jurisdiction, such as Michigan, where she will be the legal parent.<sup>161</sup> In addition, surrogacy contracts routinely include provisions such as the right of the intended parents to decide on abortions or the agreement of the gestational carrier to attend medical appointments that are of dubious enforceability. No court will specifically enforce a clause such as one compelling an abortion – or prohibiting an abortion

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<sup>158</sup> MODEL RULES OF PROF'L CONDUCT R. 4.3.

<sup>159</sup> *In re Faraone*, 722 A.2d 1, 3-4 (Del. 1998).

<sup>160</sup> *See generally* Oklahoma Bar Ass'n. v. Dobbs, 94 P.3d 31, 58-59 (Okla. 2004).

<sup>161</sup> Forman, *supra* note 65, at 30 (describing a case in which a surrogate deliberately relocated during pregnancy to Michigan where surrogacy contracts are void as against public policy).

– that affects the bodily integrity of the gestational carrier.<sup>162</sup> Nonetheless, agreement on such clauses may be important to both parties, and contracts may provide for financial penalties in the event of a dispute that may be enforced separately.<sup>163</sup>

Given the legal uncertainty, the clients' greatest protection comes from the good faith compliance of all of the parties involved in the process. This raises questions about the role of lawyers not only in drafting contracts, but in making sure that the parties understand the terms. It also raises questions about whether the attorney's obligations should go beyond the contract itself to consideration of the process of selection and review of the parties.

#### A. Drafting Advice

The lawyer should explain, on a provision by provision basis, all material portions of the proposed agreement. While this is indeed time-consuming, it is critical that the client comprehends every significant portion of the donor or gestational carrier contract. It is understandable that most clients will want to focus on the financial compensation provisions, but those form just some of the important parts of the agreement. Particular attention should be paid to explaining those sections that deal with the "worst case" scenarios, such as termination of a pregnancy. In addition, attorneys have a clear ethical obligation to inform clients that parts of the contract may not be legally enforceable.<sup>164</sup>

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<sup>162</sup> *Id.* at 34 (referring to a "consensus that specific performance of such provisions would never occur but disagreement about whether a surrogate could be liable in damages for breach of contract.").

<sup>163</sup> Indeed, the risk of litigation itself should be seen as a factor of importance to the parties. One surrogacy case involving triplets, for example, involved extensive litigation in Pennsylvania over custody of the triplets, *see* J.F. v. D.B., 897 A.2d 1261 (Pa. Super. Ct. 2006), a separate suit in Ohio for breach of contract, J.F. v. D.B., et al., 9th Dist. No. 22709, 2006-Ohio-1175 (2006), litigation involving the egg donor, and a suit against the hospital. *See* Andrew Vorzimer, *Father of Triplets Who Temporarily Lost Custody to Surrogate Mother Dies*, SPIN DOCTOR (Feb. 18, 2011), <http://www.eggdonor.com/blog/2011/02/18/father-triplets-temporarily-lost-custody-surrogate-dies/>. *See also* Robert E. Rains, *What the Erie "Surrogate Triplets" Can Teach State Legislatures About the Need to Enact Article 8 of the Uniform Parentage Act of 2000*, 56 CLEV. ST. L. REV. 1 (2008) (describing the multiple suits in the case).

<sup>164</sup> *See* Gregory M. Duhl, *The Ethics of Contract Drafting*, 14 LEWIS & CLARK L. REV. 989, 1016 (2010) (suggesting that the drafting attorney should

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Often, it is these portions of the contract that have the biggest potential for both current and future disagreement.<sup>165</sup> It is also these sections of the contract where the parties rely most heavily on the parties' voluntary agreement, and where the potential for misunderstanding exists.

