

NOTE

The Legal Ethics of Birth Surrogacy: Theory and Practice

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ABSTRACT

*The Model Rules of Professional Conduct provide a guidepost on how attorneys should behave in relation to their clients, the court, and the law. Among other things, attorneys must be competent, diligent, loyal, and avoid conflicts of interest. Family law—where attorneys must often deal with closely-related parties on matters of extreme personal significance—can be an ethical minefield. This is especially true in surrogacy law, an often-unregulated subfield that, at its best, helps create families—and at worst, leads to unethical treatment against pregnant persons. This article considers common ethical questions that arise in surrogacy law, viewed through the Model Rules of Professional Conduct. Interviews from practicing surrogacy lawyers from three states help illustrate the challenges inherent to the field.*

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\* J.D., 2023, University of California, Berkeley, School of Law © 2024, Van Le. Thank you to Attorneys Dylan Tarnoff of Tarnoff Law, Amira Hasenbush of All Family Legal, Chris Jackson of Shorebreak Law, Claudia Work of Scottsdale Family Law, Kristy B. Blackwell of Stuart & Blackwell, Bo Gregg of Young Wells Williams, and others who spoke to me on background. All errors are mine.

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INTRODUCTION

It is easy to understand the moral ethics of birth surrogacy. A couple who cannot have a child enters a contract with a woman willing to carry a baby for them. The woman agrees to become a surrogate for either financial or altruistic purposes. Along the way, something goes wrong. The surrogate decides that she does not want to give up the child after all, or financial or health complications arise. Should the dispute be resolved via contract law or family law? How should courts decide between two highly emotional parties when no compromise is possible? Are courts even the proper forum to decide questions as fraught as parenthood?

The *legal* ethics of birth surrogacy, in contrast, are less scrutinized, even though legal violations can lead to moral complications.<sup>1</sup> Is it ever acceptable for an attorney to represent both sides of a surrogacy arrangement? Can a surrogate be adequately represented when the intended parents typically pay all the costs? How can attorneys adequately counsel clients in jurisdictions where surrogacy laws are unclear?

These questions are becoming more important as the number of surrogacies grow.<sup>2</sup> Surrogacy is, in many states, still unsettled law.<sup>3</sup> While there are other fields that lack legal clarity (such as marijuana),<sup>4</sup> the serious consequences for

1. See Katherine Drabiak, Carole Wegner, Valita Fredland & Paul R. Helft, *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J.L. MED. & ETHICS 300, 300–01 (2007).

2. *Key Findings: Use of Gestational Carriers in the United States*, CTR. FOR DISEASE CONTROL AND PREVENTION (Aug. 5, 2016), <https://www.cdc.gov/art/key-findings/gestational-carriers.html> [<https://perma.cc/XS4R-FYQC>].

3. See *Guide to State Surrogacy Laws*, CTR. FOR AM. PROGRESS (Dec. 17, 2007), <https://www.americanprogress.org/article/guide-to-state-surrogacy-laws/> [<https://perma.cc/2YJ2-38SU>].

4. Many states have fully legalized marijuana even though it remains prohibited federally. See Tim Meko & Adrián Blanco, *More than half of Americans live in places where recreational marijuana is legal*, WASH. POST

families and children who participate in and are a product of surrogacy underscore how important it is for all parties in an arrangement to receive proper ethical consideration and legal protection.<sup>5</sup>

This paper considers the legal ethics of birth surrogacy through the American Bar Association (ABA) *Model Rules of Professional Conduct (Model Rules)*, then compares them to the reality of how surrogacy attorneys in different states practice. Part I provides a basic overview of birth surrogacy in the United States, from the technicalities of the process to the different types of state laws. Part II examines *Stiver v. Parker*, a 1992 Sixth Circuit Court of Appeals case that illustrates the moral consequences of ignoring the legal ethics of surrogacy.<sup>6</sup> Part III discusses the different ethical issues that arise in this field, from conflicts of interest to issues surrounding payment to the unconscionability of certain contracts, analyzed via the *Model Rules*. These rules are discussed alongside interview commentary from current surrogacy law practitioners from three different states.

## I. AN OVERVIEW OF BIRTH SURROGACY

### A. DEFINITIONS

First, I will explain surrogacy as it is used in this paper. Below, *surrogate* refers to the woman or pregnant person who agrees to carry a baby for another person or family.<sup>7</sup> *Intended parent(s)* are the person or couple who contract with the surrogate for gestational services and plan to raise the child after birth. I use *parties* when surrogates and intended parents are discussed together. *Arrangement* refers to the decision between two or more parties to enter into a surrogacy, regardless of whether there is a contract.

Surrogacies can be quite variable, depending on whose DNA is used, what state the parties live in, and what formalities the parties take.<sup>8</sup> The most common distinguishing factors involve whether a surrogacy is *paid* versus *altruistic*, and whether a surrogacy is *traditional* or *gestational*.<sup>9</sup> Paid surrogates provide gestational

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(Nov. 8, 2023), <https://www.washingtonpost.com/politics/2023/legal-weed-states-map/> [https://perma.cc/B96P-5D63]; see also *In the Weeds*, ROCKEFELLER INST. GOV'T, <https://rockinst.org/intheweeds/> [https://perma.cc/55EX-N4AC] (last visited Feb. 11, 2024).

5. Without adequate communication and strong legal protections, surrogates and intended parents may end up fighting over babies, unwanted children may be born and put into foster care, surrogates may end up with health issues, and intended parents may be forced to undergo a difficult and expensive surrogacy process multiple times. See, e.g., *In re Baby M*, 537 A.2d 1227 (N.J. 1988); *Stiver v. Parker*, 975 F.2d 261 (6th Cir. 1992).

6. *Stiver*, 975 F.2d at 261.

7. Because most pregnant persons are female, I will default to she/her pronouns for surrogates in order to distinguish them from attorneys, whom I will generally refer to as they/them.

8. See *Types of Surrogacy*, AM. SURROGACY, <https://surrogate.com/about-surrogacy/types-of-surrogacy> [https://perma.cc/8SZU-GRZT] (last visited Sept. 12, 2023).

9. *Id.*

services in exchange for money; altruistic surrogates generally have their medical costs covered but are not paid.<sup>10</sup>

In a typical traditional surrogacy, the surrogate is artificially inseminated with the intended father's sperm, which pairs with the surrogate's egg to create the embryo that the surrogate carries to term.<sup>11</sup> In a typical gestational surrogacy, gametes are taken from the intended parents and an embryo is created through *in vitro* fertilization.<sup>12</sup> The embryo is then transferred into the surrogate.<sup>13</sup>

Traditional surrogacies are logistically easier—they resemble traditional procreation and were accomplished even before the advent of modern assisted reproduction technology.<sup>14</sup> However, they are legally more complicated because the surrogate is both the birth mother and the genetic mother—two common-law tests for who should be considered the parent of a child.<sup>15</sup> In comparison, gestational surrogacies are often more legally straightforward. In gestational surrogacies, the surrogate is not biologically related to the baby, leading courts to somewhat consistently declare that the surrogate is *not* a parent, thus alleviating any parentage and custody concerns that may arise.<sup>16</sup>

## B. THE SURROGACY PROCESS

The initiation of the surrogacy process ranges from shockingly casual to multi-layered with checks and balances. Some surrogacies are informal, involving a relative or friend who agrees to help a couple have a baby.<sup>17</sup> In extremely informal cases, parties may even skip the contract process and only enlist a lawyer to help establish proper legal custody for the child.<sup>18</sup> Other surrogacies involve agencies that match surrogates and intended parents.<sup>19</sup> The agency process varies from

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10. One example of an altruistic surrogate would be a woman who offers to carry a child for an infertile sister free of charge. For a more in-depth discussion of paid and altruistic surrogacies see *What is Altruistic Surrogacy*, AM. SURROGACY, <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-altruistic-surrogacy/> [https://perma.cc/G5YH-KYE5] (last visited Feb. 11, 2024); *What is Commercial Surrogacy*, AM. SURROGACY, <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-commercial-surrogacy/> [https://perma.cc/RD46-C6AB] (last visited Feb. 11, 2024).

