ETHICAL CONSIDERATIONS IN DRAFTING CONTRACTS

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CLAUDE E. DUCLOUX

- 39-year seasoned attorney
- Board Certified in Civil Trial Law and Civil Appellate Law, Texas Board of Legal Specialization
- Former president, Austin Bar Association
- Received Gene Cavin Award for Lifetime Achievement in Teaching Continuing Education

PURPOSES AND GOALS

- Discuss whether the conduct presented is ethical
- Discuss when a lawyer has a duty to reveal the error of the other lawyer
- Examine when or if the lawyer must consult the client before fixing an error
- Practice strategies to avoid these problems

RULES TO CONSIDER

1. Competence—knowing what you're doing: ABA Model Rule DR 6-101, 7-101; TX Rule 1.01; FL Rule 4-1.1; CA Rule 3-110; MO Rule 1.1
2. Conflicts of interest: ABA DRs 5-105, 5-106,5-107; TX Rule 1.06; CA Rule 3-310; FL Rule 4-1.7–4-1.10; MO Rule 1.7(a)
3. Doing business with client: ABA DR 5-104; TX Rule 1.08(b); CA Rule 3-300; FL Rule 4-1.8; MO Rule 1.8(a)
4. Truth in statements to others: ABA DR 1-102(A); TX Rule 4.01; CA Rule 3-700(B)(2); FL Rule 4-4.1, 4-8.4; MO Rule 4.1
5. Dealing with unrepresented persons: ABA DR 7-104(A)(2); TX Rule 4.03; CA Rule 5-100; FL Rule 4-4.3; MO Rule 4.3
6. Conduct involving dishonesty, fraud, deceit, and misrepresentation: ABA DR 1-102, 9-101; TX Rule 8.04; CA Rule 5-200; FL Rule 4-8.4; MO Rule 4.1; California Ethics Opinion 2013-189

SITUATION 1

WORDING CHANGES

SITUATION 1: WORDING CHANGES

After sending settlement and release to the opposing party, they modify a term, sign it, and do NOT identify the modification, which now does not release “all claims” but only “claims presented in the lawsuit.”

A year later, the releasing party sues on an ancillary claim which wasn’t released due to that change, and your client looks to you to protect them.

Question: Was the unidentified modification unethical?

WHAT RULES ARE INVOLVED?

- ABA DR 1-102; TX Rules 4.01 and 8.04; Cal Opinion 2013-189; FL 4-4.1; MO Rule 4.1
- What principles apply?
- How should the Court analyze this occurrence?
- Are you negligent for not catching it?
- What strategies can you use to avoid this?

WHAT CASE LAWS APPLY?

Hand v. Dayton Hudson, 775 F.2d 757 (6th Cir. 1985) found the lawyer acted unethically in not revealing changes.

ABA Informal Opinion 86.1518 also addressed this issue, concluding that under Rules 1.2 and 4.1 of the Model Rules an attorney has a duty to disclose the omission of the term to the other attorney and to agree to reform the writing.

Key to Analysis: WHAT WAS THE STATUS OF THE NEGOTIATIONS WHEN DOCUMENTS ARE RECEIVED?

Examine the expectations of the “sending” party:

- Is it clearly a “rough draft” for review?
- Is it intended to be a “take is or leave it”?
- Did it come with representations, e.g., “This is the state bar form I use”?
- “I cannot make changes without client approval”
- Did the other party request you draft the agreement of the parties? Does that excuse your review if he says, “I think this accurately reflects the agreement we made”?

STRATEGIES TO PROTECT YOURSELF

1. Ask for a representation by the other lawyer that the document has no modifications.
2. Send a confirming communication concerning that representation.
3. Make it clear when you send a final version that finality is your intent.

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SITUATION 2

ALTERING A STANDARD FORM

SITUATION 2: A[illegible]ERING A STANDARD [illegible]ORM

Before word processors, [illegible]s regularly used standard printed forms, which made chan[illegible]d deletions obvious. The drafter filled in the blanks, and "[illegible]" out the deletions.

Question: When a lawyer sends out the standard state bar real estate form for, e.g., a Deed of Trust, may the receiving lawyer assume it's signed with no alteration? Or should the presumption be that the receiving lawyer always Retains the duty to check the document upon receipt?

TO WHOM IS DUTY OWED?

If the document comes back signed, how significant is your duty to ensure no changes have been made?

Does it depend on who handled it at the other end?
A *pro se* signer vs. a represented party?

Are your duties different if a non-lawyer gets it and signs it, and returns it to you without representation?