The United States remains sharply divided on abortion<sup>166</sup> and both intended parents and gestational carriers may have strong views on the acceptability of abortion. Surrogacy agencies should attempt to match contracting parties with similar views. Indeed, it would be irresponsible for an agency to pair a carrier strongly opposed to abortion with intended parents who regard it as an important safeguard to prevent birth of a child with serious birth defects. Nevertheless, contracts should not just address these matters, but lawyers should call the parties' attention to certain provisions that the parties may not fully consider in advance. These include:

— Selective reduction. Particularly if the gametes come from older parents, doctors may wish to transfer multiple embryos. Yet, the greater the number of fetuses, the higher the risk of birth defects.<sup>167</sup> The intended parents in such a case may want "selective reduction," that is, the abortion of one or more of the fetuses.<sup>168</sup> In the California dispute mentioned above, the in-

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"conspicuously disclose" potentially invalid terms); Christina L. Kunz, *The Ethics of Invalid and "Iffy" Contract Clauses*, 40 *LOY. L.A. L. REV.* 487, 496-504 (2006) (observing that intentionally including invalid clauses could constitute fraudulent conduct and the inclusion of "iffy" clauses without advising the client that they are unenforceable could also violate ethics rules).

<sup>165</sup> Disagreements about termination of a pregnancy have given rise to several high profile conflicts. See, e.g., Goldberg, *supra* note 95; Thomas B. Scheffey, *Surrogate Rejected \$10,000, Left State To Avoid Demand for Abortion*, *CONN. L. TRIB.* (Mar. 8, 2012), <https://www.law.com/ctlawtribune/almID/1202591498368/?slreturn=20180026224852>.

<sup>166</sup> *Public Opinion on Abortion*, PEW RESEARCH CENTER (July 7, 2017), <http://www.pewforum.org/fact-sheet/public-opinion-on-abortion/> (showing sharp divisions by party, ideology, and religion).

<sup>167</sup> See Jane E. Brody, *Some I.V.F. Experts Discourage Multiple Births*, *N.Y. TIMES* (Oct. 10, 2016), <https://www.nytimes.com/2016/10/11/well/family/eexperts-advise-minimizing-multiple-births-through-ivf.html>. See also Forman, *supra* note 65, at 51.

<sup>168</sup> See, for example, Joseph F. Morrissey, *Surrogacy: The Process, The Law, and The Contracts* 51 *WILLAMETTE L. REV.* 459, 533-34 (2015), which provides an example of a selective reduction clause:

tended father wanted to abort one of the fetuses in a triplet pregnancy. The gestational carrier, who said she would not have aborted a child with serious birth defects, objected to the termination of a healthy child. She said, after the dispute materialized, that she had not read the contract, nor had the section addressing abortion and selective reduction been explained to her.<sup>169</sup> Had a discussion of this issue occurred, it is possible that the intended father might have chosen a different surrogate, the contract provision might have been changed, or the parties might have chosen to transfer fewer than three embryos.<sup>170</sup> The conflict might have been avoided.

Corresponding to the discussion of selective reduction is discussion of the number of embryos to be transferred. Intended parents who have endured multiple rounds of failed IVF or who are worried about their ability to afford surrogacy may want to transfer a larger number of embryos to insure a pregnancy. Yet, if the parties are not willing to abort multiples, they should expressly limit the number of embryos transferred from the outset.<sup>171</sup> Even if they agree on selective reduction, they should discuss limiting the number of embryos in light of potential risks to the carrier or the health of multiples. A discussion of this issue at the outset may lessen conflicts later.

—Serious birth defects. Many intended parents and gestational carriers are willing to agree to abortion in the event of

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Example 3-13: Selective Reduction: The parties hereto agree that if the Surrogate becomes pregnant with [two] [three] or more embryos, that the intended Parents will have the right to request a selective reduction up until the [12th][20th] week of pregnancy, as measured from the date of insemination. If such a request is made, then the Responsible Physician will identify the embryos with the lowest chance of survival and will terminate that or those embryos, allowing the most viable to remain and develop. Understanding that such a provision is not specifically enforceable, the Surrogate agrees to respect and follow the wishes of the Intended Parents in this regard. In any event, the parties agree that if any Responsible Physician advises that continuing to be pregnant with multiples puts the Surrogate's life or health at risk, then the Surrogate shall have the right to decide to terminate any or all of the embryos at any time.