11. *What is Traditional Surrogacy?*, AM. SURROGACY, <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-traditional-surrogacy/> [https://perma.cc/PC63-JMN8] (last visited Sept. 14, 2023).

12. *Traditional vs. Gestational Surrogacy – What's Best for My Family?*, AM. SURROGACY, <https://surrogate.com/about-surrogacy/types-of-surrogacy/traditional-vs-gestational-surrogacy-whats-best-for-my-family/> [https://perma.cc/LHH9-JM5Z] (last visited Sept. 14, 2023). It is also possible for the intended parents to use donor eggs and sperm, meaning they are not biologically related either. *Id.*

13. *Id.*

14. *See id.*

15. *See* Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 187–88 (1986).

16. *See, e.g.,* *Johnson v. Calvert*, 851 P.2d 776, 777 (Cal. 1993); *P.M. v. T.B.*, 907 N.W.2d 522, 524 (Iowa 2018); *Belsito v. Clark*, 644 N.E.2d 760, 762 (Ohio C.P. 1994).

17. *Types of Surrogacy*, *supra* note 8.

18. *See* Jaclyn Peiser, *A Woman Agreed to Have a Baby for a Facebook Friend Through Messenger. Now, They're Locked in a Custody War*, WASH. POST (Sept. 23, 2021), <https://www.washingtonpost.com/nation/2021/09/23/facebook-messenger-massachusetts-surrogacy-parentage/> [https://perma.cc/ZN8Q-NK9M].

19. *Types of Surrogacy*, *supra* note 8.

agency to agency and is generally not regulated.<sup>20</sup> Typically, intended parents and surrogates fill out a questionnaire establishing important personal preferences.<sup>21</sup> If matched, both parties undergo psychological evaluations, exploring motivations, backgrounds, and suitability.<sup>22</sup> The surrogate (and sometimes the intended parents) then undergoes a medical evaluation.<sup>23</sup> Next, the parties connect with attorneys who draft the surrogacy contract.<sup>24</sup> Finally, the sperm or embryo is transferred, and (if successful) the pregnancy begins.<sup>25</sup> Intended parents pay around \$150,000, including fees for the agency, attorneys, and surrogate (who makes around \$50,000).<sup>26</sup>

Legal custody of the child, depending on the state, can be established during the pregnancy via an attorney petitioning the court for a pre-birth order.<sup>27</sup> This allows hospitals to release the baby after birth directly to the intended parents.<sup>28</sup> Alternatively, a court can issue a post-birth parental judgment, the intended parents can formally adopt the baby, or both.<sup>29</sup>

Surrogacies are increasing as the average age of first-time parents increases and infertility problems rise.<sup>30</sup> The number of pregnancies involving gestational carriers increased from 727 in 1999 to 3,432 in 2013.<sup>31</sup> Between 1999 and 2013, there were 18,400 infants born to gestational carriers and an unknown number born to traditional carriers.<sup>32</sup>

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20. See, e.g., CAL. FAM. CODE, §§ 7960-62 (West 2013) (the code does not specify agency procedure).

21. See, e.g., *Surrogacy process*, CONCEIVEABILITIES, <https://www.conceiveabilities.com/parents/parents-and-surrogate/process-overview/> [<https://perma.cc/WLB4-PMYM>] (last visited Feb. 11, 2024). As an example of questionnaire preference matching, a questionnaire may ask each party how they feel about abortion.

22. Many agencies restrict potential surrogates to women who make more than a specified income, who already have at least one child, and who have not lost children in the past. This is done to ensure that the surrogate is not reliant on the arrangement for income, and to minimize risks involving custody. See, e.g., *Do's and Don'ts for Surrogates*, S. SURROGACY, <https://www.southernsurrogacy.com/surrogates/surrogatesoverview/dos-and-donts-for-surrogates/> [<https://perma.cc/TWY4-ASBR>] (last visited Sept. 22, 2023).

23. *The Six Steps of the Surrogacy Process*, AM. SURROGACY, <https://surrogate.com/surrogates/becoming-a-surrogate/the-six-steps-of-the-surrogacy-process/> [<https://perma.cc/JJ2W-RHQN>] (last visited Sept. 22, 2023).

24. *Id.*

25. *Id.*

26. Of course, in private contracts, the cost of individual surrogacies can be much higher or lower depending on what the parties are willing to pay and receive. Beth Braverman, *How Much Surrogacy Costs and How to Pay for It*, U.S. NEWS (May 30, 2023), <https://money.usnews.com/money/personal-finance/family-finance/articles/how-much-surrogacy-costs-and-how-to-pay-for-it> [<https://perma.cc/Y56H-C7R6>].

27. *How You Can Protect Your Parental Rights in Surrogacy*, AM. SURROGACY, <https://www.americansurrogacy.com/parents/pre-birth-orders> [<https://perma.cc/TD2T-L5HJ>] (last visited Sept. 22, 2023).

28. *Id.*

29. *Id.*

30. CTR. FOR DISEASE CONTROL AND PREVENTION, *supra* note 2; Shanna H. Swan & Stacey Colino, *Reproductive Problems in Both Men and Women Are Rising at an Alarming Rate*, SCI. AM. (Mar. 16, 2021), <https://www.scientificamerican.com/article/reproductive-problems-in-both-men-and-women-are-rising-at-an-alarming-rate/> [<https://perma.cc/R62L-3FA5>].

31. CTR. FOR DISEASE CONTROL AND PREVENTION, *supra* note 2.

32. *Id.*

## C. SURROGACY LAW

Though non-traditional insemination has existed for centuries, modern methods of assisted reproductive technology are fairly new.<sup>33</sup> The first U.S. sperm bank opened in 1952.<sup>34</sup> The first surrogacy contract was drafted in 1976.<sup>35</sup> The first American baby created through *in vitro* fertilization was born in 1981.<sup>36</sup> Lawsuits soon followed. The infamous *Baby M* case, in which a traditional surrogate refused to give up the baby she had agreed to carry for a New Jersey couple, lasted from 1986 to 1988.<sup>37</sup>

During this time, Congress could have drafted national standards for surrogacy that would protect pregnant persons and families while regulating the agencies and attorneys who make up the industry.<sup>38</sup> But Congress never did so, and today there are no federal laws regulating surrogacy.<sup>39</sup> Each state has its own policies (or lack thereof) regulating surrogacy, and they vary widely.<sup>40</sup>

Some states ban surrogacy altogether, while other states have neither statutes nor case law.<sup>41</sup> Some states prohibit paid surrogacies, and some states prohibit traditional surrogacies.<sup>42</sup> Most surrogacies are completed without issue, but when complications arise, the legal remedy is far more predictable in some states than others.<sup>43</sup>

The Uniform Law Commission has drafted legislation that would implement federal regulations for surrogacy three times.<sup>44</sup> The most recent draft, the

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33. *History of Surrogacy*, AM. SURROGACY, <https://surrogate.com/about-surrogacy/surrogacy-101/history-of-surrogacy/> [<https://perma.cc/XX7R-Y398>] (last visited Sept. 23, 2023).