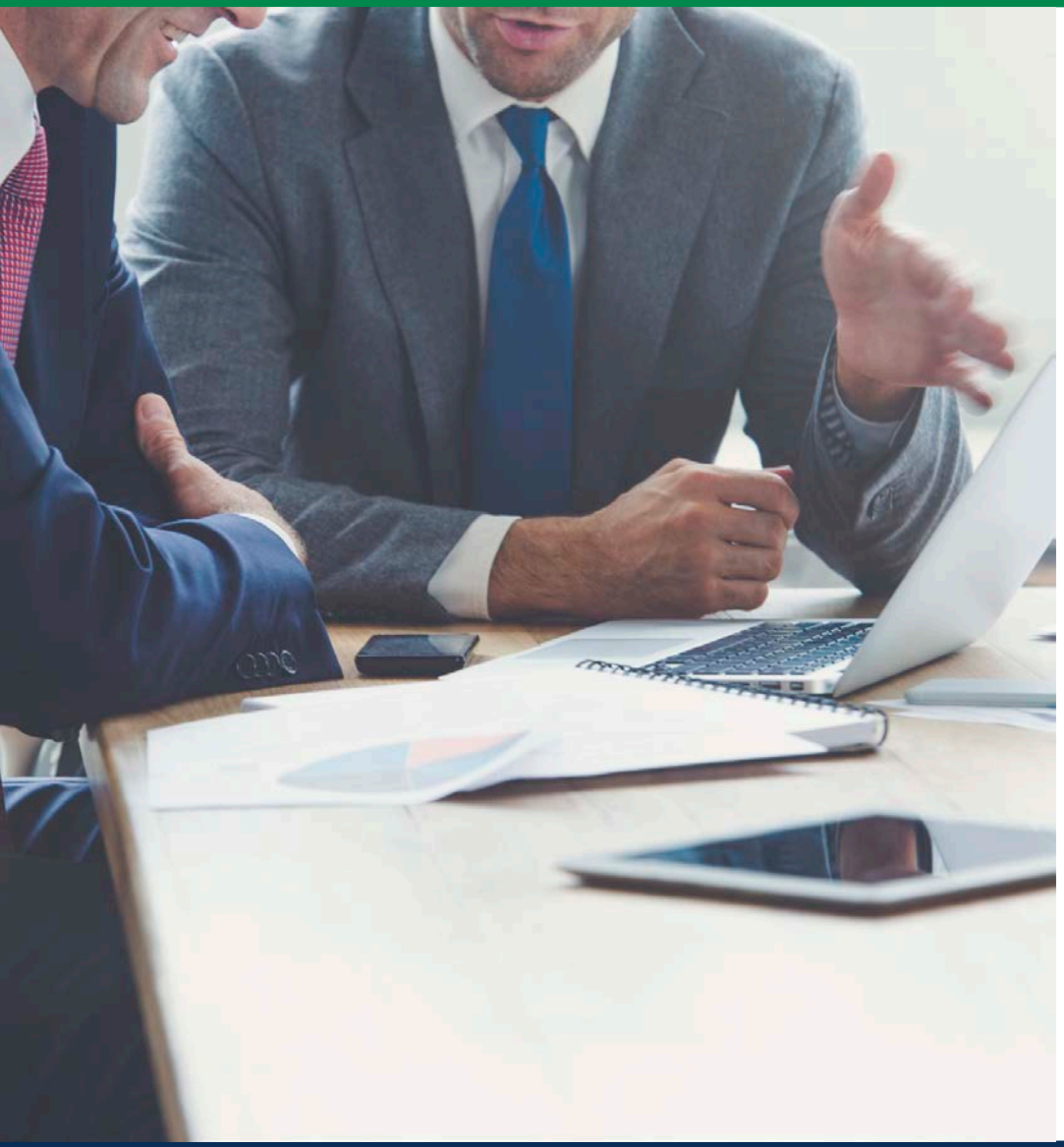
ARE YOUR STRATEGIES THE SAME?

Ask: are there any are modifications?

Send a confirming communication.

What if modification is obvious?

What is the standard for your conduct in reviewing it?



SITUATION 3

INFORMING THE OTHER PARTY OF A CHANGE

SITUATION 3: INFORMING THE OTHER PARTY OF A CHANGE

Attorney 1 asks for a change in terms.

Attorney 2 agrees to it but the change affects another part of the agreement.

Does Attorney 1 have a duty to inform Attorney 2 of ripple effects?

TO WHOM IS DUTY OWED?

Professor Scott Burham from Gonzaga University School of Law says, in effect:

There is no such duty to inform the other counsel of the ripple effect of the change. Assuming such duty would make the duty "endless." Each attorney has the duty to know the deal, and its terms well enough to adjust risk and outcomes.

The duty to get the most favorable outcome is owed to YOUR client, unless that outcome violates another duty.

