EFFECTIVE AND ETHICAL NEGOTIATION: TIPS FROM THE TRENCHES

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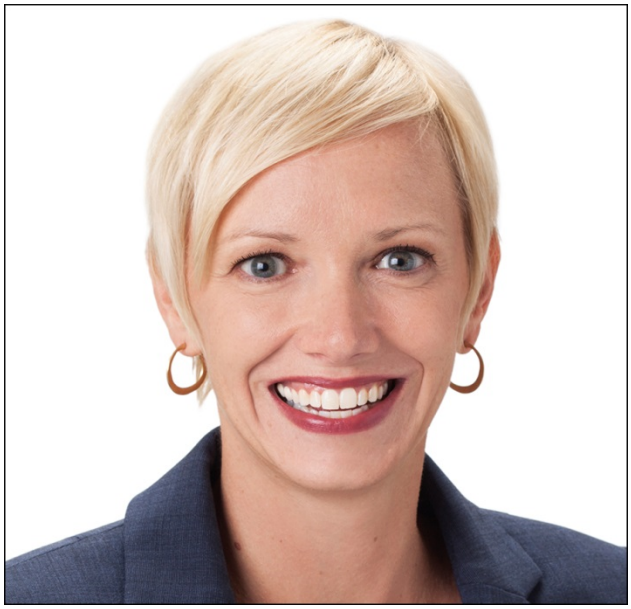

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ABSTRACT

I. INTRODUCTION

In this article my co-author, Amy Sanders, and I lead with a brief introduction of the broader concept of a "negotiation" to frame the context rather than jumping straight into the give and take that occurs during the bargaining phase of a negotiation. Next, the article will summarize recognized negotiation types and the characteristics associated with those types. Following that summary the article will then discuss some of the essential stages of any negotiation, from vital preparation through agreement—including the in-between bargaining phase—with the goal of reaching better negotiation results. Finally, the article will conclude with an overview of ethical considerations at play in negotiation. On one further note, we have attempted to avoid "reinventing the wheel" in this article because of the wealth of existing negotiation materials, including previous courses of Advanced In-House Counsel. With that goal in mind, this article draws from scholarly works and materials which are identified in the References and Resources section, *infra*, some of which are available through MyBarCLE.com.[1]

II. THE PROCESS OF NEGOTIATION – WHAT IS IT REALLY?

Black's Law Dictionary (West 5th Ed.) defines "negotiate" as

> "… to transact business; to bargain with another respecting a purchase and sale; to conduct communications or conferences with a view to reaching a settlement agreement. It is that which passes between parties or their agents in the course of or incident to the making of a contract and is also conversation in arranging terms of a contract . . . . [T]o arrange the preliminaries of a business transaction . . . to conclude by bargain, treaty or agreement."

In the vernacular, practitioners may tend to think of negotiation in a more limited manner as being the back and forth of offers and counteroffers made during the bargaining *stage* of a negotiation (*i.e.*, the haggling over a price, term, deal, settlement payment, or the like). And although bargaining is fundamentally part of every negotiation, true negotiation must involve more than bargaining only. Viewed more thoroughly then, negotiation is the process by which one or more separate parties seek an acceptable end result, the achievement of which involves some form of deliberate communication. Commentators contend negotiation is even a skill to be learned. Thus, a so-called "born negotiator" imbued with a superior negotiation gene is but a fiction; rather a respected negotiator is a practitioner who has invested the time and energy to study, practice, and hone her negotiation skills.[2] The highly skilled, in-house counsel negotiator understands the types of negotiation, prepares for the various stages of negotiation, and applies ethical principles throughout the negotiation process.

III. UNDERSTANDING TYPES OF NEGOTIATION

There are two predominant negotiation types: competitive (a/k/a "distributive") and cooperative (a/k/a "integrative").[3] Using a particular negotiation type will depend largely upon the context of the negotiation and the business goals of the in-house lawyer's client.

A. Competitive or Distributive Negotiations

A competitive negotiation is a results driven approach that above all else treats the end result as something to be won or lost. It is a "zero sum" equation—the desired "thing" is perceived as fixed, both parties desire to gain it, and one party's gain is the counterparty's loss. It is the classic win/lose construct in that one side wins, the other side loses.[4] The substance of what is being sought or to be gained is the key concern to the negotiator because there is a limited amount of what the parties are willing to distribute. At the close of the negotiation, the in-house counsel's client will want to have given up less or gained substantially more of the resource or currency (*e.g.*, money) than her client's counterparty. This type of negotiation is often used when, say price, outweighs all other deal points, or when there is a single issue to be negotiated. It is perceived as adversarial, sometimes "hardball," generally non-cooperative, and

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[1] Several of the CLE articles—some written especially for in-house counsel—are reprinted in the Appendix. Much of this article is drawn from these more comprehensive works which we would recommend to the in-house lawyer wanting to improve her negotiation and skills.

[2] Ann Shuttee, *Winning as Many Rounds as Possible—Negotiation Tactics*, STATE BAR OF TEX., IN-HOUSE COUNSEL 101 COURSE (CH. 1) at 1 (August 2014) (hereinafter "Shuttee").

[3] Sean Romanoff, *Outlining Negotiation Types and Processes*, PRAC. L. INST., LITIG. & ADMIN. L SERIES, BASIC NEG. SKILLS (CH. 1) at 29-30 (Jan. 2019) (hereinafter "Romanoff"). Romanoff includes "collaborative" as a third type although its characteristics overlap greatly with the cooperative type. Shuttee employs the terms "distributive" and "integrative" to describe competitive and cooperative, respectively.

[4] Romanoff at 29-30.

hostile even. Because of this competitive win/lose nature, an ongoing or potential future relationship with the counterparty is typically not a principle or even relevant concern of at least one, if not both, parties.

A competitive negotiation is often recognized by the following characteristics:

- A limited disclosure of information between the client party and its counterparty—think of each party "holding its cards close to the chest";
- All the while seeking to obtain more information from the counterparty—after all, additional information is potential leverage—so the in-house counsel negotiator may play an inquisitive role by poking around the edges to find "hard stops," "bottom lines," or points about which a counterparty will not negotiate;
- A holding-out by both parties for what each desires—for in-house counsel the focus is on her client's "self-interest";
- A very measured approach during the bargaining stage;
- Conveying limited flexibility because the client projects having alternative options to a resolution or agreement—another supplier, a willingness to incur more litigation costs and fees before settling a dispute, etc.;
- Tying the client's concessions to concessions of equal or greater value from the counterparty; and
- Mutually exclusive goals.

A competitive negotiation can be useful when wanting to avoid disclosure of information that might come to light in a cooperative negotiation. It may also be useful in a particular transaction as a diversionary tactic when the client has a more important undisclosed goal in mind. It also is frequently used when there is an imbalance of leverage between the two parties. Whatever the motivation, the client sees a "fixed pie" and wants as much of the pie as it can have without regard or concern for the needs or wants of the counterparty.

B. Cooperative or Integrative Negotiation

A cooperative negotiation process is the opposite of competitive—both parties accept the need for the other to be satisfied so each considers its own need or interest and those of the counterparty to achieve the desired outcome. The resources being divvied up are not viewed as necessarily finite, but as expandable or at least unfixed so that each party might have a piece of the pie. Cooperative negotiation is often preferable when the parties intend an ongoing relationship, the success of which depends upon both parties' gain, *e.g.*, a supply or manufacturing contract.[5] For example, the buyer of product needs the seller also to profit so that seller stays in business, timely supplies the product, adheres to quality specs, etc. A more open exchange of information, therefore, is an essential component to a cooperative negotiation. This type of negotiation is "integrative" because it involves combining the interests of the parties to achieve the desired goal.

A cooperative negotiation can be characterized by:

- The importance of several factors: *e.g.*, time, price, quality, relationship;
- Sharing and building rapport if not trust;
- More open communication;
- Thorough information exchange;
- An acknowledgment or understanding of complementary or common interest(s);
- A desire for both parties to succeed—common, shared, or joint objectives;
- More aligned goals;
- A shared desire to create value; and
- A view toward the long term.

IV. THE STAGES OF A NEGOTIATION

Every negotiation is comprised of certain stages, each offering in-house counsel the opportunity to demonstrate her negotiation skills and hence, value to her client.

A. Preparing for the Negotiation

The importance of negotiation preparation cannot be underscored enough; it is one of the most crucial stages of any negotiation, regardless of the type of negotiation to be conducted. In-house counsel understands this importance from experience, including insights gained from those instances when thorough preparation fell victim to other competing time demands. The amount of time and resources in-house counsel expends in preparation obviously will

[5] *Id*. at 30.

be relative to the significance of the desired transaction or materiality of the dispute to be resolved. Regardless of the preparatory time or resource investment, the preparation stage will draw on (i) in-house counsel's knowledge and understanding of her client's business; (ii) the negotiation style and personality of, and prior experiences with, her client representative participating in the negotiation decision-making; (iii) the client's expectations and those of the client representative; (iv) the rules of the forum or how the negotiation is to be conducted; and (v) strategic information about the counterparty, its negotiators, and counsel.[6]

1. Understand the Business Goal—What does your client want.

Defining a clear business goal before engaging in a negotiation might seem evident, but in any multi-faceted negotiation at some point in-house counsel or the client business representative might turn to the other and ask: "What is it that we truly want?" Understanding the business goal means having a solid sense of the "what" the client seeks to achieve and a clear appreciation of "why" that "want" is important. Knowing what the client wants to achieve may sometimes be easier said than done. During the preparation (or bargaining stage even), the business leader may tell her in-house lawyer that "none of these provisions" are negotiable.[7] At that point, the in-house lawyer may need to engage in her own fact finding to evaluate if the client actually has some "give". Asking questions and exploring alternatives will often lead to identifying various alternatives that will satisfy the client while also giving counsel substantive bargaining power.[8] The following illustration reflects this "power of knowledge" and the teasing out of interests and considerations—monetary or otherwise.

> "The client's initial answer to the question is often expressed monetarily: payment, refund of payment, or damages. Upon further exploration, however, you may find that the client may have underlying interests that can be satisfied either by money or by other consideration. For example, in a breach of warranty case involving a machine purchased from the defendant vendor, the client's underlying interest may be to have a working machine so that she can meet her production deadlines. This interest can be satisfied by a refund check by means of which she can buy a replacement machine, but it can also be satisfied in other ways, such as a deal under which she buys a new and improved model of the machine from the vendor at a substantial discount, is provided by the vendor a refurbished machine with a full warranty, or receives enhanced technical support from the vendor at no charge to keep the old machine in operating condition. If all you [learn] is that she wants money and write down the amount, you may miss opportunities to satisfy her underlying interests and concerns via other means."[9]

Equally central to comprehensive preparation is accessing the relative leverage, both in the particular negotiation and in the overall relationship. In-house counsel will endeavor to investigate what, where, when and how her client holds an advantage she can use to better her client's position. She will also know these same facts in the comparative sense—where, when, what and how the counterparty holds an advantage—and plan accordingly.

Thorough preparation by in-house counsel will include identifying, inquiring about, and assessing her client's:

- Priorities, interests, and other relevant considerations in addition to the "end goal";
- Deal and relationship objectives;
- Required contract "boilerplate";
- Resources and currencies – your client's and the counterparty's – can each realistically deliver;
- Leverage points and those of the counterparty; and
- Larger interests and whether such interests are at stake in the negotiation.[10]

2. Understand the Rules of the Forum or How the Negotiation Will Occur

A good negotiator will also understand "how" the negotiation is to be conducted. Is this a mediated settlement conference? If it's a business transaction will the negotiation occur face-to-face or by telephone? Will business principals be involved? How long in terms of time is the negotiation anticipated to take (*e.g.*, days, weeks, months)?[11]

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[6] Matthew Vafidis, *Preparing for Negotiation*, PRAC. L. INST., LITIG. & ADMIN. L. SERIES, BASIC NEG. SKILLS (CH. 6) 99-102 (Jan. 2019) (hereinafter "Vafidis"); Romanoff at 30-34; Suttee at 1 (Shuttee refers to this stage as "Preparation, Preparation, Preparation").

[7] Vafidis at 99.

[8] Shuttee at 2

[9] *Id*.

[10] Vafidis at 99 (knowing the process makes the negotiator more comfortable); Shuttee at 1 ("The more you understand about … the business, [the more business leaders] will see the value you bring to a negotiation.").

[11] Vafidis at 99.

Having answers to these questions will allow in-house counsel to craft a stronger strategy and calibrate her and her business representatives' expectations.

3. Who is the Counterparty?

Thorough preparation also includes in-house counsel's learning or confirming relevant information about the counterparty.[12] Counsel will want to know who are on the counterparty negotiating team, what their negotiating styles are including any cultural considerations,[13] what prior experiences her client has had with them, and what can be expected from the counterparty during the negotiation.

4. Your Client's BATNA and WATNA

Any negotiation textbook treatise or article will underscore the importance of developing the client's BATNA or "Best Alternative to a Negotiated Agreement."[14] Developing the BATNA arms in-house counsel and her client representative(s) with necessary information about "when to hold 'em or when to fold 'em." Negotiating from a position of strength means understanding the point at which the client should walk away from the negotiation and fall back to its BATNA, *i.e.* a predetermined Plan B.[15] A prepared negotiator will also have inquired about her client's WATNA or "Worst Alternative to a Negotiated Agreement." WATNA involves identifying and understanding the worst possible outcome should the client fail to make a deal.[16] Finally, prepared in-house counsel and her business representatives will have attempted to develop an educated guess about the counterparty's BATNA and WATNA.[17]

B. Developing a Strategy

Substantive preparation better equips in-house counsel to design a more relevant strategy for the negotiation. Strategy involves anticipating which tack might prove more effective, such as first tackling the harder issues or building early momentum by initially reaching agreements on less important items. Counsel will also attempt to anticipate her client's moves and bargaining positions along with what might be the counterparty's expected moves.[18] Strategizing will also help guide in-house counsel when framing her client's leverage points and identifying the counterparty's leverage points over her client. Crafting a strategy further assists in-house counsel to determine the tone, style, and posture that might prove most productive during the bargaining. Upon developing a strategy in-house counsel can then better manage internal expectations. Pre-bargaining strategy discussions also offer in-counsel the opportunity to remind her representatives that parties are usually disappointed with some aspects of the final agreement.[19]

One of the more strategic considerations involves placing relative values on your client's resources of "currencies" in addition to money or price. Available currencies include timing, number of units, contract provisions, relative obligations during the course of a contract, and the like. Having a grasp of the client's currencies will provide valuable positioning during the bargaining phase of the negotiation.[20]

C. Set the Tone

As the negotiation commences, in-house counsel will want to set the tone in the room with the counterparty or mediator.[21] Do you wish to project optimism or pessimism? Does in-house counsel or the client want to appear hesitant or at the ready? Will an adversarial tone be productive or counterproductive? What strategy can offer better leverage? What perception does in-house counsel wish to convey to her counterparty? All of these considerations influence the tone in-house counsel and her client want to project. Commentators suggest in-house counsel avoid showing emotion

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[12] Romanoff at 6.

[13] Understanding cultural differences is crucial to international negotiations. Cultural differences can create communication misunderstandings, lead to misunderstandings about behavior, affect the form or substance of a transaction, and influence how the counterparty's negotiators behave and interact during the bargaining stage. *See* Jeswald W. Salacuse, *Dear Negotiation Coach: Bridging the Cultural Divide*, HARV L. SCHOOL PROGRAM ON NEGOTIATION, OVERCOMING CULTURAL BARRIERS IN NEGOTIATION (CH. 3) at 8-9 (2015). *available at* www.pon.harvard.edu/publications

[14] Roger Fisher & William Ury, GETTING TO YES: NEGOTIATING AN AGREEMENT WITHOUT GIVING IN, at 50 (Penguin, 3rd Ed., 2011).

[15] Shuttee at 3.

[16] *Id.*

[17] *Id.*

[18] Vafidis at 100 (design a general strategy to gain desired result).

[19] *Id.* This is especially true when reaching a final settlement in a dispute resolution negotiation.

[20] Romanoff at 32 (Identifying options and alternatives provides greater leverage; it's a "value-add" by counsel to the process).

[21] *Id.* at 32.

during the negotiation.[22] Projecting patience and leading with "qualifications" to any offers or concessions is often a preferred strategic tone.

D. Information Gathering and Sharing

At some point in the negotiation in-house counsel's client or the counterparty may want to gain or share information it believes persuasive to the negotiation. This process typically begins in an earlier stage of the negotiation. In a business transaction negotiation for instance, the obtaining and sharing of information can occur over days, weeks and months before the bargaining begins and continue in earnest while it is ongoing. Posing open ended questions is an effective means of gaining relevant information. One of the best questions to pose is "why?" because it may provide useful background information about a particular term or provision counterparty is demanding.[23] During the negotiation, qualifying questions may elicit information that otherwise would not be forthcoming such as, "would X work for you if we could do it" or "would you be willing to do Y if we did X"?[24] Employing active listening techniques are another means for obtaining information. Projecting an even and measured expression generally is a more advantageous approach to gaining new information.

Try to determine in advance of the bargaining stage what information it is you want to learn, what information you will be willing to share, and why. Toward the end of the bargaining the information gathering or sharing is likely to cease or taper at least, especially in a dispute resolution mediation, with the facilitator or the counterparty signaling the negotiation has become solely "about the dollars."

E. The Give and Take of Bargaining

The give and take bargaining, be it about price, terms, conditions, or other currencies, is what we often think of as "negotiation." This bargaining is indeed a fundamental part of any negotiation, but as made clear by now it is only one of the many essential phases of a successful negotiation. As a part of the give and take, in-house counsel will want to have identified viable options and alternatives in addition to any key terms such as price. For instance, if an acceptable APA purchase price will prove less than initially desired, a more broadly worded indemnification provision might rise in importance. In addition, look for creative solutions that may not have been so evident going into the negotiation but may present themselves based on exchanges of information occurring during the earlier phases of the negotiation process.

1. Avoiding Cognitive Biases

During the bargaining stage a skilled in-house counsel negotiator will be mindful of cognitive biases that many commentators believe can hinder reaching the client's most preferred outcome. Cognitive biases are "the psychological tendencies that cause the human brain to draw incorrect conclusions."[25] There are several recognized cognitive biases that can affect a negotiator:

- **"Anchoring"** is the disproportionate focus on the first number…and a tendency to work off that number in assessments of value.[26]
  - Anchoring can be a powerful marker: "Opening a negotiation with an aggressive first offer greatly increases the chances that the ultimate resolution will be drawn in the direction of the anchor you have set."[27]
  - Conversely, an unreasonably high first demand or low counter is unlikely to set a favorable anchor.
  - To be effective an anchor must be credible. Counsel should encourage her business representative to demand the highest—or offer the lowest—reasonable number or term the client can unquestionably defend. If the counterparty opens first with a reasonable offer setting a feasible and defensible anchor, in-house counsel should recommend her client counter setting an opposite anchor in an effort to establish a favorable range reasonably likely to lead to an agreement.[28]

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[22] *Id.*

[23] Art Hinshaw, Peter Reilly, & Andrea Kupfer Schnider, *Attorneys and Negotiation Ethics: A Material Misunderstanding*, 29 NEG. J. 265, 280-281 (2013); Shuttee at 3-4 and 7.

[24] Romanoff at 37.

[25] Tom Kosakowski, *Guide to Cognitive Bias*, THE OMBUDS BLDG. (May 19, 2010). *available at* http://ombuds-blogs.blogspot.com/2010/05/guide-to-cognitive-biases.html

[26] Shuttee at 5. "Anchors can have almost gravitational drawing power on a price or value. Studies have shown that anchors can affect the outcome of negotiations between experienced plaintiff and defense attorneys negotiating settlement of a hypothetical personal injury claim …" *Id.* at 5-6.

[27] *Id.* at 6.

[28] *Id.* at 6-7.

- **"Framing"** focuses on the manner information is presented (*e.g.* an offer) can materially affect the recipient's reaction.[29]
  - Information framed positively can lead the negotiator to become more interested and risk tolerant, perhaps leading to accepting an unnecessary risk during the negotiation itself or within transaction deal terms.
  - The inverse is also true – when an issue is presented negatively, in-house counsel may perceive the offer negatively and as creating unwanted, additional risk.[30]
  - Framing is equally important consideration during the information gathering stage as it is to the bargaining stage. Knowing of one's potential framing bias can counteract the affect and lead to more reasoned analysis of the information being received.

- **"Confirmation Bias"** reflects the tendency to favor information confirming one's existing beliefs.[31]
  - It's the "Yep, I knew it!" moment.
  - Here again, confirmation bias can be problematic during both the information gathering and bargaining stages.[32] Filtering key information through a knowledgeable business representative who may not be as invested in the potential transaction or outcome can be a practical counter to this bias. In addition, when particular information or a position is confirmed, query yourself and the client representative about how she might have reacted to learning that information for the first time.

- **"Reactive Devaluation"** involves devaluing the counterparty's concession simply because the counterparty made the concession; you anticipated the concession; or both.[33]
  - The danger with reactive devaluation is that it could dissuade in-house counsel from appropriately valuing a concession once it has been made or failing to recognize a need to make a concession of similar value.

- **"Escalation of Commitment"** reflects the tendency to continue making decisions that follow what has become a failing strategy or course of action.[34]
  - If a strategy, series of concessions, or an offer simply lead to a "dead-end", then in-house counsel and her business representative should fall back and reevaluate the client's position and strategy for reaching the desired end goal. "Doubling down" on an unsuccessful strategy is fruitless.

2. Bargaining Tactics, Ploys, and More

There also is plenty of commentary on tried and true bargaining tactics, ploys, and moves:

- A "best and final" or "take it or leave it" offer is often viewed as a bluff that once made the client might find hard to sustain. Avoid making a "take it or leave it offer," or if you do, be fully prepared to follow through and depart the negotiation. If presented with an unacceptable "take it or leave it" offer, counter anyway.[35]

- Be mindful of the "request-then-retreat" ploy. It's a two-play scheme that works like this: the counterparty first makes an unreasonable request, offer, or demand knowing your client surely will reject it. Then the counterparty appears to "concede" by extending a less obviously unreasonable offer which your client would not likely have considered (much less accepted) had the counterparty made it first as a stand-alone offer/demand, not juxtaposed against the initial unreasonable one. The psychology of this ploy often generates a positive response to the second offer/demand from the recipient party notwithstanding that such follow-up "concession" or offer/demand would have been rejected out-of-hand had it been made initially and standing

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[29] Billy Fink, *The Psychology of Negotiation: Common Tricks Your Brain Plays on You*, AXIAL NETWORKS, MIDDLE MARKET REVIEW at 2 (Nov. 2014). *available at* https://www.axial.net/forum/cognitive-biases-deals/

[30] *Id.*

[31] *Id.* at 3.

[32] *Id.* Confirmation bias can become particularly problematic during diligence because it can lead counsel to seek and "selectively remember" that information supporting her initial hypothesis".

[33] *Cognitive Biases in Negotiation*, THE BUS. PROFESSOR, NEG. COURSE, (CH. 5) COGNITIVE ASPECTS OF NEG., § 4 at 2-3 (2019). *available at* http://thebusinessprofessor.com/knowledge-base/cognitive-biases-in-negotiation/

[34] *Id.* at 1.

[35] Shuttee at 7. There are various ways to curb this ploy: in a lawsuit context, the client can convene the negotiation to pursue more discovery or file a dispositive motion. Counsel can consider adjourning a negotiation to include each party's business representatives if they already are not part of the negotiation bargaining. If the counterparty is simply intransient, then evaluate the "take it-or-leave it" demand against your client's BATNA and WATNA.

alone.[36] To protect her client, in-house counsel should encourage evaluation of the second proposal on its own merits, and not in relation to the unreasonable, rejected offer.

- Seeking additional consideration after the main objective is reached.[37] For example, after an agreement is reached on a settlement number in mediation the counterparty may ask counsel's client to "throw in" the mediator's fees or court and forum costs. The best way to guard against this tactic is to tell the mediator during the final negotiation stages that no such "ask" will be considered. Another strong defense is responding with your client's own additional request: "That brings up a good point and if [the counterparty] wants to reopen the negotiation, [my] client has something to request of [the counterparty]."[38] Finally, this additional request ploy can simply be rejected.

3. Additional Bargaining "Quick Hits"

There are innumerable other recognized bargaining strategies, including:

- If negotiating a transaction, consider not leading with price.
- Draw attention to any concession you make.
- Avoid revealing a deadline unless it plays to your client's advantage.
- Halt negotiations if your client needs to regroup or adjust its goals for a favorable or acceptable end.
- When the other side asks for a previously undiscussed concession at the negotiation end, respond firmly and politely, "that's not a part of our agreement."[39]
- When told your client must "do better," in-house counsel can respond that her client has stated a fair price or position.[40]
- When confronted with "that just isn't done", respond with "that's our position" or "this is the right circumstance to break new ground."[41]
- Consider attempting to make your client's concessions conditional—my client can agree to "X" if counterparty will agree to "Y".
- Avoid the free "throw-in" at the end—that is, it is preferable to leave with an acceptable agreement while still holding onto a concession your client was willing to give. Such unoffered concession might come in handy if the documentation or later, the transaction, incurs turbulence.

V. ETHICAL OBLIGATIONS IN NEGOTIATIONS

"As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others."[42] Certain of the Texas Disciplinary Rules of Professional Conduct ("Conduct Rule" or "Rule") and ethical duties seem regularly in play for in-house counsel during negotiation, including:

- Truthfulness in statements to others;
- Communications with persons known to have legal counsel;
- Client's objectives of the representation;
- Organization as the client; and
- Misconduct involving dishonesty, fraud or deceit.

A. Truthfulness in Statements to others – TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 4.01

Conduct Rule 4.01 is likely implicated in every negotiation whether competitive or cooperative and certainly when negotiating a transaction or settling a dispute. Rule 4.01 requires:

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[36] *Id.* This ploy plays into the idea of "reciprocity" bias which Shuttee describes as "an almost irresistible tug of obligation to reciprocate what another person has done for them." This "tug" is also applicable to concessions, meaning receiving a concession can lead to responding with one.

[37] *Id.* at 7-8. Shuttee calls this "nibbling". It's a tactic for obtaining additional "concessions or deal points" after main issues resolve.

[38] Shuttee at p. 8

[39] Romanoff at 10.

[40] *Id.*

[41] *Id.*

[42] TEX. DISCIPLINARY R. PROF'L CONDUCT PREAMBLE §2 *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, App. A (Vernon's 2019) (hereinafter Vol. 3B TEX. GOV'T CODE, tit. 2, subtit. G, App. A.).

"In the course of representing a client, a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person; or

(b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."[43]

There generally are four principle elements to the Rule 401 proscription: (1) knowingly making; (2) a false statement; (3) of a material; (4) fact or law. The "terminology" section of the Conduct Rules makes clear that "knowingly" requires the lawyer have actual knowledge which may be "inferred from the circumstances."[44] Rule 4.01(a) is prohibitive; it forbids a lawyer to make the proscribed statement. Rule 4.01(b) is mandatory; it requires disclosure to a third party when necessary to avoid assisting in a fraud or crime.

1. Materiality

The Conduct Rules do not define the term "material." Thus, in-house counsel should be guided by definitions of material or materiality found in Texas law. By way of a standard example, *Black's* defines a material fact as one "that is significant or essential to the issue or matter at hand."[45] Relative to negotiation, one federal district court aptly noted: "A fact is material to a negotiation if it reasonably may be viewed as important to a fair understanding of what is being given up and, in return, gained by the settlement."[46] Going further, the opinion cautioned against making the inquiry more complex than it need be. "While the legal journals engage in some hand-wringing about the vagueness of this aspect of [ABA Model] Rule 4.1, in reality, it seldom is a difficult task to determine whether a fact is material to a particular negotiation."[47] The court then concluded its analysis with a warning to those willing to push the line. "In cases of *real* doubt, disciplinary committees and ultimately the courts will decide."[48] Comment 1 to Rule 4.01 recognizes that whether a statement of fact is material "can depend on the circumstances."