34. Alexis C. Madrigal, *The Surprising Birthplace of the First Sperm Bank*, THE ATLANTIC (April 28, 2014), <https://www.theatlantic.com/technology/archive/2014/04/how-the-first-sperm-bank-began/361288/> [<https://perma.cc/35LW-PZ96>].

35. AM. SURROGACY, *supra* note 33. This contract was drafted by Noel Keane, *id.*, the “father of surrogacy,” who would have a role in many famously litigated surrogacy cases, including *Stiver v. Parker*, 975 F.2d 261 (6th Cir. 1992). See Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMPAR. L. 97, 98, 113 (2010).

36. Ashley M. Eskew & Emily S. Jungheim, *A History of Developments to Improve in vitro Fertilization*, 114:3 MO. MED. (May–June 2017) 156, 156–59.

37. See *In re Baby M*, 537 A.2d 1227, 1227 (N.J. 1988) (invalidating the surrogacy contract but citing family law to give the baby to the intended parents).

38. Congress does not appear to have ever considered a federal law protecting surrogacy and surrogates. Scholars have explained why a federal law should exist, put forward legal rationales, and even drafted an example federal surrogacy law. See Brett Thomaston, *A House Divided Against Itself Cannot Stand: The Need to Federalize Surrogacy Contracts as a Result of a Fragmented State System*, 49 J. MARSHALL L. REV. 1155, 1168, 1190 (2016); Makenzie B. Russo, *The Crazy Quilt of Laws: Bringing Uniformity to Surrogacy Laws in the United States* 32–33 (Spring 2016) (B.A. thesis, Trinity College) (Trinity College Dissertation Repository).

39. *What You Need to Know About Surrogacy Laws in the U.S.*, AM. SURROGACY, <https://www.americansurrogacy.com/surrogacy/surrogacy-laws-in-the-united-states> [<https://perma.cc/CGE4-V796>] (last visited Sept. 23, 2023).

40. ALEX FINKELSTEIN, SARAH MAC DOUGALL, ANGELA KINTOMINAS & ANYA OLSEN, *SURROGACY LAW AND POLICY IN THE U.S.* 8–11 (2016).

41. *Id.* at 9–11.

42. *Id.* at 10.

43. *Id.* at 8–11.

44. UNIF. PARENTAGE ACT PREFATORY NOTE (UNIF. L. COMM’N 2017) [hereinafter UPA].

Uniform Parentage Act of 2017, provides guidelines on both gestational and traditional surrogacy, how to protect all parties involved, and how to address legal conflicts.<sup>45</sup> Additionally, in 2008 the ABA issued a Model Act guiding assisted reproductive technology, which discussed many of the same protections.<sup>46</sup> Neither of these guidelines are legally binding, however, and it remains up to the states to decide which, if any, provisions they want to adopt.<sup>47</sup>

## II. CASE ILLUSTRATION: STIVER V. PARKER

There are many ways in which surrogacies can go wrong. *Stiver v. Parker*, a 1992 Sixth Circuit case, is an unfortunate example of how violations of legal ethics can lead to serious harms in the surrogacy process.<sup>48</sup> Judy Stiver, the surrogate, and Alexander Malahoff, the intended father, were matched through a surrogacy program owned and operated by attorney Noel Keane.<sup>49</sup> Stiver was artificially inseminated with Malahoff's semen (a traditional surrogacy), but the baby was born with cytomegalic inclusion disease (CID), leading to hearing loss, mental defects, and severe neuro-muscular disorders.<sup>50</sup> At trial, the parties did not contest that the baby's CID was a sexually transmitted disease, transmitted to Stiver during her pregnancy through Malahoff's semen, which the program had not tested.<sup>51</sup>

When Stiver sued Keane and others involved in the program, they argued that they owed no duty of care to Stiver.<sup>52</sup> The defendants said they provided standard medical advice and followed routine obstetrical practices.<sup>53</sup> However, the court disagreed, finding that Keane owed an "affirmative duty of protection" arising out of a "special relationship" with Stiver, because Keane had shepherded Stiver through a business deal with the expectation of a "benefit or profit."<sup>54</sup> The court found that Keane's program operated haphazardly, with no written records as to what procedures were administered, no notes on conversations with surrogate mothers, and no screening for sexually transmitted diseases.<sup>55</sup> In short, the program "operated in disregard of foreseeable risks of harm."<sup>56</sup>

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45. *Id.*

46. MODEL ACT GOVERNING ASSISTED REPROD. TECH (AM. BAR ASS'N 2008).

47. The Uniform Law Commission provides states with legal frameworks. *See* UPA, *supra* note 44. ABA Model Acts "provide model provisions that can be considered in whole or in part by legislative bodies." *Standards of Practice, Reports & Recommendations*, AM. BAR ASS'N, [https://www.americanbar.org/groups/family\\_law/resources/standards\\_of\\_practice\\_reports\\_recommendations/](https://www.americanbar.org/groups/family_law/resources/standards_of_practice_reports_recommendations/) [<https://perma.cc/2X45-W864>] (last visited Oct 28, 2023).

48. *See Stiver v. Parker*, 975 F.2d 261, 263 (6th Cir. 1992).

49. *Id.* at 264, 266.

50. *Id.* at 263.

51. *Id.* at 263–65.

52. *Id.* at 264.

53. *Id.* at 267.

54. *Id.* at 270–71.

55. *Id.* at 263.

56. *Id.* at 268.



*Stiver*, as a case, stands for gross negligence and legal duty, but the whole situation might have been avoided with a greater respect for the general standards of legal ethics.<sup>57</sup> Keane owned the business, oversaw recruiting surrogates like Stiver, represented Malahoff, and drafted the surrogacy agreement.<sup>58</sup> These responsibilities created a major conflict of interest that left multiple parties without adequate representation of their interests. Keane owed a duty of loyalty to at least three parties—Malahoff, the program, and Stiver—all of which were in conflict.

Keane, as Malahoff's lawyer, owed Malahoff a duty of competent representation and might have advised Malahoff to choose a fertility program that would screen his sperm—except that Keane was the owner of this particular program and probably wanted to retain Malahoff as a customer.<sup>59</sup> Keane, as the drafter of the contract, was obligated to work toward the success of the arrangement—but as the owner, was incentivized to minimize costs, such as the ones involved in screening.<sup>60</sup> As the owner of the program, Keane should have protected his customers from medical dangers like STDs, but screening out customers like Malahoff likely meant losing legal clients.<sup>61</sup> Finally, as the court noted, Keane also had a duty to Stiver, since he recruited her, but this duty was impaired by his obligations to Malahoff, the surrogacy agreement, and the program.<sup>62</sup> The program did provide lawyers for surrogates, including Stiver, but surrogates only met with their lawyers for “very brief consultation[s],” were expected to sign their contracts immediately, and were only given copies of the contract after insemination.<sup>63</sup>

Here, Stiver and Malahoff should each have had independent counsel advise them on what questions to ask and what to look out for. Keane should have operated his program with greater respect for transparency and medical safety procedures. Better safeguards on the program might have existed if Keane operated as the owner-operator of the program while leaving all contract work to outside, independent lawyers. Ultimately, Malahoff was forced to seek out another surrogate, though Stiver's child arguably bore the greatest cost of the incident.<sup>64</sup>

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57. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2023) [hereinafter MODEL RULES] (The *Model Rules* were adopted before this case).

