

FOLLOWING ETHICAL GUIDELINES IN ADOPTION LAW

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Identifying Conflicts of Interests

The goal in any adoption is to ensure that each participant's rights are protected, that each fully understands the implications of the process and the placement to be a permanent one. A placement can unravel quickly if ethical guidelines are given short shrift. This can lead to the voiding the surrender overturning the adoption, putting the agency at risk in losing its license, incurring a fine, jeopardizing the social worker's license and/or the attorney's ability to practice law.

An attorney's role in any aspect of adoption law can easily be fraught with conflicts. It is critical to identify whom you represent, and stick to that role. The participants in the adoption process are the agency, prospective adopting parent(s), expectant/ birth mother, and expectant/ birth father.^{1 2}

Massachusetts Rule of Professional Conduct ("Mass. R. Prof. C.") Conflict of Interest 1.7 (b) (1) allows a lawyer to represent multiple clients in a single transaction, with certain conditions.

Among them are the lawyer's beliefs such as the representation will not adversely affect the relationship with the other client; Id. 1.7 (a) (1) and each client consents after consultation. Id. 1.7 (a) (2). In addition, the lawyer shall not represent a client if the representation of that client

¹ The term expectant parent refers to the parent before giving birth to the child. A parent only becomes a birth parent once the child is born, and he/she has decided to make a plan for adoption for his/her child.

² In the event the matter becomes contested, the court will appoint an attorney for the child.

may be materially limited by the lawyer’s responsibilities to another client or to...unless, the lawyer reasonably believes the representation will not be adversely affected Id. (2) (b) (1); and the client consents after consultation. Id. (2) (b) (2). Specifically in situations representing multiple clients in a single matter, the consultation must include an explanation of the common representation and advantages and risks involved. Id.

In adoption matters, it is often very easy for, in particular, the attorney representing the agency, to give the appearance of *also* representing the interests of any other member of the adoption triad. Despite the permission granted by provided Mass. R. Prof. C., this is an invitation for malpractice, because conflicting circumstances are always present.³

Placement of the Child

The agency attorney must have only one client, that of the agency. Although at first blush, it may appear that the interests of the expectant parent(s) and that of the prospective adopting family and the agency are the same: all want the placement to occur. However, in accordance with the Code of Massachusetts Regulations, Title 102: Office of Early Education and Care, (“102 CMR”) 5.02 Definitions, an agency retains the right to refuse to place a child in a designated home based upon the results of a completed adoptive parent assessment. There are circumstances where a birth parent has made an adoption plan to place the child with a specific family. Nevertheless, it is the agency’s responsibility to determine the appropriate placement for the child. 102 CMR 5.08. As a result, the agency may determine that placement with that

³ Set out in the Appendix is the Code of Ethics of the American Academy of Adoption Attorneys, (“AAAA”) which as of this writing, is under reconsideration, specifically for the allowance of multiple representation of clients. The Code of Ethics of the American Academy of Assisted Reproduction Attorneys, (AAARTA”) a specialized division of AAAA specifically prohibits multiple representation.

particular family is not in the child's best interests. Furthermore, it is the agency's responsibility to determine whether the adoption will be finalized. M.G.L. Ch. 210 §2A (E).

Parental Rights

Expectant/birth parents have the right to independent counsel. 102 CMR 5:09 (1) (f). The expectant parents must be made aware that the agency's attorney does not represent them. Id. This can be confusing, because many times, it is the agency's attorney who takes the surrender from the birth parents, and has explained the implication of their surrender and the law as it applies to them.⁴

Often times, the mother may or may not identify the father. Massachusetts does not require that the expectant/birth mother do so. Rather, the statute provides the agency request the mother voluntarily provide a sworn written statement, executed before a notary and in the presence of two competent witnesses, one of whom shall be selected by the mother, that identifies the child's father and his current or last known address. M.G.L. Ch. 210 §2. In such cases, the placement is considered a high legal risk, pending the termination of parental rights.

It is critical for the prospective adoptive family to have independent representation to advise them as to the implications and whether they should go forward with a high legal risk placement. A very frequent disagreement is when the agency does not want to go forward on the placement and would prefer to place the child in foster care, pending termination of parental rights. Again,

⁴ Best practice is to have each expectant parent consult an independent attorney. If either of the expectant parents are 18 years or younger, although not mandatory, the court will expect independent representation or appoint a guardian ad litem to determine whether the expectant parent fully understood the implications when they executed the surrender.

here is a situation where the interests of the birth mother, agency and prospective adopting family can collide.

Another critical point is when, and if, the father comes forward and asserts his parental rights. It is the agency's decision as to whether to challenge the father because it will be the agency's burden to prove by clear and convincing evidence that he is unfit. Proof of parental unfitness must be established by clear and convincing evidence. Stantosky v. Kramer, 455 U.S. 745 (1982).