Materiality does not, however, require counsel to inform her client's counterparty of an adverse material fact or rule of law. In most circumstances, a statute of limitations would be material; however, despite such materiality, a disclosure obligation does not arise because a lawyer has no obligation to inform her opposing counsel that the statute is about to lapse on a claim in dispute.[49]

2. Generally Accepted Negotiation Conventions Not Considered to be Material or Statements of Fact

Certain types of statements are generally accepted negotiation conventions and as such are not taken as statements of material fact.[50] Types of statements falling outside Rule 4.01(a) include (a) estimates of price or value placed on the subject of a transaction;[51] (b) a party's intentions as to an acceptable settlement of a claim;[52] (c) exaggerating or emphasizing the strengths of your client's case or de-emphasizing the weakness;[53] (d) understating or downplaying a willingness to make contract concessions; or (e) stating the client does not want to settle for more than $X—when $X is below the established authority, or that $X is too high—when lawyer's authority exceeds $X.[54] Thus, counsel may freely exaggerate the strengths or minimize the weaknesses of her client's legal or factual positions. In addition, in an effort to increase leverage, in-house counsel may stress the importance of including a particular deal

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[43] *Id.* at Rule 4.01.
[44] *Id.* at "Terminology."
[45] *See* Black's Law Dictionary (9th ed.)
[46] *See Usherman v. Bank of America*, 212 F. Supp. 2d 435, 448 (D. Md. 2002) (citing to ABA Model Rule 4.1 cmt. 1 and declaring plainly, "[l]awyers may not lie for their clients…."); *see also* Conduct Rule 4.01 cmt 1.
[47] *Usherman*, 212 F. Supp. 2d at 448.
[48] *Id.* (emphasis added).
[49] *See* AMERICAN BAR ASS'N. COMM. ON ETHICS AND PROF'L RESP., FORMAL OP. 94-387 (1994).
[50] VOL. 3B TEX. GOV'T CODE, tit. 2, subtit. G, App. A, PROF'L CONDUCT RULE 4.01 cmt. 1. (*e.g.* such statements viewed as opinion or conjecture).
[51] *Id.*
[52] *Id.*
[53] AMERICAN BAR ASS'N. COMM. ON ETHICS AND PROF'L RESP., FORMAL OP. 06-439 (April 2006) *available at http://apps.americanbar.org/labor/lel-aba-annual/papers/2006/42.pdf*. "A buyer of products or services, for example, might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of dependence upon the supplier with which it is negotiating."
[54] *Id.*

term in the document or during a settlement negotiation despite knowing fully her client is willing to forgo that provision, *i.e.*, the "false demand".[55] Negotiation statements crossing the Rule 4.01(a) line include:

- Representing as fact certain deposition testimony from a client representative which the lawyer believes it false or likely false;[56]
- Representing to opposing counsel her client "won't settle for less than" $100,000 when in fact she has authority to settle for as low as $75,000;[57]
- Stating during a negotiation that her client's cost per item is $0.25 when in fact she knows is to be $0.22 and the difference is material.
- Representing the existence of a document purporting to support a defense or claim when the document does not in fact exist;[58]
- Denying the existence of liability insurance when insurance is available or stating that, to best of your knowledge, the client's insurance coverage is limited to $200,000 when documents in counsel's file reflect coverage of $1,000,000;[59] and
- Misrepresenting your client's *actual* "bottom line" or settlement authority.[60]

Unfortunately, the reported instances of Rule 4.01 violations are *legion*.[61] "Affirmative misrepresentations by lawyers in negotiation have been the basis for imposing litigation sanctions, setting aside settlement agreements, and civil lawsuits against the lawyers themselves."[62]

In-house counsel should have stock responses at the ready should she be pressed by a third-party neutral (*i.e.* mediator) or judge to disclose her limits of authority. She can, for example, rightfully refuse to answer the question; describe persuasively what her client opposes doing (without stating her client *won't* do it if authority to do so exists); or deflect or refocus the query to "more immediately relevant issues" such as counterparty's refusal to offer material concessions.[63]

3. Application to Mediation and Mediators

Without question Rule 4.1 applies in both mediation and negotiation. A "'Tribunal' includes … any other person engaged in a process of resolving a particular dispute or controversy. 'Tribunal' includes … *mediators*…."[64]

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[55] Also falling outside of Rule 4.1 are opinions, false statements unknowingly made, non-material facts, immaterial matters, and statements that do not relate to either material law or facts.

[56] A lawyer violates Rule 4.01 (a) by intentionally "incorporating or affirming a [false] statement [of material fact] made by another person" which the lawyer knows to be false. *See* RULE 4.01 cmt. 2.

[57] *Compare* this statement— "*won't* settle for $X" when X is within counsel's authority (unacceptable) *with* the statement "*doesn't want* to settle for $X" when X is within counsel's authority (acceptable). *See* ABA FORMAL OP. 06-439.

[58] *Id.*

[59] *In re McGrath*, 468 N.Y.S.2d 349, 351 (N.Y. App. Div. 1983).

[60] ABA FORMAL OP. 06-439, footnote 53, *supra*. Misrepresenting the client's actual authority differs from stating that $X amount is "too high" or that client does not want to settle for $X when $X is within counsel's authority. Moreover, a lawyer is not authorized to reveal her client's settlement authority absent the client's informed consent. *See* AMERICAN BAR ASS'N. COMM. ON ETHICS AND PROF'L RESP., FORMAL OP. 93-370 ("A lawyer should not, absent informed client consent, reveal to a judge the limits of the lawyer's settlement authority or the lawyer's advice to the client regarding settlement.").

[61] *See, e.g.*, *Davin LLC v. Daham*, 746 A.2d 1034 (N.J. Super. App. Div. 2000) (lawyer for prior owner obligated to advise client to inform new prospective tenant of foreclosure proceeding or authorize lawyer to inform opposing counsel); *Banco Popular N. Am. v. Gandi*, 876 A.2d 253 (N.J. 2003) (lawyer's favorable opinion to bank while knowing client's guarantee was "worthless" obligated lawyer to advise client to disclose truth to bank—and see to it that client did so disclose—or "discontinue representation"); *Brown v. County of Genesse*, 872 F.2d 169 (6th Cir. 1989) (lawyer for county had no obligation to correct mistaken belief of plaintiff's lawyer concerning highest amount of back wages available to plaintiff under county's pay scale); *In re Lyons*, 780 N.W.2d 629-636 (MN 2010) (false and misleading statements to opposing counsel about whether counsel knew of client's death before parties reached a settlement concerned a material fact). In both the *Daham* and *Gandi* opinions, the respective lawyer found to have violated Rule 4.01 represented the respective client in underlying transaction which rendered the lawyer's later misstatement of material fact to have been made knowingly; *see also* footnote 53, *supra* (ABA FORMAL OP. 06-439) (collecting cases)

[62] ABA FORMAL OP. 06-439 (citations and footnotes omitted). Note that the Texas Conduct Rules do not define standards of civil liability for lawyers nor do the Rules create a private cause of action for violation. *See Greenberg Traurig v. Moody*, 161 S.W.3d 56, n.21 (Tex. App—Houston [14th Dist.] 2004, no. pet.); (citing TEX. DISCIPLINARY R. PROF'L CONDUCT PREAMBLE §15); *Jurek v. Kivell*, 2011 Tex. App. LEXIS 3032 **19-20, (Tex. App—Houston [1st Dist.] 2011, no pet.) (collecting cases).

[63] *See* ABA FORMAL OP. 93-370 (1993); ABA FORMAL OP. 06-439 at (reaffirming authority to refuse to answer question).

[64] *See* footnote 44, *supra* (emphasis added).

The scope of Rule 4.01 as described in the comments is broad, applying to opposing counsel, a tribunal, and third parties.

4. Transaction Negotiations, Exchange of Contract and Settlements Drafts, and "Mistakes"

Rule 4.01 applies in circumstances beyond the traditional dispute resolution bargaining context and is equally applicable when drafting or editing a contract or communicating with counterparty's counsel about the contract. Case law and ethics opinions finding misconduct generally reflect counsel's failure to square zealous representation (acceptable) with prohibitions against misrepresenting contract content or draft (unacceptable). For instance, it is accepted that one who purposefully misleads by representing to have signed a contract as presented when in fact having secretly revised a material term to his benefit violates Rule 4.01.[65] Whether or not an alteration to a contract or draft violates Rule 4.01 usually turns on whether and what kind of a representation accompanied the document exchange, prior representations by the negotiation parties, or both. Consider the following:

- Party A demands provision Z—unfavorable to Party B—be included in the contract. Reluctantly, Party B agrees. When Party A's lawyer sends Party B's lawyer the draft, provision Z is omitted. Party B's lawyer spots the omission. Arguably, Party's B lawyer has an obligation to alert Party A's lawyer of the material omission.[66]

- Party C and Party D reach an agreement. Party C's lawyer tenders the contract to Party D's lawyer which is obviously drawn on the standard state bar form for the transaction subject matter. Party C's lawyer has changed, however, one of the boilerplate terms to favor Party C, say, reversing industry custom in Texas regarding which party pays certain costs at closing. Party C's lawyer emails the draft Party D's lawyer with the comment, "Please have signed and returned." Party D's lawyer fails to notice the change to the standard form term and his client signs. Here, Party C's lawyer has arguably not violated Rule 4.01 because an affirmative misstatement is missing and a disclosure obligation is not present.[67]

- Same facts, but Party C's offers to prepare the contract and represents he'll "use the State Bar form contract." The transmittal email from Party C's lawyer now reads, "As promised. Please have signed and returned." This is a much closer question that could likely conclude Party C's lawyer violated Conduct Rule 4.01, considering his representation to use the standard form and the "as promised" statement in his transmittal irrespective of the ambiguity about the "as promised" statement.[68]

Each of these three hypothetical situations can be avoided via a thorough examination of the draft contract. When a series of revisions are passing back and forth, there are sure acts to undertake to avoid being victim of misunderstandings or worse yet, a victim of the counterparty counsel's misrepresentations. Readily evident preventative measures include the obvious: running comparisons between drafts; asking for a statement from counterparty's counsel identifying what changes were made to the draft; asking a business representative to read the

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[65] *Hand v. Dayton-Hudson*, 775 F.2d 757 (6th Cir. 1985).

[66] *See* AMERICAN BAR ASS'N. COMM. ON ETHICS AND PROF'L RESP., INFORMAL OP. 86-1518 (Feb. 1986) ("Notice to Opposing Counsel of Inadvertent Omission of Contract Provision") (concluding "… the omission of the provision from the document is a 'material fact' which under Rule 4.l (b) … must be disclosed.") *reprinted in* Claude E. Ducloux, *Ethics of Contracts Drafting and Negotiation*, STATE BAR OF TEXAS, 16TH ANNUAL ADVANCED BUSINESS LAW COURSE CH.20, Appx. D (Nov. 2018); *but see* MARYLAND ST. B. ASSOC., CMTE ON ETHICS, ETHICS DOCKET 89-44 (reaching opposite result). Irrespective of the potential Rule 4.01 disclosure obligation, the likely *favored* course in the hypothetical is to disclose the innocent omission because once discovered, Party A is likely to sue—and successfully so—to reform the contract. *See* ABA INFORMAL OP. 86-1518; Daniel C. Bitting, *Ethical Considerations in Negotiating and Drafting Contracts*, STATE BAR OF TEXAS, 17TH ANNUAL ADVANCED IN-HOUSE COUNSEL COURSE CH. 5, at 2 (2018) (citing Texas law holding "unilateral mistake by one party, and knowledge of that mistake by the other party, is equivalent to a mutual mistake.") (hereinafter "Biting").

[67] Claude E. Ducloux, *Ethics of Contracts Drafting and Negotiation*, STATE BAR OF TEXAS, 16TH ANNUAL ADVANCED BUSINESS LAW COURSE, CH.20 at 3 (Nov. 2018) (hereinafter "Ducloux") *reprinting with permission* Scott J. Burnham, *Ethical Issues in Negotiating Contracts*, BUSINESS LAW TODAY, TRAINING FOR TOMORROW (Dec. 21, 2012) *available at* http://apps.americanbar.org/buslaw/blt/content/2012/12/trainingfortomorrow.shtml (hereinafter "Burnham"). Burnham and Ducloux acknowledge the "sharp practice" by Party C's lawyer, but conclude the lawyer did not violate Rule 4.01 because he made no "affirmative misrepresentation."

[68] The argument can clearly be made that Party C's lawyer violated Rule 4.01 because of his perceived affirmative misrepresentations which are missing in the prior hypothetical. *Id.*

final draft before actually signing (sometimes easier said than done because that's often a task placed on counsel); and confirming in writing what the material provisions are.

B. Communications with One Known to be Represented by Counsel – TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 4.02

Conduct Rule 4.02 prohibits a lawyer from communicating or causing or encouraging another to communicate about the subject of a representation with a person represented by counsel in the matter unless the person's lawyer has consented or the lawyer is authorized by law to do so.[69] This Rule's broad scope seeks to prevent client-representative-to-client-representative communications when the communication is either encouraged by counsel or the substance of the communication is devised or dictated by counsel. In both scenarios, the substance of the communication is viewed as being between the lawyer and the represented person.[70] Counsel, therefore, may not send a letter jointly addressed to the adverse attorney and adverse client stating that a compromise is possible and should be discussed even when she believes the adverse attorney has refused to consult his client about settlement.[71] In-house may, however, confer with a person who represents affirmatively in writing he has terminated the attorney-client relationship with counsel.[72] In-house should also be mindful that a lawyer may communicate with an individual working for a represented entity when the individual does not have "managerial responsibility" and cannot make the entity vicariously liable for the matter at issue.[73]

C. Organization as the Client and Objectives of Representation – TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 1.12 and 1.02

Well known to any in-house counsel is that the organization and not any one officer, director, or group is her client.[74] Of course, during the course of performing services for her entity client, in-house counsel will report to and accept direction from any number of authorized agents or constituents such as officers and directors.[75] In-house counsel must be knowledgeable that the constituent or representative from whom she is taking direction has the requisite authority to seek and act upon legal advice.[76] Adhering to her client representative's instruction during a negotiation can sometimes prove problematic — in-house counsel must ordinarily implement the instruction even if its "utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province."[77]

Implementing her client's instruction can also sometimes implicate Rule 1.02 which obligates counsel to abide her client's decision about the representation objectives, including whether to accept or decline a settlement offer.[78] In-house counsel remains encumbered by this duty be it about a particular transaction or deal point—regardless of whether implementing her advice is likely to achieve a more beneficial outcome—it is the client who holds ultimate authority to determine the objectives of the representation.[79] Rule 1.02 further obligates in-house counsel to communicate any settlement offer in a civil matter to her client unless through prior communications she knows the

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[69] This Rule applies regardless of whether the counterparty is an individual, organization, governmental entity, or other legal person.

[70] TEX. DISCIPLINARY R. PROF'L CONDUCT 4.02 cmt.1, Vol 3B TEX GOV'T CODE, tit. 2, subtit. G, App. A. This Rule seeks to prevent circumvention of the attorney-client relationship existing between another person and its counsel by proscribing "the caus[ing] or encourag[ing] of such a communication, but it does not require counsel affirmatively to discourage communications between her client and the other represented person. *Id.* cmts 1 and 2.

[71] Tex. Op. 57.

[72] *In re Users Sys. Servs.*, 22 S.W.3 331, 333 (Tex. 1999) (Rule 4.02 forbids communication with other person only if lawyer *knows* he has legal counsel in the matter). In *Users Systems Services* Rule 4.02 did not prohibit counsel's communication because the represented individual provided her with his written affirmation that he no longer had representation. *Id.* at 334-335.

[73] Rule 4.02 cmt 4; Bitting, footnote 66, *supra* at 9.

[74] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12, Vol 3B TEX GOV'T CODE, tit. 2, subtit. G, App. A. The lawyer represents the organization as distinct from its directions, officers, employees, members, shareholders or other constituents. *Id.* cmt 1.

[75] *Id.* cmt 1.

[76] *Id.*

[77] *Id.* cmt.6.

[78] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(a)(1) & (2), Vol 3B TEX GOV'T CODE, tit. 2, subtit. G, App. A.

[79] For instance, counsel may not ask her client to waive its right to make a final determination to accept or reject a settlement offer. *Id.* cmt 5. Counsel is not completely shackled because her advocacy skills and powers of persuasion can come into play if she believes a better course is advisable.

particular proposal would be unacceptable.[80] In all other aspects, it is generally for the client to decide to accept, reject, or counter a proposal.[81]

An altogether different analysis arises when counsel knows that her client is likely to be "substantially injured" by the action of the constituent representative which violates the law or a legal obligation owed to the organization. In such instances, in-house counsel must take remedial measures.[82]

D. Misconduct – TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 8.04

Each of the preceding Conduct Rules is incorporated into Rule 8.04 "Misconduct." Among other prohibitions, Rule 8.04 plainly instructs that "a lawyer shall not violate these rules …." In this sense, counsel should know that Rule 8.04 is intended as a deterrent and used often to bolster Rule 4.01 violations. The Rule 8.04 proscription includes knowingly assisting or inducing another to violate any Rule or engaging in a violation of the Conduct Rules through the acts of another person regardless of whether the violation occurred in the course of the lawyer-client relationship.[83] Violation of the Conduct Rules can lead to litigation sanctions; grievance referrals and filings; setting aside settlement agreements, transactions, and contracts because of fraudulent inducement; and in some cases counsel's civil liability under fraud, negligent misrepresentation, or similar causes of action.[84]

E. Concluding Thoughts on Negotiation Ethics

"Virtually all difficult ethical problems arise from apparent conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interests." Some commentators take a seemingly jaundiced view of the ethical tension inherent in negotiation:

> "[D]rafting rules about truthfulness arises out of the paradoxical nature of the negotiator's responsibility. On the one hand the negotiator must be fair and truthful; on the other he must mislead his opponent ... The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled." [85]

Others advocate that the commentary "bemoaning" lack of honesty and truthfulness in negotiation take such criticism too far.[86] What is clear is that the sometimes seemingly conflicting responsibilities in-house counsel encounter in the zealous representation of her client during negotiation are really no different from those she faces daily in any of her other legal duties. In an interest-based negotiation environment overt gamesmanship may lead to short-term gains at the expense of longer-term client and personal reputational benefits: the inefficiencies imposed by distrust[87] and the opportunity costs of lost future transactions.[88]

If in the end it *is* reputation that counts both for in-house counsel and her client (*e.g.*, to be known as tough, but honest), and the Rules of Professional Conduct prescribe the minimum standards below which no lawyer may fall, then there are certain principles of ethical negotiation to which counsel should aspire:

- ***Reciprocity***: Would I want other organizations to treat my organization or me this way?

- ***Publicity***: Would I be comfortable if my or my company's actions in negotiation were fully and fairly described in the newspaper? … Industry publications? … On 60 Minutes?

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[80] *Id.* cmts. 2 and 3.
[81] *Id.* cmts. 1-3 and 5.
[82] *Id.* (regarding reporting of and taking remedial measures.)
[83] TEX. DISCIPLINARY R. PROF'L CONDUCT, Vol. 3B TEX GOV'T CODE, tit. 2, subtit. G, App. A.
[84] Note that in Texas there exists no private cause of action for a Rules violation. *See Blankenship v. Brown*, 399 S.W.3d 303 (Tex. App.–Dallas 2013, pet. denied).
[85] James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 5 Am. B. Found. Res. J. Vol. 926, 927 (Autumn 1980). White challenges those who challenge his statement: "Some experienced negotiators will deny the accuracy of this assertion, but they will be wrong. I submit that a careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true positions." *Id*.
[86] *E.g.*, Barry R. Temkin, "*Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?*," 18 GEO. I. LEGAL ETHICS 179,181 (2004) (clients are entitled to expect their lawyers to be zealous advocates; current literature bemoaning lack of honesty and truthfulness in negotiation has gone too far).
[87] George A. Akerlof, The *Market for Lemons: Quality, Uncertainty and the Market Mechanism*, Q. J OF ECON. Vol. 84, Issue 3 (1970) 488, 495 (the explaining "costs" of dishonesty).
[88] Leigh Thompson, THE MIND AND HEART OF THE NEGOTIATOR, 141-143 (Person, 5th Ed., 2012).

- ***Trusted Friend or Colleague***: Would I be proud telling my mentor how I conducted the negotiation or what I did or said? Would I feel confident telling a trusted friend?

- ***Universality***: How would I advise another company or a counsel I mentor to conduct negotiations?

- ***Legacy (Reputation)***:[89] Did my negotiation conduct reflect how either my client or I want to be regarded?

[89] Michael Wheeler, *5 Principles of Ethical Negotiation*, HARV. L. SCHOOL, PROGRAM ON NEGOTIATION (Feb. 2019) https://www.pon.harvard.edu/daily/negotiation-training-daily/questions-of-ethics-in-negotiation/

APPENDIX 1

WINNING AS MANY ROUNDS AS POSSIBLE – NEGOTIATION TACTICS

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CHAPTER 1

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Summary

Anne Shuttee is an experienced collaborative attorney, mediator, and commercial litigator, providing a range of services focused on resolving disputes constructively and cost-effectively:

- Counseling and representation of clients in the civil collaborative dispute resolution process;
- Mediation and facilitation of party negotiations in civil, commercial, probate, and family disputes;
- Service as an arbitrator, special master, or early neutral evaluator;
- Counseling and representation of clients in civil litigation and arbitration;
- Customized training in the collaborative process for clients and in-house counsel.

Professional Background

Anne brings to her practice more than twenty years of experience as an in-house commercial litigation attorney for a Fortune 500 company, almost ten years of litigation experience with major law firms, and a judicial clerkship. Her many years of experience addressing and resolving a wide variety of legal disputes involving her clients' customers, vendors, and joint venturers enable her to look at legal problems from multiple angles and to develop creative approaches to their resolution.

Anne has long experience in the development and innovative use of alternative dispute techniques and immediately saw the potential that collaborative law holds for the resolution of commercial disputes, becoming an early proponent of the collaborative process in the business arena. She understands the value of interest-based negotiations to resolve disputes and takes that approach in her mediation practice when appropriate to the resolution of the dispute. Anne's experience and skill in contract interpretation, legal analysis, and case evaluation also enable her to serve effectively as an arbitrator or special master.

A frequent speaker on dispute resolution topics, Anne has made presentations on collaborative law before a number of audiences, including the ABA's Section of Dispute Resolution, the Corporate Counsel Institute, and the Texas Wesleyan Business Leadership Symposium. She has also spoken on corporate depositions at the State Bar of Texas' Advanced Evidence and Discovery Course.

Professional Employment

- Principal/Attorney, Law Office of Anne Shuttee, Dallas, Texas
- Senior Litigation Counsel, EDS, an HP Company (formerly Electronic Data Systems Corporation), Legal Department, Plano, Texas
- Attorney, Hughes & Luce (Dallas, Texas) and Shook Hardy & Bacon (Kansas City, Missouri)
- Judicial Law Clerk, Hon. William O. Collinson, United States District Court, Western District of Missouri

Education

- J.D., Harvard Law School (cum laude)
- B.A., Trinity University, political and social science (magna cum laude)
- Civil Collaborative Law training, Dallas Bar Association
- Basic Mediation Training, A.A. White Dispute Resolution Center, University of Houston Law Center; Family Mediation Training, Texas Woman's University
- Arbitration Training Institute, American Bar Association
- Certified for ad litem appointments in Texas Courts

Professional Licenses/Admissions

- State of Texas
- State of Missouri (inactive)
- United States Supreme Court and numerous other federal appellate and district courts

Professional Associations and Honors

- American Bar Association, including ABA's Section of Dispute Resolution
- State Bar of Texas, including the Collaborative Law Section, the Dispute Resolution Section, and the Construction Law Section
- Chair, State Bar of Texas Collaborative Law Section (2014-15)
- President, Collin County Bar Association (2010-11) and co-chair of CCBA Corporate Counsel Section (2011-14)
- President, Plano Bar Association (1992)
- Dallas Bar Association – Chair of Collaborative Law Section (2012-13) and of Lawyer Referral Service Committee (2013-14); co-chair of Ethics Committee (2009); co-chair of Pro Bono Activities Committee (2008)
- Founding Member and Master, Curt B. Henderson American Inn of Court
- Fellow, Texas Bar Foundation
- Fellow, Dallas Bar Foundation
- Fellow, Collin County Bench-Bar Foundation
- Vice-President in charge of Public Education, Global Collaborative Law Council
- Credentialed Advanced Mediator, Texas Mediator Credentialing Association
- Member, Association of Attorney-Mediators
- Member, Texas Association of Mediators
- Pro Bono Attorney of the Year, Collin County, Texas (various)
- Women's Advocacy Award, Legal Services of North Texas (2002)
- AV rating, Martindale Hubbell
- Phi Beta Kappa

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TABLE OF CONTENTS

WINNING AS MANY ROUNDS AS POSSIBLE – NEGOTIATION TACTICS

I. ABSTRACT

This paper provides a brief overview of some of the key aspects of negotiations theory and practice. A bibliography of leading reference works in the field is attached.

II. "WINNING" A NEGOTIATION

In most negotiations, "winning", in the sense of defeating your opponent, is not really the objective. Rather, the goal is to craft an agreement that satisfies your client's interests and concerns to the greatest extent possible and that is sustainable for both parties.

In this context, therefore, to "win a round" at the negotiating table is to take a step towards the ultimate goal of a satisfactory and sustainable deal. It is not to trounce the other side. It requires that you be fully prepared for the negotiation; to have charted an overall strategy for arriving at the desired agreement; and to be sufficiently conversant with negotiation tactics and psychology to be aware of the dynamics affecting the exchanges between the parties, all within a framework of ethical conduct.

III. NEGOTIATING IS A SKILL, NOT A TALENT

People often assume that there are "born negotiators" and suppose that because they don't do well or feel comfortable in negotiations, they just don't have the "negotiating gene". Not so. We all negotiate from the time we are toddlers, and we negotiate in almost every relationship in our lives. Negotiating is a skill that can be taught, learned, and studied, and that improves with practice.

IV. THE SATISFACTION TRIANGLE

There are three essentials of a durable agreement:

a) *People* Satisfaction – people need to feel that they have been treated well, heard, and respected;
b) *Process* Satisfaction – people need to feel that the process by which the agreement was made was fair and there was no power imbalance; and
c) *Product* Satisfaction - the agreement must meet the parties' needs so that they will accept and honor it.

If you focus only on the product, you will overlook the fact that people will accept a less-than-perfect deal if they are highly satisfied with the other two legs of the triangle. Similarly, if the "people" and "process" legs of the triangle are disregarded, the affected participants will be unhappy even with a great product.

V. PREPARATION, PREPARATION, PREPARATION

Many people find negotiations frightening and dread the very thought of having to hammer out a deal with an adversary or prospective business associate. Indeed, the term "negotiation" comes from the Latin words for "not leisure". The remedy for such anxiety about a prospective negotiation is preparation.

Abraham Lincoln is quoted as having said, "Give me eight hours to chop down a tree and I will spend the first six sharpening the axe." Just as you would not dream of going to trial without familiarizing yourself with the issues and preparing your lines of examination and argument, you should not embark on a negotiation without first educating yourself on the subject of the negotiation; learning about the parties' goals and concerns; assessing each side's options for achieving those goals and resolving those concerns; and deciding on your strategy for the negotiation.

By arming yourself with facts, insights, and options through a careful preparation process, you enter the negotiation with confidence. This psychological strength increases your credibility with the other side and the chances that you will exit the negotiation with a sustainable and valuable deal for your client.

A. Familiarity with the Underlying Context of the Negotiation

In-house counsel are typically far more conversant than outside counsel with their client's business, but that familiarity takes time and effort to achieve. Take advantage of what your employer offers in the way of company education, talk with executives and employees on the business side, attend internal meetings relevant to your areas of responsibility, and become fluent with the language and substance of your client's business and that of the customers, vendors, or partners with which it contracts. Go to quarterly meetings, meet your clients for coffee, learn their acronyms - develop a personal and professional relationship with them. The more you understand about the client's business, the more the executives and others with whom you work will see the value you bring to a negotiation.

Get on the invitation list for kick-off meetings to discuss new deals so that you understand the opportunity from the ground up. When disputes arise, review the critical documents and secondary materials such as briefs or memoranda from outside counsel about the key factual and legal issues and talk with the account leaders inside the company responsible for the contract or matter at issue. Your investigation may not provide you with the same level of knowledge of a

dispute as trial counsel, but you can gain enough familiarity to discuss the key points during mediation or settlement negotiations.

B. Your Client's Interests and Concerns

After you know enough to understand the issues, Job One in any negotiation is to find out what your client wants. This involves more than simply asking the question and noting what your client says. Going beyond the answer to probe the "why" behind the "what" enables you to discover your client's interests and concerns - which may in turn lead to a wide range of options for achieving his goals.

A simple illustration from outside the business world is a divorce in which one party - say, the wife - says that she wants to be awarded the house. If you explore why she feels that way, you may discover that she wants her son to remain in the same school district and near his friends, that she wants to live in a safe area near her office, and that she wants to keep a vegetable garden. This in turns open up a range of options in addition to being awarded the house, such as renting a smaller house in the same area, renting a nearby apartment, renting an apartment some distance away but within the same school district, joining a community garden, and arranging for play dates with the boy's friends from the old neighborhood.

Within the business world, the client's initial answer to the question is often expressed monetarily: payment, a refund of payment, damages. Upon further exploration, however, you may find that the client may have underlying interests that can be satisfied either by money or by other consideration. For example, in a breach of warranty case involving a machine purchased from the defendant vendor, the client's underlying interest may be to have a working machine so that she can meet her production deadlines. This interest can be satisfied by a refund check by means of which she can buy a replacement machine, but it can also be satisfied in other ways, such by as a deal under which she buys a new and improved model of the machine from the vendor at a substantial discount, is provided by the vendor a refurbished machine with a full warranty, or receives enhanced technical support from the vendor at no charge to keep the old machine in operating condition. If all you do is find out that she wants money and write down the amount, you may miss opportunities to satisfy her underlying interests and concerns via other means.

Find out why your client says she needs from the negotiation, what her priorities are, and what her short-term and long-term objectives are with respect to this deal and with respect to her relationship (if any) with the other party and with other stakeholders not at the table. The more you can learn about her interests, goals, and concerns about this transaction and this relationship, the better equipped you will be to negotiate a deal that satisfies them.

Of course, in a corporate setting, what the business executive or account manager tells you is not necessarily the last word. The entity rather than the employee is your client, and the person responsible for this particular transaction or lawsuit may be focused only on her or her account and not on the corporation's larger interests, or be unaware of other business considerations that should be taken into account in the negotiations. The left hand may not know what the right hand is doing. For example, one of the company's other departments or affiliates may be in the process of asserting a claim against or negotiating a big contract with the other party to your negotiation. If you don't find out about your client's overall interests with respect to the other party, you may inadvertently damage those interests by the tack you take in this negotiation.