58. *Stiver*, 975 F.2d at 265.

59. See MODEL RULES R. 1.7.

60. *Id.*

61. After litigation began, Keane would either have had to drop Malahoff as a client or act as both advocate and witness. See MODEL RULES R. 3.7.

62. *Stiver*, 975 F.2d at 272.

63. *Id.* at 268.

64. The baby, Christopher Ray, was eventually brought home by Stiver, and paternity tests showed that Malahoff was not the father. Leslie Griffin, *Baby Born to Surrogate Mother Not Fathered by Man Who Hired Her*, UNITED PRESS INT'L (Feb. 2, 1983), <https://www.upi.com/Archives/1983/02/02/Baby-born-to-surrogate-mother-not-fathered-by-man-who-hired-her/2378413010000/> [https://perma.cc/T5GN-WBKC].



### III. LEGAL ETHICS OF BIRTH SURROGACY: THEORY AND PRACTICE

Below, I will explain some of the issues that arise in legal ethics and surrogacy as viewed through the *Model Rules*. I will juxtapose these legal rules with comments from practicing surrogacy attorneys interviewed for this paper.

In order to explore how surrogacy law works in different states, I spoke with attorneys from California, Arizona, and Mississippi. In California, surrogacies of all types (paid, altruistic, traditional, gestational) are generally legal, and are permitted by both statute and long-standing case law.<sup>65</sup> Arizona specifically prohibits paid surrogacy by statute, making surrogacy contracts unenforceable.<sup>66</sup> Mississippi has neither statutes nor case law on surrogacy.<sup>67</sup>

#### A. COMPETENCE AND DILIGENCE

Rule 1.1 of the *Model Rules* says that a lawyer “shall provide competent representation” to a client, requiring the “legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”<sup>68</sup>

According to the attorneys I interviewed, the competence that surrogacy attorneys must demonstrate takes many different forms.<sup>69</sup> First, an attorney advising a party or preparing a surrogacy contract must be aware of all the potential factors that could derail the arrangement. A typical gestational period is forty weeks, and in that time, parties may change their mind, run into financial difficulties, or be forced to make difficult medical decisions.<sup>70</sup> A competent attorney needs to be able to spot these issues ahead of time.

Step one is to make sure that the parties’ goals are aligned. If the parties are working with an agency, the attorney may be able to rely on psychological and medical evaluations attesting to the suitability of the surrogates and intended parents. However, the attorney must still watch out for mistakes made by the agency and other red flags. When the parties have *not* gone through an agency, the attorney may want to explain the benefits of going through the process and the risks of not undertaking that extra scrutiny.<sup>71</sup>

Step two involves heading off any potential issues via contract. If, for example, intended parents want to attend doctor appointments alongside the surrogate and

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65. See CAL. FAM. CODE §§ 7960–62 (West 2013); *Johnson v. Calvert*, 851 P.2d 776, 783–84 (Cal. 1993); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998).

66. ARIZ. REV. STAT. ANN. § 25-218 (2018).

67. *What You Need to Know About Surrogacy in Mississippi*, AM. SURROGACY, <https://www.americansurrogacy.com/surrogacy/mississippi-surrogacy-laws> [<https://perma.cc/7PUT-NV6Q>] (last visited Sept. 23, 2023).

68. MODEL RULES R. 1.1.

69. Telephone Interview with Dylan M. Tarnoff, Att’y, Tarnoff L. (Nov. 14, 2022); see also Susan L. Crockin, Meagan A. Edmonds & Amy Altman, *Legal Principles and Essential Surrogacy Cases Every Practitioner Should Know*, 113 FERTILITY & STERILITY 908 (2020).

70. Richard B. Vaughn, *Assisted Reproductive Technology Law: 10 FAQs*, AM. BAR ASS’N, [https://www.americanbar.org/groups/family\\_law/publications/family-advocate/2019/summer/assisted-reproductive-technology-law-10-faqs/](https://www.americanbar.org/groups/family_law/publications/family-advocate/2019/summer/assisted-reproductive-technology-law-10-faqs/) [<https://perma.cc/M273-5YE9>] (last visited Oct. 15, 2023).

71. Telephone interview with Amira Hasenbush, Att’y, All Fam. Legal (Nov. 15, 2022).

receive medical updates, that can be written into the agreement. Nevertheless, certain provisions are unenforceable no matter what the contract says, and attorneys must ensure that their clients understand this reality.<sup>72</sup> In a contract breach, monetary damages may be possible, but specific performance—where a court orders one party to do something—is generally unheard of in surrogacy law.<sup>73</sup>

As Dylan M. Tarnoff of Tarnoff Law in Oakland, California explained, there are multiple layers of protection for parties involved in a surrogacy arrangement.<sup>74</sup> A contract is one of them, but not necessarily the most important one. “There’s three levels here. The first is trust between the parties. The second involves vetting from the agencies. The third is the contract.”<sup>75</sup>

Although the contract provides legal protection, trust is arguably the most important part. “We don’t know when someone is lying,” said Mr. Tarnoff.<sup>76</sup> “We’re relying on [trust and vetting] to make sure that someone is doing something for the right reasons.”<sup>77</sup>

Chris Jackson of Shorebreak Law in Mission Viejo, California emphasized the importance of screening the parties before formalizing the arrangement. “Pairing the correct personalities together is the biggest thing you can do for success. If something comes up and you can smooth that over, that’s ideal. That requires trust. If not, lawyers have to get involved and then we start talking about bright-line rules.”<sup>78</sup>

Attorneys drafting contracts should consider all possible scenarios, including necessary termination, selective reduction, the decline of the surrogate’s health, the divorce of the intended parents, and potential financial difficulties. Furthermore, if the attorney practices in a state that restricts surrogacy, or a state where the law is unclear or unsettled, the attorney must keep up to date with statutory changes while understanding how local courts might interpret the law.<sup>79</sup>

The attorney should also be aware of the client’s relative familiarity with the surrogacy process. Some intended parents go through the surrogacy process more than once, either because the process was not successful the first time, or because they want to have multiple children.<sup>80</sup> Some surrogates also opt to carry more

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72. For example, abortion requirements. Since the pandemic, vaccination is another common point of contention between surrogates and intended parents. Unenforceability in general is discussed in a later section. See discussion *infra* Part III.F; see also Danielle Braff, *Desperately Seeking Surrogates*, N.Y. TIMES (Apr. 2, 2022), <https://www.nytimes.com/2022/04/02/style/surrogate-shortage-us-pandemic.html> [<https://perma.cc/ZTE7-CPYC>].

73. Samantha Lollo, *Our Baby, Her Choices: The Need for Enforcement for Gestational Surrogate Contracts*, 56 FAM. CT. REV. 180, 181 (2018).

