Ethical Representation of Placing Parents in Adoptions LexVid 2023

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The Terms "Birth Parent" vs. "Placing Parent"

- **My apologies in advance for using the term "birth parent" at any time in this presentation**
- **Many adoption proponents will readily point out that a more appropriate term is "placing parent" or something similar**
- **However, the adoption statutes in most states, like Virginia, refer to such placing parents as "birth parents"**
- **At all costs, please avoid the term "natural parent"**

Key Ethical Considerations

Conflicts of Interest



- **Most state ethical codes and the Model Rules of Professional Conduct provide that it is a conflict of interest for an attorney to represent both the adopting parent(s) and placing parent(s) in an adoption. The best practice is to have separate representation for the birth parent. It is much more difficult for a placing parent to challenge an adoption if he or she has received separate legal representation.**
- **Where a placing parent goes unrepresented – the integrity of the adoptive placement is at much greater risk.**
- **Also, many times when an attorney (or social worker) is representing a birth parent – his or her fees are being paid by the adoptive parents (directly or indirectly). In such event – it always is recommended to explain to the birth parent in writing – with a signed disclosure and waiver form signed by the birth parent.**

Key Ethical Considerations



Conflicts of Interest – Pertinent Model Rules of Professional Conduct

Client-Lawyer Relationship

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.**

Key Ethical Considerations



Conflicts of Interest – Pertinent Model Rules of Professional Conduct

Rule 1.8: Current Clients: 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.**

Key Ethical Considerations

Conflicts of Interest – Pertinent Model Rules of Professional Conduct



Transactions With Persons Other Than Clients

Rule 4.3 Dealing With Unrepresented Person

- 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.

Key Ethical Considerations

Conflict of Interest – Code of Ethics of the Academy of Adoption & Assisted Reproduction Attorneys

In order to further the cause of ethical adoption and assisted reproductive technology law, the members of the Academy of Adoption & Assisted Reproduction Attorneys (AAAA) hereby make and establish this CODE OF ETHICS. Each Fellow of the Academy agrees as follows:

2. LEGAL RIGHTS AND OBLIGATIONS: A Fellow shall assure that the Fellow's clients are aware of their legal rights and obligations and that all parties are aware of their right to separate legal counsel.

3. MULTIPLE REPRESENTATION: A Fellow shall not simultaneously represent multiple parties with potentially conflicting or competing interests, where such representation is prohibited. Where such representation is permitted, a disclosure and waiver shall be required.

Key Ethical Considerations:

Fee Agreements – AAAA Code of Ethics

6. LEGAL FEES and SCOPE of REPRESENTATION: (a) A Fellow shall inform the Fellow's client, at the time the Fellow accepts employment, of the scope and terms of the Fellow's services and the fees to be charged for these services. The Fellow shall provide the client with a copy of a written retainer agreement that accurately reflects the scope and terms of such services and states the jurisdiction or jurisdictions in which the Fellow is licensed to practice law.

Key Ethical Considerations:

Fee Agreements – AAAA Code of Ethics

6. (b) A Fellow shall not enter into any agreement or arrangement with any person or entity that would have the effect of restricting the ability of the Fellow, or the ability of counsel for any party, to exercise independent professional judgment on behalf of, or to provide necessary, complete, and competent legal services to, his or her client. However, a Fellow may accept an engagement that limits the representation of counsel to specific issues as long as (1) the limitation is clearly specified in a written retainer agreement between and signed by the Fellow and his or her client, and (2) the limitation concerns specific legal issues and is not an arbitrary and unreasonable limit on the number of hours counsel may spend or the amount in fees counsel may incur in the representation. This provision does not prevent a Fellow from entering into an agreement to provide services on a flat fee basis.

Key Ethical Considerations

Fee Agreements – AAAA Code of Ethics

6. (c) A Fellow may not accept or retain compensation for representing a client from someone other than the client unless: (1) the client has given informed consent, in writing; (2) the payment arrangement and terms do not interfere with the Fellow's independent professional judgment nor with the attorney-client relationship; and (3) the Fellow maintains and respects all client confidences under this Code and all other applicable legal ethical rules.

