Conflicts of Interest in ART: Conspiracy or Collaboration

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Steven H. Snyder, Esq., is the founding and principal partner of Steven H. Snyder & Associates in Minnesota. Mr. Snyder attended law school at the University of Minnesota, graduating cum laude in 1982.

Mr. Snyder successfully litigated the first contested Minnesota surrogacy case in 2006 in which he won sole custody of the child for a single father, affirmed by the Minnesota Court of Appeals.

Mr. Snyder is a member of the American Bar Association (Real Property, Probate and Trust Law, Law Practice Management, and Family Law Sections), Past Chair of the Assisted Reproductive Technology (ART) Committee of the Family Law Section (FLS) of the American Bar Association (ABA), the ABA Liaison to the Uniform Law Commission Committee to Amend the Uniform Parentage Act, and ABA FLS ART Committee observer at the International Social Services working ground to develop policy on international surrogacy, a member of the Minnesota State Bar Association (Family Law, Real Property, Probate and Trust Law sections), Past Chair of the Family Law Section, the Hennepin County Bar Association, and a Fellow of the American Bar Foundation.

Mr. Snyder is the author of numerous articles and continuing legal education materials. Mr. Snyder is also a frequent national and international lecturer and continuing legal education presenter in the area of assisted reproductive technology law. Mr. Snyder regularly contributes to various media interviews and publications as a legal expert in assisted reproduction and third party reproduction legal issues.

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New York, NY
Known by some as The Stork Lawyer®, Attorney Swire Falker graduated from Wellesley College and The Benjamin N. Cardozo School of Law and is an attorney practicing in the areas of third-party assisted reproduction and adoption law in New York. Prior to opening her private practice in 2004, Attorney Swire Falker spent 7 years as a litigator in Manhattan before taking a leave of absence to build her own family and publish The Infertility Survival Handbook (Riverhead/Penguin). She later published The Ultimate Insider's Guide to Adoption (Warner Books), and a law review article, The Disposition of Cryopreserved Embryos: Why Embryo Adoption is an Inapposite Model for Application to Third-Party Assisted Reproduction, 35 William Mitchell L.R. 489 (2009). Her blog was listed by the ABA among its directory of best legal blogs: http://www.abajournal.com/blawg/the_stork_lawyer_blog/

In 2011 she co-founded The Stork Escrow Management Connection, Inc. (or TSEMCI) which provides escrow management to the third-party assisted reproductive industry.

Ms. Swire Falker has served on numerous panels on third-party assisted reproduction and is frequently interviewed by the media on ART law and adoption. She is a professional member of ASRM, RESOLVE, SEEDS, The NY State Bar, The ABA and its Committee on Assisted Reproductive Technology and the Law, and the Academy of Adoption and Assisted Reproduction Attorneys. She is admitted to practice in the State of New York, the United States District Courts for the Southern and Eastern Districts of New York, and the Second Circuit Court of Appeals.
Conflicts of Interest in Third Party Reproduction: Who Doesn’t Have One (and How Can They Be Managed)?

ABA Family Law Section Spring Section Meeting, Dominican Republic, May 2019

By

Steven H. Snyder, Esq.

Introduction

Third party reproduction is a complicated, interdependent system of competing interests. At the center of it lies the procreative intent of the commissioning intended parents, but intricately orbiting around that intent are the competing and often conflicting interests of multiple professionals and other third parties such as gamete donors and surrogates. Further complicating this delicately-balanced system are the free radicals of human nature, mother nature, and randomly successful medical treatments and procedures. Hence, third party reproduction is fraught with unpredictable outcomes and conflicts of interest that must be identified and properly addressed, especially by the attorneys who advise these various interrelated parties.

I maintain that conflicts of interest are universal to all elements of third-party reproduction, but only some of them are subject to clear and applicable ethical guidelines to manage them appropriately. The goal of this presentation is to first identify those conflicts that apply directly to attorneys and how they should be addressed, and then to discuss whether these professional guidelines for managing legal conflicts of interest should be imported into the management of the conflicts of other professionals and third parties not technically governed by them. Whether an attorney is advising the intended parents, a donor, a surrogate, a medical clinic or physician, or a recruiting and matching agency about their procedures and documentation, perhaps the rules that apply to us as a profession can also guide us in establishing appropriate disclosure and safe management of the conflicts of interest of all the participants in third party reproduction.

Who May Have a Potential Conflict of Interest?