Under such circumstances, the birth mother's interests will undoubtedly conflict with the father, because she has made an adoption plan, does not want to parent the child, and probably does not want him to parent the child, either. Not represented by counsel, or not having adequate counsel, she may not have realized that upon the signing of the surrender, she cannot revoke her surrender on the grounds that the father came forward to challenge the placement. If she has executed the surrender, the birth mother is essentially, foreclosed from participating in any further proceedings regarding her child. If the father cannot be proved to be unfit, and birth mother has not executed the surrender, she may find herself parenting by default, that is, unless she is willing to have him parent the child.

The prospective adoptive family may want to pursue the challenge, against the advice of the agency. Here, again, vital interests are at odds.

Confidentiality in Adoption Cases

M.G.L. Ch. 210 §5D, provides strict guidelines for the release of information to an adopted person, the biological parent of an adopted person and the adoptive parents of an adopted person.

Simply put, per the statute, an agency may release information as follows:

- Upon written request the agency may release to the adopted person, if he/she has reached the age of 18, information about his biological parents which will not identify or tend to lead to the identification of the biological parents or their present or former locations. Id. (a) (1).
- Upon written request by the biological parent of an adopted person, information about the adopted person which will not reveal or tend to reveal his identity after adoption or his present or former locations and which will not tend to lead to his identity after adoption or present or former locations. Id. (a) (2).
- Upon written request by the adoptive parent, release to the adoptive parent, if the adopted person is under the age of eighteen years, information about the adopted person and his/her biological parents which will not identify or tend to lead to the identification of the biological parents or their present or former locations. Id. (a) (3).
- A placement agency may release the identity of the adopted person to the biological parent and the identity of the biological parent to the adopted person, after the adoption, if it has received written permission from the biological parent and the written permission from the adoptive person or parents if the adoptive person is under the age of twenty-one.

However, if the biological parent is surviving, the written permission must be given at least thirty days before the release of the identifying information. Id. (b).

However this law conflicts with M.G.L. Ch. 46 §2B Inspection of Birth Certificates of Adopted Persons, which after years of convincing the legislature, was finally enacted December 5, 2007. Simply put, an adopted person 18 years or older born in the Commonwealth on or before July 17, 1974 or after January 1, 2008 or by an adoptive parent of an adopted person under 18 years of age and born in the Commonwealth on after January 1, 2008, may have access to the birth certificate prior to adoption.

The reason for the qualification of dates was to “protect” those birth parents who were promised confidentiality at the time of their adoption plan. Practically speaking, today with the internet, Facebook, persons who specialize in searches and judges having a more liberal attitude, access to once confidential information may be had.

Guidelines for Setting Fair Attorneys Fees

Attorney’s fees in adoptions vary from attorney to attorney. Mass. R. Prof. C. 1.5. FEES, offers excellent guidance. Mass. R. Prof. C. 1.5 provides in pertinent part:

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee or collect an unreasonable amount for expenses. The factors to be considered in determining whether a fee is clearly excessive 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) if the lawyer is the successor to a lawyer whose representation has terminated before the conclusion of the case, whether the client or the successor lawyer is to be responsible for payment of former counsel's attorney's fees and expenses, if any such payment is due.

Mass. R. Prof. C. does not prohibit a lawyer from entering into an arrangement for charge or collect any fee in an adoption matter, the payment or amount of which is contingent upon the securing a child for placement. See Mass. R. Prof. C. 1.5 (d). However, M.G.L. Ch. 210 §11A prohibits any person or entity other than a duly authorized agent or employee of the Department of Children and Families or Massachusetts (“DCF”) licensed placement agency to offer to place, locate or dispose of children for adoption; and, likewise, for accepting consideration for placing a child for adoption. Id.

In setting fees, licensed placement agencies must comply with 102 CMR 5.04 (6) and (7). 102 CMR 5.04 (6) provides that the agency must keep on file at the agency and with DCF its annual

operating budget, specifying salaries of all full time employees and all bonuses and other benefits, including rent, mortgage payments, and payment for vehicles owned, rented or leased by the agency. However, there is no set regulation for the amount the agency may charge for its services.

102 CMR 5.04 (7) provides that the agency must have a written policy which includes specific information on fees, and states the fees charged shall be “reasonable.”

Although there is transparency in the amount of fees charged by agencies, there are no specific guidelines as to the amounts which may be charged. As a result, fees vary from agency to agency, depending upon the services offered.

Other states, which are not agency states, and allow attorneys to locate and place children for adoption, attorneys’ fees may often reflect the services offered by an agency. Those who seek services outside of Massachusetts will find that fees do vary; depending upon what is allowable in each individual state.