Key Ethical Considerations



Fee Agreements – AAAA Code of Ethics

(d) A Fellow shall not enter into an agreement for, charge, or collect, an illegal or un- conscionable fee. Advanced fees collected by a Fellow shall be returned to the Fellow's client if not commensurate with the services that have been provided by the Fellow. In determining whether a fee is unconscionable, the factors to be considered shall include, but not be limited to, the following: (1) The amount of the fee in proportion to the value of the services performed; (2) The novelty and difficulty of the questions involved and the skill required to perform the legal services properly; (3) The time limitations imposed by the client or by the circumstances; (4) The time and labor required; and (5) The experience, reputation and ability of the Fellow performing the services.

Pertinent Retainer Language for Retainer with Adoption Agency/Adoptive Parents

Dear Adoptive Parents/Agency/Paying Party:

This letter confirms that I have been retained to represent [name], a prospective placing parent in an adoption proceeding. Although payment of my fee will be directly from you, all parties understand that my representation is solely as to the placing parent.

I request that you provide us with a retainer in the amount of $____ toward the fees and costs for representation of the placing parent. This is not a flat fee but merely an estimate for the legal services required. Our minimum billing segment is 0.1 hour. Our present hourly rates include $___ per hour for paralegal time and $___ per hour for my time…..

It is expected that payment for my services will continue to be made by you unless a serious and adverse conflict arise between you and the placing parent, in which event I will look to her/him for payment. Moreover, should there be remaining funds from the retainer after the placement or should the adoption not occur or should the placement disrupt, any unused retainer funds will be refunded to you.

Pertinent Retainer Language for Representation of Placing Parent



Dear Client:

This letter confirms that I have been retained to represent your anticipated adoption plan. Although payment of my fee will be directly from the Adoptive Parents, all parties understand that my representation is as to you.

I have requested that the Adoptive Parents provide me with a retainer in the amount of $_____ for the estimated legal fees and costs for the representation of you. This is not a flat fee but merely an estimate for the legal services required. Our minimum billing segment is 0.1 hour. Our present hourly rates include $___ per hour for paralegal time and $___ per hour for my time…

In the event a serious and adverse conflict arises between you and the Adoptive Parents over the course or performance of the Agreement, you cannot expect that they will continue to pay my fees and, at that point, any legal work I perform on your behalf will become your responsibility.

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Pertinent Retainer Language for Married Clients



Conflict of Interests: Even though you are married, there is the inherent risk of there being a conflict of interest that can arise in my undertaking representation of both of you. I am not able to advise each of you individually as to your individual respective rights. Therefore, if an actual conflict arises between you that is material to the representation and cannot be resolved, I will have to withdraw from representation as to both of you. Your signature to this retainer agreement indicates your acknowledgement of this disclaimer.

Pertinent Other Retainer Language

- Address how file will be kept – in paper or electronically only – and for how long
- Address not using encrypted technology for email communications (unless you do use encryption)
- Address whether interest applies to any outstanding bill and when additional retainer amounts will be needed.

Key Ethical Considerations



Confidentiality

- **The ethics codes in most states and the Model Rules of Professional Conduct generally provide that information shared between client and attorney is subject to attorney-client confidentiality. Because of the nature of adoptions, whereby much background information is shared by the parties, it is important in representing the placing parent that the placing parent understands exactly what information will be kept confidential by his or her attorney and what information will be shared with the adopting parents, the adopting parents' attorney, the adoption agency or any others.**

Key Ethical Considerations

Confidentiality – Model Rules of Professional Conduct

Client-Lawyer Relationship

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: [limited exceptions listed]
- (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.