Attorneys:

Certainly attorneys, who can interface with third party reproduction for multiple reasons and for multiple parties, have potential conflicts. In its simplest form, attorneys can be asked to represent multiple parties in the same transaction. Recipients and donors in known sperm or ovum donation, or intended parents and their selected surrogate, especially in family/close personal friend surrogacies.

Even if they represent only one party, other conflicts are inherent in the process. It is common for the intended parents to be paying all legal fees. In addition, there have been reported instances of agencies referring parties to attorneys who have a distinct relationship with the agency (i.e. – wife agency owner referring exclusively to husband’s law firm). In some cases, there may be some financial incentive that passes between the attorney and other professionals, such as referral fees. Even without exclusive referral or referral fees, some attorneys rely on regular referrals from certain clinics/agencies, and that flow of business may raise issues of objectivity. Some agencies will only allow intended parents to use
certain attorneys “approved” by the agency with the expectation that the approved attorneys will acquiesce more readily to the agency’s boilerplate agreements with minimal changes in order to retain the ongoing flow of referrals. All these scenarios, and others, raise issues of potential conflict for an attorney.

There may also be conflict of interest issues when an attorney represents clients who are patients at certain clinics or clients of certain agencies. Attorneys are also sometimes asked to provide legal services to such professional entities in drafting their consent forms, contracts, or develop other internal practices and procedures. Once an attorney provides legal services to a clinic/agency and is then referred patients/clients of those entities for legal services in certain cases, there may be some tension or conflict between the services the attorney has provided to the entity and their subsequent individual client(s) who are now receiving services from both the entity and the attorney.

This is a representative but not necessarily exhaustive list of potential conflicts and attorney may face. Each individual case must be closely examined with an eye toward the applicable rules of professional conduct to determine if other unexpected conflicts may exist and need to be addressed.

**Surrogates/Donors**

The essence of third-party reproduction involves the substitution of one or more reproductive components by a third-party donor or surrogate for the missing components of the intended parents. Aspiring parents may be missing sperm, eggs, or a functioning uterus and yet still wish to procreate. In order to do so, they enter into arrangements with appropriate donors or surrogates to have a child of whom they are intended to become the sole legal parents. This places the donor/surrogate in the position of balancing their own independent desires and opinions against the potentially differing interests of the intended parents and/or the child. This is perhaps the most fundamental conflict of interest in the third-party equation.

The intended parents have a desire to control the donor’s/surrogate’s personal autonomy and behavior to maximize the success of their reproductive journey. Yet the donor/surrogate has an interest in determining their own behavior according to their own morals or choices. This creates a tension between the two for the donor/surrogate.

Examples of the manifestation of this conflict abound. The donor who cancels a cycle because of finals or a trip on Spring break. The Michigan surrogate who voided a parentage proceeding to keep the child upon learning for the first time at the hearing that the intended mother had a history of depression. The surrogate who moved to Michigan to avoid complying with a contractual termination provision when the intended parents requested termination because the child was missing organs. The California surrogate who ignored the intended father’s request for selective reduction of triplets and litigated to attempt to keep the children as her own. These are only representative examples of the inherent potential conflicts that exist for donors/surrogates in every third-party reproduction arrangement.

**Physicians/Clinics**

Physicians have many of the same conflicts attorneys do. In third party reproduction, a single physician or clinic typically treats and gives concurrent medical advice in the same cycle/process to more than one
patient, whether intended parent and donor or intended parent, donor, and surrogate. Again, this creates potential conflicts of interest for the physician.

What is in the best interests of the intended parent in a donor cycle may not coincide with the best interests of the donor in being stimulated – to a certain degree or at all. Note the settlement of a lawsuit against a clinic that hyperstimulated a donor, thereby causing her to have a stroke.

What is in the best interests of the surrogate (and the child) for a safe pregnancy may or may not coincide with the initiation of a successful pregnancy for the intended parents, especially if they are actively attempting a twin pregnancy.

In addition, as with attorneys, it is inherent in the process that the intended parents will be paying the clinic. That causes the intended parents’ interests to predominate because their best interests will be inextricably intertwined with the clinic’s financial best interests.

As with attorneys, physicians have professional guidelines to manage and avoid detrimental conflicts of interest.

**Agencies**

As business entities providing services to the same population of clients as attorneys and physicians, agencies face the same types of potential conflicts. Agencies connect intended parents with donors/surrogates and have extended communication with each. They also actively implement and mediate the relationship between the two parties, each of whom have differing interests.