It is impossible to regulate the fees charged in adoptions from state to state. This has been an issue of the Academy of American Adoption Attorneys for a long time. The best the Academy could do is found in the Academy’s Code of Ethics (“Code of Ethics”) Section 7, appendix attached, which provides that the member [of the Academy] shall not enter into an agreement for, charge or collect an illegal or unconscionable fee. Academy members are prohibited from charging a finder’s fee for locating a birth parent. Academy members may not possess a

financial stake in the success of any adoption in which the member is retained as counsel for any party. Code of Ethics, Section 8.

Observing the Rules of Professional Conduct

It was critical for the Academy to set out a Code of Ethics. Every annual meeting has some continuing legal education dedicated to ethics. Bad behavior by attorneys and other so-called adoption professionals is fodder for sensationalism and consequently taints all adoption practice. There are some specific Rules in Mass. R. Prof. C. which are particularly pertinent in the practice of adoption law. Although set out in the Appendix, the following are worth noting:

Rule 1.2 – Scope of Representation

It is critical, as an adoption attorney to seek the lawful objective of his/her client. However, also contained in the Rule is that a lawyer may limit the objectives of the representation if the client consents after consultation. Mass. R. Prof. C.1.2 (c). It is essential that particularly in adoption matters, that be put in writing. It is very common for an attorney to represent a client for the purposes of finalization, only. If not clearly stated, and the adoption disrupts for one reason or another, or the child is found to be of ill health, it is easy for the client to state that the attorney should have known, and breached his/her duty to the client. The finalization of an adoption in and of itself would not require, nor should it require the attorney to review medical records, or social psycho-histories, or examine the termination of parental rights, if termination has already taken place. Each of these factors can be trigger points to the unraveling of an adoption.

So too, an attorney must adhere to adoption practices and standards. Mass. R. Prof. C.1 (d) prohibits a lawyer from engaging or assisting a client in the conduct the lawyer knows to be fraudulent. Adoptions can be fraught with fraud. Consents must be taken voluntarily. Notice must be given to all known birth fathers. The notice should be published in a newspaper likely to give notice to the birth father, not some obscure newspaper, no one would read.

Rule 1.6 – Confidentiality of Information

The attorney is often privy to confidential information that may not be shared with his/her client. The attorney should take care in upholding the wishes of the birth parents and or the adopting family if confidentiality is requested. Carelessness is no excuse in violating the wishes of the parties in such a delicate situation.

Rule 1.14 – Client With Diminished Capacity

There may be times when an attorney is called upon to represent a birth parent who, or is aware that one of the parties to the adoption has diminished capacity. To ensure a permanent placement, the attorney must take steps, whether the person is his client or not, to protect that person's rights and make sure the agency offers and provides the necessary services so that it is clear that upon making the decision to consent to an adoption and voluntarily give up parental rights, the person did so with the full understanding of the consequences of his/her act. This may mean having a guardian ad litem appointed by the court, having an independent evaluation conducted to ensure the person has the capacity to make such a decision, and/or having the person's therapist or mental health professional be a part of the team. If a person does not have the mental capacity to execute a surrender, the surrender may be revoked.

Appendix



The American Academy of Adoption Attorneys has members throughout the U.S. and Canada who are experienced in the complexities of adoption law as well as interstate and international regulations surrounding adoption. The Academy is the largest and most accessible resource for finding an adoption attorney.



Click on Map or underlined link for [Member Directory](#) to locate an adoption attorney.

Ethics Code

CODE OF ETHICS AMERICAN ACADEMY OF ADOPTION ATTORNEYS

In order to further the cause of ethical adoption, the members of the American Academy of Adoption Attorneys hereby make and establish this CODE OF ETHICS. Each member of the Academy agrees as follows:

1. A member shall be duly licensed to practice law in each state in which the member maintains a law office, shall fully comply with the Ethical Rules, Disciplinary Rules, Ethical Canons, or other Rules of Professional Conduct in effect in each state in which the member maintains an office, and shall maintain the highest standards of professional and ethical conduct. A member shall not engage in activities which bring discredit upon the Academy.

2. (a) A member shall assure that the member's clients are aware of their legal rights and obligations in the adoption, and that all parties to the adoption are aware of their right to separate legal counsel.

(b) A member may inform a client as to the member's understanding of the laws of a jurisdiction in which the member is not licensed provided that the member discloses that the member is not licensed to practice in that jurisdiction.

3. A member shall not purport to represent both the prospective adopting parent(s) and one or both birth parents, where such representation is specifically

prohibited. This rule shall not preclude a member from undertaking such representation of multiple parties if the member desires to challenge the statutes, court rules or case law of that jurisdiction, provided that the member has fully disclosed such intent and risks incident thereto in writing to each party to the adoption and has obtained the written consent of each party.