74. Telephone Interview with Dylan M. Tarnoff, *supra* note 69.

75. *Id.*

76. *Id.*

77. *Id.*

78. Telephone Interview with Chris Jackson, Att’y, Shorebreak L. (Nov. 21, 2022).

79. Telephone Interview with Claudia Work, Att’y, Scottsdale Fam. L. (Nov. 15, 2022).

80. Braff, *supra* note 72.

than once.<sup>81</sup> These parties may be veterans of the agency, matching, and legal process, thus requiring less handholding. First-time parents and surrogates, in contrast, may have more questions and may require more extensive counsel. The client's familiarity with the process, however, should not encourage the attorney to make assumptions about what the client understands or take shortcuts in their representation.

## B. JURISDICTION

Since surrogacy laws vary so much from state to state and some states are far friendlier to surrogacy than others, intended parents sometimes "forum shop," seeking surrogacy-related services in a state outside the one they live in in order to utilize state laws more amenable to their wishes.<sup>82</sup> Furthermore, the domicile of the intended parents, the domicile of the surrogate, the location of the agency that brings them together, the office of the attorney who writes the contract, and the hospital or clinic where the embryo is transferred might all be in different states. Parties, in creating the agreement, could choose to form the contract in the state friendliest to their needs.<sup>83</sup> In a multi-state case, the parties may want to stipulate in the surrogacy contract where any litigation should take place.<sup>84</sup>

Multiple attorneys emphasized the importance of jurisdiction to the overall success of the surrogacy arrangement. Mr. Jackson noted: "The state that the surrogate gives birth in is going to control your parentage order. If you're working in a jurisdiction that is bad, that isn't a match we can allow to go forward. Or we have to come up with a plan to make it work."<sup>85</sup>

In states like Arizona, where paid surrogacy is prohibited, attorneys get around the statute by attaching a different state's laws to the arrangement.<sup>86</sup> "We will do whatever we can to have a friendly state's hands all over the contract," said Claudia Work of Scottsdale Family Law.<sup>87</sup> If intended parents in Arizona are seeking a paid surrogacy, "the parents or surrogate should be represented by out-of-state counsel, the contracts should be drawn there, or the implantation can occur there. There have to be legitimate reasons" for a different state's laws to apply.<sup>88</sup>

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81. See *Five Things to Expect During a Repeat Surrogacy Journey*, AM. SURROGACY BLOG (Nov. 9, 2020), <https://www.americansurrogacy.com/blog/what-to-expect-if-youre-pursuing-surrogacy-again/> [https://perma.cc/Y6A9-TWW8].

82. *The Logistics of Completing a Surrogacy Across State Lines*, AM. SURROGACY BLOG (July 6, 2018), <https://www.americansurrogacy.com/blog/the-logistics-of-completing-a-surrogacy-across-state-lines/> [https://perma.cc/9F4K-LAUU].

83. Telephone interview with Claudia Work, *supra* note 79.

84. *Id.*

85. Telephone Interview with Chris Jackson, *supra* note 78.

86. Telephone Interview with Claudia Work, *supra* note 79.

87. *Id.*

88. *Id.*

In jurisdictions where access to surrogacy is more limited or restricted altogether, some attorneys prefer to send their clients out-of-state. “This is my preference for them,” wrote Kristy B. Blackwell of Stuart & Blackwell, PLLC in Chandler, Arizona.<sup>89</sup> It can be “the only option if they do not have a family/friend willing to be their surrogate/gestational carrier.”<sup>90</sup>

Since attorneys generally cannot practice across state lines, attorneys working with multi-state parties must be cautious of what legal advice they give their clients.<sup>91</sup> As Mr. Jackson of Mission Viejo, California, said, “It’s a fine line. You can give advice that is basic knowledge.”<sup>92</sup> For example, if he was working with a California couple who matched with a Colorado-based surrogate planning to give birth in Colorado, “the surrogate would need counsel from a Colorado attorney. Then I would collaborate with the [Colorado] attorney. Whatever contract we drafted, I would ask if they are okay with translating that into Colorado law.”<sup>93</sup>

### C. JOINT REPRESENTATION

Model Rule 1.7 states that a lawyer “shall not represent a client if the representation involves a concurrent conflict of interest.”<sup>94</sup> Such a conflict happens when a client is “directly adverse” to another client, the matter involves a “claim by one client against another client,” or representation would be “materially limited” by the lawyer’s duty to someone else.<sup>95</sup> Notably, it is not representing multiple clients (even on the same matter) that is the issue, it is representing multiple clients who are *adverse* to each other.<sup>96</sup> In such situations, the attorney’s duty of loyalty, duty of confidentiality, and the attorney-client privilege might all be compromised.<sup>97</sup>

In surrogacies, attorneys may be asked to represent both sides of an arrangement by advising both the surrogate and intended parents.<sup>98</sup> Surrogacy is expensive, and the intended parents may seek to cut costs by minimizing the number of lawyers involved.<sup>99</sup> Even when the attorney objects, the parties may argue that everyone is on the same side, that there is no risk of adversity, and that everyone

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89. Email Interview with Kristy Blackwell, Att’y, Stuart & Blackwell (Nov. 22, 2022).

90. *Id.*

91. MODEL RULES R. 5.5.

92. Telephone Interview with Chris Jackson, *supra* note 78.

93. *Id.*

94. MODEL RULES R. 1.7(a)(1)–(2).

95. “The lawyer may still represent the client if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation, the representation is not prohibited by law, and each client gives informed written consent.” MODEL RULES R. 1.7(b)(1)–(4).

96. MODEL RULES R. 1.7(a)(1).

97. MODEL RULES R. 1.7, cmts. 1, 18.

98. Telephone interview with Bo Gregg, Att’y, Young Wells Williams P.A. (Nov. 16, 2022).

99. See Amanda McGarry, *Joint Representation in Surrogacy Agreements: A Professional Ethics Perspective*, 31 J. LEGAL PROF. 321, 325 (2007) (utilizing the ethical framework of no-contest divorce).

wants the surrogate to successfully carry a baby for the intended parents. According to the attorneys I spoke with, this kind of request is common.

But joint representation in such situations would still be unwise. One party might become antagonistic toward the other over something relatively small, such as dietary habits during the pregnancy. Even worse, one or more parties could change their mind about a major issue, such as termination, payment, or custody of the child.<sup>100</sup> Even the intended parents may not always be on the same side. For example, they may divorce before completing a successful transfer and become adverse over what to do with their embryos.

If the relationship truly breaks down, the attorney may be forced to drop both clients, potentially violating the scope of the attorney's duties.<sup>101</sup> If the arrangement falls apart because of some flaw in the contract, the attorney effectively becomes a third party in the conflict.<sup>102</sup> For example, if the intended parents made it clear they did not want the surrogate's spouse to smoke during the pregnancy, but the attorney failed to write that into the contract (and the spouse smoked), the attorney might end up representing two opposing parties while trying to protect their own reputation and liability.