<sup>169</sup> Goldberg, *supra* note 95.

<sup>170</sup> Given the use of donor eggs from a young woman, implantation of three embryos violated the ordinary practice in such cases. *Id.*

<sup>171</sup> Forman, *supra* note 65, at 34.

serious birth defects without necessarily agreeing as to what constitutes such a defect.<sup>172</sup> In addition, information available at various stages of a pregnancy may not clearly indicate how serious potential birth defects are. Given the intrinsic uncertainty of predicting these matters in advance, the more important questions may be: a) how strongly are the parties opposed to abortion absent proof of severe birth defects and b) who should decide? Discussions of these two questions may provide a framework for a decision and establish an understanding between the parties that goes beyond the mere language of the contract.

—Conduct during the pregnancy. Surrogacy contracts typically prohibit surrogates from smoking, drinking, and other conduct during the pregnancy that may harm the fetus.<sup>173</sup> These provisions are also of dubious enforceability, and even if the intended parents could sue for breach of contract, the damages would be uncertain. Again, a discussion that underscored these clauses and produced agreement would offer greater practical protection than simple recitation of the contract provisions.

Attorneys for both parties should explain that the provisions are unenforceable.<sup>174</sup> The attorneys may want to explain and the attorney for the intended parents may want to insist that both parties are told that the agreement is in part a matter of trust; the provisions are in the contract as part of a genuine effort to insure that the parties are in agreement, and that the intended parents are relying on the gestational carrier to comply with the contract whether or not the provisions can be legally enforced.<sup>175</sup>

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<sup>172</sup> See, e.g., the clause in the *Kelley* case, which provided that: “The Gestational Carrier agrees to selective fetus [sic] reduction or/and abortion in case of severe fetus [sic] abnormality as determined by 3-dimensional [sic] ultrasound test with following pathology expertise, or by any other procedure or test(s) used to diagnose sever[sic] fetus abnormality.” *Id.* at 34.

<sup>173</sup> See Angie Godwin McEwen, *So You’re Having Another Woman’s Baby: Economics and Exploitation in Gestational Surrogacy*, 32 *VAND. J. TRANSNAT’L L.* 271, 277 (1999) (stating that surrogacy agreements “may require the gestational surrogate to refrain from smoking, consuming alcohol, or using unnecessary drugs during the pregnancy.”).

<sup>174</sup> See *supra* note 162.

<sup>175</sup> See Julia Dalzell, *The Enforcement of Selective Reduction Clauses in Surrogacy Contracts*, 27 *WIDENER COMMONWEALTH L. REV.* 83, 106 (2018) (arguing for enforceability of selective reduction clauses and discussing possible remedies).

Of course, the agreement may also include financial provisions that are more likely to be legally enforced. Where a carrier, for example, refuses to have an abortion, the contract may provide for termination of any remaining payments due under the agreement. If the carrier flees to another state to ensure that she will receive recognition as a legal parent, the surrogacy contract may be unenforceable in that state, thus terminating the financial obligations due under the agreement.<sup>176</sup> The intended parents, particularly if the father is also the genetic parent, may nonetheless find themselves liable for child support.<sup>177</sup> This may not necessarily preclude, however, an action for damages in the state in which the contract was formed.<sup>178</sup> Lawyers may not necessarily need to explain how legally complex enforcement is, only that there is no guarantee either that the contract clauses will be enforced as written or that they can be ignored with impunity.<sup>179</sup>

#### B. Matching Advice

Given the level of uncertainty underlying fertility agreements, the parties achieve their greatest protection from the voluntary agreement of the parties and their good faith performance of the terms of their agreement. In this context, the agency process that screens prospective surrogates and donors and matches them with intended parents is critically important. Intended parents rely on this screening and reputable agencies take the process seriously.<sup>180</sup> Most surrogacy cases gone wrong involve defects in screening. The agency that chose Mary Beth Whitehead as a surrogate in the *Baby M* case ignored warnings that she would have difficulty giving up the child.<sup>181</sup> In the case of a surro-

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<sup>176</sup> Forman, *supra* note 65, at 47.