Educate yourself regarding your client's internal processes for approving deals or settlements of particular types or sizes, and of any policies that your client has adopted for deal terms that may be involved in your negotiation (such as whether a limitation of liability can be waived). So-called "boilerplate" clauses that your client representative may later wish to waive to secure the deal can be of vital importance to the corporation's longer-term interests, and it is important prior to the commencement of negotiations that you and your client are agreed on what can be modified or waived and what must be included in the transaction.

C. Your Client's Resources – and the Resources Available to the Other Party

Your preparation should also include learning about the pertinent resources available to your client or to the other party. For example, if you are dealing with settlement of a claim, is insurance available to your client? On what terms? What type of policy is available and what is the self-insured retention or deductible? If you are the claimant, do you have reason to believe that the other party has insurance? Does either party have in-house experts it can consult at no charge, or in-house or captive counsel who can litigate the dispute at no external cost? Or will they incur substantial attorneys' fees in pursuing or defending against the claim?

Whether you are negotiating the settlement of a dispute or the terms of a new contract, consider whether there might be other possible transactions available between your client and the other party. Does your client have a department or subsidiary that could provide related or unrelated services to the other party? Does the other party have any such departments or affiliates with whom your client or its affiliates might do business? If the answer is in the affirmative,

such potential transactions can provide additional options and flexibility in the negotiations and alert you to possible risks in other areas if your negotiations fail to result in a mutually satisfactory agreement.

D. Setup and the Negotiating Team

Before starting your negotiations, step back and with your client take a look at whether you have the right player on the other side of the table. You may be the best negotiator in the world, but if your client is trying to do business with the wrong party for the deal he is seeking, you may get a poor return on your efforts. For example, if your client is seeking funding, is a commercial bank the entity most likely to enter into the best possible funding arrangement? Or should the client be negotiating with a different type of funder instead – say, a venture capitalist?

Accordingly, look at the transaction from several angles. What are the other party's likely interests, concerns, and deal points? Do you see an overlap with those of your client – a zone of possible agreement (referred to in negotiations parlance as a "ZOPA")? Why should they want to agree to a deal that would maximize value for your client in the transaction? Are they likely to insist on terms that would undermine the value of the deal from your client's perspective? What other entities might be available to do the desired transaction on terns more attractive to your client? What would be their likely interests, concerns, and deal points?

In short, before you start barking up the tree, be sure you're barking up the *right* tree.

Also consider who should be conducting the negotiations on your side and who you'd prefer on the other side. (If you don't think the other side's likely representatives would be good negotiating partners, you may be able to affect their decisions on representation by the people you and your client select to lead your negotiations.) Does it make sense for the account managers to begin the negotiation? For the lawyers to do so? To have joint meetings of executives and the attorneys? Which executives? Whom do you want to hold in reserve in case the negotiations need to be escalated to more senior executives within the company? What is the best way to keep them informed of progress? Who else should be on your negotiating team? Finance? Tax? Outside counsel?

Many of these questions have obvious answers in individual settings, but all should be considered and the right people brought into place before the negotiations are launched.

When negotiating government contracts, be aware that goverment agents have no authority beyond what is set forth in the applicable statute and delegation of authority. Accordingly, address up front the scope of the negotiating agent's authority to be sure that you have the right person at the table.

E. BATNA and WATNA

In the classic Getting to Yes, Roger Fisher and William Ury addressed the importance of developing your client's "BATNA" (Best Alternative to a Negotiated Agreement) in advance of the negotiation. Doing so enables your client to determine when to walk away from a deal and terminate the negotiations in favor of Plan B (or BATNA).

To come up with your BATNA, talk with your client about his alternatives if you can't reach a deal with the other party on terms your client can accept. Are there other vendors, partners, or buyers available? On what terms? Can he get a quote or shop a potential deal with his second-best option so that he feels reasonably comfortable that it is attainable if you can't make an acceptable deal with his first-choice option? If the subject of the negotiation is a claim, what are his prospects in litigation, and at what cost in dollars, time, and stress?

Likewise, what is the worst thing that can happen to your client if he fails to make a deal with the other side, and what is his appetite for risk? Assessing your client's WATNA (Worst Alternative to a Negotiated Agreement) also helps him assess his options and determine at what point he should terminate this negotiation. An extremely dangerous WATNA (a do-or-die deal) may compel your client to make a deal that otherwise he might choose to reject, especially if he doesn't have any really viable positive options.

As best you can, also evaluate the other side's likely BATNA and WATNA. Do they have so much other business that they don't need to negotiate down from their initial offer? Is there anything uniquely desirable from their perspective about what your client brings to the table? Are they experiencing hard times and pressing for business? In a settlement negotiation, what will be the effect on them if they lose the lawsuit against your client? Do they need to settle now versus later for some extraneous reason?

F. Option Development

Before commencing the negotiation, put together your opening position and several fallback positions and alternatives as well as your anticipated walk-away point or bottom line, and try to project the other party's likely positions and alternative proposals. Talk with your client about what additional consideration she might be able to provide to the other party that wouldn't cost much, or about whether there are other avenues to a deal that would be mutually beneficial – a contract extension, for example, or an additional project. Ask your client what the other party might be able to provide that would be of value – you can't get what you don't ask for, and there might be something the other party doesn't think to offer that would benefit your client.

A word of caution: when contracting with the government, be aware that too many changes to a contract bid can make it non-qualifying. If you are not conversant with negotiating government contracts involving bids, familiarize yourself with the rules of the road in such negotiations to avoid such traps for the unwary.

G. Timing

Timing can affect the outcome of a negotiation. A settlement reached before litigation commences is likely to be significantly different from one reached after the jury has heard closing arguments. A sales agreement reached just before the end of the quarter may vary from one reached just afterward. Where either party is seeking to recover attorneys' fees, it may be wise to conduct serious settlement negotiations before reimbursement of attorneys' fees become a major obstacle to settlement. Often lawyers defer settlement negotiations longer than necessary in order to complete pretrial discovery, but that approach can backfire because the parties will each have already incurred much of the expense of litigation by doing so and will have less incentive to settle without reimbursement of that expense. Adding an information-sharing process to the settlement negotiation instead can allow the parties to learn the essential facts while minimizing the sunk costs of discovery prior to the negotiation.

Be aware of your client's internal deadlines and accounting processes and those imposed by accounting or regulatory requirements. For example, if a reserve will be required for a settlement offer you are contemplating, be sure that your client is aware of the situation and agrees with the timing of the offer so that the reserve is taken in the correct quarter.

H. Planning Instruments

Just as airline pilots complete pre-flight checklists before taking off even though they know how to fly, it is a good practice for negotiators to complete a negotiations planning instrument before commencing the negotiation. Such instruments are available through various negotiations courses and books, and generally feature a template in which you make note of your client's goals and concerns, the other side's projected goals and concerns, your walk-away point based on your client's BATNA, what you think is the other side's walk-away point and BATNA might be, your projected opening moves, and alternative approaches to the deal that could satisfy both sides' interests.

Review and update your planning instrument as the deal progresses so that you don't lose sight of options, goals, and concerns that might be critical to the success of the negotiation.

VI. DISTRIBUTIVE ("ZERO-SUM") VS. INTEGRATIVE ("WIN-WIN") NEGOTIATIONS

A strategic choice to be made at the outset of the negotiation is whether it is to your client's advantage to conduct it as a distributive or integrative negotiation, and how to respond if you prefer an integrative negotiation but the other side pursues a distributive strategy. Remember: hope is not a strategy!

A. Distributive Bargaining or Competitive Negotiations

Generally speaking, a distributive negotiation is a zero-sum game of positional or competitive bargaining. Side A offers $100; Side B demands $1000; Side A counters with $200; Side B responds with $750; and so on until a deal is reached somewhere between the parties' opening positions. Distributive bargaining typically involves 6 or 7 moves, with progressively smaller concessions. Any benefit to one side comes at the expense of the other; an additional dollar to Side B comes from the pocket of Side A.

The distributive approach to negotiations is useful when there are no significant deal points other than money to be negotiated and the parties have no expectation of a future relationship. The classic example is a street market in which you are negotiating with a vendor over the price of a rug.

Even when a situation would seemingly call for a distributive approach – such as a new car purchase or a property damage settlement with an insurer – there may be other elements involved that could make integrative negotiations more desirable. Such elements might include timing of payment or delivery, confidentiality, accompanying warranties, or options for future or collateral business transactions. Before assuming that the distributive approach is the way to go, consider whether any such elements are involved in the negotiation and, if so, whether an integrative approach might be more appropriate.

B. Integrative or Interest-Based Negotiations

It typically does your client little good to extract every ounce of value from a transaction by following a strategy that deprives or threatens to deprive the other side of any profit or incentive to perform as promised and anticipated. How does your client benefit by creating an incentive for the other party to breach or default, or from a hostile relationship with someone with whom your client has an ongoing relationship (vendor, partner, etc.)? An agreement that sows seeds of resentment and anger is hardly conducive to smooth business dealings.

When there are a number of aspects of a deal to be negotiated and the parties have or expect to have an ongoing relationship, an integrative or interest-based approach to the negotiation is generally preferable to a

purely distributive negotiation. Once the parties have identified their underlying interests and concerns, they may find wide overlap between them. Working cooperatively in a problem-solving mode, they may also discover ways to "expand the pie" by developing options that add to the value received by one side at very little cost to the other, and vice-versa, thus making the ultimate transaction far more beneficial to both than a compromise deal negotiated from the parties' initial offers. Integrative negotiations often employ distributive negotiations at some stage to "divide the pie" that has been enlarged through the integrative approach.

Integrative negotiations are one of the foundations for Collaborative Law, an alternative dispute resolution technique that focuses on identifying the parties' underlying interests and developing of a range of options for them to consider in resolving the situation. Unlike adversary dispute resolution processes, which typically involve trial attorneys conducting primarily distributive negotiations, the aim of Collaborative Law is for the parties, assisted by settlement counsel, to use integrative negotiations to devise a solution to their dispute that achieves the goals of each side to the greatest extent possible.

C. "Tit for Tat" – Moving from Distributive to Integrative Negotiation

When one party prefers cooperative, integrative negotiations and the other is taking a competitive, distributive approach, problems arise. The party using the integrative approach may unilaterally provide a range of options, while the party using a competitive approach responds by choosing one option and delivering a counter-offer designed to maximize value for his side. This puts a party who persists in using the integrative approach during a negotiation at risk of exploitation by a competitive negotiator operating in a zero-sum world of extracted rather than shared value. This risk has been described as "swimming with sharks".

Game theorists and social scientists have expended considerable effort examining how and why cooperative behavior among human beings has developed and persisted, with great long-term benefit to all, when competitive behavior seems to be more beneficial for each participant in the short term. Extensive studies of the classic “Prisoner's Dilemma” game (which forces players not in communication with one another to choose whether to cooperate in the hope of a best-possible outcome or to defect in favor of protecting against downside risk) have determined that the most successful long-term strategy for both sides is the “Tit for Tat with forgiveness” approach.

Under that strategy, the player opens with a cooperative move, and thereafter follows a “tit for tat” approach in which he reciprocates what the other player does. If the other player defects, in the next round he defects. If the other player cooperates, he responds in the next round with a cooperative move. However, he tempers the purely "tit for tat" approach with occasional forgiveness - that is, seeking opportunities to respond to defection with cooperation. Doing so can put an end to a repeated cycle of defection and counter-defection.

The “Tit for Tat with forgiveness” strategy is helpful in negotiations in which you wish to use an integrative, cooperative approach, but the other party's strategy is either unknown or competitive. You can open with a cooperative move that doesn't cost you anything, such as offering to meet at the other side's office. If that move is accepted but then followed by a non-cooperative move by the other party (say, a demand for information), you respond with a proportionate non-cooperative reply move (i.e., your own demand for information). You look for opportunities to make another cooperative move that won't put you at a disadvantage, and the rule of reciprocity (discussed below) helps to nudge the other side to join you in a long-term cooperative rather than competitive approach to the negotiation.

Of course, in addition to following the “Tit for Tat” strategy, you have the benefit not available to players of the Prisoner's Dilemma game of being able to talk with the other side before making any moves. If you offer to share information or propose that each side come up with several options, and the other side does not respond in kind, you can ask them why they are not willing to do so, and explore their concerns. By using the “Tit for Tat” strategy at the same time, however, you can guard against exploitation in the negotiation.

VII. SOME PSYCHOLOGICAL AND COGNITIVE ASPECTS OF NEGOTIATIONS

Human beings are not purely rational beings who assess and make choices based solely on economic considerations. On the contrary, our perceptions and reactions to events during negotiations are affected by a wide array of psychological factors and cognitive biases. Among these are anchoring, contrast, reciprocity, and perceptions of fairness.

A. Anchoring

Anchoring is a type of cognitive bias in which people focus disproportionately on the first number, such as a new car price or a settlement offer, and tend to work off that number in their assessments of value. Anchors can have almost gravitational drawing power on a price or value. Studies have shown that anchors can affect the outcome of negotiations between experienced plaintiff's and defense attorneys negotiating settlement of a hypothetical personal injury claim and judges' assessments of how much such a

claim is worth. Strangely, even numbers having no relationship to value - such as social security numbers - can have inflationary or deflationary effects on assessments of value, if they are viewed shortly before value is assessed.

B. Contrast

Another perceptual bias results from the contrast between two things that are presented consecutively. When a person hears, views, or experiences the first - whether it is a high-priced item of jewelry or a 5-lb weight - he or she will perceive the second in relation to the first, rather than independently. Thus, while a customer might view a $40 scarf as expensive on its own, if she is offered it as an accessory to a $600 suit she has just purchased, it seems less costly. A 5-lb weight seems as light as a feather if a person lifts it just after lifting a 35-lb weight.

The contrast principle is widely used by retailers and nonprofits seeking donations - salespeople will offer less expensive items after more expensive ones, or display goods with markdowns showing a higher initial price followed by a lower price. Charities and political fundraisers will often list several high-dollar options followed by a lower-dollar option in the hope that donors will be attracted by a low-dollar option they might have rejected if it were the only figure listed.

In negotiations, the principle of contrast can increase the chance that relatively minor items will be accepted if they are introduced into the discussion after higher-value items have been addressed.

C. Reciprocity

People feel an almost irresistible tug of obligation to reciprocate what another person has done for them. This norm or rule of reciprocity affects not only individuals but organizations and even nations (for example, the Netherlands came to the aid of New Orleans after Hurricane Katrina, reciprocating for the help they received from that city after a storm forty years earlier). It can overcome feelings of personal dislike, irritation, and even prejudice. It is reflected in the small gifts (such as address labels) provided by charities seeking donations; such gifts have been shown to increase proceeds dramatically.

The norm of reciprocity applies not only to favors, but also to concessions - when one party has made a concession, it is hard for the other to resist the impulse to reciprocate with a concession of his own. Thus, when one person makes a large request that he expects will be rejected and follows the rejection with a smaller request (a concession), the second request is much more likely to be honored than if it had been made initially. (This phenomenon is due not only to the rule of reciprocity but also to the principle of contrast. The two form a potent combination.) Interestingly, studies indicate that this approach generally does not cause resentment on the part of the other party.

D. Perceptions of Fairness

Human beings share with other primates an instinctive unwillingness to accept a deal if we perceive it to be unfair compared to what others are receiving. (How many of us have heard even very young children shout “No Fair”?).

In one celebrated experiment, a monkey that earlier was happy to accept a slice of cucumber as a reward threw a subsequently offered cucumber slice into the experimenter's face when the monkey saw that another monkey in the cage next to him was receiving a much more succulent treat - a grape - as its reward. Similar but less dramatic rejections can occur in a wide range of negotiations in which one of the participants comes to believe that others similarly situated are getting a better deal, even if he previously believed the proposal to be fair and reasonable.

VIII. TACTICS, MOVES, AND RESPONSES

A. Making the First Offer

Even experienced negotiators are sometimes heard to say that they don't want to make the first offer in a negotiation – that they prefer to see what the other party has in mind before committing themselves with an initial proposal. This approach to negotiations overlooks the power of anchoring. Opening a negotiation with an aggressive first offer greatly increases the chances that the ultimate resolution will be drawn in the direction of the anchor you have set. To be an effective anchor, the number must be credible - the highest or lowest justifiable number you can propose. If you have enough information about the situation to formulate an offer that you believe will not be too high or too low, seriously consider making the initial offer in your negotiations so that you can take advantage of the anchoring effect.

When you are the recipient of the first offer, try to set an opposite anchor of your own to establish a range for the negotiation that is reasonably likely to lead to an agreement. You want to build a big enough dance floor to allow space to hit your target.

If the other party's initial offer is far beyond a reasonable range (which will undermine its anchoring effect), and you feel that you have enough information about the matter to recognize that it is just a tactic and not a serious offer of settlement, consider rejecting it out of hand and saying that you won't even dignify such an offer with a response. Then propose an adjournment and shift to other activities related to the subject of the negotiation, such as another round of pretrial discovery or discussion of other terms of the transaction. You can revisit the subject of the unreasonable offer later, making your own initial

proposal without reference to the other side's rejected first offer.

Similarly, commencing the negotiation with your proposal or offering to do the first draft creates momentum behind the terms you have laid on the table or the contract form you are presenting. (Be cautious about doing this if your client has done previous transactions with the other party using different terms, as you will likely damage your relationship and credibility in doing so.) If the other side has presented the first template or draft of the deal, consider responding with your own template so that the ultimate agreement is more likely to be an amalgamation of the two.

B. Asking Questions and Brainstorming

Information is power, and almost nothing is more useful in negotiations than asking questions. To find opportunities to expand the pie, to learn what is important to the other party, and to discover low-cost opportunities for your client to satisfy the other side's concerns, you must ask open-ended questions and listen to the answers. Be non-accusatory and positive, using phrases such as "help me understand why . . ." rather than "how can you possibly say . . .?"

Be flexible. When possible, try to involve both your client representative and the representatives for other side in a joint search for potential options for agreement by throwing out hypothetical possibilities ("what if . . .?"), without regard to feasibility or acceptability. Evaluating each option as it is presented dampens creativity, so brainstorm ideas before evaluating them. This approach, widely used in Collaborative Law, can help generate creative solutions that would not otherwise occur to the participants.

C. "Take it or Leave It"

When the other party gives you his proposal and tells you to "take it or leave it", refusing to negotiate further, recognize that this tactic is often a bluff. (Especially in litigation, there is almost always room for some negotiation, and parties who use this tactic generally end up accepting a deal different from the one they offered.) Alternatively, the other party may have given very little discretion to his representative, but might be willing to vary its stance for the right reasons. The other party might also believe that a tough-guy approach is the smartest way to approach the negotiation.

Several responses to this tactic are available to you. You can reply with two or three alternative ways of structuring a deal that would be acceptable to your client and adjourning the discussion to allow time for his client to consider the options. If you are involved in negotiating a settlement of a dispute or lawsuit, consider providing the other side with additional information or position papers that may lead them to rethink their position, or proposing that the parties table discussions pending completion of some procedural activity (taking a key deposition or exchanging expert reports, for example).

If you think the person on the other side is taking a position that perhaps his client would not endorse, consider changing the players at the table. You can offer to hold a four-way meeting involving the clients as well as their lawyers; propose a discussion between more senior executives of the parties; or suggest bringing in a third-party neutral (a mediator) to assist in the negotiations. Far too many attorneys use mediators as closers when they might be better employed as shepherds. A mediator can work with the parties early on in the negotiation of either a settlement or a new transaction, building what Collaborative Lawyers refer to as a "roadmap to resolution" that includes interest identification, information sharing, option development, and evaluation phases leading to the ultimate agreement. Mediators can also help parties improve their communications and overcome impasse.

You should also talk further with your client about what she wants to do if the other side truly will not change its position. If her BATNA is no better than the "take-it-or-leave-it" offer, and she needs to make a decision promptly, she may decide to accept it.

D. Request-then-Retreat

As noted above with respect to rule of reciprocity, a unilateral concession offered after an initial unreasonable request is rejected can generate a positive response even though the second concession or proposal would not have been accepted if offered alone. As you conduct negotiations, be on the lookout for its use against your client.

If you are on the receiving end of such an approach (which might be made entirely innocently by the other party, just testing the waters rather than being manipulative), try to assess the second offer or proposal on its own merits and not as compared against the earlier rejected or withdrawn offer. One way to do this is to have another member of the team who hasn't been exposed to the first proposal evaluate the second. Often such a fresh look will be more accurate in its assessment than the evaluation given by those who were exposed to and affected by the initial, rejected offer.

E. Nibbling

One tactic for obtaining additional concessions or deal points after the main issues have been settled is to bring them up at the end of the exchange, almost as afterthoughts. For example, after agreeing to the price of a product, the buyer might ask if the seller would throw in free shipping. After agreeing on the amount of a settlement payment, the defending party might ask

for a confidentiality agreement as part of its "usual terms". This tactic, known as "nibbling", employs the contrast principle and occasionally the rule of reciprocity. The additional concessions may seem of little importance compared to the main deal (the contrast principle), and if the other party is happy with the deal, he may be willing to throw in more value than had been initially agreed.

One way to respond to a nibble by the other side is to say that you would have to get additional authority to provide them with what they've requested (perhaps adding but that you might be able to provide them with something else instead that is of little cost to your client). You might also respond with your own nibble – telling the other side that if they want to reopen the negotiation, your client also has something to request of them.

F. Humanizing the Transaction

People want to do business with people they like. Smiles, friendliness, and respect for the other party go a long way in greasing the path to a deal. Building rapport with the other side before diving into the substance of the negotiations is very helpful; consider inviting your counterpart to lunch or coffee to get acquainted before scheduling your first business meeting or negotiation session. If possible, try to hold your first meeting in person, even if subsequent negotiations must be negotiated by telephone. Much communication is via body language and relying only the telephone or written messages can lead to misunderstanding and miscalculation.

Likewise, when you are representing a large corporation with billions in revenue, you can reframe the other side's perception of the entity as having limitless wealth by focusing on the fact that this particular contract is housed in one department of the company, led by your client representative, and pointing out that the settlement or price proposed is simply not attainable from the resources available to her.

G. Co-Negotiating; Good Cop - Bad Cop

Having a co-negotiator enables you to divide substantive responsibility for different aspects of the negotiation and can change the dynamic of a negotiation by introducing new perspectives and approaches into the discussion. Negotiations can be conducted from the outset with a team on both sides, or you can commence a negotiation as a one-on-one discussion with the attorney for the other party, and later expand it into a four-way with the two party representatives or escalate it upward to senior management for both sides. If the tactic you initially adopt isn't working well, consider shaking things up by changing the players at the table.

The classic good cop - bad cop tactic, taken from police interrogations, seeks to induce cooperation from the other party by exploiting the contrast principle: the bad cop is unpleasant, makes unreasonable proposals, and delivers bad news, while the good cop is kind and empathetic, and delivers proposals that seem much more reasonable in contrast to those of the bad cop. This tactic is easily detected and can be countered by identifying it as such and focusing on the unreasonable behavior of the bad cop, transforming the good cop from savior into confederate.

If the other side is engaged in name-calling, shouting, or other rude behavior, the best approach for dealing with such displays of anger is to identify the tactic, label it, and then negotiate the process going forward: "I get that you're angry, but that won't help us resolve this issue - either we need to move past your anger and talk about solutions, or we need to adjourn and resume this discussion later."

H. "It's a Matter of Principle!"

When you hear this line, ask the other side to explain the principle to which he is referring. "How are you defining what constitutes the principled thing to do?" Doing so helps you elicit information about the other side's interests, which can open doors to a range of acceptable or at least plausible solutions.

I. Publicity and Acceptance of Responsibility

Especially in a settlement negotiation involving a dispute, one or both parties may fear publicity. A service provider, for example, does not want bad publicity about an unhappy customer. An actual or implied threat of publicity can be a powerful incentive for a party to settle out of court, and similarly a promise of confidentiality can be valuable consideration for settlement.

If you are representing a party fearful of bad publicity, consider adding the public relations department or an independent PR agency to your negotiations team so that they can develop a strategy for handling press inquiries and framing the dispute for the public. Doing so will minimize the coercive effect of the fear of bad publicity. Also consider whether your client should accept responsibility for the problem rather than denying and disclaiming liability. Studies have shown that an apology coupled with a sincere effort to rectify the situation and prevent its recurrence can go a long way towards settling a claim and putting the best possible public face on a bad situation.

J. Allowing the Negotiations Dance

A party whose first offer is immediately accepted does not feel triumphant, but stupid. She feels that she left money on the table by making too generous a proposal, and will not be happy or satisfied with the deal. It is therefore important to allow the

"negotiations dance" to play out over several moves: the parties' initial offers; their second offers; and then the offers and counteroffers that arrive at closure. Typically a deal is struck at about the midpoint between the first two reasonable offers.

Even if your client is happy to accept the other side's first proposal, consider making a counter-offer and lagging a bit before settling. You may end up accepting the other party's first offer or something close to it, but letting her feel that she struck a good deal with your client goes a long way towards mutual satisfaction.

K. Staying in Touch

Do not give up when a negotiation fails to produce an agreement, as there might be a possibility of agreement down the road. If a mediation or settlement discussion ends in impasse, stay in touch with the other side and the mediator (if any) and remain friendly and approachable. You can't predict what might happen that will change the parties' perceptions of what is reasonable, and it behooves you to keep the door open to an amicable resolution.

L. Closing and Post-Closing

After striking the deal, make an agreement on who will draft what by when, and set deadlines if doing so is in your client's interest. Recognize that delay may benefit one of the parties, and it could be your client. If your client is not interested in delay, volunteer to draft the necessary paperwork so that you can press for an early closing.

After the contract is signed, sealed and delivered, some account managers put it in a drawer and rarely refer to it unless trouble arises. Such practices are almost guaranteed to cause trouble. To get your client on the right track after closing, consider preparing a short bullet-point memo for the incoming performance team, summarizing the deal with the parties' expectations and purposes in making it, and highlighting key clauses in the contract.

If you've used an integrative approach to negotiating a transaction with a customer, vendor, or other party with whom your client wants to maintain a positive relationship, consider speaking with your counterpart at the other company after the closing about using the Collaborative Law process to negotiate an amicable resolution of any dispute that may later arise. Introducing the Collaborative Law option early, before either party has asserted any claims, increases the chance that it will be viewed as an attractive option should a dispute arise, and it vastly increases the chances of an amicable, cost-effective settlement of any such future disagreement.

IX. CLIENT PREPARATION AND MANAGEMENT

Sometimes the hardest part of a negotiation is managing and preparing your client for the negotiation. Be aware that the anchors you set may also affect your client's expectations, and make sure that you are setting appropriate anchors in your dealings with your client.

You may need to negotiate with your own client about the negotiation, and pull the client "out of love" with the other party. He may see nothing but good things coming from the proposed transaction. Your job is to provide a reality and risk check, making sure that the client knows what he is doing, and that he fully understands the risks and benefits of the proposed deal. Don't allow your client to negotiate the business terms and then tell you to "paper the deal". Sit down with him in advance to go over the contract template and discuss the reasons behind the terms it includes.

Trust and good client communications are essential to preparing and managing both the client and his expectations. Learn all you can about his business operations and objectives, be an active listener, delve into the interests underlying his positions so that you can reframe his objectives in constructive ways, and try to avoid inadvertently setting expectations that will skew and harden his thinking.

It sometimes happens, though, that your client is unwilling to accept what you think is a very good deal that is in his best interest. What then? As Kevin Fuller demonstrated in an excellent presentation at the 2014 Collaborative Law Course, sometimes when you lead your horse to water and he won't drink, it is for a good reason! For example, he may think the water isn't good, or be skittish, or reject who's holding the water bucket.

By analogy, your client may have decided that the deal isn't good enough, or be anxious about the situation, or dislike the other side's representative. Focus your client's attention on his BATNA and WATNA so that he can see how this deal stacks up against his alternatives. Give him time to think or consult with others. Reframe the offer or work with a mediator to help your client see offers without the taint associated with the other side's representative. Bear in mind that your client may be prudent to decline – perhaps business developments have made the deal less attractive than you thought.

X. SOME ETHICAL CONSIDERATIONS

The Texas Disciplinary Rules of Professional Conduct contain several rules and comments pertinent to negotiations. Of course, other legal standards, such as the law regarding deceptive transactions, fraud, and fiduciary duty, may also apply in a particular situation to you or to your client. Those standards are beyond the scope of this paper.

A. False Statements and Failures to Disclose

Rule 4.01 provides:

> "In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client."

Lawyers may not violate this rule either directly or indirectly (by knowingly incorporating or adopting another person's false statement of material fact or law). What is a "material fact" depends on the circumstances, but Comment 1 to the rule states that estimates of price or value and a party's supposed intentions regarding what he views as an acceptable settlement of a claim are not "material facts", nor it is necessary to disclose that a transaction is being undertaken on behalf of an undisclosed principal.