Again, the intended parents bear the sole cost of the agencies’ services, so there is an inherent financial bias that could arise. The donors/surrogates, on the other hand, are crucial to the agencies’ continued existence and viability, and there is fierce competition among agencies to recruit and keep them connected to the agency. The agency is therefore burdened with trying to keep two separate parties with differing interests each happy and content. As you can see, this creates the tension of potential conflicts for the agencies which they simply cannot avoid. (Note the superfetation case in which an agency was accused of suggesting the surrogate repay certain funds before receiving her own genetic child back from the intended parents.

Some agencies only enter into agreements with their clients, the intended parents. Others have their donors/surrogates also sign independent agreements with the agencies that set forth their relationship and respective obligations to varying degrees. To the degree that agencies enter an active contractual relationship with both their intended parents and their donors/surrogates, the potential for conflicts only magnifies.

**Attorney Owned Agencies**

There is an ongoing and open discussion as to whether agencies owned and operated by attorneys have a different and inherently disabling conflict of interest if and when they provide contract drafting and other legal services to the intended parents. Obviously, such individuals/entities will have the same potential conflicts as each of the separate professionals cited above have. Whether these potential
overlapping conflicts are, indeed, disqualifying will be discussed below in conjunction with the applicable rules that govern them as attorneys.

**The Rules**

As attorneys, ethical guidelines regarding potential and actual conflicts of interest are set forth in our respective rules of professional conduct. Each state has adopted such rules, many of them modeled on the American Bar Association Model Rules of Professional Conduct. Given the variation among states as to the exact content and terms of their specific rules, each attorney should refer to their specific state rules in applying them to our discussion. For the purposes of our discussion, however, I am going to use the provisions of the ABA Model Rules as set forth below.

**Rule 1.5: Fees**

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

For discussion:

Should the intent of this rule apply to:

Attorneys?
Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

   (1) to prevent reasonably certain death or substantial bodily harm;

   (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;

   (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;

   (4) to secure legal advice about the lawyer’s compliance with these Rules;

   (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;

   (6) to comply with other law or a court order; or

   (7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

For discussion:

Should the intent of this rule apply to:

Attorneys?
Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

For discussion:

Should the intent of this rule apply to:

Attorneys?

Surrogates/Donors?

Physicians?

Agencies?

Rule 1.8 Conflict of Interest: Specific Rules

(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.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

For discussion:

Should the intent of this rule apply to:

Attorneys?

Surrogates/Donors?

Physicians?
Rule 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

   (1) whose interests are materially adverse to that person; and

   (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

   (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

   (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

For discussion:

Should the intent of this rule apply to:

Attorneys?

Surrogates/Donors?

Physicians?

Agencies?

Rule 1.18 Duties to Prospective Client

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

1. both the affected client and the prospective client have given informed consent, confirmed in writing, or:

2. the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

   i. the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

   ii. written notice is promptly given to the prospective client.

For discussion:

Should the intent of this rule apply to:

Attorneys?
Surrogates/Donors?
Physicians?
Agencies?

Rule 4.3 Dealing with Unrepresented Clients

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

For discussion:

Should the intent of this rule apply to:
Rule 5.4 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

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

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

For discussion:

Should the intent of this rule apply:

Attorneys?
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**Public Service**

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

For discussion:

Should the intent of this rule apply to:

Attorneys?

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Agencies?

*How Can These Various Conflicts Be Managed?*
Clearly, the easiest way to avoid conflicts of interest is to stay out of multiple representational relationships that cause them. Unfortunately, as is clear from the discussions above, not all conflicts are “avoidable” in third party reproduction. Some of them are inherent in the process and professional relationships involved, and some of them may be situationally in the best interests of our clients overall. As the rules above make clear, provision should be made for exceptions to the general rule of avoidance.

As is also made clear, if conflicts necessarily occur or are willingly and knowingly undertaken in a particular case, the central and necessary concept in properly addressing them is “full disclosure.” Initially, a potential conflict is distinguishable from an actual conflict. In numerous areas of the law, and in third party reproduction, differing parties may have a common goal that supersedes a potential conflict. If all parties acknowledge that fact, are fully advised of the potential conflict, and accept the risk, the rules allow proceeding in spite of the potential conflict. If a potential conflict later becomes and actual conflict, then the representative is obligated to withdraw from representation of any of the parties and refer them to other representatives.