4. A member shall actively discourage adoption fraud or misrepresentation, shall not engage in such conduct, and shall take all reasonable measures not inconsistent with the confidentiality of the attorney/client relationship to prevent adoption fraud or misrepresentation, withdrawing from representation where necessary to avoid participation in any such conduct.

5. (a) A member shall assure that parties to an adoption are aware of any laws which govern permissible financial assistance to birth parents.

(b) A member shall not assist or cooperate in any adoption in which the member has reason to believe that the birth parent or parents are being paid, or given anything of value, in exchange for the placement for adoption, for the consent to an adoption, for a relinquishment for adoption, or for cooperation with the adoption of his or her child, without first making full disclosure to the appropriate court. This rule does not make it improper for a member to assist or cooperate with an adoption in which the birth parent or parents are reimbursed for reasonable and necessary pregnancy-related expenses actually incurred by the birth parent, or in which such expenses are paid directly on behalf of the birth parent, provided that such payment or reimbursement is allowed under the law of the affected jurisdiction.

(c) A member shall comply with such standards regarding birth parent expenses as are, from time to time, established by the Academy or by its Board of Trustees.

6. A member shall assure that the member's fee arrangement with each client is carefully explained and fully understood by the client at the time the member accepts employment by an adoption client, and the fee agreement shall be in writing, wherever practicable.

7. A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee. Advanced fees collected by a member shall be returned to the client if not commensurate with the services that have been provided by the member. A member shall not, directly or indirectly, charge a finder's fee for locating a birth parent. In determining whether a fee is unconscionable, the factors to be considered shall include, but not be limited to, the following:

(a) The amount of the fee in proportion to the value of the services performed;

(b) The novelty and difficulty of the questions involved and the skill requisite

to perform the legal services properly;

(c) The time limitations imposed by the client or by the circumstances;

(d) The time and labor required; and

(e) The experience, reputation and ability of the member performing the services.

8. A member shall not possess a financial stake in the success of any adoption in which the member is retained as counsel for any party. A member shall be considered to have a financial stake in an adoption if the member enters into a fee agreement by which the member is to receive a greater fee for a successful adoption than is warranted based upon the reasonable value of the services performed by the member or if the member enters into a fee agreement in which the member is contractually entitled to a lesser fee than the reasonable value of the services performed by the member if the attempted adoption is unsuccessful.

9. A member shall disburse client trust funds only for those purposes specifically authorized by the client, and the member shall not exercise independent judgment or discretion over trust fund disbursements unless the client has specifically authorized the exercise and scope of such discretion. A member shall promptly account for all client funds held by the member, upon request by the client, and shall promptly reimburse to the client all client funds upon request by the client or upon completion of the case.

10. A member shall not make false or misleading claims in advertisements. (4/09). A member shall not advertise in a manner which is unprofessional or which brings the adoption bar into disrepute. A member shall comply with those guidelines regarding advertising as, from time to time, may be established by the Academy or by its Board of Trustees.

11. (a) A member shall extend every possible professional courtesy to other members and to the clients of other members. If a member is offered employment in an adoption where a birth parent has previously consulted with another member, the member shall forthwith contact the other member to confer regarding the matter. If a birth parent has previously consulted with another member, and has received financial assistance from the other member or clients represented by the other member, the member shall endeavor, if possible, to secure reimbursement of the financial assistance to the person(s) who provided same from the prospective adopting parent(s) represented by the member, so long as the reimbursement represents legally permissible and reasonable expenses.

(b) A member shall not induce or encourage a birth parent to change attorney representation unless the member is aware that the original attorney is not knowledgeable in the field of adoption law. A member shall not induce or

encourage a birth parent to change selection of prospective adopting parents unless the member knows or has reason to believe that the proposed adopting parents can not obtain court approval of a placement with them.

12. A member shall not enter into any agreement with any person which would have the effect of restricting the member's ability to exercise independent professional judgment on behalf of the member's clients.

13. A member may, when appropriate and/or when requested by a client, refer parties to competent and professional medical providers, legal counsel, psychological counselors, or adoption agencies. A member shall avoid any appearance of impropriety and shall advise the parties of any family or professional relationship between the member and any other professional to whom the member may refer a party, including a doctor, hospital, counselor or birth coach. A member shall fully disclose to the parties any financial benefit received by the member from any professional, organization or counselor to whom a party may be referred by a member, or any financial benefit bestowed by the member upon any other person or entity for referring a party to the member.

14. A member shall be under a duty to investigate representations made to the member by prospective birth parents and prospective adopting parents if the member believes or has reason to believe that such representation is false. Under all other circumstances, a member may ethically rely upon representations made by the parties to an adoption.

15. Any changes or amendments to the Academy Code of Ethics shall be made in the same manner as set forth in Article XI of the Bylaws of the American Academy of Adoption Attorneys.

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Send mail to: help@adoptionattorneys.org with questions or comments about this web site.