There is no general duty to disclose facts absent a fiduciary relationship, but lawyers do have a duty to take action to avoid becoming a vehicle for crime or fraud by a client. If confidential information known to the lawyer clearly establishes that the "client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud" and if he learns afterward that his services have been used by the client to perpetrate a crime or fraud, he "shall make reasonable efforts under the circumstances to persuade the client to take corrective action." Rule 1.02(c) and (d). Per Comment 3 to Rule 4.01, "a lawyer must disclose a material fact to a third party if the lawyer knows that the client is perpetrating a crime or fraud and the lawyer knows that disclosure is necessary to prevent the lawyer from beginning a party to that crime or fraud."

B. The "No Contact Rule"

Rule 4.02(a) provides that: "In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." This rule (known as the "No Contact Rule") not only prohibits you from contacting the other party directly about the subject of the negotiations without her lawyer's consent, but also from causing or encouraging such a communication "because such communications in substance are between the lawyer and the represented person . . ." Comment 1 to Rule 4.02.

With respect to organizational clients such as corporations, Comment 4 to Rule 4.02 states that a lawyer may not communicate about the matter "with persons having a managerial responsibility on behalf of the organization that relates to the subject of the representation and with those persons presently employed by such organization or entity whose act or omission may make the organization or entity vicariously liable for the matter at issue" unless the other lawyer consents. The rule doesn't prohibit contact with former employees or with current employees "whose conduct is not a matter at issue but who might possess knowledge concerning the matter at issue", *id.*, but disagreements may arise about whether a particular employee falls into that category. For safety's sake, you may want to avoid communications with any current manager or employee of the entity without the consent of its attorney.

What if your client tells you that she would like to have a conference with her counterpart about the matter at issue? The rule does not require you to discourage her from doing so, but neither should you encourage the contact, and certainly you should not sit down and develop her talking points for communicating with the other party. You may counsel her about the pros and cons of such a communication and educate her about the fact and issues involved, including positions, offers, and negotiating strategy, so that she can choose her words wisely in discussing the matter with her counterpart.

If for some reason you think it is important for you or another lawyer for your client to speak directly to the other party, ask for the other attorney's consent and document it. By doing so you will have complied with the requirements of Rule 4.02.

C. Imprudent Settlements and Breaches of Duties by Constituents

What are your duties and options if the executive with whom you are working on the subject of the negotiation tells you to accept a settlement that you don't think is very good? Can you decline to follow the instruction?

Rule 1.02(a)(2) requires lawyers to abide by a client's decision on "whether to accept an offer of settlement of a matter, except where authorized by law." Comment 6 to Rule 1.12 states that "[w]hen constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones

entailing serious risk, are not as such in the lawyer's province."

Although the decision to settle belongs to the client, it would certainly be appropriate for in-house counsel concerned about the wisdom of a settlement to escalate the matter to her leadership so that a higher-level person within the corporation can take a second look at the proposed deal and perhaps come to a different conclusion. Such an approach is entirely consistent with the duties imposed by lawyers to follow their clients' instructions on settlement.

Similarly, should you learn with respect to a matter within the scope of your responsibility that "an officer, employee or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization" and that is "likely to result in substantial injury to the organization", you must take action within the organization to resolve the violation. Rule 1.12 (b) and (c). This obligation is in addition to any obligation you might have to third parties under other rules. See Comment 8 to Rule 1.12. At all times, be aware of Rule 1.12(a)'s admonition that "[a] lawyer employed or retained by an organization represents the entity." Thus, although on a day to day basis you receive direction from executives, officers, and managers of the corporation, your duty is not to them but to the corporation.

XI. FINAL THOUGHTS

Negotiation is a life skill that improves with practice and study, and there are a myriad of ways to do both. The list of resources attached to this article include many excellent books and resources on the subject and on the related topic of the psychological and neurological factors that influence human perceptions and decisions. Consider taking a course or seminar in negotiations - they are offered by many private providers as well as by colleges and universities. Training in Collaborative Law is available through the Global Collaborative Law Council (www.collaborativelaw.us). Joining a negotiations study group can provide a forum for discussing and analyzing books on the subject, sharing tips, and conducting role-play exercises. Talk with negotiators whom you admire about how they handle negotiations. Look for opportunities to practice your negotiating skills in your personal business dealings. Above all, remember the "Satisfaction Triangle" and always negotiate in a way that is fair and respectful of all participants and that meets your own high ethical standards as well as those of the Texas Disciplinary Rules of Professional Conduct.

REFERENCES AND RESOURCES

Robert B. Cialdini, Influence: The Power of Persuasion (5th ed., 2009)

Herb Coen, Negotiate This! (2003)

Roger Fisher, William Ury & Bruce Patton, Getting to Yes (2nd ed., 1991)

Roger Fisher and Daniel Shapiro, Beyond Reason: Using Emotions as You Negotiate (2005)

Seth Freeman, "The Art of Negotiating the Best Deal" (recorded course, The Teaching Company, 2014)

James C. Freund, Anatomy of a Merger, Strategies and Techniquest for Neogiating Corporate Acquisitions (1975)

Mary Greenwood, How to Negotiate Like a Pro (2006)

David J. Lieberman, Make Peace with Anyone (2002)

Martin E. Latz, Gain the Edge! Negotiating to Get What You Want (2004)

David A. Lax and James K. Sebelius, 3D Negotiation (2006)

Richard Luecke, Negotiation, Harvard Business School Press (2003)

Melissa L. Nelken, Negotiation: Theory and Practice (2nd ed., 2007)

Lisa Schirch & David Campt, The Little Book of Dialogue for Difficult Subjects (2007)

Andrea Kupfer Schneider and Christopher Honeyman (editors), The Negotiator's Fieldbook (2006)

L. Wayne Scott, "The Ethics of Conflict – Hints for the Peaceful Resolution of Disputes" (2003)

Lawrence Susskind, Good for You - Great for Me: Finding the Trading Zone and Winning at Win-Win Negotiation (2014)

William Ury, The Power of a Positive No (2007)

Charles B. Wiggins and Randolph Lowry, Negotiation and Settlement Advocacy: A Book of Readings (2nd ed., 2005)

APPENDIX 2

ETHICS OF CONTRACT DRAFTING AND NEGOTIATION

Presented by:
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Attorney at Law

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State Bar of Texas
16th ANNUAL
ADVANCED BUSINESS LAW
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Dallas

CHAPTER 20

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EDUCATION
University of Texas, Austin, B.A., 1972
St. Mary's University, San Antonio, J.D., December 1976

BAR ADMISSIONS
Texas1977; California 1978, Colorado 2003
Various US District Courts and Circuit Courts of Appeal

EMPLOYMENT
Assistant General Counsel, State Bar of Texas: 1978-1980
Robinson, Felts, Starnes, Angenend & Mashburn; Civil Trial Attorney, 1980-1987
Wood, Lucksinger & Epstein; Civil Trial Attorney, 1987-1989
1989-2016 Hill, Ducloux, Carnes & de la Garza
2016 - Attorney at Law, private practice, and Director of Education, Ethics and Compliance, Affinipay-LawPay

PROFESSIONAL ACTIVITIES
President, Travis County Bar Association (now, Austin Bar Association); 1997-1998; every officer position 92-97;
Chair, Texas Board of Legal Specialization, 1997-1998
Board Certified: Civil Trial Law, 1984; Civil Appellate Law, l987
Chair, Texas Bar Foundation 2005-2006; Secretary-Treasurer (04-05); Trustee 2004-2008
Chair, Texas Center for Legal Ethics and Professionalism: 2004-06, Trustee 2003-07
Chair, College of the State Bar of Texas; 1992-94; Vice-Chair 1990-92; Director, 1988-98,
Chair, State Bar of Texas Annual Meeting (Texas Bar Convention), 2001
Chair, United States Fifth Circuit Judicial Conference, Austin 2004
President, St. Mary's Law School Alumni Association, 2006-07, Trustee, 2001-2008.

Associate, American Board of Trial Advocates, 1999- pres.
Director, State Bar of Texas; District 9, 1998-2001; Executive Committee 1999-2001
(Outstanding 3rd Year Director Award - 2001)
Director, Austin Lawyers Care (now: Volunteer Legal Services of Central Texas), 86-89
Director, Austin Young Lawyers Association, 1984-1986
Editor, Travis County Practice Handbook, 1984, 1986
Trustee; St Mary=s University, San Antonio, Texas 2007-08
Member and Founder ABar & Grill Singers,@ Lawyer Group performing musical parody across the country, and raising (through Jan 2008) $400,000 for *pro bono* causes.
Member, Supreme Court Advisory Committee on Court-Annexed Mediation, 1996-1998
Distinguished Mediator, Texas Mediator Credentialing Association, 2010

PROFESSIONAL HONORS
Lola Wright Foundation Award for Promotion of Legal Ethics, 2013 (Statewide Award)
Gene Cavin Award for Excellence in CLE, State Bar of Texas, 2011 (Statewide Award)
Annual Professionalism Award, College of the State Bar of Texas, 2002 (Statewide Award)
W. Frank Newton Award (Statewide Annual Pro Bono Award given by State Bar of Texas), 2000
Outstanding Young Lawyer Award, 1987 (Awarded by Austin Young Lawyers Association)
Presidential Citation; State Bar of Texas, 2001 and 2006
Pro Bono Award, Volunteer Legal Services of Central Texas, 1991, 1993, 1997, 1999
Professionalism Award, Austin Bar Association, 2007
Outstanding Mentor of the Year Award, Austin Young Lawyers Association, 2007
SBOT- "Stars of the Bar" Award for Best Article Series *"Entre Nous"*, 2003

MILITARY SERVICE U.S. Army; 1st Cavalry Division, 1972-1974 (Awarded
Army Commendation Medal, 1974)

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Civil Litigation

Thomas H. Watkins

PARTNER

Tom Watkins has practiced full-time litigation for over 50 years. He was invited to be a member of the American College of Trial Lawyers in October 1990 and the American Board of Trial Advocates. Over the years, Tom has specialized in high-profile, bet-the-company litigation in healthcare, patent, oil and gas, environmental, legal malpractice and general commercial litigation.

Tom's experience on behalf of industry clients includes:

- Defended a Canadian company in a patent infringement lawsuit filed by a Fortune 100 company seeking over $5 million in damages/injunction for control of the telecommunications splicing market. Case tried to a jury in federal court in Austin, Texas, returning a favorable verdict invalidating two of Plaintiff's patents due to obviousness and anticipation and invalidated several claims of another patent for indefiniteness.
- Represented owner of next-generation technology company relating to the clarity of flat-panel televisions in a lawsuit against a Japanese multinational corporation concerning compliance with a license agreement between the two. The case was filed in federal court in Austin, Texas.

Tom has defended numerous legal malpractice cases and serves as an expert witness with regard to the Texas Disciplinary Rules of Professional Conduct in numerous cases.

A frequent speaker on industry issues and ethics and conflicts regarding the Texas Disciplinary Rules of Professional Conduct, Tom has lectured for the State Bar of Texas, the American Bar Association, UT Law CLE, CLE International, National Business Institute, Travis County Bar Association, Practicing Law Institute, University of Houston Law Center, Water Law Institute, Williamson County Bar, Austin Bar, Corpus Christi Bar, Texas Association of Counties and the New Mexico Bar.

Representative Experience

- Defended legal malpractice/breach of fiduciary duty case in a $30 million claim and forfeiture of a seven-figure contingent attorneys' fee. Settled the case with a payment of funds to client for his portion of fee for underlying litigation.
- Defended a California-based start up company against patent infringement and misappropriation of trade secret claims relating to CMOS PA semiconductor technology used in cell phones. The case was successfully tried to a jury in federal court in Austin, Texas.
- Defended the Texas State Board of Insurance in a $22 million attorneys' fee claim for wrongful prosecution of individuals in an insurance company takedown resulting in take-nothing judgment against TDI.

- Defended a German company in a patent infringement lawsuit filed against it by a university and dominant company in the field of rapid prototyping systems using laser technology.
- Represented a municipality in defending the pro environmental Save Our Springs ordinance against a high profile, media-driven constitutional attack by local developers; statute ultimately upheld by the Texas Supreme Court.
- Represented 1600 class members in a suit against a developer and lender; obtained settlement approved by the District Court, the Bankruptcy Court reorganization and a class action settlement approval.
- Defended client's $10 million ownership interest involving adverse claim to stock ownership in a closely-held corporation among in-fighting shareholders; successful in defending through summary judgment proceeding in federal court; Upheld by appellate courts.

Awards & Recognitions

- AV® Preeminent ™ Peer Review Rated
- AV® Preeminent ™ and BV® Distinguished™ are certification marks of Reed Elsevier Properties Inc., used in accordance with the Martindale-Hubbell certification procedures, standards and policies.
- Recognized by the Texas Bar Foundation and recipient of its Outstanding 50-year Lawyer Award, July 2016
- Recognized in *Best Lawyers in America*, Bet-the-Company Litigation, Commercial Litigation, Litigation – Environmental and Patent Litigation, 1989
- Recognized as "Super Lawyer," Business Litigation, named by Law & Politics Media and published in *Texas Monthly*, 2010
- Professionalism Award from Texas Center for Legal Ethics, 2003
- State Bar/Texas Gene Cavin Award for Excellence in Continuing Legal Education, May 2003
- Distinguished Lawyer Award for 2000 from the Travis County Bar Association, May 2000
- State/Bar/Texas Presidential Citation for leadership in improving SBOT grievance system, 1999
- Lola Wright Foundation Award in memory of Coleman Gay for outstanding public service in the enhancement of legal ethics in Texas, 1995

Professional Associations & Memberships

- American Bar Association
- American Board of Trial Advocates
- American College of Trial Lawyers, 1990-Present
- Association of Trial Lawyers of America

- Supreme Court Task Force on Texas Disciplinary Rules of Professional Conduct, Chairman (1992 – 1995)
- State Bar of Texas, Board of Disciplinary Appeals, Chairman, 1992-1994; District 9 Grievance Committee, Chairman, 1986-1989; Board of Directors, 1981-1983; Professional Ethics Committee, Former Member; CLE Committee, Chairman
- College of the State Bar of Texas
- Texas Trial Lawyers Association
- Texas Commission for Lawyer Discipline, Member, 1995-1999
- Travis County Bar Association, President, 1979
- Austin Junior Bar Association, President, 1972

Civic Involvement

- First United Methodist Church of Austin, Former Chairman of Board/Directors, Current Endowment Board Chair
- March of Dimes, Chairman of State Advocacy and Government
- National Association of Mental Health, former Director, Vice President, and President
- Texas Association of Mental Health, former Director, Treasurer, and President
- Travis County Mental Health Association, former Director and Vice President

Admissions

- Attorney at Law, Texas, 1964
- Texas Board of Legal Specialization, Civil Trial Law, Board Certified
- United States Supreme Court
- United States Court of Appeals, Federal Circuit
- United States Court of Appeals, Fifth Circuit (1986)
- United States Tax Court
- United States District Court for the Western District of Texas (1965)
- United States District Court for the Southern District of Texas (1971)
- United States District Court for the Eastern District of Texas
- United States District Court for the Northern District of Texas

Education

- Bachelor of Laws, The University of Texas School of Law
  Phi Delta Phi (1964)
- Bachelor of Arts in Government, University of Oklahoma (1962)

Publications & Presentations

Mr. Watkins has been privileged to be on the faculty for many legal education programs including the State Bar of Texas, the American Bar Association, UT Law CLE, CLE International, National Business Institute, Travis County Bar Association, Practicing Law Institute, University of Houston Law Center, Water Law Institute, Williamson County Bar, Austin Bar, Corpus Christi Bar, Texas Association of Counties, the New Mexico Bar and private industry. He has authored the following articles:

- *Too Many Entities, Too Many Conflicts;* 38th Annual Advanced Real Estate Law Seminar, July 7, 2016; Legal Ethics/Texas' Rules of Professional Conduct, March 15, 2016; CLE International Eminent Domain Conference, October 1, 2015; UT Advanced Texas Administrative Law Seminar August 31, 2015; 2nd Mergers & Acquisitions/Acquisitions & Disposals Conference, April, 2015
- *Direct and Cross Examination*; Corpus Christi Bar Association Advanced Civil Trial Law Seminar; March, 2015
- *Real World Ethics for Consumer and Commercial Lawyers*; 10th Annual Advanced Consumer & Commercial Law Course, September, 2014
- *Ethics In Negotiation;* Advanced Oil, Gas & Energy Resources Law, October, 2013
- *Ethics: Issues for Eminent Domain Professionals;* CLE International, June, 2013, Article
- *Who is the Client?;* 26th Annual Technology Law Conference, May, 2013, The University of Texas at Austin School of Law
- *Ethics Roundtable: Navigating the Challenges;* 25th Annual Health Law, April, 2013, The University of Texas at Austin School of Law
- *How to Practice Law Without Selling Your Soul;* Texas State Bar College Summer School 2013;
- *Representing Multiple Parties;* The Changing Face of Water Rights seminar, February 2013
- *Ethics Jeopardy;* Federal Law Conference, October, 2011, Hidalgo County Bar Association
- *Knowing Who's Your Client and Nurturing That Relationship*, In House Counsel 101, July, 2011, State Bar of Texas
- *Fee Agreements: Sandbags Against the Tide;* 19th Annual Conference on State and Federal Appeals; June, 2009; The University of Texas at Austin School of Law
- *Ethical Considerations With Regard to Technology;* Tech Law SA; Practical Use of Technology in Litigation, July 2008, Thompson West
- *Avoiding Malpractice at the Speed of Light: Are your Email Communications Protected and Secure?,* Texas Bar Journal, 2005, Article
- *Balancing the New Texas Ethics Rules with Federal Ethics Requirements*, 23rd Annual Advanced Business Bankruptcy Course, May 2005
- *Malpractice Issues in the Technology Sector*, 17th Annual Computer & Technology Law Institute Conference *at The University of Texas in Austin, 2004, Speech*
- *A Rose Is a Rose Is a Rose - Or Is It?* Fiduciary and DTPA Claims Against Attorneys, St. Mary's Law Journal, Volume 35 Number 4, 2004, Article

TABLE OF CONTENTS

ETHICS OF CONTRACT DRAFTING AND NEGOTIATION

By Claude E. Ducloux,
incorporating (with permission) portions of material prepared by
Professor Scott J. Burnham, Ret., former Curley Professor of Law,
Gonzaga University School of Law, and published in
ABA Business Law Today, December, 2012

Any time a lawyer negotiates or drafts a contract there are at least six ethical concepts in play which apply to your duties to the client under the Texas Disciplinary Rules of Professional Conduct. Those include the following:

1. Competence – knowing what you are doing. That is covered by TDRPC 1.01, ABA Model Rule 6-101;
2. Conflicts of Interest – covered by TDRPC 1.06 and ABA Model Rule DR5-105;
3. Whether or not the contract is connected with business with the client. That is covered by TDRPC 1.08(b) and ABA DR5-104;
4. Your duty to engage in truth in statements to others under TDRPC 4.01 and ABA Rule 4.1;
5. Additional duties arise if you are dealing with unrepresented persons under TDRPC 4.03 and ABA DR7-104(A)(2); and
6. Your duty to refrain from conduct involving dishonesty, fraud, deceit or misrepresentation, TDRPC 8.04 and ABA DR1-102.

ANALYSIS OF CLAIMS

Whenever the Court is required to make an analysis of the conduct of the parties when it comes to contract negotiation, the key to that is an examination of the status of the case when the documents are received. First, we must examine the expectations of the sending party as follows:

A. Is it clearly a "rough draft" for review?
B. Is it intended to be "take it or leave it"?
C. Did it come with representations (for example, "This is the State Bar form I used.")?
D. Did the sender indicate that the sender has no authority to make any changes without client approval?
E. Who was responsible for sending the original draft and what representations where made at that time?

STRATEGIES

Anytime there is a complex negotiation there are several strategies that an attorney can easily employ if he or she is not sure that the document has been drafted properly, or whether or not changes had been made.

1. Ask for a representation as to changes in the document under discussion. Lawyers are under a duty to tell you in good faith whether or not there have been any modifications.
2. Once you receive a representation, send a confirming communication of that representation that removes any doubt of what you were told.
3. Make your intentions clear on what the document should include.

All of these strategies, however, are undergirded with the duty not to be negligent. If you send a party a 13-page document and it comes back as an 11-page document with the representation that no changes have been made, you are probably negligent in not noticing those changes based upon the standard that a typical attorney would notice that the document had been altered.

INCORRECT RECITATIONS OF LAW

Occasionally, a lawyer will unwittingly cite incorrect laws. For example, if the lawyer says, you must bring all tort claims in [Texas] within 4 years after accrual, and the actual statute limits such claims to 2 years, does the receiving lawyer have the duty to notify of the incorrect recitation of law, or simply enjoy the additional benefits of what clearly appears to be a drafting error.

The answer may be, whether the error involves a "material term," a circumstance which we will discuss hereinafter in Hypothetical 4 below. As we will discuss, if a material term is not correct, "the deal" is not "the deal" the parties intended to enter, and the court will have power to reform it to include the provision the party intended.

ATTORNEY LIABILITY AND EXEMPTIONS

Cantey Hanger, LLP v. Byrd, 467 S.W.3d 467 (Tex. 2015). Fairly recently the Texas Supreme Court addressed the liabilities and immunities of a firm involved in litigation. In this case, the Cantey Hanger firm is handling a big divorce for the Wife. It settles and the Wife is awarded three (3) aircraft (together with all taxes, liens and assessments). Months later Cantey drafts transfer document on one aircraft to a third party directly from Husband's Corporation, so title never goes first to the Wife (represented by Cantey) which has the effect of transferring the tax liability from Wife (their client) to Husband's Corporation in contravention of the Decree. Byrd sues Cantey Hanger. The Texas Supreme Court gave the attorney immunity in a 5 to 4 decision, in essence saying that Cantey owes no duty to the opposing party, even for fraud. Part of the Opinion states:

"Fraud is not an exception to attorney immunity; rather the defense does not extend to fraudulent conduct that is outside the scope of the attorney's legal representation of his client, just as it does not extend to the other wrongful conduct outside the scope of representation."

Thus, so long as an attorney is in the scope of his duties when fraud is committed he's immune. The four members of the Supreme Court who dissented insisted that the majority…"overlooks an important element of the form of attorney immunity at issue in this case - - that the attorney's conduct [to be immune] must have occurred in litigation - - and applies the attorney immunity in a manner that results in much broader, more expansive liability protection." And, the dissent continues: "The Court holds that attorney immunity shields Cantey Hanger from liability arising from its alleged drafting of the Bill of Sale more than year after the entry of the Divorce Decree." . . . "Instead of limiting this form of attorney immunity to the context of litigation, the Courts' cursory analysis implicitly adopts a test in which attorneys are shielded from civil liability to non-clients if their conduct merely occurs in the scope of client representation or in the discharge of duties to the client."

Many professional responsibility attorneys think that the Supreme Court will be revisiting this decision when appropriate facts present themselves to narrow the scope of Cantey Hanger.

NEGOTIATING HONESTLY

ABA Model Rule 4.1, 2 states that the prohibition against making false statements of material fact or laws intended to cover only representations of fact and not statements of opinion or those that merely reflect the speaker's state of mind. Whether statements should be considered one of fact as opposed to opinion depends on the circumstances. The question is how do you distinguish fact from opinion? The difference is if something is expected to be a representation of fact versus simply puffery. If the lawyer, for example, says:

"I have handled 10 of these cases and I have won every case,…"

Such a statement is clearly is intended to be understood as a statement of fact.

However, if the attorney says,

"This is the worst case of fraud I've ever seen,"

a statement like that is likely to be considered simply puffing or negotiation.

Attached as appendices A and C are State Bar of California Formal Opinion 2015-194 discussing the ethical limitations on statements the attorney may make to third parties that may be considered "puffing" or posturing, and American Bar Association Formal Opinion 06-439 dated April 12, 2006, which discusses in detail the lawyer's obligation for truthfulness and negotiation.

This article looks at this situation and a number of other situations arising during the process of negotiating a draft agreement that raise ethical issues. While the Rules of Professional Conduct are an initial resource in attempting to resolve the questions, it can be a challenge to apply the Rules to the tasks of the transactional lawyer. The principal Rules relevant to drafting are 1.2 and 4.1, which state in relevant part:

1.2 A lawyer shall not counsel or assist a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent . . . .

and

4.1 In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

In determining whether conduct is ethical, it may be helpful to examine:

- Whether there is a duty to read a draft.
- Whether an affirmative misrepresentation is made.
- Whether there is a duty to disclose.
- What the reasonable expectations of the parties are.

FOUR HYPOTHETICAL SITUATIONS

1. The attorney receiving the draft alters it after receipt.

An employer discharged an employee, offering the employee $38,000 if he agreed, in the words of the release he was tendered, to release the employer "from all claims." The employee thought it over and later agreed to sign the release, which he returned to the employer. After the release was signed, the employee sued the employer for age discrimination and breach of contract. When the employer raised the release as a defense, the employee said, "Ha ha," and pointed to the language of the release, which stated that the employee released the employer "from all claims except as to claims of age discrimination and breach of contract." When the employer protested that it had been tricked, the employee acknowledged that he had changed the language of the document, but claimed that because a party is bound by the agreement it signs, it fails to read the agreement at its peril.

The facts are from the case of *Hand v. Dayton-Hudson*, 775 F.2d 757 (6th Cir. 1985). Did Hand act unethically in failing to inform Dayton-Hudson that he had made the changes? On Dayton-Hudson's motion for summary judgment, the trial court found that because Dayton-Hudson's signature had been induced by fraud, the agreement would be reformed to conform to its understanding. The appellate court affirmed. It probably did not help his case that Hand, the perpetrator of the fraud, had been employed by Dayton-Hudson as an attorney, even if he was not acting as an attorney in the matter in issue.

The decision is undoubtedly correct. By returning the document while saying it was acceptable, Hand was effectively saying that the document *as prepared by Dayton-Hudson* was acceptable. Although Rule 4.1 prohibits only "mak[ing] a false statement of material fact," and Hand's lapse was his non-disclosure, here non-disclosure seems the equivalent of an affirmative misrepresentation. In these circumstances, Dayton-Hudson's duty to read should be excused since the employer would reasonably expect that Hand was returning the document it had tendered to him.

As a general rule, when one attorney makes changes to the other's draft, the ethical practice is to inform the other attorney of those changes.

BUT WHAT IF THE CHANGES ARE MADE BEFORE THE DRAFT IS PRESENTED TO THE OTHER ATTORNEY; THAT IS, THEY ARE MADE TO A FORM CONTRACT?

2. The party preparing the draft alters a standard form contract.

Assume that the attorneys are negotiating a contract for the sale of real property, and in the jurisdiction, it is customary for the seller to pay certain closing costs. The seller's attorney tenders to the buyer's attorney a draft contract in which the seller's attorney has altered the customary language to provide that these costs are borne by the buyer rather than by the seller. The buyer's attorney reads the variable terms, but not the boilerplate terms, and does not notice this change before her client signs the agreement. At closing, the change becomes apparent.

Did the seller's attorney act unethically in altering the customary terms without informing the buyer's attorney?

Even though this is a sharp practice on the part of the seller's attorney, I don't think an attorney has a duty to disclose the fact that changes were made to the customary terms. No affirmative misrepresentation was made, and the buyer's attorney may not be justified in assuming the draft contract contains the customary terms. The situation might be different if the form was presented as a model form prepared, for example, by the ABA or a state bar. In that case, there may be a reasonable expectation that the boilerplate terms are those set forth in the model form. But in other cases, I think the attorney to whom the contract was tendered takes the risk that it does not contain the expected terms. That attorney should either read it, put it through the "compare" feature of a word processor or stand-alone program that will compare it to standardized terms, or ask the other lawyer to make an affirmative statement about whether any changes were made to the customary terms.

WHAT IF CHANGES ARE DISCLOSED, BUT NOT THE CONSEQUENCES OF THOSE CHANGES?

3. The attorney requesting a change fails to disclose ripple effects.

The first attorney asks for a change in a term, which the second attorney agrees to, but the first attorney does not inform the second attorney that the change in that term affects a term in another part of the agreement that is not favorable to the party represented by the second attorney. An example might be a choice of law provision, where the law in the chosen jurisdiction affects another part of the agreement. Does the first attorney have a duty to inform the second attorney that the change in language may affect another part of the agreement?

The State Bar of California in Formal Opinion No. 2013-189, seems to indicate that, absent fraud or deceit, there is no such duty (See attached Appendix B). One attorney does not have to educate another as to the legal effect of a contract provision, as long as no affirmative misrepresentation is made. In fact, the lawyer's duty of competent representation in Rule 1.1 would require the recipient to recognize the ripple effects.

These problems are exacerbated when the contract is drafted not through an exchange of drafts over time, but in real time, using a program such as Google Docs. The first attorney can suggest a change by typing it in, and the other attorney can assent or not. The alteration itself is clearly disclosed, but not the effect that the change in paragraph 7.2 has on paragraph 14.4. This is a significant drawback to real-time drafting, for such repercussions can best be discovered by reviewing the document in its entirety. Alas, the pace of modern business may not grant us this luxury. An attorney must therefore know the transaction well, including knowledge of how all the parts fit together.

FINALLY, WHAT IF AN AGREED TERM IS OMITTED ALTOGETHER?

4. The final contract omits a term the parties agreed to.

The parties agree to the terms of an agreement. One attorney reduces the agreement to writing and both parties review and sign it. Later, the first attorney realizes that an important term has been omitted. The second attorney acknowledges this "scrivener's error," but refuses to modify the writing, which purports to contain the final and complete agreement of the parties. Should the second attorney agree to reform the contract to include the missing provision?