Key Ethical Considerations

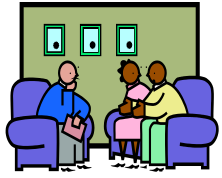


Confidentiality

Suggested Retainer Agreement Language:

- While the information exchanged in the attorney-client relationship generally is considered to be confidential, the nature of adoptions is that detailed background information is as a matter of course conveyed between the parties, therefore, if there is anything that you do NOT wish to have shared with the adoptive parents/placing parents, please ensure that you are very clear in expressing what information you would like to be kept confidential and we will discuss whether that information can remain confidential or not as part of the adoption process.
- Examples: past conviction not applicable to the adoption, financial information, tax information, etc.

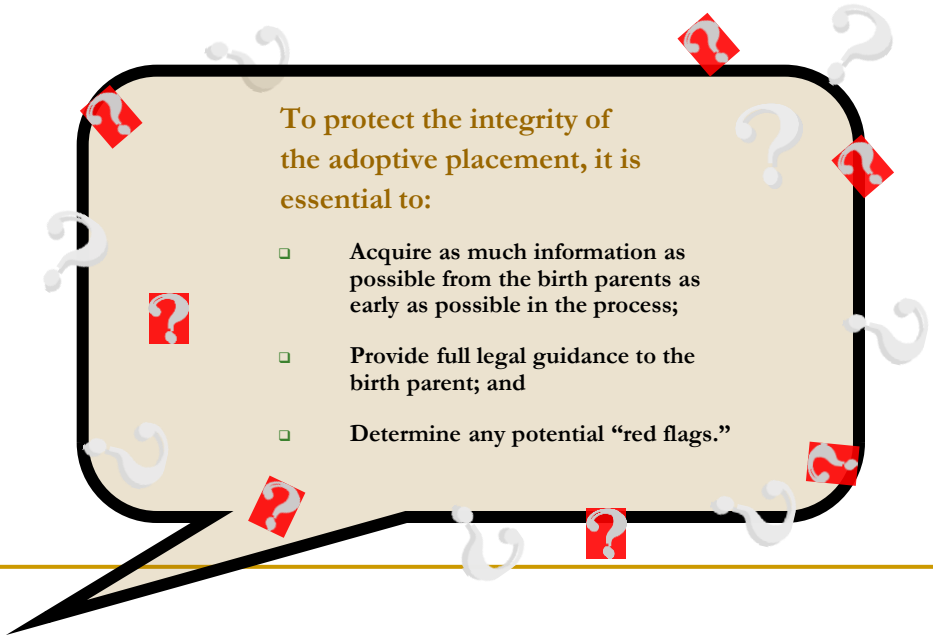
Key Ethical Considerations



Placing Parent Counseling

- Most states require that placing parents at least be provided the opportunity for mental health or adoption counseling.
- This is often called "adoption options" counseling.
- Best done by a qualified adoption social worker.
- Moreover, AAAA by Resolution, has resolved that, "Whenever possible, members of [AAAA] shall endeavor to help birth parents understand the importance of, and receive, adoption counseling."
- Encouraging such counseling is significant to ensure that the birth mother has thoroughly thought through her adoption plan.

Direct (Parental) Placements: Initial Meeting or Contact with Birth Parent



The Initial Interview



During the initial interview of the birth parent, it is essential to determine the following:

1. How the placing parent reached the decision to place his or her child or child-to-be for adoption.
2. Any and all persons supportive or not supportive of the placing parents' decision for an adoption plan.
3. Any and all significant persons that do not know about the placing parent's adoption plan and could be an influential factor if they did know about the plan.
4. The identity and whereabouts of any and all potential birth fathers and how his or their rights will be terminated or otherwise addressed.
5. The support, non-support, and/or awareness of any and all birth fathers regarding the adoption plan.

The Initial Interview (continued)



During the initial interview of the birth parent, it is essential to determine the following:

6. Whether any of the placing parents have Indian heritage for the purposes of compliance with the Indian Child Welfare Act (ICWA).
7. The pre-natal care, if applicable, obtained by the placing parent.
8. The extent of drug use (whether illegal, prescription, or otherwise) or alcohol use by the birth parents, especially the placing parent.
9. How the placing parents chose the adoptive parents if the adoptive parents already have been chosen.
10. The level of financial assistance the placing parent requires, if any.
11. Whether the placing parent is in counseling or whether counseling needs to be set up.