SITUATION 4

INCORRECTLY RECITING THE LAW

SITUATION 4: INCORRECTLY RECITING THE LAW

Suppose you're in a state (like Texas) where there is a two-year statute of limitations for tort, and the other lawyer gives your client "four years to bring a case for negligence under [state] law."

Questions: Do you have a duty to inform the other attorney that that is an incorrect statement of law? Or do you shut up and give your client an additional two years!?

SITUATION 5

OMITTING A TERM BY ACCIDENT

SITUATION 5: OMITTING A TERM BY ACCIDENT

What if the final contract omits a term the parties agreed to? Attorney 1 reduces the agreement to writing and both parties review and sign it. Later, Attorney 1 realizes an important term has been omitted. Attorney 2 acknowledges there is a “scrivener’s” error but refuses to modify it because it has an integration clause saying it’s the final and complete agreement of the parties.

Question: Assuming the error is mutual, is Attorney 1 entitled to reformation?

NOTES ON REFORMATION

Calamari & Perillo on Contracts § 9.31
Note this distinction: “Contracts are not reformed for mistakes; records are.” If it is a true contract, it truly embodies the parties’ agreement. If it mistakenly records the agreement, it should be reformed to **record the agreement** correctly. The distinction is in the intent of the parties. In a case governed by the Parol Evidence Rule, the party opposing inclusion of the term claims that, while the parties 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 they agreed to it and intended to include it, but inadvertently omitted it.

HOW DOES THE CLIENT FIT INTO REFORMATION OF CONTRACTS?

Question: Do you have to inform your client first of the advantage you've gotten by error before you agree to correct it?

If an oversight gives your Client an unexpected advantage, shouldn't you have to consult before correcting that oversight?

HOW DOES THE CLIENT FIT INTO REFORMATION OF CONTRACTS?

Question: Do you have to inform your client first?

ABA Informal Opinion 86-1518 says no. The attorney need not consult the client because the client had already agreed to include the missing term in the contract. However, the Maryland State Bar Association reached a contrary conclusion and advised attorneys to explain to the client what happened and provide enough information to permit the client to make an informed decision on whether to stand on the mistaken contract or advising of the likelihood of success of the other side's reformation action and the cost of defending it.

WHEN IS THE ATTORNEY LIABLE? Look at: *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 467 (Tex. 2015)

The firm, Cantey Hanger is handling big divorce for Wife. It settles, and W awarded 3 aircraft (together with all taxes, liens and assessments). Months later, Cantey drafts transfer documents on one aircraft to a third party directly from H's corp. (so title never goes first to W), which has the effect of transferring the tax liability from Wife (their client) to Husband's Corporation, in contravention of the Decree. (Byrd) sues.

NOPE: Cantey owes no duty to opposing party… even for fraud!?

- TX Sup. Court gives Attorney immunity; 5-to-4 decision
- "Fraud is not an exception to attorney immunity; rather, the defense does not extend to fraudulent conduct that is *outside the scope of an attorney's legal representation of his client*, just as it does not extend to other wrongful conduct outside the scope of representation."
- *Thus, so long as attorney in scope of duties when fraud is committed, he's immune.* *Huh?*

Cantey Hanger v. Byrd (Cont'd)

- Does *Cantey's* protections apply in non-litigation negotiation settings?

- Sup. Ct. Dissent: 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 a much broader, more expansive liability protection."

Cantey Hanger v. Byrd (Cont'd)

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 a year after entry of the divorce decree."

Cantey Hanger (Cont'd)

- "Instead of limiting this form of attorney immunity to the context of litigation, the Court's 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."

SITUATION 6

NEGOTIATING HONESTLY

SITUATION 6: NEGOTIATING HONESTLY

ABA Model Rule 4.1 Comment 2:

The prohibition against making false statements of material fact or law is intended to cover only representations of fact, and not statements of opinion or those that merely reflect the speaker's state of mind. Whether a statement should be considered one of fact, as opposed to opinion, depends on the circumstances.

Question: How do you distinguish fact from opinion?

SITUATION 6: NEGOTIATING HONESTLY

FACT or OPINION?

This case is worth $1,000,000

Identical cases have settled for $1,000,000

I'll give you this Watch (which looks like a Rolex).

Our expert is ready to testify as to liability and damages.

I have tried many of these cases.

My client is disabled.