Informed clients can waive adverse conflicts if the waiver is confirmed in writing.<sup>103</sup> But conflicts cannot be waived if the attorney does not believe they can provide "competent and diligent representation" to each client.<sup>104</sup> In the worst-case scenario for a surrogacy—for example, the termination of one or more fetuses, or a disagreement about the custody of the child—it is extremely difficult to see how any attorney could represent both sides. For this reason, both the 2017 Uniform Parentage Act and the ABA Model Act Governing Assisted Reproductive Technology highly recommend that intended parents and surrogates each have their own independent lawyer.<sup>105</sup> Many states that have statutes regulating surrogacy require independent counsel for both sides.<sup>106</sup>

The conflict of interest inherent in joint representation is so egregious that, in practice, joint representation does not happen. The attorneys I spoke with said they would never enter such an arrangement and did not know of anyone who would.

As Chris Jackson said, creating an arrangement with such a flagrant conflict of interest risks damaging the whole enterprise.<sup>107</sup> "I don't want to put my [court] parentage order at risk. Especially with the amount of money involved, you don't

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100. See *What to Know About Surrogacy, Termination of Pregnancy and Selective Reduction*, AM. SURROGACY, <https://www.americansurrogacy.com/surrogate/surrogacy-and-abortion> [<https://perma.cc/RZT2-8YUH>] (last visited Sept. 23, 2023).

101. See MODEL RULES R. 1.16(a)(1).

102. *But cf.* MODEL RULES R. 1.7(a)(2) (prohibiting conflicts with the personal interest of the lawyer).

103. MODEL RULES R. 1.7(b)(4).

104. MODEL RULES R. 1.7(b)(1).

105. UPA, *supra* note 44; MODEL ACT GOVERNING ASSISTED REPROD. TECH (AM. BAR ASS'N 2008).

106. See, e.g., CAL. FAM. CODE § 7962(b) (West 2013).

107. Telephone Interview with Chris Jackson, *supra* note 78.

want someone to argue that the contract is void because they didn't know what they were signing.”<sup>108</sup>

Bo Gregg of Young Wells Williams P.A. in Ridgeland, Mississippi, said that he doesn't even entertain requests to represent both sides. “I hang up,” he said. “From time to time, I get that ‘neighbor situation’” where parties think they don't need multiple lawyers. “I hang up, and only after we get representation in place can we start talking about the agreement. It's just good optics when everyone has independent counsel.”<sup>109</sup>

#### D. THIRD-PAYER PROBLEM AND NON-REPRESENTATION

Nonetheless, independent attorneys for each party do not always solve all problems. The intended parents typically pay for all costs involved in a surrogacy, including the surrogate's attorney.<sup>110</sup> This leads to a third-party payer problem in which the attorney's client and the person(s) paying for the attorney's services are different people. The surrogate's attorney may only proceed in representing the surrogate if there is no significant risk that the attorney will be materially limited by the fee arrangement or their relationship to the third-party payer, and they must obtain the surrogate's informed consent to the conflict.<sup>111</sup> Ideally, the attorney will also make it clear to the third-party payer that the attorney does not represent the third-party payer, that their duty is to their client (the surrogate), that they cannot share any of the surrogate's confidences, and that the third-party payer cannot instruct the attorney on how to represent the surrogate.<sup>112</sup>

The third-party payer issue is “very common,” said Amira Hasenbush of All Family Legal in Encino, California.<sup>113</sup> But it can be circumvented. “Any ethical lawyer just has to sign an agreement saying that their ethical duty is to the client.”<sup>114</sup>

Mr. Gregg of Mississippi added that payer issues can represent a conflict of interest. “It does raise the concern that the lawyer is going to be loyal to whoever's footing the bill,” said Mr. Gregg, “and it does raise the appearance of impropriety.” However, ethics-conscious attorneys can recognize the issue and move past it by focusing on their clients, not the payer. “The surrogate can rely on the ethical fealty of the attorney who's been chosen to represent her.”<sup>115</sup>

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108. *Id.*

109. Telephone Interview with Bo Gregg, *supra* note 98.

110. Braverman, *supra* note 26.

111. MODEL RULES R. 1.7(a), 1.8(f)(1).

112. See Paula M. Bagger, *When a Third Party Pays the Legal Fees*, AM. BAR ASS'N (May 21, 2019), <https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2019/when-a-third-party-pays-legal-fees/> [https://perma.cc/7P22-Z8KY]. To be clear, the surrogate's attorney should be speaking with the payer's attorney, per Model Rule 4.2.

113. Telephone interview with Amira Hasenbush, *supra* note 71.

114. *Id.*

115. Telephone interview with Bo Gregg, *supra* note 98.

In some cases, the intended parents might have legal representation while the surrogate does not. In those situations, the intended parents' attorney must make it clear that the attorney is not also representing the surrogate, and that the attorney is not disinterested.<sup>116</sup> Attorneys must avoid giving legal advice to unrepresented surrogates if they know that the surrogates' interests "are or have a reasonable possibility of being in conflict with the client."<sup>117</sup> Even if the surrogate's interests are not in conflict with the intended parents, the intended parents' attorney cannot give an unrepresented surrogate legal advice without risking the possibility that the attorney will end up representing both sides.<sup>118</sup> For example, many surrogacy agencies screen out women who are on Medi-Cal or Medicaid, since the income they receive from paid surrogacy may push them out of eligibility.<sup>119</sup> However, if the agency does not flag the issue, it is up to her attorney to recognize the risk—not the intended parents or their representation.<sup>120</sup>

#### E. SCOPE AND LEGALITY

Model Rule 1.2(c) states that an attorney "may limit the scope of the representation if the limitation is reasonable . . . and the client gives informed consent."<sup>121</sup> As in any field, surrogacy attorneys may find it useful to clarify the scope of their representation. Some parties may only want an attorney to review an already-drafted contract; others may require drafting and negotiating services.<sup>122</sup> For some attorneys, representation only involves the drafting of the contract and filing the paperwork for the pre- or post-birth order.<sup>123</sup> Others may find themselves advising their clients for the duration of the pregnancy and afterward, as disagreements arise between the parties.<sup>124</sup>

Model Rule 1.2 also requires attorneys not to counsel clients in conduct "that the lawyer knows is criminal or fraudulent."<sup>125</sup> The attorney may, however, "counsel or assist a client to make a good faith effort to determine the . . . meaning or application of the law."<sup>126</sup> In surrogacy law, the line between the two may not always be clear.<sup>127</sup> As mentioned in Part II, surrogacy law is different in every

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116. MODEL RULES R. 4.3.

117. MODEL RULES R. 4.3.

118. *But cf.* MODEL RULES R. 1.7 (limiting concurrent conflicts of interest).

119. *Health Insurance Issues During Surrogacy*, ESSIG & EVANS, <https://www.surrogatesearch.com/faq/health-insurance-issues> [<https://perma.cc/FZZ2-K2B3>] (last visited Sept. 15, 2023).

120. Telephone interview with Dylan M. Tarnoff, *supra* note 69.

121. MODEL RULES R. 1.2(c).

122. Telephone interview with Dylan M. Tarnoff, *supra* note 69.

123. *Id.*

124. Some attorneys may want to specify that they will work on contract, negotiation, and transactional services only, and that any litigation work arising from the surrogacy arrangement will be contracted out or require a new agreement with the attorney.