The Initial Interview



During the initial interview of the birth parent, it is essential to determine the following:

12. **Whether the placing parent has considered all of his or her alternatives to adoption.**
13. **Whether the placing parent is competent to consent.**
14. **Whether the placing parent has health insurance coverage.**
15. **If the adoptive parents already were selected – how they were selected, whether sufficient information has been provided regarding the adoptive parents or more information needs to be provided and whether other adoptive parents need to be considered.**

The Initial Interview



During the initial interview of the birth parent, it is essential to determine the following:

16. **The hospital process - Pre-registration with the hospital as well as hospital procedures, the hospital plan (including whether the adoptive parent(s) will be in the delivery room and whether the birth mother wishes to see the child after the birth), and any documents to be signed at the hospital (such as Health Care Power of Attorney and HIPAA Compliant Medical Authorization and any hospital indemnification or release documents). Also review how the birth certificate application will be filled out at the hospital and naming the baby.**

The Initial Interview



During the initial interview of the birth parent, it is essential to determine the following:

17. **Ongoing contact – will there be any? What will it be? Does the placing parent want it to be enforceable?**
18. **The placing parents' whereabouts after placing the child and before any consent hearing (if any) plus transportation to the hearing.**
19. **Full and complete background on both placing parents (including medical, social, educational and other background information to the extent possible) for the benefit of the adoptive parents and the child in raising the child.**

See next slide re Rule 1.4 of the Professional Code of Responsibility regarding communication between attorney and client

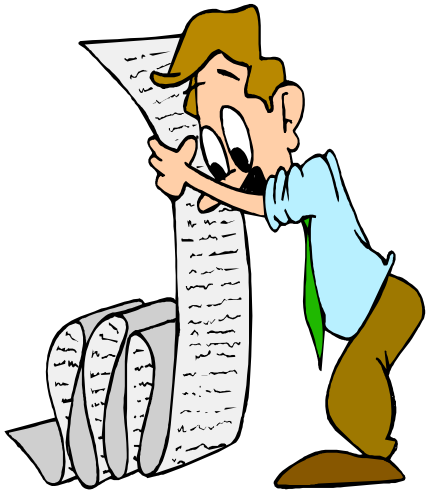
Key Ethical Considerations

Model Rules of Professional Conduct



- ***Client-Lawyer Relationship***
  Rule 1.4 Communication
- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Legal Advice to be Provided



- **The placing parent(s) should be advised of all applicable laws to the adoption.**
  - **If the adoption is to occur in a state other than a state in which the birth (placing) parent resides, then the laws of the other state as well as the home state should be explained so that the placing parent can make an express waiver of the laws of one of those states (usually the home state).**
- **Use a Legal Counseling Acknowledgement form that covers:**
  - **Alternatives to adoption.**
  - **The applicable laws and procedures pertinent to the adoption, including the manner by which the consent, relinquishment, or entrustment may be given as well as any waiting periods or revocation periods.**
  - **Special issues in interstate adoptions**

Legal Advice Continued…

- **The express waiver of the law of one state in favor of the law of another state if it is an interstate placement.**
- **Permissible payments that may be made by the adopting parent(s).**
- **That the payment for the placing parent's attorney's fees may be made by the adopting parent but that the representation rendered will be fully on the placing parent's behalf.**
- **The hospital's procedures and any forms that might be signed at the hospital**
- **The birth certificate procedure and whether the placing parent desires a copy of the original birth certificate.**
- **Any arrangement for ongoing contact, including whether an open adoption or ongoing contact agreement is enforceable or not enforceable.**
- **Finding all available sources, including public assistance, for heath care coverage.**

Legal Advice – Choice of Law

- AAAA Code of Ethics:
- 13. INFORMATION PROVIDED TO CLIENTS: A Fellow may inform a client as to the Fellow's understanding of the laws of a jurisdiction in which the Fellow is not licensed provided that the Fellow discloses that the Fellow is not licensed to practice law in that jurisdiction.
- Therefore – ensure obtain accurate info from attorney in the other state including actual statutes or case law.

