

## **Ethics Opinion No. 84-4**

### **Propriety of Attorney Drafting a "Surrogate Mother" Contract.**

A law firm has been approached by a female client who wishes to be a surrogate mother for a childless couple. The firm has been requested to prepare, on behalf of the surrogate mother, a contract to be available for future discussions between the parties.

The law firm has asked whether it is ethically proper to prepare a contract for the surrogate mother. Assuming that the proposed contract is not illegal, the Ethics Committee concludes that no ethical rule prohibits an attorney from preparing such an agreement.

DR 7-102(A)(7) states that a lawyer shall not "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." Thus, if the lawyer determines that the contract is illegal, then the lawyer must refuse to participate in drafting the contract. In this case, the law firm has concluded that the contract is not illegal, but may be found by a court to be voidable or unenforceable. The Code of Professional Responsibility does not prohibit an attorney from drafting a contract which might be held voidable or unenforceable, provided that the attorney advises the client of the particular risks involved in the particular contract that is being drafted.

Ethics Opinion No. 81-67 of the Association of the Bar of the City of New York deals with a similar situation. In that opinion, the client of the law firm was the prospective father, rather than the prospective surrogate mother. The proposed contract provided for artificial insemination of the surrogate mother by the client, and, if pregnancy and birth ensued, the surrogate mother would deliver the child to the client and his spouse, and would forfeit all rights with regard to the child. The Association of the Bar of the City of New York, also citing DR 7-102 (A)(7), concluded that nothing prohibits the law firm from drafting such a contract, as long as the firm advises the client of the risks that the contract might not be enforced or might be voided by the prospective surrogate mother. This opinion also pointed out that the law firm should advise the prospective surrogate mother to seek separate counsel, for it appears that she may have an actual or potentially adverse interest to the firm's client, citing DR 7-104 (A)(2).

The law with respect to surrogate mother contracts is nonexistent in Alaska, and nonexistent or very sparse in other jurisdictions. Additionally, this situation is fraught with many potential legal, public policy, emotional and practical problems. Regardless of whether the attorney represents the prospective father or the prospective surrogate mother, the attorney cannot

represent both parties, and must advise the other party to seek separate counsel. Such an approach is mandated by DR 7-104(A)(2), which states:

"During the course of his representation of a client a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."

A contractual arrangement to provide for a surrogate mother is inherently a situation in which there is a reasonable possibility of a conflict developing between the parties.

Adopted by the Alaska Bar Association Ethics Committee on May 24, 1984.

Approved by the Board of Governors on June 5, 1984.