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

We won't settle for less than $500,000

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SITUATION 7

DRAFTING FOR BOTH PARTIES

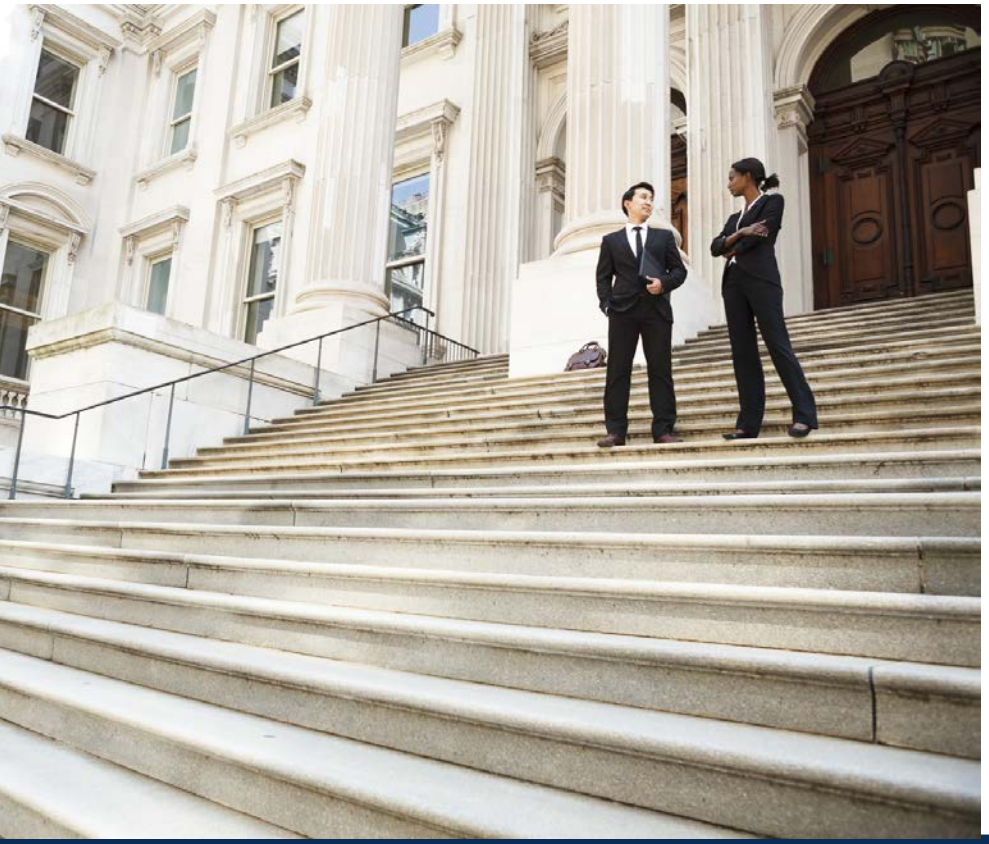
SITUATION 7: DRAFTING FOR BOTH PARTIES

Your client Bob asks you to draft a note payable to his neighbor, Pat. You draft it favorably to Bob with a lower interest rate, and long notice and cure periods.

Payee Pat has been your client in the past for a separate matter, but not for many years. Pat trusts you and says, “Hey, just let me know if this note is normal and typical, and I trust you, and I’ll sign it.”

What are your obligations to Pat? Do you need to inform him of the whole Conflicts of Interest Matrix?

RIGHTS AND DUTIES WHEN CONFLICTS ARISE



When discovering a conflict, the lawyer has the duty to:

a) Disclose
b) Secure permission
c) Withdraw when appropriate

COMPLETE DISCLOSURE

DISCLOSING THE CONFLICT EFFECTIVELY INCLUDES:

1. The EXISTENCE of the conflict
2. The NATURE of the conflict
3. The IMPLICATIONS of the conflict
4. Possible ADVERSE CONSEQUENCES of common representation
5. ADVANTAGES of common representation

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SITUATION 8

DOING BUSINESS WITH A CLIENT

SITUATION 8: DOING BUSINESS WITH A CLIENT

Anytime you are doing a deal with a client, YOU MUST OBSERVE CERTAIN RULES!

What is “Doing Business?”

1. Acquiring an undivided interest in a client entity
2. Purchasing something outright
3. Agreeing to accept “Alternate Consideration”
4. Selling an asset, item or interest to Client
5. Sharing business opportunities. E.g., Real Estate Development

SITUATION 8: DOING BUSINESS WITH A CLIENT

YOUR OBJECTIVES:

1. Be fair to the client
2. Have full disclosure
3. Have written documentation to protect yourself
4. Give the client the right to seek independent advice
5. Reaffirm your fiduciary duties to be fair in the writing, and put important points in large bold type.
6. GET THE CLIENT'S CONSENT IN WRITING!

TAKEAWAYS

1. The attorney's duty to read the contract draft is excused when there is fraud or a mistake.
2. Nevertheless, as a matter of preventive law, attorneys should review contracts diligently before signature.
3. Ask for a representation as to changes and modifications from the other party—especially their attorney—and document the opposing lawyer's reply as to changes.
4. Whenever possible, attorneys should allow clients to read contracts. A second set of eyes can be helpful in detecting problems.

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