Red Flags



In representing a birth parent, a practitioner should look for potential "red flags" which may signal that an adoption may not be successful.

None of these items is necessarily determinative of whether the adoption will take place. However, they are factors that often are apparent in unsuccessful placements:

- **Whether the placing parents are married or in a long-term relationship.**
- **Whether the placing parents are placing a sibling child of children the placing parents already are raising.**
- **Whether the placing is evasive or not entirely forthcoming regarding the identity or whereabouts of the birth father.**
- **Whether the placing parent(s) is/are primarily interested in financial gain.**
- **Whether the placing parent is being pushed into the adoptive placement by others.**
- **Whether the adoption is being kept secret from influential persons who could change the outcome of the adoption, especially by coming to the placing parent's financial assistance.**

Red Flags



- **Whether the placing parent is mentally stable.**
- **Whether the placing parent is extremely emotional regarding the placement of the child.**
- **Whether the placing parent is extremely unemotional regarding the placement of the child.**
- **Whether the placing parent is obsessive about keeping hospital items for the child (baby's hospital bracelet, footprints, etc.) – and/or maintaining a close amount of ongoing contact – including very frequent visitation (and the placing parent is not related to the adoptive parents)**

Key Ethical Items to Keep in Mind When Representing a Placing Parent

1. **Mental Stability**
2. **Proper Termination of Birth Father Rights**
3. **ICWA Compliance**
4. **Background Information**
5. **Leave Issues**
6. **Health Insurance Coverage**



1. Mental Stability

- **Make a determination of whether the birth parent is mentally stable**
- **If there is any issue of mental illness, then an appropriate medical provider should be involved in making a determination as to whether a birth parent is competent to make an adoptive placement decision**



2. Proper Termination of Birth Father Rights

Non-Putative Father Registry States and States with Modified Putative Father Registries



- **It is generally a best practice to find the birth father or fathers, especially if your state does not have a putative father registry or if there is some issue that the placing parent is concealing the placement from the birth father**
- **It is the best practice to ensure complete compliance regarding notice to the birth father**
- **Also, note the benefits to the child for the child and the adoptive parents to have some information about his/her father**

2. Proper Termination of Birth Father Rights

- **Sample questions to ask the placing mother in determining whether the birth father's identity and whereabouts are "reasonably ascertainable" include:**
  - **Does she know his full name or only part of his name?**
  - **How did she meet him?**
  - **If she does not have his phone number or address, can she get back in touch with him through mutual friends or contacts?**
  - **Does she know where he works?**
  - **Does she know where any of his family or friends live/work?**
  - **Does she know where he went to school?**
  - **Watch out when BF is listed as "unknown"!**

2. Proper Termination of Birth Father Rights



- **Pure Putative Father Registry States**
  - **Most putative father registries make a distinction between putative birth fathers and birth fathers that are: acknowledged (as on the birth certificate or via some other legal acknowledgement), adjudicated (such as ordered to pay child support) or presumed (such as a legal birth father via marriage to the placing parent).**
  - **Most acknowledged, adjudicated and presumed fathers are entitled to actual notice of the adoption proceedings while putative fathers typically do not get notice unless they register with the state's Putative Father Registry.**
    - **In pure Putative Father Registry states, a judge usually will accept a certificate of proof from the applicable Putative Father Registry that no man has registered within the applicable time period as sufficient in order to terminate the putative father's rights.**

2. Proper Termination of Birth Father Rights

- **Placing Mother's Constitutional Right to Refuse to Name the Birth Father**
  - **Some states, like Utah, recognize that the birth mother has a Constitutional right to privacy which includes not having to name the birth father.**
  - **There is a court opinion out of Augusta County, Virginia whereby the mother was permitted by the court to refuse to identify the birth father.**
  - **The arguments is more compelling if the birth mother is afraid of the birth father or if the child is a product of rape but the birth father has not yet been convicted (thus making his consent not required).**