<sup>177</sup> *Id.*

<sup>178</sup> See, e.g., *J.F.*, 879 N.E.2d 740 (awarding the biological father damages that included reimbursement for child support where the gestational carrier refused to surrender triplets).

<sup>179</sup> See, e.g., Dalzell, *supra* note 175, at 110 (emphasizing that “[s]urrogates should be held to their contractual agreements because the intended parents relied, to their detriment, on the surrogate’s commitments.”).

<sup>180</sup> Forman reports that “[t]he ASRM guidelines require surrogates to go through mental health evaluation and counseling as part of the screening process for eligibility, as do several of the statutes that permit surrogacy.” Forman, *supra* note 65, at 51.

<sup>181</sup> Sanger, *supra* note 140, at 90.

gate who fled to Michigan rather than undergo an abortion, there were also “red flags” that the agency ignored.<sup>182</sup> In other cases, the surrogate developed concerns about the intended parents that were also predictable. The California surrogate who refused to abort one of the triplets she was carrying expressed concern about the intended father’s ability to care for the triplets as she learned more about him.<sup>183</sup> A different Michigan case involved a surrogate selected from a website, who declined to surrender twins because of her concerns that the intended mother, who suffered from bipolar disorder controlled by medication, might not be a fit mother.<sup>184</sup> The meltdown in all of these cases might have been prevented through adequate screening of surrogates, and counseling to help match surrogates and intended parents. The question is whether attorneys have any responsibility for this process.

In the case of an attorney who also owns a surrogacy agency selecting gestational carriers and who also represents the intended parents in a negotiation with the surrogate, the answer should be that the attorney clearly bears a non-waiveable obligation to insure the adequacy of the screening process. That screening is an important component of the services the agency provides. The reliability of the screening, particularly one that evaluates the likelihood that a surrogate will surrender children born through the process, should be an important factor in an intended parent’s decision to go ahead with a surrogacy agreement. In addition, intended parents will rely on the agency’s evaluation of a potential gestational carrier’s beliefs about abortion and likelihood that she will honor the abortion provisions in the contract. The agency may be able to enter into an agreement with the intended parents in which they need not reveal every bit of information provided in a psychological screening. But an attorney who owns such an agency should be charged with sufficient information about the nature of the screening to determine whether the screening meets professional standards, and whether there is any basis for concluding that a surrogate will not honor a provision that the attorney has proposed or inserts at the request of the intended parents. Given the requirement that attorneys

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<sup>182</sup> Forman, *supra* note 65, at 51.

<sup>183</sup> Goldberg, *supra* note 95.

<sup>184</sup> Saul, *supra* note 52.



with conflicts of interest like these must insure that the transaction is “fair and reasonable to the client,”<sup>185</sup> that should mean an obligation to insure the adequacy of the screening and to disclose possible reservations about proposed surrogates to the intended parents.

Even if the attorney simply owns the agency and does not independently represent the intended parents, such a duty may exist. In one of the first surrogacy cases, a traditional surrogate sued Noel Keane, an attorney and owner of a traditional surrogacy-matching program, for negligence when she was infected by artificially inseminated, untested sperm from the intended father.<sup>186</sup> The Sixth Circuit found that a “special relationship” had been established and that Keane and the others named in the suit

owed affirmative duties to the Stivers and to Malahoff [the intended father], the surrogacy program beneficiaries. This duty, an affirmative duty of protection, marked by a heightened diligence, arises out of a special relationship because the defendants engaged in the surrogacy business and expected to profit thereby. Keane owed a duty to design and administer a program to protect the parties, including a requirement for appropriate testing.<sup>187</sup>