125. MODEL RULES R. 1.2(d).

126. MODEL RULES R. 1.2(d).

127. See generally Hannah Beech, *They Were Surrogates. Now They Must Raise the Children*, N.Y. TIMES (Nov. 26, 2022), <https://www.nytimes.com/2022/11/26/world/asia/surrogacy-cambodia.html> [<https://perma.cc/2X5F-FVB9>] (providing an example of what happens when surrogacy law is unclear, and changes catch parties off-guard).



state and is not regulated at all at the federal level.<sup>128</sup> In some states, there are neither surrogacy statutes nor case law; in others, the laws are unclear or unsettled.<sup>129</sup> In the future, new technological or legal developments could lead to further gray areas in surrogacy.<sup>130</sup>

An attorney cannot counsel a client to take a course of action they know to be illegal.<sup>131</sup> However, statutes can be unclear and open to interpretation, and attorneys can work within that gray area. In Arizona, paid surrogacy is specifically banned by statute, and surrogacy contracts are technically unenforceable.<sup>132</sup> Nonetheless, attorneys in Arizona often help intended parents enter into arrangements and find workarounds by attaching another state's laws to the arrangement, usually by drafting the surrogacy contract or completing the embryo transfer in another state.<sup>133</sup> Attorneys also use other workarounds, for example grafting surrogacy contracts onto Arizona parentage laws.<sup>134</sup> Since parentage laws are established in Arizona and pro-surrogacy laws are not, elements of the former can sometimes be used to validate contracts involving the latter.<sup>135</sup> Attorneys also rely on the Fourteenth Amendment's Equal Protection clause—arguing that intended parents shouldn't be treated differently from “traditional” parents just because their children came from surrogates—and other methods they would only talk about off-the-record.<sup>136</sup>

“There's a lot of stuff we do that's creative,” said Claudia Work.<sup>137</sup> Regarding her reluctance to talk about some of her strategies, she said, “We're in such a delicate situation, and we don't want to take away the tools we have.”<sup>138</sup> Her methods are occasionally so dependent on local jurisdictions that “it's a little bit of an underground railroad sometimes.”<sup>139</sup> Not all her solutions work everywhere, every time. “It's very much just feeling out the atmosphere.”<sup>140</sup>

Different attorneys have different opinions on how exactly surrogacy law works in Arizona. “There's one attorney out-of-state,” Ms. Work said, “who argues that due to legislative inaction, the [Arizona surrogacy] statute is completely void now.”<sup>141</sup> Other attorneys simply avoid paid surrogacy work and only

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128. *Surrogacy Laws By State*, AM. SURROGACY, <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/surrogacy-laws-by-state/> [<https://perma.cc/Q6FX-NMWT>] (last visited Nov. 10, 2023).

129. FINKELSTEIN ET AL., *supra* note 40.

130. Cf. Greer Donley, *Does the Constitution Protect Abortions Based on Fetal Anomaly?*, 20 MICH. J. GENDER & L. 291, 291 (2013) (discussing the effect of new technology on abortion law).

131. MODEL RULES R. 1.2(d).

132. See ARIZ. REV. STAT. ANN. § 25-218 (2018).

133. Telephone Interview with Claudia Work, *supra* note 79.

134. *Id.*

135. *Id.*

136. See U.S. CONST. amend. XIV, § 1.8.

137. Telephone Interview with Claudia Work, *supra* note 79.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

deal in good-faith arrangements, regardless of the lack of clarity on what would happen if such arrangements go wrong.<sup>142</sup> Ms. Work herself believes that a 2018 state law permitting the usage of embryos after divorce implies that paid surrogacy *is* legal in Arizona: “what if the person who wants to use the embryo doesn’t have a uterus?”<sup>143</sup>

In Mississippi, the lack of surrogacy statutes actually makes the state fairly surrogacy-friendly, according to Mr. Gregg.<sup>144</sup> But the lack of statutes gives incredible power to judges to decide cases as they see fit. There are local judges who “would not entertain the prospect of taking an unborn child” by signing a pre-birth order, because doing so would violate their moral, religious, and legal beliefs.<sup>145</sup> This contrasts with California, where judges are *required* by statute to sign pre-birth orders, without discretion, when they are properly requested.<sup>146</sup> Attorneys are allowed to make “good faith effort[s] to determine the . . . meaning or application of the law,” but this can be difficult when there are many different interpretations and unpredictable on-the-ground applications.<sup>147</sup>

#### F. UNCONSCIONABLE AND UNENFORCEABLE CONTRACTS

A contract in any field risks having unconscionable (and therefore unenforceable) provisions, and this is especially true in surrogacy arrangements, considering their implications for children, families, and pregnant bodies.<sup>148</sup> Charges of unconscionability and unenforceability may be levied upon certain parts of the contract or against the entire arrangement itself.<sup>149</sup> Critics of paid surrogacy arrangements have argued that such practices are no different from selling babies, and that they violate women’s autonomy and commodify human life.<sup>150</sup> Critics point out that intended parents tend to have more financial resources than surrogates, leading to a gross imbalance of bargaining power, perhaps exacerbated by inequities such as youth, lack of education, or financial difficulties.<sup>151</sup> Some judges in some states view surrogacy as unethical, regardless of contract law, and may refuse to sign pre- and post-birth orders altogether.<sup>152</sup>

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142. *Id.*

143. *Id.*; See ARIZ. REV. STAT. ANN § 25-318.03 (2018).

144. Telephone Interview with Gregg, *supra* note 98.

145. *Id.*

146. CAL. FAM. CODE § 7962(f)(2) (West 2013); Telephone Interview with Dylan M. Tamoff, *supra* note 74.

147. MODEL RULES R. 1.2(d).

148. See MODEL RULES R. 1.2(d). The Rule does not specifically cover unconscionability and unenforceability, but this would be covered by Model Rule R. 1.2(d) (assisting a client in conduct the lawyer knows is criminal or fraudulent).

149. Telephone Interview with Bo Gregg, *supra* note 98.

150. See Rachel Rebouché, *Contracting Pregnancy*, 105 IOWA L. REV. 1591, 1613 (2020).

151. See Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perceptive*, 20 WM. & MARY J. WOMEN & L. 423, 449–50 (2014) (discussing substantive unconscionability in contracts involving human bodies).

152. See *In re Baby M*, 537 A.2d 1227, 1227 (N.J. 1988).

Since the pandemic, one common area of disagreement between surrogates and intended parents involves vaccination.<sup>153</sup> Intended parents may want the surrogate to be up to date on vaccinations, which can provide the fetus with antibodies in utero, but the surrogate may refuse. Regardless of what a contract says, a judge is unlikely to enforce surrogacy-related vaccination.<sup>154</sup>

Another major area of contention involves abortion.<sup>155</sup> In a surrogacy, parties may want to consider abortion if the pregnancy becomes hazardous to the surrogate's health, or if multiple embryos have been implanted and it is not recommended or desired that they all be carried to term, or if congenital disorders have been discovered in testing. Surrogates and intended parents should be on the same page about such difficult questions, and what they agree on can be written into the contract. But ultimately, provisions controlling the surrogate's body and medical health are unenforceable.<sup>156</sup> It would be considered unconscionable for a court to force a surrogate to receive an abortion, even if the alternative is a child that the intended parents may not want.<sup>157</sup> An attorney should ensure that the intended parents understand that.