2. Proper Termination of Birth Father Rights



- **<u>WARNING: Attorney's Duty and Avoiding Lawsuits</u>**
  - **The Virginia Supreme Court decision of *Wyatt, et. al. v McDermott, et. al*, 283 Va. 685 (Va 2012) has been an eye opening decision for many adoption attorneys and what duty is owed to a birth father when representing a birth mother, if any.**
    - The Virginia Supreme Court addressed the certified question from the federal district court of whether Virginia law recognizes tortious interference with parental rights as a valid cause of action and, if so, what elements must be met in order to assert such a claim.
    - In finding that such a cause of action does exist, the Virginia Supreme Court cited its prior decisions as acknowledging that "the relationship between a parent and child is constitutionally protected by the Due Process Clause of the Fourteenth Amendment." *Wyatt* at 692 (citing *Copeland v. Todd*, 282, Va. 183, 198 (Va. 2011).

2. Proper Termination of Birth Father Rights

- **After concluding that such a tort does exist under Virginia common law and is supported by persuasive authority and policy interests, the Court set forth the elements of the tort, borrowing from West Virginia's language in *Kessel*:**
  - **" (1) the complaining parent has a right to establish or maintain a parental or custodial relationship with his/her minor child; (2) a party outside of the relationship between the complaining parent and his/her child intentionally interfered with the complaining parent's parental or custodial relationship with his/her child by removing or detaining the child from returning to the complaining parent, without that parent's consent, or by otherwise preventing the complaining parent from exercising his/her parental or custodial rights; (3) the outside party's intentional interference caused harm to the complaining parent's parental or custodial relationship with his/her child; and (4) damages resulted from such interference." *Id.* at 699.**

3. Compliance with the Indian Child Welfare Act (ICWA)



- **ICWA is a federal act that was put into place to protect Indian children from being removed from, or placed out of, Indian tribes without first considering whether an acceptable adoptive family could be found within the tribe.**
- **An ICWA inquiry starts by asking each placing parent if he or she has any Native American Indian heritage and, if so, then exploring the nature and degree of such heritage in great depth.**
- **If a placing parent has American Indian heritage, then it must be determined:**
  - **That the claimed tribe to which there is heritage is officially a federally recognized tribe; and,**
  - **That the child to be born qualifies as an "Indian child" under ICWA (which is based on the definition of an "Indian child" under ICWA as well as the member requirements and/or the definitions for the specific tribe at issue).**

3. Compliance with the Indian Child Welfare Act

- **Then, whether a tribe must be notified or involved depends in large part on (a) whether the placement is voluntary or involuntary and (b) if voluntary, then the placing parent's desires as to whether the tribe should be notified.**
- **Even if the tribe is not notified, the birth parent must sign an ICWA compliant consent which must be before a judge and can only be signed once at least ten days after birth have passed. The birth parent(s) also will have expanded revocation rights.**
- **This presentation only gives an extremely basic overview of ICWA – which can be a very complicated area of the law. If a new adoption practitioner has a placement situation that may involve ICWA – he/she should consult with experienced ICWA adoption counsel.**
- **Some states have "mini-ICWAs" (state ICWA statutes) that have even more restrictive requirements than ICWA (the worst ones being Oklahoma, Wisconsin, Minnesota, and Arizona).These may require notice to the Indian tribe and/or placement preferences with a tribal family not only in voluntary placements but even in domestic violence and other egregious situations.**

4. Background Information



- **Be sure that the placing parents complete comprehensive background information forms and that a review is made of the pre-natal care obtained by the placing parent.**
- **Determine whether any drugs or alcohol were used by either parent (including the birth father prior to and at the time of conception.)**
- **If the birth father is not available or refuses to fill out a background information form – then at least see if the birth mom will provide as much information as she can regarding the birth father for the child's sake (also some ICPC offices will require the provision of whatever possible information is available regarding the birth father).**

5. Leave Issues

- **Be aware of the Federal Law governing Family and Medical Leave and Pregnancy Discrimination (which falls under Title VII of the Civil Rights Act of 1964).**