In a second case, a second traditional surrogate sued Noel Keane and a different surrogacy-matching program he ran for wrongful death after the child she carried for a single father died within weeks of his birth from shaken baby syndrome and the father was convicted and jailed for manslaughter.<sup>188</sup> The Pennsylvania court, in following the Sixth Circuit’s analysis, ruled that:

[A] business operating for the sole purpose of organizing and supervising the very delicate process of creating a child, which reaps handsome profits from such endeavor, must be held accountable for the foreseeable risks of the surrogacy undertaking because a “special relationship” exists between the surrogacy business, its client-participants, and most especially the child which the surrogacy and undertaking creates.<sup>189</sup>

These obligations arise from the nature of the agency’s business rather than from an attorney-client relationship. Subsequent litigation has not tested these principles. In particular, the

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<sup>185</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.8(a)(1).

<sup>186</sup> *Stiver v. Parker*, 975 F.2d 261 (6th Cir. 1992).

<sup>187</sup> *Id.* at 268.

<sup>188</sup> *Huddleston v. ICA*, 700 A.2d 453 (Pa. Super. Ct. 1997).

<sup>189</sup> See *Crockin*, *supra* note 1, at 14, 16.

courts have not addressed whether gestational carriers enjoy the same consideration as traditional surrogates with respect to screening of prospective parents.<sup>190</sup> And many observers oppose screening intended parents for suitability on the grounds that agencies would then be likely to exclude single parents or disabled parties.<sup>191</sup> Nonetheless, agencies are likely to have some obligation to screen,<sup>192</sup> and an attorney with such an obligation arising from the agency relationship must take this obligation into account in any subsequent representation of the parties to a surrogacy agreement.

This may raise a particularly devilish conflict of interest for attorneys who both own agencies and represent the intended parents. The agency may have some obligation to screen the intended parents for the benefit of the surrogate at the same time that the intended parents may object to such screening. The conflict would be less, however, if state law mandated such screening (*e.g.*, for disease that could infect the surrogate) or prohibited the inquiry as discriminatory. Even in the absence of a state mandate, attorneys would have more protection from potential conflicts if the agency explained to potential clients at the outset that the agency required such screening. In that event, the agency should also take steps to insure that the surrogate was comfortable with the findings from such a screening. Accordingly, while a client may waive the right to know all of the information the agency discovers in screening procedures, an attorney owner should remain responsible for taking the adequacy of the screening process into account in representing the parties and drafting a

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<sup>190</sup> In *Huddleston*, 700 A.2d at 457, the court noted that the surrogacy agency has waived its ability to contest the surrogate's standing to bring a wrongful death action on the basis of the child's death.

<sup>191</sup> Forman, *supra* note 65, argues that agencies should "screen" surrogates and donors for the benefit of intended parents, but counsel the parties to insure that they are appropriate matches for each other. She expresses concern that screening intended parents would involve discrimination on the basis of age, marital status, handicap, and other factors that involve impermissible discrimination. Indeed, surrogates who have expressed concern about intended parents have often done so on the basis of handicap (deafness, bipolar disorder) or marital status.

<sup>192</sup> Some state surrogacy statutes and some professional associations require it. *Id.*

contract, and securing waivers of any potential conflicts of interest.

Independent attorneys who represent parties in a surrogacy contract face different issues. Ordinarily, in evaluating contracts, they do not pass judgment on agency procedures and, indeed, they may not be in a position to know directly what the agency does in such screenings. Nonetheless, they, too, have conflicts of interest if their referrals come directly from such agencies. They can expect that the more issues they raise about agency procedures, the fewer referrals they will receive. At a minimum, such attorneys should have an obligation not to misrepresent whatever information they have about an agency and the regularity of its procedures.

If, however, attorneys in a surrogacy negotiation encourage the parties to reach agreements on matters unlikely to be legally enforceable, they may be in a position to judge the suitability of the parties to reach agreement with each other. They may also be in a position to encourage the parties to seek out more information about each other, and perhaps to discuss directly sensitive matters such as abortion. The more the parties are in communication with each other, however, the greater the risk that negotiations may stall or that the parties will develop doubts about each other.

