

June 1, 2021

Ethics in Negotiations: Transactions, Contracts, and Litigation

Presented by:

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Ethical Analysis and Consideration: Rules and Aspirations

Governing Rules:

- State Rules of Professional Conduct
 - Texas Disciplinary Rules of Professional Conduct

Other Guidance:

- ABA Model Rules of Professional Conduct
- Comments under the governing rules and the ABA rules
- Texas Lawyer's Creed
- Ethics Opinions
- Case law
- A lawyer's own ethical considerations...

The Rules are a Minimum Standard of Conduct

“As always, this is a discussion of what the rules require, i.e., the bare minimum standard of conduct. What an attorney must do and what she should do is not always the same.”

Texas Lawyer's Creed

THE TEXAS LAWYER'S CREED *A Mandate for Professionalism*

*I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system.
I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct,
but I know that Professionalism requires more than merely avoiding the violation of laws and rules.
I am committed to this Creed for no other reason than it is right.*

4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.
5. I will always be conscious of my duty to the judicial system.

II. LAWYER TO CLIENT

A lawyer owes to a client diligence, honesty, skill, and industry.

A lawyer shall employ all appropriate legal means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the substance of this Creed when undertaking representation.
2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.
3. I will be loyal and committed to my client's lawful objectives, but I will not permit the loyalty and commitment to interfere with my duty to provide objective and independent advice.
4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.
5. I will advise my client of proper and expected behavior.
6. I will not abuse parties and witnesses with fairness and this consideration.
7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.
8. I will advise my client that we will not pursue tactics which are intended primarily to delay.
9. I will advise my client that we will not pursue any course of action which is without merit.
10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.
11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

III. LAWYER TO LAWYER

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between counsel shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.
2. I will not quarrel over matters of form or style, but I will communicate on matters of substance.
3. I will identify for other counsel or parties all changes I have made to documents submitted for review.
4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.
5. I will notify opposing counsel, and, if appropriate, the Court or other parties, as soon as practicable, when hearings, dispositions, meetings, conferences or changes are cancelled.
6. I will agree to reasonable requests for continuance of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.
7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.

- and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any abusive or personal predilection or discrimination of opposing counsel.
11. I will not take advantage, by causing any default or dismissal to be entered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed.
12. I will promptly release copies to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the Court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.
13. I will not attempt to gain an unfair advantage by sending the Court or to staff correspondence or copies of correspondence.
14. I will not arbitrarily schedule a disposition. Court appearance, or hearing, until a good faith effort has been made to schedule it by agreement.
15. I will modify stipulation to undisputed facts in order to avoid needless costs or inconvenience for any party.
16. I will refrain from excessive and abusive discovery.
17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make discovery not give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all discovery questions which are reasonably understandable. I will neither encourage nor permit any witness to quibble about words whose true meaning is reasonably clear.
18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.
19. I will not seek sanctions or disqualification unless it is necessary for protection of my client's lawful objectives or is fully justified by the circumstances.

IV. LAWYER AND JUDGE

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.
2. I will conduct myself in Court in a professional manner and demonstrate my respect for the Court and the law.
3. I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.
4. I will be punctual.
5. I will not engage in any conduct which offends the dignity and decorum of proceedings.
6. I will be honestly, transparent, circumspect, responsive or amiable face or otherwise to gain an advantage.
7. I will respect the rulings of the Court.
8. I will give the issue in controversy deliberate, impartial and studied analysis and consideration.
9. I will be conscious of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.

Mandated by the Supreme Court of Texas and the Texas Court of Criminal Appeals on November 7, 1989.

Reaffirmed by the Supreme Court of Texas and the Texas Court of Criminal Appeals in April 2013.



Texas Lawyer's Creed

I am passionately proud of my profession. Therefore, "My word is my bond."

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings.

I will identify for other counsel or parties all changes I have made in documents submitted for review.

I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.

I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.

I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.

Setting the Foundation under the ABA Rules

■ Preamble: A Lawyer's Responsibilities:

- “As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”
- “As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.”
- The basic principles underlying the ABA Rules: “[T]he lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”

Misconduct

ABA Rule 8.4	Texas Rule 8.04
It is professional misconduct for a lawyer to:	a) A lawyer shall not:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;	(1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;	(2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;	(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice...	(4) engage in conduct constituting obstruction of justice...