The Restatement (Second) of Contracts says the answer is "yes." Section 155 provides:

Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, …

Calamari and Perillo state the rule more succinctly in § 9.31 of their Contracts hornbook: "Contracts are not reformed for mistake; records are." Note that this situation must be distinguished from the situation in which the parol evidence rule applies. The parol evidence rule provides that once the parties have adopted a writing that they intend to contain their final and complete agreement, then evidence may not be offered of terms that supplement or contradict it. The distinction is in the intent of the parties. In the case governed by the **parol evidence rule**, the party opposing inclusion of the term claims that while the parties may have discussed the term during negotiations, they did not intend it to be a part of their final agreement; in the **mistake** case, the party admits that they agreed to it and intended to include it in the writing, but inadvertently omitted it.

ABA Informal Opinion 86-1518 (Appendix D) addressed this issue, concluding that under Rules 1.2 and 4.1, an attorney has a duty to disclose the omission of the term to the other attorney and to agree to reform the writing. An attorney might maintain that he informed his client of the omission, and while the attorney would of course be willing to disclose it, he had a duty to zealously represent his client, who insisted on taking advantage of the situation. The opinion concluded that because the client had already agreed to include the term in the contract, the attorney need not even consult the client before agreeing to reform the contract. Curiously, the Maryland State Bar Association Committee on Ethics addressed the same issue in Ethics Docket 89-44 and, without mentioning the ABA opinion, reached the contrary conclusion. However, the Maryland opinion did warn the attorney to explain to the client, pursuant to Rule 1.4(b), information necessary to permit the client to make an informed decision, including the fact that the other party may bring a reformation action, the likelihood of success of such an action, and the cost of defending it.

CONCLUSION

The attorney's duty to read the draft contract is excused when there is fraud or mistake. Nevertheless, as a matter of preventive law, the attorney should review the contract - perhaps with the help of a computer program - before it is signed. Also, the attorney should provide the client with an opportunity to review it. Not only can review by a second set of eyes be helpful in detecting problems, but if the attorney victimized by these situations faces a client's malpractice claim, it will be helpful if the attorney gave the client an adequate opportunity to review the contract, for most of the problems could be detected (or at least questioned) by the review of a layperson.

APPENDIX A

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2015-194

ISSUE: When an attorney is engaged in negotiations on behalf of a client, are there ethical limitations on the statements the attorney may make to third parties, including statements that may be considered "puffing" or posturing?

DIGEST: Statements made by counsel during negotiations are subject to those rules prohibiting an attorney from engaging in dishonesty, deceit or collusion. Thus, it is improper for an attorney to make false statements of fact or implicit misrepresentations of material fact during negotiations. However, puffery and posturing, such as statements about a party's negotiating goals or willingness to compromise, are generally permissible because they are not considered statements of fact.

AUTHORITIES INTERPRETED: Rule 3-700(B)(2) of the Rules of Professional Conduct of the State Bar of California.[1/]

Business and Professions Code section 6068, subdivisions (b), (c), and (d).

Business and Professions Code section 6106.

Business and Professions Code section 6128(a).

STATEMENT OF FACTS

Plaintiff is injured in an automobile accident and retains Attorney to sue the other driver (Defendant). As a result of the accident, Plaintiff incurs $50,000 in medical expenses and Plaintiff tells Attorney she is no longer able to work. Prior to the accident Plaintiff was earning $50,000 per year.

Attorney files a lawsuit on Plaintiff's behalf. Prior to any discovery, the parties agree to participate in a court-sponsored settlement conference that will be presided over by a local attorney volunteer. Leading up to and during the settlement conference, the following occurs:

1. In the settlement conference brief submitted on Plaintiff's behalf, Attorney asserts that he will have no difficulty proving that Defendant was texting while driving immediately prior to the accident. In that brief, Attorney references the existence of an eyewitness to the accident, asserts that the eyewitness's account is undisputed, asserts that the eyewitness specifically saw Defendant texting while driving immediately prior the accident, and asserts that the eyewitness's credibility is excellent. In fact, Attorney has been unable to locate any eyewitness to the accident.

2. While the settlement officer is talking privately with Attorney and Plaintiff, he asks Attorney and Plaintiff about Plaintiff's wage loss claim. Attorney tells the settlement officer that Plaintiff was

[1/] Unless otherwise indicated, all future references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

earning $75,000 per year, which is $25,000 more than Client was actually earning; Attorney is aware that the settlement officer will convey this figure to Defendant, which he does.

3. While talking privately outside the presence of the settlement officer, Attorney and Plaintiff discuss Plaintiff's "bottom line" settlement number. Plaintiff advises Attorney that Plaintiff's "bottom line" settlement number is $175,000. When the settlement officer asks Attorney for Plaintiff's demand, Attorney says, "Plaintiff needs $375,000 if you want to settle this case."

4. In response to Plaintiff's settlement demand, Defendant's lawyer informs the settlement officer that Defendant's insurance policy limit is $50,000. In fact, Defendant has a $500,000 insurance policy.

5. Defendant's lawyer also states that Defendant intends to file for bankruptcy if Defendant does not get a defense verdict. In fact, two weeks prior to the mediation, Defendant consulted with a bankruptcy lawyer and was advised that Defendant does not qualify for bankruptcy protection and could not receive a discharge of any judgment entered against him. Defendant has informed his lawyer of the results of his consultation with bankruptcy counsel and that Defendant does not intend to file for bankruptcy.

6. The matter does not resolve at the settlement conference, but the parties agree to participate in a follow-up settlement conference one month later, pending the exchange of additional information regarding Plaintiff's medical expenses and future earnings claim. In particular, Attorney agrees to provide additional information showing Plaintiff's efforts to obtain other employment in mitigation of her damages and the results of those efforts. During that month, Attorney learns that Plaintiff has accepted an offer of employment and that Plaintiff's starting salary will be $75,000. Recognizing that accepting this position may negatively impact her future earnings claim, Plaintiff instructs Attorney not to mention Plaintiff's new employment at the upcoming settlement conference and not to include any information concerning her efforts to obtain employment with this employer in the exchange of additional documents with Defendant. At the settlement conference, Attorney makes a settlement demand that lists lost future earnings as a component of Plaintiff's damages and attributes a specific dollar amount to that component.

DISCUSSION

Although attorneys must advocate zealously for their clients (see *Davis v. State Bar* (1983) 33 Cal.3d 231, 238 [188 Cal.Rptr. 441]), there are limits to an attorney's conduct, as set forth in the Rules of Professional Conduct and the Business and Professions Code. (See *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 126 [116 Cal.Rptr. 713] ["The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously *within the bounds of the law* . . ."].) Business and Professions Code section 6068 requires, among other things, that an attorney "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth." (Business and Professions Code section 6068(d).)[2/]

[2/] Attorneys further must "maintain the respect due to the courts of justice and judicial officers," and cannot "seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Business and Professions Code section 6068(b) and (d); see also Rule 5-200(B).) If a judicial officer was presiding over the settlement conference, these rules would prohibit the attorney from making a false statement of fact or law. Whether a lawyer who serves as a settlement officer is a "judicial officer" for purposes of these provisions is beyond the scope of this opinion.

Under Business and Professions Code section 6106, an attorney who commits any act of moral turpitude or dishonesty, whether or not in the course of the attorney's conduct as an attorney, is subject to disbarment or suspension. (Business and Professions Code section 6106.)[3/]

Furthermore, Business and Professions Code section 6128(a) provides that "[e]very attorney is guilty of a misdemeanor who . . . [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . ."

Finally, the State Bar's non-binding *California Attorney Guidelines of Civility and Professionalism*[4/] address an attorney's conduct when negotiating a written agreement on behalf of a client. Specifically, Section 18, "Negotiation of Written Agreements" provides:

> An attorney should avoid negotiating tactics that are abusive; that are not made in good faith; that threaten inappropriate legal action; that are not true; that set arbitrary deadlines; that are intended solely to gain an unfair advantage or take unfair advantage of a superior bargaining position; or that do not accurately reflect the client's wishes or previous oral agreements.

In addition to the applicable California authority, in 2006, the American Bar Association published ABA Formal Opinion No. 06-439, specifically addressing this issue. According to ABA Formal Opinion No. 06-439:

> Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," ordinarily are not considered "false statements of material fact" within the meaning of the Model Rules.[5/]

[3/] The Standards for Attorney Sanctions for Professional Misconduct ("Standards") are based on the State Bar Act and "are adopted by the Board of Trustees to set forth a means for determining the appropriate disciplinary sanction in a particular case." With respect to acts of dishonesty, Standard 2.11 states:

> Disbarment or actual suspension is the presumed sanction for an act of moral turpitude, dishonesty, fraud, corruption, intentional or grossly negligent misrepresentation, or concealment of a material fact. The degree of sanction depends on the magnitude of the misconduct; the extent to which the misconduct harmed or misled the victim, which may include the adjudicator; the impact on the administration of justice, if any; and the extent to which the misconduct related to the member's practice of law.

Moreover, "misrepresentation" is an aggravating circumstance in determining the appropriate sanction for attorney misconduct. (Standards, Section 1.5(e).)

[4/] California State Bar's California Attorney Guidelines of Civility and Professionalism are non-binding, but do provide some general guidance to California lawyers. "[T]he Guidelines are not mandatory rules of professional conduct, nor rules of practice, nor standards of care, [and] they are not to be used as an independent basis for disciplinary charges by the State Bar or claims of professional negligence."

[5/] The ABA Model Rules are not binding in California but may be used for guidance by lawyers where there is no direct California authority and the ABA Model Rules do not conflict with California policy. (*City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771].) Thus, in the absence of related California authority, we may look to the ABA Model Rules, and the ABA Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance. (Rule 1-100(A) ["Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."]; *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656 [82 Cal.Rptr.2d 799].)

"Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation." (ABA Form. Opn. 06-439, p. 6.) False statements of material fact, in addition to "implicit misrepresentations created by a lawyer's failure to make truthful statements," may result in ethical violations. An attorney may not, for example, settle a pending personal injury lawsuit filed on behalf of a client without disclosing that the client had died. This conclusion is based on "the concept that the death of the client was a material fact, and that any continued communication with opposing counsel or the court would constitute an implicit misrepresentation that the client still was alive." (ABA Form. Opn. 06-439, p. 5; discussing ABA Form. Opn. 95-397.)

The ABA cautions that a lower standard of lawyer truthfulness is not warranted because of the consensual nature of mediation or because the parties somehow waive protection from lawyer misrepresentation "by agreeing to engage in a process in which it is somehow 'understood' that false statements will be made." (ABA Form. Opn. 06-439, p. 8.) On the other hand, the ABA has recognized that "puffing" or posturing may be permissible based on the generally understood norms of negotiation. The ABA defines "puffing" or posturing as "statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely." (ABA Form. Opn. 06-439, p. 2.)

ABA Formal Opinion No. 06-439 relies on Rule 4.1 of the ABA Model Rules of Professional Conduct, which prohibits an attorney from making a false statement of material fact or law to a third person and failing to "disclose a material fact . . . when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

Comment [2] to Model Rule 4.1 clarifies that the Rule applies to statements of fact:

> Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category . . . . Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

The California Rules of Professional Conduct do not contain a rule that corresponds to Model Rule 4.1. Under California's statutes and case law governing attorney honesty; however, California lawyers are not permitted to intentionally deceive opposing counsel. (See Business and Professions Code sections 6106, 6128(a), and 6068(d); *Coviello v. State Bar* (1955) 45 Cal.2d 57, 66 [286 P.2d 357] [upholding a six-month suspension based on lawyer's intentional deceit of opposing counsel because "[s]uch conduct falls short of the honesty and integrity required of an attorney at law in the performance of his professional duties."]; *Monroe v. State Bar* (1961) 55 Cal.2d 145, 152 [10 Cal.Rptr. 257] [upholding a nine-month suspension because "intentionally deceiving opposing counsel is ground for disciplinary action."]; *Hallinan v. State Bar* (1948) 33 Cal.2d 246 [200 P.2d 787] [attorney suspended for three months after attorney admitted that he simulated a client's name on a settlement release even though he knew that the opposing counsel wanted the attorney's client to personally sign the settlement papers]; *Scofield v. State Bar* (1965) 62 Cal.2d 624, 628 [43 Cal.Rptr. 825] ["Affirmative representations made with intent to deceive are grounds for discipline, even though no harm results."].)[6]

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[6] For purposes of imposing discipline, an attorney's representations may be characterized as "moral turpitude," "dishonesty" or "corruption" under Business and Professions Code section 6106 only if the representations were made with an intent to mislead. (See *Wallis v. State Bar* (1942) 21 Cal.2d 322, 328 [131 P.2d 531].)

Acts of moral turpitude, which are prohibited by Business and Professions Code section 6106, "include concealment as well as affirmative misrepresentations . . . . '"[N]o distinction can . . . be drawn among concealment, half-truth, and false statement of fact.'" (*In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80, 86, citations omitted, quoting *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 808.) In *Loftus*, an attorney who obtained a recorded statement from a putative defendant by creating the false impression that she was not an adverse party and the conversation was not being recorded was disciplined for violating Business and Professions Code section 6106. In *Dale*, an attorney was found culpable of moral turpitude for making misleading statements in order to induce an unrepresented party to sign a declaration confessing to arson.

"A member of the bar should not under any circumstances attempt to deceive another. [Citations.] 'An attorney's practice of deceit involves moral turpitude.'" (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 888 [126 Cal.Rptr. 793], quoting *Cutler v. State Bar* (1969) 71 Cal.2d 241, 252–53 [78 Cal.Rptr. 172].)

In addition, various California courts have found attorneys liable in tort for making, during the course of their representation of a client, false statements of material fact to third parties.[7/] In *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 291 [17 Cal.Rptr.3d 26], for example, that court held: "a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient [citation], and may be liable to a nonclient for fraudulent statements made during business negotiations." That court also stated: "A fraud claim against a lawyer is no different from a fraud claim against anyone else." (*Id.*; see also *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 346 [134 Cal.Rptr. 375]; *Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 202 [227 Cal.Rptr. 887] ["the case law is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney negotiating at arm's length"]; see also California State Bar Formal Opn. No. 2013-189, fn. 11, 12.)

When considering what types of statements may give rise to civil liability under a variety of legal theories, such as false advertising or fraud, California courts consider the type of statement and whether the statement is likely to induce reliance. A statement of opinion is not actionable, nor is a statement of "puffery." A statement of puffery is one that is "extremely unlikely" to induce reliance. "'Ultimately, the difference between a statement of fact and mere puffery rests in the specificity or generality of the claim.'" (*Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294, 311 [175 Cal.Rptr.3d 131], *reh'g denied* (Aug. 20, 2014), *review denied* (Nov. 12, 2014), quoting *Newcal Industries, Inc. v. Ikon Office Solution* (9th Cir. 2008) 513 F.3d 1038, 1053.) A statement that is quantifiable, specific or absolute will generally be actionable, whereas a statement that is general or subjective will not. (*Id.*)

The standards for determining whether there is civil liability for fraud are different than those for determining an attorney's ethical obligations of honesty. However, the factors considered in civil cases to determine whether a statement is one of verifiable fact are instructive in determining whether an attorney's statements may fairly be characterized as deceitful, not "consistent with truth," collusive or dishonest in violation of an attorney's ethical duties.

In our scenario, the attorneys make two types of representations worthy of discussion here: (1) statements that constitute impermissible misrepresentations of material fact upon which the opposing party is

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[7/] The intentional tort of fraud has various elements that go beyond making a false statement of material fact. Whether or not all of the elements of fraud exist, however, is a separate inquiry. Even if not satisfying all of the elements of the intentional tort, an attorney may violate ethical rules by making a false statement of fact to the opposing party in settlement negotiations because such statements could constitute deceit, employment of means not "consistent with truth" and dishonest conduct, all of which are ethically prohibited by Business and Professions Code sections 6106, 6128(a), and 6068(d).

intended to rely; and (2) statements that constitute acceptable exaggeration, posturing or "puffing" in negotiations.

Specific Examples

We will consider the examples set forth in the hypotheticals:

Example Number 1: Attorney's misrepresentations about the existence of a favorable eyewitness and the substance of his expected testimony.

Attorney's misrepresentations about the existence of a favorable eyewitness and the substance of the testimony the attorney purportedly expects the witness to give are improper false statements of fact, intended to mislead Defendant and his lawyer. Attorney is making representations regarding the existence of favorable evidence for the purpose of having Defendant rely on them. Attorney has no factual basis for the statements made. Further, Attorney's misrepresentation is not an expression of opinion, but a material representation that "a reasonable [person] would attach importance to . . . in determining his choice of action in the transaction in question . . ." (*Charpentier v. Los Angeles Rams Football Co., Inc.* (1999) 75 Cal.App.4th 301, 313 [89 Cal.Rptr.2d 115] quoting Rest.2d Torts, § 538).

Thus, Attorney's misrepresentations regarding the existence of a favorable eyewitness constitute improper false statements and are not ethically permissible. This is consistent with Business and Professions Code section 6128(a), *supra*, and Business and Professions Code section 6106, *supra*, which make any act involving deceit, moral turpitude, dishonesty or corruption a cause for disbarment or suspension.

Example Number 2: Attorney's inaccurate representations to the settlement officer which Attorney intended be conveyed to Defendant and Defendant's lawyer regarding Plaintiff's wage loss claim.

Attorney's statement that Plaintiff was earning $75,000 per year, when Plaintiff was actually earning $50,000, is an intentional misstatement of a fact. Attorney is not expressing his opinion, but rather is stating a fact that is likely to be material to the negotiations, and upon which he knows the other side may rely, particularly in the context of these settlement discussions, which are taking place prior to discovery. As with Example Number 1, above, Attorney's statement constitutes an improper false statement and is not permissible.

Example Number 3: Attorney's inaccurate representation regarding Client's "bottom line" settlement number.

Statements regarding a party's negotiating goals or willingness to compromise, as well as statements that constitute mere posturing or "puffery," are among those that are not considered verifiable statements of fact. A party negotiating at arm's length should realistically expect that an adversary will not reveal its true negotiating goals or willingness to compromise.

Here, Attorney's statement of what Plaintiff will need to settle the matter is allowable "puffery" rather than a misrepresentation of fact. Attorney has not committed an ethical violation by overstating Plaintiff's "bottom line" settlement number.

Example Number 4: Defendant's lawyer's representation that Defendant's insurance policy is for $50,000 although it is really $500,000.

Defendant's lawyer's inaccurate representations regarding Defendant's policy limits is an intentional misrepresentation of fact intended to mislead Plaintiff and her lawyer. (See *Shafer v. Berger, Kahn,*

Shafton, Moss, Figler, Simon & Gladstone (2003) 107 Cal.App.4th 54, 76 [131 Cal.Rptr.2d 777] [plaintiffs "reasonably relied on the coverage representations made by counsel for an insurance company"].) As with Example Number 1, above, Defendant's lawyer's intentional misrepresentation about the available policy limits is improper.

Example Number 5: Defendant's lawyer's representation that Defendant will file for bankruptcy if there is not a defense verdict.

Whether Defendant's lawyer's representations regarding Defendant's plans to file for bankruptcy in the event that Defendant does not win a defense verdict constitute a permissible negotiating tactic will hinge on the specific representations made and the facts known. Here, Defendant's lawyer knows that Defendant does not intend to file for bankruptcy and that Defendant consulted with bankruptcy counsel before the mediation and was informed that Defendant is not legally eligible to file for bankruptcy. A statement by Defendant's lawyer that expresses or implies that Defendant's financial condition is such that he is in fact eligible to file for bankruptcy is therefore a false representation of fact. The conclusion may be different; however, if Defendant's lawyer does not know whether or not his client intends to file for bankruptcy or whether his client is legally eligible to obtain a discharge.

Example Number 6: Plaintiff's instruction to Attorney to conceal material facts from Defendant and Defendant's lawyer prior to the follow-up settlement conference.

This example raises two issues: the failure to disclose the new employment, and Plaintiff's instruction to Attorney to not disclose the information. First, as to the underlying fact of employment itself, it is assumed that Plaintiff would not be entitled to lost future earnings if Plaintiff found a new job. As such, including in the list of Plaintiff's damages a separate component for lost future earnings is an implicit misrepresentation that Plaintiff has not yet found a job. This is particularly true because Plaintiff agreed to show documentation of her job search efforts to establish her mitigation efforts, but did not include any documentation showing that she had, in fact, been hired. Listing such damages, then, constitutes an impermissible misrepresentation. (See, e.g., *Scofield v. State Bar*, supra, 62 Cal.2d at 629 [attorney who combined special damages resulting from two different auto accidents in separate claims against each defendant disciplined for making affirmative misrepresentations with the intent to deceive]; *Pickering v. State Bar* (1944) 24 Cal.2d 141, 144 [148 P.2d 1] [attorney who alleged claim for loss of consortium knowing that plaintiff was not married and that her significant other was out of town during the relevant time period violated Business and Professions Code section 6068(d)].)

Second, Attorney was specifically instructed by Plaintiff not to make the disclosure. That instruction, conveyed by a client to his attorney, is a confidential communication that Attorney is obligated to protect under Rule 3-100 and Business and Professions Code section 6068(e). While an attorney is generally required to follow his client's instructions, Rule 3-700(B)(2) requires withdrawal if an attorney's representation would result in a violation of the ethical rules, of which a false representation of fact or implicit misrepresentation of a material fact would be. When faced with Plaintiff's instruction, Attorney should first counsel his client against the misrepresentation and/or suppression. If Plaintiff refuses, Attorney must withdraw under Rule 3-700(B)(2), as Attorney may neither make the disclosure absent client consent, nor may Attorney take part in the misrepresentation and/or suppression. (California State Bar Form. Opn. No. 2013-189;[8] see also Los Angeles County Bar Association Opn. 520).

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[8] California State Bar Form. Opn. No. 2013-189 contains a full discussion regarding an attorney's ethical obligations when a client instructs his or her attorney to conceal material facts from the opposing party and/or opposing counsel. As addressed more fully in that opinion, an attorney should first counsel his or her client regarding the client's request and, if the client refuses to reconsider, the attorney may be obligated to withdraw his or her representation, pursuant to Rule 3-700(B)(2).

CONCLUSION

Attorneys are prohibited from making false statements intended to be relied upon, including during the course of negotiating with a third party and even where those negotiations occur through a third party neutral. Such prohibited communications include an attorney's implicit misrepresentations. However, attorneys may engage in permissible posturing or "puffery" during negotiations and may generally make statements regarding a client's negotiation goals or willingness to compromise because such statements are not the type of statements upon which parties to a negotiation ordinarily would justifiably be expected to rely.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

APPENDIX B

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2013-189

ISSUE: Has an attorney engaged in deceitful conduct by not alerting opposing counsel of: (A) an apparent material error made by opposing counsel in contract language; or (B) a material change made by the attorney in contract language?

DIGEST: Where an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligations.

AUTHORITIES INTERPRETED: Rule 3-700(B)(2) of the Rules of Professional Conduct of the State Bar of California.[1]

Business and Professions Code section 6106.

Business and Professions Code section 6128(a).

STATEMENT OF FACTS

Buyer and Seller have been in discussions regarding the sale of the Company from Seller to Buyer, and have agreed in concept to some of the material terms, including total consideration of $5 million to be paid by Buyer and Buyer's requirement that Seller enter into a covenant not to compete with the Company following the sale. Buyer's Attorney and Seller's Attorney are tasked with preparing a Purchase and Sale Agreement to reflect the agreement of the parties.

Buyer's Attorney prepares an initial draft of the Purchase and Sale Agreement. One section towards the back of the 50-page draft agreement contains the terms of an enforceable covenant not to compete, and includes a provision that Buyer's sole and exclusive remedy for a breach by Seller of its covenant not to compete is the return of that portion of the total consideration which has been allocated in the Purchase and Sale Agreement for the covenant not to compete. Another section in the front of the draft agreement provides that, of the $5 million to be paid by Buyer, $3 million is to be allocated to the purchase price for the Company and $2 million is to be allocated as consideration for the covenant not to compete.

Scenario A

After soliciting input on the initial draft from Seller and Seller's tax advisor, Seller's Attorney provides Buyer's Attorney with comments on the initial draft, including the observation from Seller's tax advisor that payments received by Seller with respect to the covenant not to compete are not as favorable, from a tax perspective, as payments with respect to the purchase price for the Company.

Buyer's Attorney then prepares a revised version of the Purchase and Sale Agreement which, apparently in response to the comments of Seller's Attorney, provides for an allocation of only $1 as consideration for

[1] Unless otherwise indicated, all future references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

the covenant not to compete with $4,999,999 allocated to the purchase price for the Company. In reviewing the changes made in the revised version, Seller's Attorney recognizes that the allocation of only $1 as consideration for the covenant not to compete essentially renders the covenant meaningless, because Buyer's sole and exclusive remedy for breach by Seller of the covenant would be the return by Seller of $1 of the total consideration. Seller's Attorney notifies Seller about the apparent error with respect to the consequences of the change made by Buyer's Attorney. Seller instructs Seller's Attorney to not inform Buyer's Attorney of this apparent error. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by the parties in that form.

Scenario B

After receiving the initial draft from Buyer's Attorney, Seller's Attorney prepares a revised version of the Purchase and Sale Agreement which provides for an allocation of only $1 as consideration for the covenant not to compete, with the intent of essentially rendering the covenant not to compete meaningless. Although Seller's Attorney had no intention of keeping this change secret from Buyer's Attorney, Seller's Attorney generates a "redline" of the draft that unintentionally failed to highlight the change, and then tenders the revised version to Buyer's Attorney. Subsequently, Seller's Attorney discovers the unintended defect in the "redline" and notifies Seller about the change, including the failure to highlight the change, in the revised version. Seller instructs Seller's Attorney to not inform Buyer's Attorney of the change. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by the parties in that form.

Under either Scenario, has Seller's Attorney violated any ethical duties?[2/]

DISCUSSION

Following Client's Instruction to Not Disclose

Attorneys generally must follow the instructions of their clients. See ABA Model Rule 1.2(a) ("a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by [ABA Model] Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation ...").[3/] However, if the client insists on certain unethical conduct, the attorney may have an obligation to withdraw from the representation. Rule 3-700(B)(2) provides "[a] member representing a client . . . shall withdraw from employment, if: . . . [t]he member knows or should know that continued employment will result in violation of these rules or of the State Bar Act." Such an obligation, for example, may arise if the unethical conduct in question involves a fraudulent failure to make a disclosure. As the Los Angeles County Bar Association has opined, upon discovering that an adverse party made an overpayment under a settlement agreement, "[c]ounsel is obligated to inform his/her client of the overpayment under [rule] 3-500. Under [Bus. & Prof. Code,] § 6068(e) . . ., where the client has requested the information be held in confidence, the attorney is obligated to preserve the secret. The attorney should counsel the client to disclose and return

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2/ This opinion addresses a situation arising out of a transaction setting only, and because the matter is not pending before a tribunal, a lawyer's duty of candor to the court found in rule 5-200 and Business and Professions Code section 6068(d) are not being addressed in this opinion. See *Datig v. Dove Books, Inc.* (1999) 73 Cal.App.4th 964, 980-981 [87 Cal.Rptr.2d 719].

3/ The ABA Model Rules are not binding in California but may be used for guidance by lawyers where there is no direct California authority and the ABA Model Rules do not conflict with California policy. *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771]. Thus, in the absence of related California authority, we may look to the ABA Model Rules, and the ABA Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance. (Rule 1-100(A) (ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered); *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656 [82 Cal.Rptr.2d 799]).

the overpayment. If the client refuses, however, the attorney must consider whether the failure to disclose constitutes fraud. The attorney must then determine whether he/she may or must withdraw from the representation pursuant to [rule] 3-700." Los Angeles County Bar Assn. Formal Opn. No. 520.

Under either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development,[4/] Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances. See Cal. State Bar Formal Opn. No. 1996-146.

Failure to Alert Opposing Counsel

Attorneys are held to a high standard, and may be subject to general obligations of professionalism. For example, attorneys have been held to have a duty to respect the legitimate interests of opposing counsel. "An attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice." *Kirsch v. Duryea* (1978) 21 Cal.3d 303, 309 [146 Cal.Rptr. 218] (overturning a malpractice judgment against an attorney for withdrawing from a case he believed lacked merit). Further, this Committee has previously concluded that attorneys should treat opposing counsel with candor and fairness. (See Cal. State Bar Formal Opn. No. 1967-11 ["It is true that, under [former] canon 15 of the Canons of Ethics of the American Bar Association, an attorney must zealously advance the interests of his client, but not by using 'any manner of fraud or chicane. He must obey his own conscience and not that of his client.' One of the obligations of conscience to which the lawyer must conform is stated in [former] canon 22: his conduct with other lawyers 'should be characterized by candor and fairness.' [Former] canon 29 states that a lawyer 'should strive at all times to uphold the honor and to maintain the dignity of the profession . . .' All of the canons are commended to the members of the State Bar by rule *[former]* 1 of the Rules of Professional Conduct of the State Bar."]). [5/] See also ABA Model Rule 3.4.[6/]

[4/] Attorneys have an obligation to keep their clients reasonably informed about significant developments relating to the matter for which they have been employed. Rule 3-500 and Bus. & Prof. Code, § 6068(m). See also rule 3-510. Both the apparent error made by Buyer's Attorney in Scenario A and the intentional change made by Seller's Attorney in Scenario B would constitute a "significant development," which would require that Seller be informed of the potential for added costs and burdens of enforcement, including litigation and the likelihood that Buyer may seek reformation of the Purchase and Sale Agreement. See Civ. Code, §§ 3399, 1689. See also *Dyke v. Zaiser* (1947) 80 Cal.App.2d 639 [182 P.2d 344] and *Stare v. Tate* (1971) 21 Cal.App.3d 432 [98 Cal.Rptr. 264]. On the other hand, if Seller's Attorney intends to inform Buyer's Attorney of the apparent error, Seller's Attorney need not inform Seller of the apparent error. Where a client has already agreed to a contract provision which is inadequately reflected in the draft contract prepared by opposing counsel, the inadvertent error by opposing counsel by itself (i.e., unless left uncorrected in the final executed version) does not constitute a significant development, and the client's attorney may correct the drafting error and need not inform the client. See ABA Informal Opn. No. 86-1518 (attorney has no obligation to inform his client of the error because "the decision on the contract ha[d] already been made by the client.").