Ms. Hasenbush of Encino, California said that abortion and other potentially unconscionable contract provisions are treated with the utmost care.<sup>158</sup> "Those kinds of provisions are written in all caps," she said. "Even if the parties have agreed to something, at the end of the day, the surrogate makes decisions about her body. That's why the [vetting process] is so important. Any contract is just people's willingness to abide by it."<sup>159</sup>

Mr. Tarnoff told me about a case where the fetus tested positive for Down's Syndrome.<sup>160</sup> The parties had agreed ahead of time to terminate such a pregnancy, and the surrogate's psychological evaluation suggested that she would agree to terminate.<sup>161</sup> Nevertheless, during the actual pregnancy, she refused an abortion and the child was put up for adoption.<sup>162</sup> "We try to create happy families," said Mr. Tarnoff, "but the gravity of things that could go wrong does come into play sometimes."<sup>163</sup>

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153. See Braff, *supra* note 72.

154. See Carter Sherman, *Parents Are Demanding Surrogates Who Won't Get the COVID Vaccine*, VICE NEWS (Mar. 9, 2021), <https://www.vice.com/en/article/qjpqe3/parents-are-demanding-surrogates-who-wont-get-the-covid-vaccine> [<https://perma.cc/J8EJ-GDLU>].

155. *Surrogates and Abortion: What to Know Before Taking This Journey*, AM. SURROGACY, <https://surrogate.com/surrogates/pregnancy-and-health/surrogates-and-abortion-what-to-know-before-taking-this-journey/> [<https://perma.cc/V7C5-9CP5>] (last visited Nov. 10, 2023).

156. *Id.*

157. See Alexis Williams, *State Regulatory Efforts in Protecting a Surrogate's Bodily Autonomy*, 49 SETON HALL L. REV. 205, 223 (2018).

158. Telephone interview with Amira Hasenbush, *supra* note 71.

159. *Id.*

160. Telephone Interview with Tarnoff, *supra* note 74.

161. *Id.*

162. *Id.*

163. *Id.*

Other, less extreme issues—relating to food, birth schedule, and medical care—can also be unconscionable.<sup>164</sup> Though the presence of an independent lawyer theoretically protects the surrogate during the contract process, intended parents may still push to include contract provisions that may be considered unconscionable.

“Contracts can run the gamut of everything that can be controlled about surrogate behavior,” said Mr. Gregg.<sup>165</sup> “These are often 50-plus-page contracts.”<sup>166</sup> Some parents, he said, ask for unreasonable dietary restrictions, but “foods are hard to enforce because you can’t watch the surrogate all the time.”<sup>167</sup> Some superstitious parents want the child to be born on certain days of the week, but “that’s not something we can control.”<sup>168</sup> Other parents want unreasonable control over the doctor, where they pick the obstetrician and the surrogate can only receive certain types of treatment.<sup>169</sup> “We cut that stuff out of the contract,” said Mr. Gregg, “even if the surrogate says that she doesn’t care,” because that kind of clause “gives rise to the probability of abuse and the appearance of unequal power.”<sup>170</sup>

If the intended parents are adamant about including provisions that the attorney considers unconscionable, the attorney may want to consider withdrawing from the representation in order to avoid drafting a contract the attorney thinks may be illegal. This would also allow attorneys to avoid continuing to represent clients with whom they have a “fundamental disagreement.”<sup>171</sup>

#### G. REFERRALS

Finally, Model Rule 1.7(a)(2) states that an attorney may have a conflict of interest if their representation of a client will be “materially limited . . . by a personal interest of the lawyer.”<sup>172</sup> This might occur if an attorney has come to depend financially on a client’s business, or becomes too close to a client personally.<sup>173</sup> In either case, the attorney may be reluctant to provide legal advice that would displease the client, or unwilling to say no to the client, even when that is the ethical thing to do.<sup>174</sup>

In surrogacies, this type of unhealthy relationship sometimes develops between the attorney and local surrogacy agencies.<sup>175</sup> Intended parents and surrogates

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164. Telephone Interview with Bo Gregg, *supra* note 98.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. MODEL RULES R. 1.2(d), 1.16(b)(4).

172. MODEL RULES R.1.7(a)(2).

173. See *Murphy & Demory, Ltd. v. Murphy*, No. 128219, 1994 WL 1031072, at \*1 (Va. Cir. Ct. Mar. 2, 1994).

174. See *Breezevale Ltd. v. Dickinson*, 783 A.2d 573 (D.C. 2001); *Fairfax Sav., F.S.B. v. Weinberg & Green*, 685 A.2d 1189 (Md. Ct. Spec. App. 1996).

175. Telephone interview with Amira Hasenbush, *supra* note 71.

usually go through the agency process first: each party signs up with an agency, the agency matches the parties, and each party then goes through medical and psychological evaluations.<sup>176</sup> If the parties pass the evaluations, the agency often gives the parties a list of attorneys they can contact to complete the next step of the process – the drafting and signing of the surrogacy contract.<sup>177</sup> This type of referral is permitted as long as the attorney does not pay for it.<sup>178</sup> However, when any one agency refers so much business to an attorney or office that the agency becomes a significant source of business, a conflict of interest may arise. The attorney may be hesitant to provide any legal advice to the parties that would displease the agency, knowing that the agency may cut off referrals to the attorney and significantly curtail a source of business.

Ms. Hasenbush in California stated that representing too many clients from one agency would probably cross an ethical line, though it's hard to know where to draw the line.<sup>179</sup> "I don't think any one agency refers to me more than three times a year," she said.<sup>180</sup> "Others get two hundred referrals a year [from the same agency]. That's quite a different practice."<sup>181</sup>

Ms. Hasenbush further explained why financially relying on certain agencies can be a conflict of interest and lead to ethical tension. "Some agencies provide bad matches," Ms. Hasenbush said.<sup>182</sup> For example, if an agency brought together a surrogate who will not abort in any circumstance, with parents who insist on the option in case of birth defects, "that's not a match."<sup>183</sup> In such circumstances, Ms. Hasenbush will not let the arrangement proceed. "The agency then gets mad because I broke the match, but they didn't do the proper screening in the first place."<sup>184</sup> In the future, that agency might decline to refer parties to her because of their belief that she is bad for business.

Giving legal advice that goes against an agency's interests might be difficult for an attorney if they are reliant on specific agencies for business. However, according to Ms. Hasenbush, there is no easy way to avoid getting into such a conflict.<sup>185</sup> Attorneys must be conscientious about not entangling their personal interests with their ability to give legal advice. But unless an attorney turns away clients preemptively, the attorney may not notice that they have become reliant on an agency until it's too late. "Some lawyers might choose to not be on a referral list," she said. "But I don't know anyone who wouldn't."<sup>186</sup>

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176. *The Six Steps of the Surrogacy Process*, *supra* note 23.

177. *Id.*

178. MODEL RULES R. 7.2.

179. Telephone interview with Amira Hasenbush, *supra* note 71.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

## CONCLUSION

Multiple attorneys emphasized to me that surrogacy law is a collaborative, non-adversarial process where parties generally want the same thing. At the same time, in the rare instances where things go wrong, the emotional stakes can be high, and the consequences costly. In lieu of heavy regulation and broad standardization, the surrogacy field utilizes trust between parties, proper procedure, and contract law to protect parties in arrangements. Legal ethics also plays a necessary role, through rules that clarify attorney competence, jurisdictional issues, the representation of parties, sources of payment, unsettled state laws, unconscionable contract provisions, third-party referrals, and more.