6. Health Insurance Coverage

- **If the placing parent is not covered by health insurance, the placing parent's attorney should encourage the placing parent to pursue all avenues of state or federally funded health insurance.**
- **This encouragement is not for the purpose of saving the adopting parent(s) medical costs. Rather, it is to protect the placing parent in the event she changes her mind or the adopting parent(s) change their mind, or if something goes wrong during the birth process that causes injury to either the placing parent or the infant or if the infant is born with significant medical problems.**



6. Health Insurance Coverage

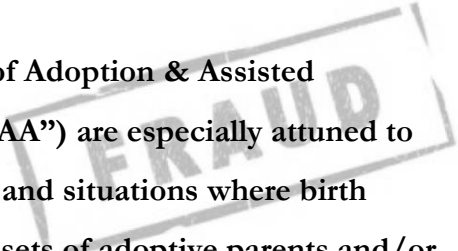
- **If the placing parent is not eligible to apply for public medical assistance, then it should be explored whether she can procure private health insurance coverage. Payment for such coverage is usually a lawful or permissible adoption expense (but can vary from state to state). For example, Virginia Code §63.2-1218 (ii) expressly provides that the adoptive parents can pay for:**
  - **Payment or reimbursement for medical expenses and insurance premiums that are directly related to the placing parent's pregnancy and hospitalization for the birth of the child who is the subject of the adoption proceedings…**
- **Accordingly, the adoptive parents in Virginia can lawfully pay for the cost of the health insurance on the placing parent. This is generally a much better option than paying the actual medical bills and better protects the placing parent – especially in the event there are unforeseen complications.**

Changing Choice of Adoptive Parents

- **The placing parent has the fundamental right to change her mind.**
- **However, it is important to make sure that she is not changing adoptive parents for the purpose of obtaining unlawful payments or money.**
- **While there is no crystal ball, it is important to be on the lookout for adoption fraud.**



AAAA Code of Ethics



The Fellows of the Academy of Adoption & Assisted Reproduction Attorneys ("AAAA") are especially attuned to issues of placing parent fraud and situations where birth mothers are talking to several sets of adoptive parents and/or agencies at the same time.

- **The AAAA has adopted in its Code of Ethics the following rules:**
  - 4. FRAUD AND MISREPRESENTATION: A Fellow shall actively discourage fraud or misrepresentation, shall not engage in such conduct, and shall take all reasonable measures, consistent with the confidentiality of the attorney/client relationship, to prevent fraud or misrepresentation, withdrawing from representation where necessary to avoid participation in any such conduct.

The Interstate Compact Placement Act

- **Does not matter whether agency or independent/parental/ private/direct placement – interstate placements require compliance with the Interstate Placement Compact (ICPC).**
- **Unless the "relative" exception to the ICPC applies – typically ICPC approval will need to be obtained.**
- **ICPC approval is initiated via the sign off of a "100-A" form by the sending parent or agency.**
- **It is critical to determine what the ICPC offices in each state will require before preparing the ICPC package for filing in the sending state.**
- **BE CAREFUL – it is always advisable to consult with an experienced adoption attorney in both states to make sure there will not be any issues with obtaining interstate approval. For example, Virginia ICPC will take the position that a birth mom whose rights have been completely terminated under the law of another state no longer has standing to sign the 100-A form**
- **Also – failure to obtain ICPC approval can be a basis to upset or challenge the underlying adoption.**

Applicable Forms



- Attorney Retainer Agreement
- Placing Parent Information Forms
- Medical Release Forms
- Internal Acknowledgement Form
- 100-A Form
- Consent to the Adoption (or Relinquishment or Entrustment)
- Ongoing Contact Agreement
- Acknowledgement of Receipt of Funds
- Other Documents

Handling Birth Parent Living Expense Funds

- AAAA Code of Ethics:
- 5. FINANCIAL ASSISTANCE: A Fellow shall assure that parties to an adoption or ART matter are aware of laws in the state where the Fellow is licensed to practice law as to financial assistance to birth parents in an adoption or parties to an ART matter. A Fellow shall not assist or cooperate in any adoption or ART matter in which the Fellow has reason to believe that the birth parent, parents, or parties are being paid or given anything of value contrary to law.