[5/] An insertion added by the Committee is placed in brackets and italicized to distinguish it from bracketed insertions appearing in the original material.

[6/] See also, the California State Bar's *California Attorney Guidelines of Civility and Professionalism*, (posted online at http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=mPBEL3nGaFs%3d&tabid=455 (as of May 20, 2013)) which, among other things, encourages attorneys "to be professional with . . . other parties and counsel . . . ." We note, however, that such guidelines are nonbinding: "[T]he Guidelines are [voluntary and] not mandatory rules of professional conduct, nor rules of practice, nor standards of care, [and] they are not to be used as an independent basis for disciplinary charges by the State Bar or claims of professional negligence." *California Attorney Guidelines of Civility and Professionalism*, adopted by the Board of Trustees July 20, 2007, long version at page 3. A copy is on file with the State Bar.

Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients. *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 961 [226 Cal.Rptr. 532] ("an attorney has no duty to protect the interests of an adverse party [citations] for the obvious reasons that the adverse party is not the intended beneficiary of the attorney's services, and that the attorney's undivided loyalty belongs to the client."). See also *Skarbrevik v. Cohen, England & Whitfield* (1991) 231 Cal.App.3d 692, 702 [282 Cal.Rptr. 627] ("no [attorney] duty has been found when the third party is someone with whom the client is dealing at arm's length, rather than someone intended to be benefited by the attorney-client transaction."). Furthermore, a duty to nonclients would damage the attorney-client relationship. *Fox, supra,* 181 Cal.App.3d at p. 962 ("The effect of such a duty on respondent would be the eradication of confidentiality (Bus. & Prof. Code, § 6068 subd. (e); Evid. Code, § 950 et seq.), the creation of a conflict of interest ([former] rules 4-101, 5-101, 5-102, Rules Prof. Conduct) and the consequent destruction of the attorney-client relationship between respondent and his clients.").

Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure. *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 342, 346 [134 Cal.Rptr. 375]. There is also no duty to correct erroneous assumptions of opposing counsel. See ABA Formal Opn. No. 94-387 (no duty to disclose to opposing party that statute of limitations has run). See also *Ethical Guidelines for Settlement Negotiations* (August 2002), ABA Section of Litigation, at page 56,[7] ("there is no general ethics obligation, in the settlement context or elsewhere, to correct the erroneous assumptions of the opposing party or opposing counsel . . .").[8]

On the other hand, it is unlawful (and a violation of an attorney's ethical obligations) for an attorney to commit any act of moral turpitude, dishonesty, or corruption. Business and Professions Code section 6106 provides that: "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." It is similarly inappropriate for an attorney to engage in deceit or active concealment, or make a false statement of a material fact to a nonclient. Business and Professions Code section 6128(a) provides that: "Every attorney is guilty of a misdemeanor who . . . [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party." Also, an attorney may not knowingly assist his or her client in any criminal or fraudulent conduct. See: rule 3-210 ("A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid."); Business and Professions Code section 6068(a) (it is the duty of an attorney to "support the Constitution and laws of the United States and of this state."); and ABA Model Rule 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.").[9]

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[7] Posted online at: http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/settlementnegotiations.pdf (as of May 20, 2013). A copy is on file with the State Bar.

[8] This opinion does not address a scrivener's error. See ABA Informal Opn. No. 86-1518: interpreting Model Rule 1.2(d) to conclude that where a transcription of an agreement contains a scrivener's error, an attorney cannot allow his or her client to benefit from the mistake and must notify the other party's attorney ("Where the lawyer for A has received for signature from the lawyer for B the final transcription of a contract from which an important provision previously agreed upon has been inadvertently omitted by the lawyer for B, the lawyer for A, unintentionally advantaged, should contact the lawyer for B to correct the error and need not consult A about the error."). See also *In re Conduct of Gallagher* (Or. 2001) 332 Or. 173 [26 P.3d 131] (attorney who was aware of opposing counsel's mistake regarding settlement checks – settlement amount had been wrongly calculated – had a duty to correct such mistake). But see Md. State Bar Ass'n, Comm. on Ethics Opn. No. 89-44 (1989) (opining that there is no obligation to reveal the omission of a material term in a contract).

[9] See also ABA Model Rule 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); ABA Model Rule 4.1 [Truthfulness In Statements To Others] ("In the course of representing a client a lawyer shall not knowingly: (a) make a

As a result, an attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct.[10/] "While an attorney's professional duty of care extends only to his own client and intended beneficiaries of his legal work, the limitations on liability for negligence do not apply to liability for fraud. [Citation.] Accordingly, a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient [citation] . . . ." *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 291 [17 Cal.Rptr.3d 26].[11/] Even when no duty of disclosure would otherwise exist, "where one does speak he must speak the whole truth to the end that he does not conceal any facts which materially qualify those stated. [Citation.] One who is asked for or volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud." *Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 201. See *Goodman, supra,* 18 Cal.3d at pp. 346-347 and *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 72 [131 Cal.Rptr.2d 777].[12/]

Scenario A

In Scenario A of our Statement of Facts, although the Purchase and Sale Agreement contains a covenant not to compete, the apparent error of Buyer's Attorney limits the effectiveness of the covenant because the penalty for breach results in payment by Seller of only $1. However, Seller's Attorney has engaged in no conduct or activity that induced the apparent error. Further, under our Statement of Facts, there had been no agreement on the allocation of the purchase price to the covenant, and the Purchase and Sale Agreement does in fact contain a covenant not to compete the terms of which are consistent with the parties' mutual understanding. Under these circumstances, where Seller's Attorney has not engaged in deceit, active

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[footnote continued...]

false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."); *Ethical Guidelines for Settlement Negotiations* (August 2002), ABA Section of Litigation, at pages 56–57, ("the duty to avoid misrepresentations and misleading conduct implies a professional responsibility to correct mistakes induced by the lawyer or the lawyer's client and not to exploit such mistakes."); and *In Re Martinez* (Bankr. D. Nev. 2008) 393 B.R. 27, 35 (attorneys sanctioned for "advocating the propriety of [a] mistaken stipulation when they knew, or should have known, that the continued assertion of the validity of the stipulation, and the order entered on it, was not 'warranted by existing law.'").

[10/] "Active concealment or suppression of facts by a nonfiduciary 'is the equivalent of a false representation, i.e., actual fraud. [Citation.]'" *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 291 [17 Cal.Rptr.3d 26]. See *Fox, supra,* 181 Cal.App.3d at p. 962 and 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, 678, p. 136.

[11/] If a person commits actual fraud, the fact that such person does so in the capacity of attorney does not relieve the person of liability. See: *Goodman, supra,* 18 Cal.3d at p. 346; and *Vega, supra,* 121 Cal.App.4th at p. 291 ("A fraud claim against a lawyer is no different from a fraud claim against anyone else."). Also, the fact that the other person is also an attorney makes no difference. *Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 202 [227 Cal.Rptr. 887] ("the case law is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney negotiating at arm's length.").

[12/] See also *Vega, supra,* 121 Cal.App.4th at p. 294 ("it is established by statute 'that intentional concealment of a material fact is an alternative form of fraud and deceit equivalent to direct affirmative misrepresentation' [citations omitted] . . . . In some but not all circumstances, an independent duty to disclose is required; active concealment may exist where a party '[w]hile under no duty to speak, nevertheless does so, but does not speak honestly or makes misleading statements or suppresses facts which materially qualify those stated.'" [Fn. omitted.]); *Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 97 [111 Cal.Rptr.2d 711]; *Stevens v. Superior Court* (1986) 180 Cal.App.3d 605, 608 [225 Cal.Rptr. 624].

concealment or fraud, we conclude that Seller's Attorney does not have an affirmative duty to disclose the apparent error to Buyer's Attorney.[13/]

Scenario B

Had Seller's Attorney intentionally created a defective "redline" to surreptitiously conceal the change to the covenant not to compete, his conduct would constitute deceit, active concealment and possibly fraud, in violation of Seller's Attorney's ethical obligations. However, in Scenario B of our Statement of Facts, Seller's Attorney *intentionally* made the change which essentially renders the covenant not to compete meaningless, but *unintentionally* provided a defective "redline" that failed to highlight for Buyer's Attorney that the change had been made. Under these circumstances, and prior to discovery of the unintentional defect, Seller's Attorney has engaged in no such unethical conduct. But once Seller's Attorney realizes his own error, we conclude that the failure to correct that error and advise Buyer's Attorney of the change might be conduct that constitutes deceit, active concealment and/or fraud, with any such determination to be based on the relevant facts and circumstances.[14/] If Seller instructs Seller's Attorney to not advise Buyer's Attorney of the change, where failure to do so would be a violation of his ethical obligations, Seller's Attorney may have to consider withdrawing.[15/]

CONCLUSION

Where an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment, or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligations.

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[13/] We do not address whether such conduct is offensive or unprofessional – only that such conduct does not violate Seller's Attorney's ethical obligations.

[14/] Any such determination – which may depend, for example, on whether the changed provision is further negotiated and revised (thereby effectively calling Buyer's Attorney's attention to the changed language) – is beyond the scope of this opinion. See, e.g., Cal. State Bar Formal Opn. No. 1996-146 ("A lawyer acts unethically where she assists in the commission of a fraud by implying facts and circumstances that are not true in a context likely to be misleading."); cf. *Datig, supra*, 73 Cal.App.4th at pp. 980-981 (once attorney realized he had negligently misled the court, the attorney had an affirmative duty to immediately notify the court).

[15/] Subject to any ethical obligations regarding withdrawal from representation. See, e.g., rule 3-700.

APPENDIX C

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 06-439 **April 12, 2006**

Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," ordinarily are not considered "false statements of material fact" within the meaning of the Model Rules[1].

In this opinion, we discuss the obligation of a lawyer to be truthful when making statements on behalf of clients in negotiations, including the specialized form of negotiation known as caucused mediation.

It is not unusual in a negotiation for a party, directly or through counsel, to make a statement in the course of communicating its position that is less than entirely forthcoming. For example, parties to a settlement negotiation often understate their willingness to make concessions to resolve the dispute. A plaintiff might insist that it will not agree to resolve a dispute for less than $200, when, in reality, it is willing to accept as little as $150 to put an end to the matter. Similarly, a defendant manufacturer in patent infringement litigation might repeatedly reject the plaintiff's demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete. In the criminal law context, a prosecutor might not reveal an ultimate willingness to grant immunity as part of a cooperation agreement in order to retain influence over the witness.

A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. A buyer of products or services, for example, might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in August 2003 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdictions are controlling.

dependence upon the supplier with which it is negotiating. Such remarks, often characterized as "posturing" or "puffing," are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact. An example of a false statement of material fact would be a lawyer representing an employer in labor negotiations stating to union lawyers that adding a particular employee benefit will cost the company an additional $100 per employee, when the lawyer knows that it actually will cost only $20 per employee. Similarly, it cannot be considered "posturing" for a lawyer representing a defendant to declare that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do not exist or will be inadmissible. In the same vein, neither a prosecutor nor a criminal defense lawyer can tell the other party during a plea negotiation that they are aware of an eyewitness to the alleged crime when that is not the case.

Applicable Provision of the Model Rules

The issues addressed herein are governed by Rule 4.1(a).[2] That rule prohibits a lawyer, "[i]n the course of representing a client," from knowingly making "a false statement of material fact or law to a third person." As to what constitutes a "statement of fact," Comment [2] to Rule 4.1 provides additional explanation:

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2. Although Model Rule 3.3 also prohibits lawyers from knowingly making untrue statements of fact, it is not applicable in the context of a mediation or a negotiation among parties. Rule 3.3 applies only to statements made to a "tribunal." It does not apply in mediation because a mediator is not a "tribunal" as defined in Model Rule 1.0(m). Comment [5] to Model Rule 2.4 confirms the inapplicability of Rule 3.3 to mediation:

> Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Rule 3.3 does apply, however, to statements made to a tribunal when the tribunal itself is participating in settlement negotiations, including court-sponsored mediation in which a judge participates. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370 (1993) (Judicial Participation in Pretrial Settlement Negotiations), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 157, 161 (ABA 2000).

Rule 8.4(c), which on its face broadly proscribes "conduct involving dishonesty, fraud, deceit or misrepresentation," does not require a greater degree of truthfulness on the part of lawyers representing parties to a negotiation than does Rule 4.1. Comment [1] to Rule 4.1, for example, describes Rule 8.4 as prohibiting "misrepresentations by a lawyer other than in the course of representing a client . . . ." In addition, Comment [5] to Rule 2.4 explains that the duty of candor of "lawyers who represent clients in alternative dispute resolution processes" is governed by Rule 3.3 when the process takes place before a tribunal, and otherwise by Rule 4.1. Tellingly, no reference is made in that Comment to Rule 8.4. Indeed, if Rule 8.4 were interpreted literally as applying to any misrepresentation, regardless of the lawyer's state of mind or the triviality of the false statement in question, it would render Rule 4.1 superfluous, including by punishing unknowing or immaterial deceptions that would not even run afoul of Rule 4.1. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM

> This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.[3]

Truthfulness in Negotiation

It has been suggested by some commentators that lawyers must act honestly and in good faith and should not accept results that are unconscionably unfair, even when they would be to the advantage of the lawyer's own client.[4] Others have embraced the position that deception is inherent in the negotiation process and that a zealous advocate should take advantage of every opportunity to advance the cause of the client through such tactics within the bounds of the law.[5] Still others have suggested that lawyers should strive to balance the

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HODES, THE LAW OF LAWYERING § 65.5 at 65-11 (3d ed. 2001). It is not necessary, however, for this Committee to delineate the precise outer boundaries of Rule 8.4(c) in the context of this opinion. Suffice it to say that, whatever the reach of Rule 8.4(c) may be, the Rule does not prohibit conduct that is permitted by Rule 4.1(a).

3. The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98, cmt. c (2000) (hereinafter "RESTATEMENT") (citations omitted) echoes the principles underlying Comment [2] to Rule 4.1:

> Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law. Whether a statement should be so characterized depends on whether the person to whom the statement is addressed would reasonably regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement, or instead regard it as merely an expression of the speaker's state of mind.

4. *See, e.g.,* Reed Elizabeth Loder, "Moral Truthseeking and the Virtuous Negotiator," 8 *Geo. J. Legal Ethics* 45, 93-102 (1994) (principles of morality should drive legal profession toward rejection of concept that negotiation is inherently and appropriately deceptive); Alvin B. Rubin, "A Causerie on Lawyers' Ethics in Negotiation," 35 *La. L. Rev.* 577, 589, 591 (1975) (lawyer must act honestly and in good faith and may not accept a result that is unconscionably unfair to other party); Michael H. Rubin, "The Ethics of Negotiation: Are There Any?," 56 *La. L. Rev.* 447, 448 (1995) (embracing approach that ethical basis of negotiations should be truth and fair dealing, with goal being to avoid results that are unconscionably unfair to other party).

5. *See, e.g.,* Barry R. Temkin, "Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?," 18 *Geo. J. Legal Ethics* 179, 181 (2004) (clients are entitled to expect their lawyers to be zealous advocates; current literature bemoaning lack of honesty and truthfulness in negotiation has gone too far); James J. White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation," 1980 *Am. B. Found. Res. J.* 921, 928 (1980) (misleading other side is essence of negotiation and is all part of the game).

apparent need to be less than wholly forthcoming in negotiation against the desirability of adhering to personal ethical and moral standards.[6] Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law. Various proposals also have been advanced to change the applicable ethics rules, either by amending Rule 4.1 and its Comments, or by extending Rule 3.3 to negotiation, or by creating a parallel set of ethics rules for negotiating lawyers.[7]

Although this Committee has not addressed the precise question posed herein, we previously have opined on issues relating to lawyer candor in negotiations. For example, we stated in Formal Opinion 93-370[8] that, although a lawyer may in some circumstances ethically decline to answer a judge's questions concerning the limits of the lawyer's settlement authority in a civil matter,[9] the lawyer is not justified in lying or engaging in misrepresentations in response to such an inquiry. We observed that:

> [w]hile . . . a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party's actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty,

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6. *See, e.g.*, Charles B. Craver, "Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive," 38 *S. Tex. L. Rev.* 713, 733-34 (1997) (lawyers should balance their clients' interests with their personal integrity); Van M. Pounds, "Promoting Truthfulness in Negotiation: A Mindful Approach," 40 *Willamette L. Rev.* 181, 183 (2004) (suggesting that solution to finding more truthful course in negotiation may lie in ancient Buddhist practice of "mindfulness," of "waking up and living in harmony with oneself and with the world").

7. *See, e.g.*, James J. Alfini, "Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1," 19 *N. Ill. U. L. Rev.* 255, 269-72 (1999) (author would amend Rule 4.1 to prohibit lawyers from knowingly assisting the client in "reaching a settlement agreement that is based on reliance upon a false statement of fact made by the lawyer's client" and would expressly apply Rule 3.3 to mediation); Kimberlee K. Kovach, "New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation," 28 *Fordham Urb. L. J.* 935, 953-59 (2001) (urging adoption of separate code of ethics for lawyers engaged in mediation and other non-adversarial forms of ADR); Carrie Menkel-Meadow, "The Lawyer as Consensus Builder: Ethics for a New Practice," 70 *Tenn. L. Rev.* 63, 67-87, (2002) (encouraging Ethics 2000 Commission to develop rules for lawyers in alternative dispute resolution context).

8. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370, in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 160-61.

9. The opinion also concluded that it would be improper for a judge to insist that a lawyer "disclose settlement limits authorized by the lawyer's client, or the lawyer's advice to the client regarding settlement terms."

fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.

Similarly, in Formal Opinion 94-387,[10] we expressed the view that a lawyer representing a claimant in a negotiation has no obligation to inform the other party that the statute of limitations has run on the client's claim, but cannot make any affirmative misrepresentations about the facts. In contrast, we stated in Formal Opinion 95-397[11] that a lawyer engaged in settlement negotiations of a pending personal injury lawsuit in which the client was the plaintiff cannot conceal the client's death, and must promptly notify opposing counsel and the court of that fact. Underlying this conclusion was the concept that the death of the client was a material fact, and that any continued communication with opposing counsel or the court would constitute an implicit misrepresentation that the client still was alive. Such a misrepresentation would be prohibited under Rule 4.1 and, with respect to the court, Rule 3.3. Opinions of the few state and local ethics committees that have addressed these issues are to the same effect.[12]

False statements of material fact by lawyers in negotiation, as well as implicit misrepresentations created by a lawyer's failure to make truthful statements, have in some cases also led to professional discipline. For example, in reliance on Formal Opinion 95-397, a Kentucky lawyer was disciplined under Rule 4.1 for settling a personal injury case without disclosing that her client had died.[13] Similarly, in a situation raising issues like those presented in Formal Opinion 93-370, a New York lawyer was disciplined for

10. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1994) (Disclosure to Opposing Party and Court that Statute of Limitations Has Run), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 253.

11. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-397 (1995) (Duty to Disclose Death of Client), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1988 at 362.

12. *See* New York County Lawyers' Ass'n Committee on Prof'l Ethics Op. 731 (Sept. 1, 2003) (lawyer not obligated to reveal existence of insurance coverage during a negotiation unless disclosure is required by law; correlatively, not required to correct misapprehensions of other party attributable to outside sources regarding the client's financial resources); Pennsylvania Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility Informal Op. 97-44 (Apr. 23, 1997) (lawyer negotiating on behalf of a client who is an undisclosed principal is not obligated to disclose the client's identity to the other party, or to disclose the fact that that other party is negotiating with a straw man); Rhode Island Supreme Court Ethics Advisory Panel Op. 94-40 (July 27, 1994) (lawyer may continue negotiations even though recent developments in Rhode Island case law may bar client's claim).

13. Kentucky Bar Ass'n v. Geisler, 938 S.W.2d 578, 579-80 (Ky. 1997); *see also* In re Warner, 851 So. 2d 1029, 1037 (La.), reh'g denied (Sept. 5, 2003) (lawyer disciplined for failure to disclose death of client prior to settlement of personal injury action); Toledo Bar Ass'n v. Fell, 364 N.E.2d 872, 874 (1977) (same).

stating to opposing counsel that, to the best of his knowledge, his client's insurance coverage was limited to $200,000, when documents in his files showed that the client had $1,000,000 in coverage.[14] Affirmative misrepresentations by lawyers in negotiation also have been the basis for the imposition of litigation sanctions,[15] and the setting aside of settlement agreements,[16] as well as civil lawsuits against the lawyers themselves.[17]

In contrast, statements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1.[18]

Application of the Governing Principles to Caucused Mediation

Having delineated the requisite standard of truthfulness for a lawyer engaged in the negotiation process, we proceed to consider whether a different standard should apply to a lawyer representing a client in a caucused mediation.[19]

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14. In re McGrath, 468 N.Y.S.2d 349, 351 (N.Y. App. Div. 1983).

15. *See* Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1, 11 (1st Cir. 2005); Ausherman v. Bank of America Corp., 212 F. Supp. 2d 435, 443-45 (D. Md. 2002).

16. *See, e.g.*, Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 512 (E.D. Mich. 1983) (settlement agreement set aside because of lawyer's failure to disclose death of client prior to settlement); Spaulding v. Zimmerman, 116 N.W.2d 704, 709-11 (Minn. 1962) (defense counsel's failure to disclose material adverse facts relating to plaintiff's medical condition led to vacatur of settlement agreement).

17. *See, e.g.*, Hansen v. Anderson, Wilmarth & Van Der Maaten, 630 N.W.2d 818, 825-27 (Iowa 2001) (law firm, defendant in malpractice action, allowed to assert third-party claim for equitable indemnity directly against opposing counsel who had engaged in misrepresentations during negotiations); Jeska v. Mulhall, 693 P.2d 1335, 1338-39 (1985) (sustaining fraudulent misrepresentation claim by buyer of real estate against seller's lawyer for misrepresentations made during negotiations).

18. Conceivably, such statements could be viewed as violative of other provisions of the Model Rules if made in bad faith and without any intention to seek a compromise. Model Rule 4.4(a), for example, prohibits lawyers from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . ." Similarly, Model Rule 3.2 requires lawyers to "make reasonable efforts to expedite litigation consistent with the interests of the client."

19. This opinion is limited to lawyers representing clients involved in caucused mediation, and does not attempt to explore issues that may be presented when a lawyer serves as a mediator and, in carrying out that role, makes a false or misleading statement of fact. A lawyer serving as a mediator is not representing a client, and is thus not subject to Rule 4.1, but may well be subject to Rule 8.4(c) (*see* note 2 above). *Cf.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-433 (2004)

7 Committee on Ethics and Professional Responsibility 06-439

Mediation is a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputants to help them reach agreement as to some or all of the issues in controversy. Mediators assist the parties by attempting to fashion creative and integrative solutions to their problems. In the most basic form of mediation, a neutral individual meets with all of the parties simultaneously and attempts to moderate and direct their discussions and negotiations. Whatever is communicated to the mediator by a party or its counsel is heard by all other participants in the mediation. In contrast, the mediator in a caucused mediation meets privately with the parties, either individually or in aligned groups. These caucuses are confidential, and the flow of information among the parties and their counsel is controlled by the mediator subject to the agreement of the respective parties.

It has been argued that lawyers involved in caucused mediation should be held to a more exacting standard of truthfulness because a neutral is involved. The theory underlying this position is that, as in a game of "telephone," the accuracy of communication deteriorates on successive transmissions between individuals, and those distortions tend to become magnified on continued retransmission. Mediators, in turn, may from time to time reframe information as part of their efforts to achieve a resolution of the dispute. To address this phenomenon, which has been called "deception synergy," proponents of this view suggest that greater accuracy is required in statements made by the parties and their counsel in a caucused mediation than is required in face-to-face negotiations.[20]

It has also been asserted that, to the contrary, less attention need be paid to the accuracy of information being communicated in a mediation – particularly in a caucused mediation – precisely because consensual deception is intrinsic to the process. Information is imparted in confidence to the mediator, who controls the flow of information between the parties in terms of the content of the communications as well as how and when in the process it is conveyed. Supporters of this view argue that this dynamic creates a constant and agreed-upon environment of imperfect information that ultimately helps the mediator assist the parties in resolving their disputes.[21]

(Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law). In our view, Rule 8.4(c) should not impose a more demanding standard of truthfulness for a lawyer when acting as a mediator than when representing a client. We note, in this regard, that many mediators are nonlawyers who are not subject to lawyer ethics rules. We need not address whether a lawyer should be held to a different standard of behavior than other persons serving as mediator.

20. *See generally* John W. Cooley, "Mediation Magic: Its Use and Abuse," 29 *Loy. U. Chi. L.J.* 1, 101 (1997); *see also* Jeffrey Krivis, "The Truth About Using Deception in Mediation," 20 *Alternatives to High Cost Litig.* 121 (2002).

21. Mediators are "the conductors – the orchestrators – of an information system specially designed for each dispute, a system with ambiguously defined or, in some situations undefined, disclosure rules in which mediators are the chief information officers with near-absolute control. Mediators' control extends to what nonconfidential informa-

Whatever the validity may be of these competing viewpoints, the ethical principles governing lawyer truthfulness do not permit a distinction to be drawn between the caucused mediation context and other negotiation settings. The Model Rules do not require a higher standard of truthfulness in any particular negotiation contexts. Except for Rule 3.3, which is applicable only to statements before a "tribunal," the ethical prohibitions against lawyer misrepresentations apply equally in all environments. Nor is a lower standard of truthfulness warranted because of the consensual nature of mediation. Parties otherwise protected against lawyer misrepresentation by Rule 4.1 are not permitted to waive that protection, whether explicitly through informed consent, or implicitly by agreeing to engage in a process in which it is somehow "understood" that false statements will be made. Thus, the same standards that apply to lawyers engaged in negotiations must apply to them in the context of caucused mediation.[22]

We emphasize that, whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements "of fact," are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though a client's Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than $50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of $50, when authority had in fact been granted to settle for a higher sum.

Conclusion

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a party may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," are ordinarily not considered "false statements of material fact" within the meaning of the Model Rules.

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tion, critical or otherwise, is developed, to what is withheld, to what is disclosed, and to when disclosure occurs." Cooley, *supra* note 20, at 6 (citing Christopher W. Moore, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 35-43 (1986)).

22. There may nevertheless be circumstances in which a greater degree of truthfulness may be required in the context of a caucused mediation in order to effectuate the goals of the client. For example, complete candor may be necessary to gain the mediator's trust or to provide the mediator with critical information regarding the client's goals or intentions so that the mediator can effectively assist the parties in forging an agreement. As one scholar has suggested, mediation, "perhaps even more than litigation, relies on candid statements of the parties regarding their needs, interests, and objectives." Menkel-Meadow, *supra* note 7, at 95. Thus, in extreme cases, a failure to be forthcoming, even though not in contravention of Rule 4.1(a), could constitute a violation of the lawyer's duty to provide competent representation under Model Rule 1.1.

APPENDIX D

Informal Opinion 86-1518 **February 9, 1986**
Notice to Opposing Counsel of
Inadvertent Omission of Contract Provision

Where the lawyer for A has received for signature, from the lawyer for B the final transcription of a contract from which an Important provision previously agreed upon has been inadvertently omitted by the lawyer for B, the lawyer for A, unintentionally advantaged, should contact the lawyer for B to correct the error and need not consult A about the error.

A and B, with the assistance of their lawyers, have negotiated a commercial contract. After deliberation with counsel, A ultimately acquiesced in the final provision insisted upon by B, previously in dispute between the patties and without which B would have refused to come to overall agreement. However, A's lawyer discovered that the final draft of the contract typed in the office of B's lawyer did not contain the provision which had been in dispute. The Committee has been asked to give its opinion as to the ethical duty of A's lawyer in that circumstance.

The Committee considers this situation to involve merely a scrivener's error, not an intentional change in position by the other party. A meeting of the minds has already occurred. The Committee concludes that the error is appropriate for correction between the lawyers without client consultation.[1]

A's lawyer does not have a duty to advise A of the error pursuant to any obligation of communication under Rule 1.4 of the ABA Model Rules of Professional Conduct (1983). "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation." Comment to Rule 1.4. In this circumstance there is no "informed decision," in the language of Rule 1.4, that A needs to make; the decision on the contract has already been made by the client. Furthermore, the Comment to Rule 1.2 points out that the lawyer may decide the "technical" means to be employed to carry out the objective of the representation, without consultation with the client.