The solution to these intrinsic conflicts of interest is for professional organizations to adopt guidelines to standardize procedures. Proposals exist to address the conflicts of interest that arise from attorneys who own agencies by limiting their involvement in preparing agreements for other parties.<sup>193</sup> These proposals do not address, however, agency ability to direct referrals to attorneys who serve their interests; and independent attorneys, even if truly independent, may not be in a position to safeguard client interests by insisting on more information from the agency about its screening procedures, the quality of the medical professionals who will inform the procedures, or other matters. On the medical side, the American Society for Reproductive Medicine has adopted guidelines that require surrogates, among other things, that “to go through mental health evaluation and counsel-

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<sup>193</sup> Crockin, *supra* note 1, at 15-16.

ing as part of the screening process for eligibility.”<sup>194</sup> It is time for legal professionals to adopt similar guidelines for the conduct of legal representation in the surrogacy context.

## Conclusion

It is for these reasons that the authors stress that representation of the typical ART client must be free from even the appearance of a conflict of interest. Clients in an ART transaction must get legal advice that is truly honest and tailored to the needs of the individual client’s situation. Individually disclosing conflicts of interest and obtaining client waivers seems inevitably fraught, and particularly difficult to do with unsophisticated clients.

In the current surrogacy context, where contracts are of dubious enforceability, many parties to the agreements respond by questioning the point of spending money on lawyers. A study of Australians engaged in cross-border surrogacy arrangements found the intended parents often explained that they did not consult lawyers, because they did not think that lawyers could add anything to the process. Harry, for example, who used a surrogate in Thailand, stated that, “I think because there wasn’t really explicit laws to refer to, that’s why I think engaging with lawyers either here or there was less useful.”<sup>195</sup> Tom, who undertook surrogacy in India, commented on the contract he signed:

Look, I was following what people were saying about contracts and to get the contract looked at . . . I think some of the advice that people have shared was it costs a lot of money to have your contracts looked at and it’s not actually legal or legally viable in Australia anyway. . . . I decided not to seek legal advice because I just thought it was almost pointless.<sup>196</sup>

These comments reflect the notion that what lawyers do is to secure compliance with the law. If there is no law, or if the clients come from a jurisdiction in which American law does not matter, they do not see the point of legal representation. In California and other states that do recognize surrogacy contracts and mandate legal representation, the lawyer may matter – but solely for the purposes of securing the validity of the agreement or, if

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<sup>194</sup> Forman, *supra* note 65, at 51.

<sup>195</sup> Jackson et al., *supra* note 99, at 34-35.

<sup>196</sup> *Id.* at 35.

necessary, judgments recognizing parenthood. Where the primary purpose of legal representation is to review a contract, however, the question arises: why should a client pay for a lawyer if the lawyer is unlikely to alter the terms of the agreement?

Answering that question – why is it worth it to pay the cost – requires defining the attorney roles. Today, agencies structure surrogacy agreements in accordance with the lessons learned from what has gone wrong in the past.<sup>197</sup> What lawyers add is the drafting of surrogacy agreements that do two things: securing legal parenthood where the law permits it and negotiating a genuine meeting of the minds where the law is uncertain. Doing both would be more effective with ethical guidelines that lock in attorney obligations in defined and predictable ways.

We conclude therefore that attorneys are important to the surrogacy process and attorney participation would be more valuable with greater accountability. Conflicts of interest in the process may be an inevitable part of a contract drafting system dependent on referrals from interested parties and the inclusion of repeat players in a position to evaluate not only contract terms, but the reputation and reliability of the professionals involved in the process. Standardizing the attorney role and holding those with clear conflicts of interest to a higher standard of accountability are necessary to insure the professionalism of the practice.

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<sup>197</sup> Carbone & Madeira, *supra* note 25.