In addition to full disclosure, there must be documentation of the disclosure in writing and formal acceptance of the conflict by the relevant parties in writing. This assures that everyone is operating under the same knowledge and assumption of risks and insulates the potentially conflicted professional from later attacks for undertaking such representation in light of the general rules.

Although the above rules technically apply to only attorneys, it is evident that the concepts and principles set forth in them may have broad application and benefit if followed by other professionals in third party reproduction, as well. If we as attorneys are advising or representing clinics, agencies, or other professionals, we would be well served to advise them about their best practices in light of our own rules governing and experience with managing conflicts as set forth in those rules. As noted above, physicians have a separate set of governing principles regarding doctor/patient relationship and possible situations in which they may treat more than one patient in a particular matter. There are also professional organizations like the American Academy of Adoption Attorneys that have promulgated differing, and in some cases more stringent, rules regarding conflicts of interest in cases involving third party reproduction, but those rules do not apply to attorneys in general and are only relevant to the practice of the members of such organizations. Agencies have no rules governing them, and it is a necessary development in third party reproduction that some guidelines eventually be established as the common touchstone of proper representation, disclosure, and documentation for such entities. The recently-adopted ABA Model Act Governing Assisted Reproductive Technology Agencies is a step in the right direction, but it has no specific rules dealing in detail with various conflicts of interest as discussed above. Another viable yet developing source for rules governing agency conflicts of interest is the Society for Ethical Egg Donation and Surrogacy (SEEDS). Over time, this organization may be able to become a source of issuance of appropriate guidelines and validation of those agencies that follow them. And yet conflicts currently abound, and they are not all appropriately managed for all professionals at the present time, and not all of them will be readily subject to uniform, blanket rules beyond full disclosure and proper documentation.

Conflicts will necessarily exist and must be addressed. At the core of avoiding any adverse outcomes lies the integrity of the professionals who face and manage them. A conflict poses no harm if managed properly by professionals for whom the clients’ best interests predominate and for whom their integrity is unassailable. Avoid conflicts when you can, always give and advise full disclosure of all potential and actual conflicts of interest, and document all such advice and acceptance in all cases. Most of all, stay true to yourself and your personal and professional integrity, and such conflicts can be successfully managed.
Conflicts of Interest in Third Party Reproduction: Who Doesn’t Have One?

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Who May Have a Conflict?

- Attorneys?
Who May Have a Conflict?

- Attorneys
- Surrogates/Donors?
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- Surrogacy/Egg Donor Agencies?
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- Attorneys
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- Physicians/Clinics
- Surrogacy/Egg Donor Agencies
- Attorney Owned Agencies?
Relevant Ethical Rules

- Fees
- Confidentiality
- Conflicts of Interest
- Former/Prospective Clients
- Unrepresented Clients
- Professional Independence
- Public Service
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(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.
(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.
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Confidentiality

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- (1) to prevent reasonably certain death or substantial bodily harm;
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- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (6) to comply with other law or a court order; or
- (7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
Rule 1.7 Conflict of Interest: Current Clients

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - (1) the representation of one client will be directly adverse to another client; or
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Conflicts of Interest

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. the representation is not prohibited by law;
3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
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(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:

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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.
Conflicts of Interest

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

1. the client gives informed consent;
2. there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
3. information relating to representation of a client is protected as required by Rule 1.6.
(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.
Conflicts of Interest

Rule 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

1. whose interests are materially adverse to that person; and
2. about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

1. use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
2. reveal information relating to the representation except as these Rules would permit or require with respect to a client.
Conflicts of Interest

Rule 1.18 Duties to Prospective Client

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

   (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

   (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

      (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

      (ii) written notice is promptly given to the prospective client.
Rule 4.3 Dealing with Unrepresented Clients

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.
Rule 5.4 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.
Professional Independence

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

1. a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
2. a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
3. a nonlawyer has the right to direct or control the professional judgment of a lawyer.
Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
   - (1) persons of limited means or
   - (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:
   - (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
   - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
   - (3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.
Integrity

Conflicts will necessarily exist and must be addressed. At the core of avoiding any adverse outcomes lies the integrity of the professionals who face and manage them. A conflict poses no harm if managed properly by professionals for whom the clients’ best interests predominate and for whom their integrity is unassailable. Avoid conflicts when you can, always give and advise full disclosure of all potential and actual conflicts of interest, and document all such advice and acceptance in all cases. Most of all, stay true to yourself and your personal and professional integrity, and such conflicts can be successfully managed.