The client does not have a right to take unfair advantage of the error. The client's right pursuant to Rule 1.2 to expect committed and dedicated representation is not unlimited. Indeed, for A's lawyer to suggest that A has an opportunity to capitalize on the clerical error, unrecognized by B and B's lawyer, might raise a serious question of the violation of the duty of A's lawyer under Rule 1.2(d) not to counsel the client to engage in, or assist the client in, conduct the lawyer knows is fraudulent. In addition, Rule 4.l(b) admonishes the lawyer not knowingly to fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client, and Rule 8.4(c) prohibits the lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

[1] Assuming purposes of discussion that the error is "information relating to [the] representation," under Rule 1.6 disclosure would be "impliedly authorized in order to carry out the representation." The Comment to Rule 1.6 points out that a lawyer has implied authority to make "a disclosure that facilitates a satisfactory conclusion: - - in this case completing the commercial contract already agreed upon and left to the lawyers to memorialize. We do not here reach the issue of the lawyer's duty if the client wishes to exploit the error.

The result would be the same under the predecessor ABA Model Code of Professional Responsibility (1969, revised 1980). While EC 7-8 teaches that a lawyer should use best efforts to ensure that the client's decisions are made after the client has been informed of relevant considerations, the EC 9-2 charges the lawyer with fully and promptly informing the client of material developments, the scrivener's error is neither a relevant consideration nor a material development and therefore does not establish an opportunity for a client's decision. [2] The duty of zealous representation in DR 7-101 is limited to lawful objectives. *See* DR 7-102. Rule 1.2 evolved from DR 7-102(A)(7), which prohibits a lawyer from counseling or assisting the client in conduct know to be fraudulent. *See also* DR 1-102(A)(4), the precursor to Rule 8.4(c), prohibiting the lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

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[2] The delivery of the erroneous document is not a "material development" of which the client should be informed under EC 9-2 of the Model Code of Professional Responsibility, but the omission of the provision from the document is a "material fact" which under Rule 4.l(b) of !be Model Rules of Professional Conduct must be disclosed to B's lawyer.

APPENDIX 3

ETHICAL CONSIDERATIONS IN NEGOTIATING AND DRAFTING CONTRACTS

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CHAPTER 5

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Dan's practice focuses on complex business litigation, including fiduciary duty litigation, securities violations, professional malpractice claims, intellectual property disputes, shareholder claims, property disputes, and oil, gas and energy litigation. He handles cases with millions of dollars at stake yet also represents businesses and individuals in smaller disputes. He has decades of trial and appellate experience in both state and federal courts, including serving as lead counsel in jury trials and appellate arguments. Dan understands that the best resolution of many disputes is a satisfactory settlement, but he believes that the best settlements come from being fully prepared and able to try the case if necessary.

Toni D. Nguyen is the former SVP and General Counsel of Upland Software, Inc., a publicly traded cloud software company in Austin. She led Upland's legal department, managing its commercial and technology transactions, IP portfolio, disputes/litigation, and corporate governance practices; serving as assistant secretary to the Board; and assisting in merger and acquisition matters. Prior to joining Upland, Toni was an in-house attorney for biotech company Luminex Corporation, Texas media giant Belo Corp. and Travelocity.com, where she managed their IP portfolio, oversaw IP litigation, and handled commercial and technology transactions. Toni was also an IP licensing attorney at DLA Piper (fka as Gray Cary) and a litigation attorney with Vinson & Elkins. Toni graduated with honors from the University of Texas in Austin with a Bachelor of Journalism and Bachelor of Arts. After college, she was a television news reporter in Beaumont. Toni received her J.D. from the Southern Methodist University School of Law in 1997, graduating *cum laude* and Order of the Coif. Immediately after law school, she clerked for U.S. District Judge Jerry Buchmeyer. Toni has received multiple accolades, including Best Lawyer Under 40 from *D Magazine* and National Asian Pacific American Bar Association, Best Corporate Counsel from *Dallas Business Journal*, and Justice David Wellington Chew Award for outstanding contribution to advance minority interests. Toni is a current Council Member of the Corporate Counsel Section and has served in various diversity-related leadership roles, including as Minority Director for State Bar of Texas, Chair of Asian-American Pacific Interest Section, and Director of Dallas Asian-American Bar Association. Toni is married to her college sweetheart, Dan, and they have boy-girl twins, Austin and Trinity.

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Jason has over 20 years of experience as a practicing attorney and legal technology consultant. Prior to joining Apttus, he launched the Contract Management practice in the Legal Management Consulting group of Duff & Phelps after more than seven years as a legal technology consulting Director for Huron Consulting Group.

He focuses on emerging technology trends and innovation in the legal profession and has received the Award of Merit from the State Bar of Texas for service to the legal technology community. He was the 2012-2013 Chair of the State Bar of Texas Computer & Technology Section and is currently the Secretary of the Corporate Counsel Section, also serving as the Chair of the Section's Technology Committee. He was recently admitted to practice before the United State Supreme Court.

He is a finalist for the 2018 ILTA Leadership Award. He was recognized as a Global Leader and Influencer in Legal Business by the Association of International Law Firm Networks and was also named to the Fastcase 50 class of 2017, which recognizes the law's smartest, most courageous innovators, techies, visionaries, and leaders. He has been a finalist for the ILTA Consultant and Thought Leader of the Year award in 2013, 2015 and 2017. Under his leadership, the Computer & Technology Section was awarded the Pro Bono Service Award by the Texas Access to Justice Commission. He was also named one of Houston's Top Lawyers for Technology by *HTexas* Magazine in both 2014 and 2015. Jason was elected to the prestigious Texas Bar Foundation and was also inducted into the College of the State Bar of Texas.

Jason earned his B.A. in Journalism/Public Relations from Southwest Texas State University and a J.D. from South Texas College of Law in Houston.

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Cindy's practice includes a wide range of complex commercial litigation with an emphasis in technology litigation, fiduciary duty litigation, estate litigation, officer and director disputes, product liability defense and legal malpractice defense. Cindy has extensive experience representing individuals and companies in Austin's technology and emerging growth market. These cases typically involve claims of fraud, breach of licensing agreements, breach of non-disclosure agreements, misappropriation of trade secrets and violations of covenants not to compete. Cindy has also defended attorneys in cases arising from underlying patent infringement litigation, personal injury litigation, commercial litigation, airplane leases, probate and estate work, bridge loan financing and other transactional matters. Cindy graduated cum laude from Duke University in 1993 and from The University of Texas School of law in 1996. Cindy has served on the board of the Travis County Women Lawyers' Association and Foundation for many years and served as the Association President 2011-12 and the Foundation Chair 2015-16. Cindy also serves as a Director to the Austin Bar Association. Cindy was awarded the Kristi Couvillion Pro Bono Award in 2014. She is a frequent CLE speaker and has been named a Texas Rising Star in 2005 and a Texas Super Lawyer from 2014-2016.

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Mary represents both plaintiffs and defendants in a wide variety of complex commercial litigation, with an emphasis on oil and gas matters, pharmaceutical defense, and general business disputes. Mary has also assisted with the representation of clients in front of the Railroad Commission. Mary received her law degree from Harvard Law School, cum laude, in 2015 and received her undergraduate degree from Smith College, summa cum laude, in 2010. Mary joined the firm as an associate after graduating from law school.

TABLE OF CONENTS

ETHICAL ISSUES IN NEGOTIATING AND DRAFTING CONTRACTS[1]

I. INTRODUCTION

An attorney's job often entails balancing obligations. First and foremost, attorneys are obligated to serve their clients' interests. But attorneys also have obligations under their state's rules of ethics and common law. One of the most difficult aspects of lawyering involves balancing these various obligations when they conflict.

This paper discusses three areas of conflict that may arise in the context of negotiating and drafting contracts. It reviews the relevant Model Rules of Professional Conduct, the Texas Rules of Professional Conduct, ethics opinions, and case law. The first section of this paper addresses potentially conflicting obligations during contract negotiations and drafting. The second section deals with conflicts arising from communications with a represented client. The final section discusses issues involving the attorney client privilege.

II. ETHICAL OBLIGATIONS DURING CONTRACT NEGOTIATIONS

Contract negotiations can present potential conflicts between an attorney's obligations: (1) to conduct their dealings with honesty and in good faith and (2) to do all she can to obtain the best result for her client. *See* Philip K. Lyon, *Ethical Considerations in Negotiation*, 55 Prac. Law. 37, 38 (2009). Below we describe some specific instances where these obligations conflict.

A. Language Omitted from a Contract

Imagine that two lawyers are negotiating a contract. Lawyer B tells Lawyer A that her client will not agree to the deal unless Provision X is included in the contract. Lawyer A and her client agree to the inclusion of Provision X. But when Lawyer B sends a draft of the contract to Lawyer A, Provision X is missing. Lawyer A does not want to tell Lawyer B about this mistake because Provision X disfavors her client. What should Lawyer A do?

ABA Informal Opinion 86-1518, applying the Model Rules[2], provides some guidance here. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 86-1518 (1986). The opinion considered a factual scenario almost identical to the above hypothetical and concluded:

> [F]or A's lawyer to suggest that A has an opportunity to capitalize on the clerical error, unrecognized by B and B's lawyer, might raise a serious question of the violation of the duty of A's lawyer under Rule 1.2(d)[3] not to counsel the client to engage in, or assist the client in, conduct the lawyer knows is fraudulent. In addition, Rule 4.1(b)[4] admonishes the lawyer not knowingly to fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client, and Rule 8.4(c)[5] prohibits the lawyer form engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Id. The opinion further noted that Lawyer A does not need to consult her client before reaching out to Lawyer B because Lawyer A has implied authority under Model Rule 1.6[6] to complete the contract already agreed upon.[7]

Texas authorities appear to reach a similar conclusion. Texas Rules 1.02, 4.01, and 8.04, suggest that Lawyer A should tell Lawyer B that Provision X was mistakenly omitted from the contract. Texas Rule 1.02 provides, in relevant part, that "[a] lawyer shall not

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[1] The authors acknowledge and appreciate the assistance of Scott Douglass & McConnico 2018 summer associates Conner Brown and Cason Kynes in the preparation of this paper.

[2] Unless otherwise indicated, the phrases "Model Rules" and "Texas Rules" refer to the Model Rules of Professional Conduct and the Texas Disciplinary Rules of Professional Conduct and, respectively.

[3] Model Rule 1.2(d) provides, in relevant part, that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." Model Rules of Prof'l Conduct R. 1.2(d).

[4] Model Rule 4.1(b) provides that a lawyer shall not knowingly "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Model Rules of Prof'l Conduct R. 4.1(b).

[5] Model Rule 8.4(c) states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]". Model Rules of Prof'l Conduct R. 8.4(c).

[6] Model Rule 1.6 provides that a lawyer "shall not reveal information relating to the representation of a client unless . . . the disclosure is impliedly authorized in order to carry out the representation." Model Rules of Prof'l Conduct R. 1.6. The similar Texas rule, Rule 1.05, provides: "A lawyer also may reveal unprivileged client information . . . [w]hen impliedly authorized to do so in order to carry out the representation." Tex. Disciplinary Rules of Prof'l Conduct R. 1.05(d)(1).

[7] The opinion specifically notes that it does not "reach the issue of the lawyer's duty if the client wishes to exploit the error." *Id.* The Texas Rules of Professional Conduct, however, explain that a lawyer may withdraw from representation if "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes may be criminal or fraudulent." Tex. Disciplinary Rules of Prof'l Conduct R. 1.15(b)(2).

assist or counsel a client to engage in conduct that the lawyer knows[8] is criminal or fraudulent." Tex. Disciplinary Rules of Prof'l Conduct R. 1.02(c). Rule 4.01 states that a lawyer shall not "fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client." Tex. Disciplinary Rules of Prof'l Conduct R. 4.01(b). And Rule 8.04 provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Tex. Disciplinary Rules of Prof'l Conduct R. 8.04(a)(3). Taken together, these Rules indicate that Lawyer A should let Lawyer B know about the omission of Provision X if the failure to do so could be considered fraudulent.

But all of this begs the question: what makes a failure to disclose fraudulent? Under Texas law, a failure to disclose a fact is fraudulent only if there is a duty to disclose. *See Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001) ("As a general rule, a failure to disclose information does not constitute fraud unless there is a duty to disclose the information. Thus, silence may be equivalent to a false representation only when the particular circumstances impose a duty on the party to speak and he deliberately remains silent.") In an arms-length negotiation Lawyer A arguably has no duty to disclose the mistake if she did not cause it. The Texas Supreme Court in *Bradford* held that a failure to disclose in an arms-length transaction can only rise to the level of fraud if: a) Party A knows that Party B is ignorant of the terms and b) Party B did not have an equal opportunity to discover them. *See id*. Therefore, failing to disclose language left out of a contract would only constitute fraud if the other attorney doesn't know about and has no way to find out about the omission.[9]

Moreover, if Lawyer A disclosed the mistake without her client's approval, she could risk a malpractice claim against her. Perhaps the better course is for Lawyer A to tell her client about mistake and recommend that they tell the other side about it. Otherwise, the client will likely face litigation down the road once Lawyer B discovers the mistake and sues to reform the contract. Thus, it may be in Lawyer B's client's interest to be upfront now to avoid costly litigation down the road.

Is the situation any different if Lawyer A and Lawyer B do not realize that Provision X has been omitted until *after* all parties have signed the contract? The Restatement (Second) of Contracts suggests that if Lawyer B asks to modify the contract to include Provision X, Lawyer A would be wise to agree. It provides:

> Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected.[10]

Restatement (Second) of Contracts § 155 (1981). Similarly, Texas case law allows for reformation in the case of mutual mistake or unilateral mistake that is known by the other party:

> Under the case law already cited, a unilateral mistake by one party, and knowledge of that mistake by the other party, is equivalent to mutual mistake. This is not some novel legal theory. It has been recognized for decades by various courts and by respected commentators. Our research has disclosed six Texas cases applying this principle to the reformation of a deed and three others to reformation of other instruments affecting an interest in real property. Our research has also disclosed eleven Texas decisions either applying this principle to the reformation of other contracts or recognizing the validity of the principle.

Givens v. Ward, 272 S.W.3d 63, 71 (Tex. App.—Waco 2008, no pet.) (internal quotation marks, citations, and alterations omitted). Therefore, if Provision X is left out of the contract and Lawyer B later realizes that fact, a Texas court is likely to reform the contract to include Provision X unless such a modification would prejudice third parties.

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[8] The Texas Rules define "knowingly," "known," or "knows" as "actual knowledge of the fact in question, although "[a] person's knowledge may be inferred from circumstances." Tex. Disciplinary Rules of Prof'l Conduct Preamble.

[9] A partial disclosure, however, could give rise to a duty to disclose the entire truth. *See Rimade Ltd. v. Hubbard Enter., Inc.*, 388 F.3d 138, 143 (5th Cir.2004).

[10] While this provision has not been explicitly adopted by the Supreme Court of Texas, the Court has cited to it in previous cases. *See Dallas County Cmty. Coll. Dist. v. Bolton*, 185 S.W.3d 868, 884 (Tex. 2005) (citing section 155 in reference to the concept that "equity will not aid a volunteer"); *Cherokee Water Co. v. Forderhause*, 741 S.W.2d 377, 379 (Tex. 1987) (citing section 155 when stating "By implication, then, reformation requires two elements: (1) an original agreement and (2) a mutual mistake, made after the original agreement, in reducing the original agreement to writing.")

In sum, if Lawyer A realizes that Provision X was left out of the contract before it is signed, she should inform her client about the omission and recommend disclosing it to Lawyer B. A failure to disclose the omission could be considered an ethical violation under the Texas Rules. If the lawyers realize that Provision X was omitted after the contract has been signed, Lawyer A should probably agree to amend the contract to include Provision X, because a Texas court would likely reform the contract in the event the case was litigated.

B. Obvious Mistakes

Suppose that instead of omitting an agreed-upon provision from the contract, Lawyer B makes an obvious error that benefits Lawyer A's client. Should Lawyer A bring the error to Lawyer B's attention?

At least one New Mexico ethics opinion concluded that the answer is yes. That opinion addressed the following hypothetical:

> The attorney represents the plaintiff in a personal injury case. Prior to filing suit, the attorney attempted to settle with the insurance company. The attorney demanded $20,000. The company was willing to settle for $1,000. The attorney countered with a proposal for $10,000. The company countered with its own proposal for $1,400. The attorney wrote the company a letter, threatening suit unless the matter were settled for $10,000. The company tendered him a check for $14,000 in settlement of the matter.

New Mexico Ethics Advisory Opinion 1987-11. The question was whether the attorney should bring the error in the amount of the check to the attention of the company. Relying on ABA Informal Opinion 86-1518, discussed above, the New Mexico opinion concluded that the attorney should. It explained:

> Based on the facts of this attorney's case, it is obvious that the insurance company erroneously tendered a check with an extra zero. [W]hile we do not condone the insurance company's tactic of tendering a check in settlement for an amount which the client has already rejected (perhaps hoping that the client would endorse the check in error), we do not believe that this permits the attorney to engage in similar dishonorable behavior. Knowing that the check was mistakenly tendered, we believe that the attorney's duty is to act with honesty and to avoid a possible fraud.

Id. While this opinion is not binding in Texas,[11] it does suggest that a court could find the failure to bring an obvious mistake to the other side's attention to be fraudulent and in violation of the Texas Rules.

C. Intentional Ambiguity

Next, suppose Lawyer A and Lawyer B are negotiating a contract, and Lawyer A wants the agreement to allow for a certain outcome—for example, the availability of a certain remedy for breach. Lawyer B does not want that remedy to be available. Can Lawyer A intentionally draft the contract to create an ambiguity allowing for that remedy, while leading Lawyer B to believe that the remedy is available under the terms of the contract?

A Delaware case concluded that the answer is no, in part because such conduct violates the "forthright negotiator principle."[12] The Court in *United Rentals, Inc. v. RAM Holdings, Inc.*, addressed whether a merger agreement allowed specific performance. 937 A.2d 810 (Del. Ch. 2007). Two provisions in the agreement conflicted on this point—one arguably allowed specific performance while the other allowed either party to terminate the agreement and pay a $100 million termination fee. *Id.* at 815-16. RAM Holdings, Inc., and Ram Acquisition, Corp. (collectively, "RAM") decided not to close the merger, and the other party, United Rentals, Inc. ("URI"), sued, seeking specific performance. *Id.* at 827.

The court found the interpretations advanced by both parties to be reasonable. Specifically, the court held that URI's argument that "the plain and unambiguous language of the merger agreement allows for specific performance as a remedy for the Ram Entities' breach," to be reasonable. And it found RAM's interpretation—that the agreement "prohibit[s] URI from seeking any form of equitable relief (including specific performance) under all circumstances, relegating URI's relief to only the $100 million termination fee"—be reasonable, as well. *Id.* at 830-33. The court first looked at the extrinsic evidence presented at trial and found that it did not lead to an obvious resolution. *Id.* at 836-37. Therefore, the court

[11] In fact, even Texas Ethics Opinions are not binding on Texas courts. *See, e.g., Stonewall Fin. Services Corp. v. Corona*, No. 06-11-00108-CV, 2012 WL 4087642, at *3 (Tex. App.—Texarkana Sept. 18, 2012, pet. denied) ("[Texas Committee on Professional Ethics] opinions are concerned with matters of attorney discipline and are advisory rather than binding.") (internal quotation marks omitted) (quoting *Sidley Austin Brown & Wood, LLP v. J.A. Green Dev. Corp.*, 327 S.W.3d 859, 866 (Tex. App. – Dallas 2010, no pet.)).

[12] We have not found any Texas opinion recognizing the "forthright negotiator principle." But a creative lawyer could certainly advocate for a Texas court to adopt it. And many contracts provide for the application of Delaware law.

applied the "forthright negotiator principle" to determine the proper interpretation of the merger agreement. The court explained that "under the forthright negotiator principle, the subjective understanding of one party to a contract may bind the other party when the other party knows or has reason to know of that understanding." *Id.* at 813. The court ultimately concluded that the contract could not be read to allow specific performance.

In reaching this conclusion, the court pointed to the evidence that even if *URI* understood the agreement to provide a specific performance remedy, *RAM* did not know and had no reason to know of this understanding. *Id.* at 837-40. Next, the court found that RAM understood the agreement to eliminate any right to specific performance and that URI either knew or should have known of RAM's understanding. *Id.* at 840-44. The court explained:

> From the beginning of the process, Cerberus [Rsm's guarantor][13] and its attorneys have aggressively negotiated this contract, and along the way they have communicated their intentions and understandings to URI. Despite the Herculean efforts of its litigation counsel at trial, URI could not overcome the apparent lack of communication of *its* intentions and understandings to defendants. Even if URI's deal attorneys did not affirmatively and explicitly agree to the limitation on specific performance as several witnesses allege they did on multiple occasions, no testimony at trial rebutted the inference that I must reasonably draw from the evidence: by July 22, 2007, URI knew or should have known what Cerberus's understanding of the Merger Agreement was, and if URI disagreed with that understanding, it had an affirmative duty to clarify its position in the face of an ambiguous contract with glaringly conflicting provisions. Because it has failed to meet its burden of demonstrating that the common understanding of the parties permitted specific performance of the Merger Agreement, URI's petition for specific performance is denied.

Id. at 845 (emphasis in original).

After the holding in *United Rentals, Inc.,* URI shareholders sued URI and Cerberus. *See Decicco v. United Rentals, Inc.* 602 F.Supp.2d 325 (2009). The shareholders alleged that by intentionally drafting an ambiguous clause, the defendants defrauded the shareholders and devalued their shares. *Id.* at 329. After reviewing the *United Rentals, Inc.* decision, the court ruled that while the negotiations were deeply flawed, they did not rise to the level of recklessness required for fraud because both interpretations of the specific performance clause were reasonable. *Id.* at 342.

The *United Rentals, Inc.* opinion provides a clear lesson. A lawyer should not try to trick the other side by intentionally using ambiguous language in a contract. While this action may not rise to the level of fraud, ambiguous drafting will leave the clause up to the court's interpretation and ultimately may not be in the client's interests.

D. Undisclosed Revisions

These days, of course, parties typically exchange contract drafts electronically. It's easy to track and show changes in subsequent drafts by redlining. It is also possible to show some, but not all, of the changes in redlining. Then again, even if a later draft is not redlined or is partially redlined, it is possible to compare that draft to an earlier draft and see all the changes. But should you have the obligation to do that—that is, to double check to make sure your opposing counsel has not tried to slip in a change without telling you?

Suppose Lawyer A sends a draft of a contract to Lawyer B. Lawyer B revises the draft and returns it to Lawyer A, noting that it is acceptable but without revealing that he had made changes. Has Lawyer B engaged in an ethical violation? A Sixth Circuit opinion, *Hand v. Dayton-Hudson*, suggests that the answer is yes because such conduct is fraudulent. 775 F.2d 757 (6th Cir. 1985). In *Hand,* a non-lawyer made the changes, but the opinion is still informative.

In *Hand*, an employee, John Hand, lost his job with Dayton-Hudson Corporation. *Id.* at 758. Dayton-Hudson offered to pay Hand $38,000 if Hand agreed to release Dayton-Hudson of any claims he might have against it. *Id.* Hand refused, but Dayton-Hudson nonetheless drafted a release according to the terms it originally offered. *Id.* Hand told Dayton-Hudson that he was prepared to sign a release, and in fact, did sign a release with Dayton-Hudson's agent. *Id.* But before signing, "Hand had prepared another release which provided that he was releasing all claims 'except as to claims of age discrimination and breach of contract.'" *Id.* "Except for the changes made by Hand to limit the terms of the release, Hand's release was identical to the original prepared by Dayton-Hudson. . . . Despite the changes made, the documents appeared superficially identical." *Id.* at 758-59.

Over a year later, Hand sued Dayton-Hudson alleging age discrimination and breach of contract. *Id.*

[13] RAM was comprised of shell companies that effectively had no assets. To provide financial backing for the RAM Entities' obligations under the Merger Agreement Cerberus Partners provided a limited guarantee of payment, up to a maximum amount of $100 million. *Id.* at 817.

at 759. Dayton-Hudson responded that Hand had fraudulently procured its agent's signature on the modified release. *Id.* The district court reformed the release to conform to Dayton-Hudson's understanding.

The Sixth Circuit affirmed. *Id.* at 761. First, the Sixth Circuit held that "Hand committed fraud by not informing Dayton-Hudson of the changes he made in the release." *Id.* at 759. Next, the court determined that Dayton-Hudson was excused from not having read the new release. "[T]he general rule of being held responsible for contracts one signs, even if one has not read them, is not applicable when the neglect to read is not due to carelessness alone, but was induced by some stratagem, trick, or artifice on the part of the one seeking to enforce the contract." *Id.* at 759-60 (citation and internal quotation marks omitted). The court explained that "[t]he failure to read most definitely resulted from Hands' [sic] clever scheme, and, accordingly, does not bar Dayton-Hudson from challenging the validity of the fraudulent release." *Id.* at 760.

The *Hand* opinion indicates that lawyers (and their clients) should not attempt to sneak changes into a contract without letting the other side know about them. Therefore, one should generally make edits to a contract made in redline, or should otherwise make them known to opposing counsel. Conversely, when receiving a non-redlined draft, you should ask for a representation as to whether any changes have been made.

Nonetheless, that in certain instances a party to a negotiation may have a duty to disclose changes it made to a contract does not translate into a general duty of disclosure to the other side. Nor does this principle convert all verbal statements into binding promises.

The opinion in *Eaton Corp. v. Minerals Technologies Inc.*, provides an example of when a nondisclosure is not actionable. 96CV162, 1999 WL 33485557 (W.D. Mich. Mar. 19, 1999). In *Eaton* a purchaser made general statements indicating it would continue to use a supplier's services. But then the purchaser abruptly terminated the agreement. *Id.* The supplier sued, alleging fraud based on the purchaser's failure to disclose its intentions to terminate the relationship. *Id.*

Citing *Hand*, the Eaton court found that a general duty of disclosure only arises when "circumstances surrounding a particular transaction are such as to require the giving of information." *Id.* at 3. There the circumstances did not create a duty of disclosure between the parties because there was no contractual obligation or "long-term binding commitment to future purchases". *Id.* Instead, the parties had only exchanged "platitudes" about a "long-term relationship." *Id.*

The bottom line is that if your client is relying on a particular representation in a negotiation, get it in writing.

E. Misrepresentation Arising from Changed Circumstances

As noted above, the Texas Rules prohibit lawyers from engaging in or assisting a client to engage in fraudulent conduct. Tex. Disciplinary Rules of Prof'l Conduct R. 1.02(c), 8.04(a)(3). What is a lawyer's duty if a representation in a contract was not originally false, but becomes false due to changed circumstances? A law review article by Professor Gregory M. Duhl addresses this question using the following hypothetical:

> A lawyer assists a client in the sale of a bookstore. The representations and warranties regarding the financials of the client's bookstore were truthful when the seller and buyer executed the contract. After execution of the contract, but prior to closing, the client informs the lawyer that the most recent financials for the bookstore show a significant downturn in sales from the information that had been provided to the buyer. The client can no longer truthfully certify that the representations and warranties are correct at the time of closing but the client wants to do so anyway.

Gregory M. Duhl, *The Ethics of Contract Drafting*, 14 Lewis & Clark L. Rev. 989, 999 (2010). Duhl concluded that "[i]f the lawyer continues to represent the client with regard to the sale, the lawyer must either counsel the client to disclose the changed financials (and not to certify the representations and warranties as accurate), or disclose the changed financials himself." *Id.* Duhl further asserted that "[f]or the lawyer to fail to do so violates Model Rule 4.1(b)." [14] *Id.*

Similarly, under the Texas Rules, a lawyer would not only be permitted—but would perhaps be required—to inform opposing counsel about her client's changed financial situation. Texas Rule 1.05 mandates that "[a] lawyer *shall* reveal confidential information when required to do so by . . . Rule 4.01(b)." Tex. Disciplinary Rules of Prof'l Conduct R. 1.05(f) (emphasis added). Rule 4.01(b), in turn, states that a lawyer shall not "fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client." Tex. Disciplinary Rules of Prof'l Conduct R. 4.01(b).

[14] Model Rule 4.1(b) provides that a lawyer shall not knowingly "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Model Rules of Prof'l Conduct R. 4.1(b).

Therefore, if a lawyer believes that changed circumstances have made a material representation incorrect and potentially fraudulent, he may have a duty to reveal the changed circumstances to the other side. But as Duhn explains, "[t]he lawyer also could decide to withdraw from representation if the client insists on not disclosing the new financials." Duhl, *The Ethics of Contract Drafting*, *supra,* at 1000. "If the lawyer withdraws, he is most likely not 'assisting' the client in any fraud because the lawyer counseled against certifying the representations and warranties without further disclosure and modification." *Id.* Duhl suggests that the most prudent action for an attorney in such a situation may be to both withdraw from representation and disclose to the other side that the contractual representations are no longer truthful, because "it makes clear the attorney is not 'assisting' in any fraudulent conduct by the seller." *Id.*[15]

But this may be going too far. Many contracts define the length of time that a representation and warranty survives the closing. Moreover, is a mere breach of a warranty always tantamount to fraud? In many cases it might be, if the representation is made with the knowledge that it is wrong and with the intent to induce some act by the other party. But frequently contracts have a materiality requirement. For example, often representations and warranties are that something will not cause a "material adverse effect." But a client could reasonably contend that even though a company's financial status had changed, the change would not rise to the level of a "material adverse effect."