Handling Birth Parent Living Expense Funds

- AAAA Code of Ethics:
- 7. TRUST FUNDS: A Fellow shall disburse client trust funds or escrow funds only for those purposes specifically authorized by the client, and the Fellow shall not exercise independent judgment or discretion over trust fund or escrow fund disbursements unless the client has specifically authorized the exercise and scope of such discretion. A Fellow shall promptly account for all client funds held by the Fellow, upon request by the client, and shall promptly reimburse to the client all unearned funds upon request by the client or upon completion of the case.

Handling Birth Parent Living Expense Funds

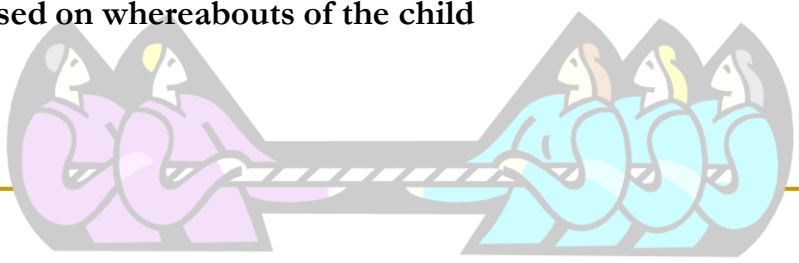
- Ensure compliance with all applicable laws regarding living expenses.
- Keep any living expense funds in a separate account in trust.
- Always get permission to release funds to the placing parent in writing.
- Best to pay living expenses directly to the recipient and not the placing parent – for example, to the landlord or pay the phone bill directly or provide a grocery store card.
- Have the recipient placing parent sign an acknowledgment of receipt form for any items paid.

Special AAAA Code of Ethics Recovery Provision

- 14. REIMBURSEMENT OF FINANCIAL ASSISTANCE: If a birth parent has received financial assistance from the clients represented by another attorney, the Fellow shall endeavor to secure reimbursement, if possible, of the financial assistance to the person(s) who provided same from the prospective adopting parent(s) represented by the Fellow, so long as the reimbursement represents legally permissible and reasonable expenses.

Awareness of the Basics for Attacking Consents

- **Dealing with Conflict of Law Issues: Which Law Governs?**
  - **Usually the law of the state of adoption, especially if the birth parent understands that the consent is being given under the law of that state**
  - **UCCJA, UCCJEA, or UAA may provide jurisdiction based on whereabouts of the child**



Awareness of the Basics for Attacking Consents

The Best vs. the Worst Arguments for Attacking Birth Parent Consents

- **Best Arguments:**
  - Indian and Child Welfare Act applies and/or requirements not met
    - See the recently handed down and much discussed United States Supreme Court decision of *ADOPTIVE COUPLE v. BABY GIRL*, (June 13, 2013) better known as the "Baby Veronica Case."
  - Failure to Comply with ICPC
  - Lack of Counsel or Not Voluntarily Waiving Right to Counsel
  - Ineffective Counsel
  - Mental Illness
  - Procedural Irregularities
  - Fraud (unlawful payments, false promises by adopting parents)
  - Mistaken belief
  - Duress (threatened to place child)

Awareness of the Basics for Attacking Consents

The Best vs. the Worst Arguments for Attacking Birth Parent Consents

- **Worst Arguments:**
  - Americans with Disabilities Act
  - Waiting to revoke/object until after lengthy revocation period or until Final Order
  - Change of heart



FINAL TAKE-AWAYS:

- A placing parents can be emotional as she or he is engaged in an emotional process – know as much as you can in order to make that parent feel secure in your representation.
- No placing parent is obligated to place his or her child – ensure that parent knows that you are there to look out for them and to help with effectuating the adoption plan so long as that parent still wants to make that plan.
- Ensure adoptive parents know that you do not represent them and cannot provide legal advice to them – this can be critical if assisting with discharge of an infant at the hospital.

Final Reflection