Finally, many respected commentators agree with the efficient breach theory that holds a party should be allowed to breach a contract and simply pay damages. *See generally,* Gregory Klass et al, *The Philosophical Foundations of Contract Law*, 363-366 (2014). Should a client not be equally free to breach a warranty and if the client wants to pursue that action and accept the consequences shouldn't a lawyer putting the client's interests first allow that to happen?

These questions highlight the difficulty of a lawyer has in balancing his obligations to his client with his ethical obligations—ethical obligations that could be subject to different interpretations.

F. Honesty and Negotiation Strategy: Puffing versus Lying

In negotiating a contract, how many of us have told the other side that our client was not prepared to pay any more than X, when in fact we knew it was? Or that our client needed a specific amount when in fact she would accept less than that. Or perhaps we have suggested that there were other parties interested in doing the deal when in fact there weren't. Are these actionable misrepresentations or legitimate negotiating tactics?

Suppose Lawyer A begins contract negotiations with Lawyer B to sell a product he knows is worth around $50,000. Lawyer A initially asks for $75,000, claiming the product is worth even more. Lawyer B responds that $75,000 is too high and counter-offers with $40,000. After more negotiating, the two settle on a price of $50,000. Could Lawyer A's statements in this scenario violate Model Rule 4.1, which prohibits attorneys from knowingly making false statements of material fact or law to third parties when representing clients? Model Rules of Prof'l Conduct R. 4.1. If so, virtually all of us who have negotiated agreements have violated this rule.

The comments to Rule 4.1, however, indicate that statements like Lawyer A's are generally not considered a statement of "material fact":

Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Model Rules of Prof'l Conduct R. 4.1 cmt. 2. This comment attempts to preserve the strength of negotiations while also preventing lawyers from lying about material facts. It recognizes that valuations are not facts but rather estimates that fluctuate based on the negotiators subjective values. This marks a realistic approach to rules for attorneys. [16]

Still, certain conduct during negotiations could implicate Model Rule 8.4, which prohibits lawyers from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." Model Rules of Prof'l

[15] An ABA formal Ethics opinion addressed this topic, finding that a lawyer who knows her services or work product "are intended to be used by a client to perpetuate a fraud must withdraw from further representation of the client". ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-366 (1992). Additionally an attorney also has the duty to disaffirm misrepresentations "even though such a noisy withdrawal may have the collateral effect of inferentially revealing client confidences." *Id.*

[16] As one scholar noted, to only speak the absolute truth in negotiations would "place [lawyers] and their clients at a distinct disadvantage, since [honest lawyers] permit their opponents to obtain [results] that transcend the terms to which they are objectively entitled." Charles B. Craver, *Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive*, 38 S. TEX. L. REV. 713, 717-18 (1997).

Conduct R. 8.4(c). But while this language is seemingly broad, courts are reluctant to allow this rule to interfere with common negotiation strategies. *See* Douglas R. Richmond, *Lawyers' Professional Responsibilities and Liabilities in Negotiations*, 22 Geo. J. Legal Ethics 249, 274 (2009). Instead, courts typically apply Rule 8.4 only when a party makes statements that he knows are verifiably false. An example is *In re Scanio*. 919 A.2d 1137 (D.C. 2007). In *Scanio*, an attorney, negotiating on his own behalf, knowingly and repeatedly lied to insurance adjusters about his hourly pay to claim a larger insurance compensation package. *Id.* at 13-15. The court found that the blatant and repeated nature of his misrepresentations was sufficient to justify a sanction under Rule 8.4(c). *Id.* at 16-17.

Taken together, Model Rules 4.2 and 8.4(c) aim to promote honesty and fair dealing within the legal profession, while also acknowledging that negotiation necessarily entails some level of "puffery" to advance clients' interests. In sum, the line for negotiations is that claims about values and willingness to pay certain amounts may be nonactionable puffery but outright lies about actual data are unethical.

But as noted above, at times the line between puffery and lying may be blurry. Would we not be better off to require lawyers to be honest and fair in negotiations? Actually, some drafters of the Model Rules put forth an idea for a rule requiring "fair" negotiations. *See* Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95 (2011). In response to this suggestion, Professor James J. White famously said: "It is my hypothesis that it is better to have no [negotiation ethics] rule than to have one so widely violated as to be a continuing hypocrisy that may poison the application of the remaining rules." *Id.* Hinsaw and Alberts confirmed this suspicion. Using an empirical study, they noted that "anecdotal reports and the findings of prior research that even that low standard is likely to be violated by a substantial number of lawyers". *Id.* Better to have a compromise position that at least some lawyers can adhere to than a laudatory rule more honored in the breach than in the compliance.

G. Negotiating Settlements

We—the authors—are litigators. The agreements we negotiate most frequently are agreements relating to issues in the litigation[17] and settlement agreements. There may be times when we strongly believe that our clients should take a settlement offer that the client doesn't want to take. Or, conversely, we may think that a client should not settle on certain terms. In those instances do we have any say in what the client decides to do?

Imagine that Lawyer A has a new client and is drafting an engagement letter. Can Lawyer A include a provision stating that her client cannot accept a settlement offer without Lawyer A's consent? Under Model Rule 1.2(a), the answer is no. The rule states:

> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. *A lawyer shall abide by a client's decision whether to settle a matter*.

Model Rules of Prof'l Conduct R. 1.2 (emphasis added). A comment to the rule further clarifies this principle:

> [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client.

Id. at cmt. 1.

Texas's corollary rule is similar. It states that a lawyer shall abide by a client's decision "whether to accept an offer or settlement of a matter." Tex. Disciplinary Rules of Prof'l Conduct R. 1.02(a)(2). Comment 2 provides an exception, explaining that a lawyer does not have to communicate a settlement offer to a client if prior communications have made it clear that that particular proposal would be unacceptable to the client. *Id.* at cmt. 2. Notably, a client cannot waive her right to make a final determination regarding whether to accept or reject a settlement offer. Comment 5 explains that "the client may not be asked to . . . surrender the right to . . . settle or continue litigation that the lawyer might wish to handle differently." *Id.* at cmt. 2. And in fact, Texas courts have found agreements providing that clients cannot settle claims without their attorneys' consent to be unconscionable. *See, e.g., In re Plaza*, 363 B.R. 517, 520-22 (Bankr. S.D. Tex. 2007) (applying Texas law and holding that a provision in contingency agreement stating that the client will not make settlement of a claim without the attorney's consent to be unconscionable); *Davis Law Firm v. Bates*, No. 13-13-00209-CV, 2014 WL 585855, at *4 (Tex. App.—Corpus Christi Feb. 13, 2014, no pet.)

[17] For example, we often negotiate with opposing counsel on pretrial scheduling deadlines and discovery limitations.

(mem. op.) ("We have already determined that because the contingent fee agreement prohibited settlement without [the lawyer's] consent, it was unenforceable as against public policy.") (citations omitted).

The bottom line is that while negotiating settlements we lawyers must follow the client's decision, no matter how fool hardy we think it is. Of course we can—and should—explain to the client why we believe its decision is not the best.

III. COMMUNICATION WITH REPRESENTED PARTIES

At times, a lawyer negotiating a deal with the other side's lawyer may feel that his message is not getting through to the opposing client. He may be tempted to seek to directly negotiate with the opposing client. Of course, if he has the opposing counsel's consent there is no problem. But what if he doesn't?

Imagine that an attorney is having trouble negotiating with opposing counsel and believes that he can achieve a better deal by addressing the opposing counsel's client directly. Can he be allowed to bypass opposing counsel and speak with the client directly? What if instead, without any prompting by counsel, a client reaches out to opposing counsel and seeks to make a deal?

Neither of these scenarios is acceptable under Model Rule 4.2. It provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Model Rules of Prof'l Conduct R. 1.2. The purpose of this rule is clear. Without Rule 4.2, lawyers could attempt overreach by interfering with the opposing counsel's attorney-client relationship. *See* Ann. Mod. Rules Prof. Cond. sect. 4.2.

Texas Rule 4.02 is similar:

> In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Tex. Disciplinary Rules of Prof'l Conduct R. 4.02(a). This rule raises several questions. For example, does it only apply in a litigation context? Can a lawyer's client contact a represented party? If the represented party is an organization, does this rule apply to every person who works at the organization? How does this rule apply to organizations with in-house counsel? The Texas Rules address these questions, as discussed below.

A. The Rule Applies in a Non-Litigation Context

Texas Ethics Opinion Number 492 addressed this question: "Do the prohibitions of Rule 4.02 apply to an attorney who represents a union member in resolving grievances or other concerns arising out of municipal employment, or who negotiates on policy matters, where there is neither litigation in progress nor contemplated?" Tex. Ethics Comm'n Op. No. 492 (1992). The opinion concluded that "despite the fact that litigation is neither in progress nor contemplated, the prohibitions of Rule 4.02 apply." *Id.* In reaching this conclusion, the opinion cited Comment 3 of Texas Rule 3.10, which states: "As to the representation of a client in a negotiation or other bilateral transaction with a governmental agency, see Rules 4.01 through 4.04." Tex. Disciplinary Rules of Prof'l Conduct R. 3.10 cmt. 3. Therefore, the opinion concluded that Texas Rule 4.02 applies in the non-litigation context. And there is no reason to limit this conclusion to situations where the represented party is a governmental agency.

B. A Client Can Contact the Other Represented Party

A client who is not under her lawyer's direct supervision can contact a represented party, as long as her lawyer doesn't encourage her to do so. Comment 2 to Rule 4.02 makes this clear:

> Paragraph (a) does not . . . prohibit communication between a lawyer's client and persons, organizations, or entities of government represented by counsel, as long as the lawyer does not cause or encourage the communication without the consent of the lawyer for the other party. . . . Similarly, that paragraph does not impose a duty on a lawyer to affirmatively discourage communication between the lawyer's client and other represented persons, organizations or entities of government. Tex. Disciplinary Rules of Prof'l Conduct R. 4.02 cmt. 2.

Texas Ethics Opinion 600 addressed this rule. The opinion considered whether a lawyer for a Texas governmental agency had to ensure that the "agency's enforcement officers do not communicate directly with a regulated person who is represented by a lawyer." Tex. Ethics Comm'n Op. No. 600 (2010). The opinion concluded that the agency's lawyer was not required to prohibit such communications. The opinion explained:

> [P]rovided that the agency's lawyer does not have direct supervisory authority over the enforcement

> personnel of the agency and does not cause or encourage communications by such personnel with represented persons, neither Rule 4.02(a) nor any other provision of the Texas Disciplinary Rules of Professional Conduct imposes restrictions on the lawyer with respect to communications by enforcement personnel with represented persons.

Id. Interestingly, the opinion also commented that "[t]here is likewise no requirement under the Texas Disciplinary Rules of Professional Conduct that a lawyer for the agency comply with a request from a regulated person's lawyer that all communications by enforcement personnel with the regulated person be carried out through the lawyer." *Id.*

Finally, the opinion observed that the result would be different "if the agency lawyer had direct supervisory authority over enforcement personnel of the agency." In that event, "Rule 5.03[18] would make the lawyer responsible for the actions of the employees supervised by the lawyer," and "the lawyer would be in violation of the Texas Disciplinary Rules of Professional Conduct if the lawyer ordered, encouraged or permitted employees under the lawyer's direct supervision to communicate with represented persons contrary to the requirements of Rule 4.02(a)." *Id.*

C. When the Represented Party is an Organization, a Lawyer Can Still Communicate with Certain of its Employees

Often some or even all of the parties to a negotiation are business organizations of some type. Whatever the type of organization,[19] it can only act through human beings. Which of those human beings on the opposing side can a lawyer ethically communicate with?

Suppose Lawyer A represents a company in a particular matter. If Lawyer B represents the opposing party, is Lawyer B prohibited from communicating with all employees the company Lawyer A represents?

Comment 4 to Texas Rule 4.02 explains that the answer is no. That comment states: "In the case of an organization or entity of government, this Rule prohibits communications by a lawyer for one party concerning the subject of the representation with persons *having a managerial responsibility* on behalf of the organization that relates to the subject of the representation and with those persons presently employed by such organization or entity *whose act or omission may make the organization or entity vicariously liable* for the matter at issue." Tex. Disciplinary Rules of Prof'l Conduct R. 4.02 cmt. 4 (emphasis added). Therefore, a lawyer can communicate with a person who works for a represented company about the subject of the representation if the person does not have managerial responsibility and his actions cannot make the company vicariously liable for the matter at issue.

Texas Ethics Opinion 474 addressed this issue. There a plaintiff sued a municipality, which was represented by the city attorney. Tex. Ethics Comm'n Op. No. 474 (1991). The municipality offered a settlement that the plaintiff considered inadequate. The plaintiff's attorney then called an individual council member to express disapproval of the city's settlement offer. *Id.* The Committee found this conduct to violate Rule 4.02 because the council member had managerial responsibility on behalf of the municipality that related to the subject matter of the representation. *Id.*

Significantly, the Official Comment to Model Rule 4.2 does not use the phrase "managerial authority." Instead it provides: "In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Model Rules of Prof'l Conduct R. 4.2 cmt. 7. Therefore, Model Rule 4.2 would cover a low-level employee who does not have managerial authority but who does regularly consult with the organization's lawyer, but the corresponding Texas Rule would not.

But even if a lawyer could ethically communicate with a company's employee there could be other risks in doing so. The opposing company could contend that the employee improperly revealed confidential information to the lawyer, necessitating that the lawyer withdraw. Even if this allegation lacked merit it could inject a collateral issue that could derail negotiations. Thus, we recommend proceeding cautiously when contacting employees of a company that is on the other side of negotiation.

D. Ability to Communicate with Company Employee when the Company has In-House Counsel

Frequently, of course, a company will have in-house counsel. Does that mean that the in-house

[18] Texas Rule 5.03 provides that with respect to a nonlawyer associated with a lawyer, "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." Tex. Disciplinary Rules of Prof'l Conduct R. 5.03(a).

[19] For the purposes of this discussion the type of organization—corporation, Limited Liability Corporation, Limited Partnership, etc.—is irrelevant.

counsel automatically represents the company on all matters, such that an opposing lawyer can never contact company employees without violating Texas Rule 4.02?

The answer to this question is likely no. Rule 4.02 requires that a lawyer "know" that a party is represented. And the Texas Rules define "knowingly," "known," or "knows" as "actual knowledge of the fact in question, although "[a] person's knowledge may be inferred from circumstances." Tex. Disciplinary Rules of Prof'l Conduct Preamble. Therefore, because a lawyer has to "know" that a company is represented in a particular matter before Texas Rule 4.02 applies, she can communicate freely with employees until it is made clear that the company is represented.

One author explained this point:

> To illustrate, suppose you are in-house counsel working on a contract with a company that has in-house counsel, but you are dealing with someone in the Procurement Department who is not a lawyer. Without more, this conduct does not violate Rule 4.02 because you do not "know" the company is represented in this matter. If the procurement officer says, "You know, we are getting close to being done on this contract, but before we can finalize it I am going to have to run it past legal," then that company remains unrepresented on that matter so far as you know. On the other hand, if the procurement officer says, "I was talking about this with a colleague in legal yesterday and she said . . . ." then you know the other party is represented in that matter. At that point, you need to cut off the conversation immediately until you get the lawyer's permission to speak directly to the other party.

John M. Tanner, In-House Counsel Ethically Dealing with Represented Parties, Unrepresented Parties, and How to Tell the Difference (in Texas and Model Rule States), Corporate Counsel Section, State Bar of Texas – Spring-II Edition 2013 Newsletter, http://www.fwlaw.com/news/302-in-house-counsel-ethically-dealing-represented-parties-unrepresented-parties. Therefore, when negotiating with an organization, you should begin communicating exclusively with the organization's attorney as soon as it is apparent that the organization is represented on the matter at issue.

Next, suppose an organization with in-house counsel has hired an outside lawyer to represent it on a particular matter. Can the opposing lawyer still communicate with the in-house counsel, even though the organization is represented by an outside lawyer? According to ABA Formal Opinion 06-443, the answer is yes. That opinion based its conclusion on Model Rule 4.2 underlying purpose:

> Rule 4.2 protects a "person" against possible overreaching by adverse lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information regarding the representation. Rule 4.2 presumes generally that the client is not legally sophisticated and should not be put by an opposing lawyer in the position of making uninformed decisions or statements or inadvertent disclosures harmful to the organization. . . . The protections provided by Rule 4.2 are not needed when the constituent of an organization is a lawyer employee of that organization who is acting as a lawyer for that organization. When communications are lawyer-to-lawyer, it is not likely that the inside counsel would inadvertently make harmful disclosures. The purpose of Rule 4.2 is to prevent a skilled advocate from taking advantage of a non-lawyer.

ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 06-443 (2006). Although this opinion is not binding in Texas, it does suggest that a lawyer may communicate directly with the in-house counsel of an organization represented by an outside lawyer on a particular matter without violating Model Rule 4.2 or the corresponding Texas Rule. But, if opposing counsel has concerns about doing this, she could always seek permission from the outside lawyer to communicate with the in-house counsel regarding the matter at issue.

IV. PRIVILEGE ISSUES FOR IN-HOUSE COUNSEL

Frequently, the lawyer negotiating the deal is in-house. That position raises additional privilege issues that can arise during a negotiation.

A. Balancing Attorney-Client Relationships with Employees and Employers.

Imagine that Lawyer A serves as in-house counsel for a company. In the course of working with the CEO on a particular matter, Lawyer A comes to believe that the CEO's interests do not align with, and may even be adverse to, those of the company. What should Lawyer A do?

First, Lawyer A should clarify to the CEO that she represents just the company, and not the CEO. This type of clarification is colloquially called an "*Upjohn*

warning"[20] and stems from Model Rule 1.13. Model Rules of Prof'l Conduct R. 1.13. The Model Rule first provides that "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." *Id.* It then addresses a lawyer's duty when the organization's representative may be acting contrary to the organization's interests:

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

Id. To ensure that company's representatives understand the lawyer's responsibilities the rule requires the attorney to "explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing" *Id.*

Texas law mirrors this approach. For example, the Comment 1 to Texas Rule 1.12 states that "[a] lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents." Tex. Disciplinary Rules of Prof'l Conduct R. 1.12 cmt. 1; *see also In re Mktg. Inv'rs Corp.*, 80 S.W.3d 44, 49 (Tex. App.—Dallas 1998) (citing Tex. R. Evid. 503(a)(1); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985)) ("A corporation is a client for purposes of the attorney-client privilege. In a corporation's affairs, however, there is but one client—the corporation."); *Kastner v. Jenkens & Gilchrist, P.C.*, 231 S.W.3d 571, 578 (Tex. App.—Dallas 2007) (citations omitted) ("It is well-established that an attorney's representation of a partnership does not constitute representation of each of the individual partners.") Of course, in-house counsel can represent both an organization and its representatives or affiliates, as long as there is no conflict of interest.[21] But the general rule is that when in-house counsel represents *just* the organization.

Notwithstanding this general rule, though, the organization's representatives may tend to view the in-house counsel as their lawyer. Accordingly, in-house counsel should take care not to create an implied attorney-client relationship between her and an individual at the organization.[22] The court in *MacFarlane v. Nelson*, 2005 WL 2240949 (Tex. App.—Austin Sept. 15, 2005) (mem. op.), considered this issue. There, lawyer Daniel Nelson helped set up a partnership between William A. MacFarlane and Robert Rickard to invest in and develop real estate. *See id.* at *2. The partnership purchased a waterfront condominium project called the Villas on Lake Travis, which consisted of the "West Side" and "East Side" developments. *See id.* A few years later, Nelson set up a limited partnership for MacFarlane and Rickard, known as the Villas by Renaissance, Ltd. ("VBR"), for the purpose of constructing and selling units on the East Side. *See id.* at *3.

Conflicts arose between MacFarlane and Rickard, and on April 29, 1999, all the parties met. *See id.* Nelson took notes during the discussion, and at the end of the meeting, the parties agreed that Nelson would be primarily responsible for drafting a settlement agreement reflecting MacFarlane and Rickard's agreement. *See id.* MacFarlane later claimed that Nelson breached a fiduciary duty owed to MacFarlane individually when Nelson drafted the agreement. *See id.* Nelson countered that MacFarlane failed to prove the existence of an attorney-client relationship. *See id.* at *4. MacFarlane acknowledged that Nelson did not affirmatively manifest an intent to represent MacFarlane on an individual basis. But McFarlane claimed that an attorney-client relationship nonetheless existed between them, or at least that it was reasonable for MacFarlane to believe that one did, because Nelson was aware MacFarlane was relying on him for personal representation and failed to manifest a contrary intent. See *id.* at *4.

The court began by noting that "[d]ifficulties in determining the existence of an attorney/client relationship often occur when a lawyer represents a

[20] While referred to as an "*Upjohn* Warning", this type of warning was actually not discussed in the case. *See Upjohn Company v. United States* 449 U.S. 383 (1981). Rather, the *Upjohn* opinion addressed a circuit split over the use of the subject matter test versus control group test to determine if the attorney-client privilege protected lower-ranking employee communications. *Id.* at 396-398. The court concluded that the control group test was too narrow and that privilege should be decided on a case-by-case analysis of the subject matter. *Id.* This decision then prompted the adoption of Model Rule rule 1.13 to ensure there is a warning to the employee before potentially adverse subject matter is discussed. Ann. Mod. Rules Prof. Cond. sect. 1.13.

[21] Comment 5 provides: "A lawyer representing an organization may, of course, also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.06." Tex. Disciplinary Rules of Prof'l Conduct R. 1.12 cmt. 5.

[22] A lawyer representing an organization has a duty to the organization's directors, officers, employees, members, shareholders, or other constituents to "explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part." Tex. Disciplinary Rules of Prof'l Conduct R. 1.12(e).

small entity with 'extensive common ownership and management,' such as a limited partnership." *Id.* (quoting Restatement (Third) of the Law Governing Lawyers § 14 cmt. f (Am. Law Inst. 2000)). The court then listed the factors to considered when determining whether an entity lawyer also represents an individual partner. They include: "whether the lawyer affirmatively assumed the duty of individual representation, whether the partner had independent representation, whether the lawyer previously represented the partner on a personal basis, and whether the evidence demonstrates the partner's reliance on or expectations of the lawyer's separate representation." *Id.* (citing *Hopper v. Frank*, 16 F.3d 92, 95 (5th Cir. 1994)). The court further explained that:

> If the lawyer knows that, contrary to his own intentions, a partner is relying on the lawyer to represent his personal interests as well as those of the partnership, then the lawyer must clarify his intentions. However, an attorney/client relationship is not created with the individual partner simply because the partner discusses matters with the lawyer that are relevant to both the individual's and the partnership's interests.

Id. (citing Restatement (Third) of the Law Governing Lawyers § 14 cmt. f).

Considering the facts the court concluded that there was no attorney-client relationship between Nelson and MacFarlane. *See id.* at *5. The court observed that MacFarlane's testimony did not establish unequivocally that he thought Nelson was representing him in his individual capacity. *See id.* at *5 ("MacFarlane testified that, when asked on previous occasions 'whether or not Dan Nelson actually represented [him] in the April 29th meeting,' he 'was not aware of how to answer it properly.'"). The court further pointed out that MacFarlane had consulted independent counsel about his dispute with Rickard and the resulting agreement. *See id.* In addition, Nelson testified that at the beginning of the April 29 meeting, he explained to MacFarlane and Rickard that he understood there were differences between them and that he could not represent them in this conflict. *See id.* Therefore, the court concluded there was no evidence showing Nelson represented MacFarlane in his individual capacity. *See id.* at *6.

The *MacFarlane* opinion demonstrates the importance of in-house counsel making it clear to individuals at the organization that he represents the organization and not the individuals. Consequently, in the hypothetical described above, Lawyer A should clarify to the CEO, ideally in writing, that she represents just the company. She could further suggest that the CEO hire her own counsel to represent her in that particular matter. Lawyer A should also be careful not to make any statements or take any action that could be interpreted as creating an implied attorney-client relationship with the CEO—unless, of course, she intends to represent the CEO in her individual capacity.

B. Navigating Privilege When Parties have Aligned Interests

Finally, imagine that Lawyer A and Lawyer B are in-house counsel for two different organizations that have aligned interests and that are on the same side of contract negotiations with a third party. Are their communications with each other and each other's clients protected by the attorney-client privilege?

Generally, the attorney–client privilege does not protect communications made in the presence of third parties. Likewise, the privilege is waived if a communication is made in confidence but subsequently revealed to a third party.

There are, however, exceptions to these rules. For instance, the Restatement of the Law Governing Lawyers provides that "[i]f two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons." Restatement (Third) of the Law Governing Lawyers § 76.

In Texas, this exception is known as the allied litigant doctrine. As explained in more detail below, this exception is narrower than the corresponding exceptions in many other jurisdictions. In particular, the allied litigant doctrine does not apply in the transactional context. Therefore, lawyers practicing in Texas need to understand its limits to avoid waiving the attorney-client privilege.

The allied litigant doctrine stems from Rule 503 of the Texas Rules of Evidence, which provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client . . . by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action.

Tex. R. Evid. 503(b)(1)(C). In *In re XL Specialty Ins. Co.*, the Texas Supreme Court held that Rule 503 creates an "allied litigant" doctrine that is distinct from the joint

defense and common interest doctrines that other jurisdictions apply. 373 S.W.3d 46, 52 (Tex. 2012).

The court explained that "in contrast to the proposed federal rule, Texas requires that the communications be made in the context of a pending action." *Id.* at 51-52 (citations and footnote omitted). Therefore, "in jurisdictions like Texas, which have a pending action requirement, no commonality of interest exists absent actual litigation." *Id.* at 52. Some jurisdictions, like New York, are less restrictive, maintaining the privilege of shared communications made in furtherance of a common legal interest during "pending or *reasonably anticipated litigation*." *See Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 37 (N.Y. 2016) (emphasis added). And the Fifth Circuit holds that the common-interest doctrine protects not only "communications between co-defendants in actual litigation and their counsel," but also "communications between *potential* co-defendants and their counsel." *In re Santa Fe Intern. Corp.*, 272 F.3d 705, 710 (5th Cir. 2001) (citations omitted).

Going even further, some federal courts have extended the common interest doctrine to communications made in furtherance of any common legal interest, whether or not made in anticipation of litigation. For example, the Third Circuit has stated that the common-interest doctrine, which it calls the community-of-interest privilege, "applies in civil and criminal litigation, and *even in purely transactional contexts*." *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007) (emphasis added). And the Seventh Circuit has held that "communications need not be made in anticipation of litigation to fall within the common interest doctrine." *United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir. 2007). Further, the Restatement provides that the common-interest doctrine applies "[i]f two or more clients with a common interest in a litigated *or nonlitigated* matter are represented by separate lawyers and they agree to exchange information concerning the matter." Restatement (Third) of the Law Governing Lawyers § 76 (emphasis added).

In addition, the *In re XL Specialty Co.* court held that Texas' "allied litigant doctrine protects communications made between a client, or the client's lawyer, to another party's lawyer, *not to the other party itself*." 373 S.W.3d at 52–53 (emphasis added). According to the court, "[t]his attorney-sharing requirement makes clear that the privilege applies only when the parties have separate counsel." *Id.* at 53. Thus, even when there is a common legal interest between parties during a pending action, communication of privileged information between the parties themselves will waive the privilege. The same restriction applies in the Third Circuit. *See In re Teleglobe*, 493 F.3d at 364 ("[T]o be eligible for continued protection, the communication must be shared with the *attorney* of the member of the community of interest. Sharing the communication directly with a member of the community may destroy the privilege." (citations and footnote omitted)).

Not all jurisdictions limit the common interest doctrine this way. For example, the Fifth Circuit has stated that the common interest doctrine applies to communications between co-defendants in actual litigation, or between potential co-defendants, and their counsel. *See In re Santa Fe Intern. Corp.*, 272 F.3d 705, 710 (5th Cir. 2001).[23]

Given these distinctions, lawyers need to be aware of what privilege law applies when dealing with aligned parties during contract negotiations. In addition, if opposing counsel seeks discovery of such communications in a litigation, the aligned lawyers should consider whether they can plausibly argue that the privilege law from a more favorable jurisdiction applies.

V. CONCLUSION

Many of the examples in this paper are clear cut. But the world of contract negotiations is not so well defined. Rather, it can be a murky world where the line between tough negotiating and an unethical behavior is murky. Perhaps the best practical advice we can offer is this. When you are making a call about a particular negotiating tactic consider how you will explain yourself in front of a judge and jury if the entire deal blows up.[24]

[23] The Fifth Circuit cited the opinion of *Aiken v. Texas Farm Bureau Mutual Insurance Co.*, 151 F.R.D. 621 (E.D. Tex. 1993), that held audio tapes of conversations between various defendants were not privileged because they were not intended to facilitate the rendition of legal services. *Id.* at 712. But The Fifth Circuit acknowledged, however, that "it was certainly possible in *Aiken* for the [common legal interest] privilege to apply, since the parties asserting the privilege were actual defendants in a lawsuit at the time the communications were made." This statement makes clear that, in contrast to the Texas rule, there is no attorney-sharing requirement in the Fifth Circuit. *See id.*

[24] This is perhaps a corollary of the advice we all got from our mothers: Always wear clean underwear because you never know when you might be in an accident.