Truthfulness in Statements to Others

ABA Rule 4.1	Texas Rule 4.01
In the course of representing a client a lawyer shall not knowingly:	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	(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...	(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid <u>making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.</u>

The Interplay of Behavioral Ethics and Negotiations

- “A lawyer is...guided by personal conscience...” [but beware of “ethical blind spots” where you view yourself as being more objective/ethical than others.]
- “Ethical Fading” – Overlooking the ethical side of things when making a decision; especially in a business or financial, self-interested context.
 - Experiment: Subjects were given short puzzles to solve and paid them based on how many were completed. For control group, experimenters could count the correct number solved. Experimental group self-reported. All were asked whether cheating was appropriate in different circumstances. Experimental group reported greater number of puzzles solved than control group and also reported more tolerant views of dishonest behavior generally.
- Lawyers as “agents” – Questionable behavior becomes justified because it’s for your client’s benefit.
 - Study: Subjects solving puzzles only for themselves (i.e., payments would not be shared with third party) found overstating the results to be more unethical than if subject was assigned to share the benefits with another person.

[Sources: Behavioral Ethics, Deception, and Legal Negotiation, 20 Nev. L.J. 1209 (Spring 2020)]

Scenario #1 – “You’re not the only one...”

- On behalf of your well equipment manufacturing client, as associate general counsel, you are negotiating a supply agreement with in-house counsel of a new potential supplier, Perfect Valves Inc. Perfect Valves’ director of sales has been a part of these negotiations. Negotiations up to this point have gone fairly well, but the indemnity provision has become a real sticking point. At this stage of the discussions, you mention that your commercial team has been approached by, and is considering, bids from three other potential suppliers, even though that is not the case, hoping that might sway Perfect Valves to back down from its position.



Scenario #1 – “You’re not the only one...”

Is the statement that “my commercial team has been approached by, and is considering, bids from three other potential suppliers” a violation of of Rule 4.01/Rule 4.1?

1. No, this is typical posturing that is common in negotiations.
2. Arguably, yes.

Scenario #1 – “You’re not the only one...”

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1. No, this is typical posturing that is common in negotiations.

- Comment: Paragraph (a) of this Rule refers to statements of material fact. Whether a particular statement should be regarded as one of material fact can depend on the circumstances. Certain types of statements ordinarily are not taken as statements of material fact because they are viewed as matters of opinion or conjecture (estimates of price, value). For example, “this is a steal;” “this is the best deal you’re going to find.”
- During negotiations, “posturing” is expected. However, details matter. In other words, the more specific a statement, the more it may be viewed as a factual representation.

Scenario #1 – “You’re not the only one...”

2. Arguably, Yes.

Scenario #1 – “You’re not the only one...”

2. Arguably, Yes.

- Here, specifying there are three bidders in play is going beyond simply saying, there are potentially others - may be pushing the envelope.
- One standard would be whether one would “justifiably rely” on the statement at issue and whether there is expectation for such reliance.
- What about M&A context (i.e., auction scenario)?

Scenario #2 – Settlement of a Dispute: Jerry's Fibbing

Attorneys Jerry and Janine are attempting to settle a dispute between their respective clients. Jerry's client, ABC Custom Parts, supplies electronic components for goods produced by Janine's client, XYZ Manufacturing. The dispute involves a large shipment of parts sold to XYZ by ABC that were defective, preventing XYZ from filling some orders. Janine has approached Jerry to work out a solution because, if they go to court, the litigation costs and business disruptions could be substantial for both parties. She suggests a deal: (1) ABC ramps up production to quickly remedy the backlog issue, and (2) ABC provides a discount on several future shipments to cover XYZ's damages.

ABC Custom Parts (Jerry)



XYZ Manufacturing (Janine)

Jerry suspects that he has some negotiating leverage because XYZ will experience more significant delays if it has to locate a new supplier and wait for them reconfigure their facility. He also knows that XYZ has a reputation for avoiding litigation and believes that they are especially eager to avoid it here. He wants to use his perceived advantage to force Janine to agree to a quick settlement on favorable terms to his client.

[Source: <https://www.legalethictexas.com/Ethics-Question-of-the-Month>; Ethics Question of the Month, July 2020]

Scenario #2 – Settlement of a Dispute: Jerry's Fibbing

During the course of his settlement discussions with Janine, Jerry makes the following representations, none of which are accurate:

1. Jerry's client cannot accept any discount over \$10,000; *his client specifically authorized him to offer a discount up to \$17,500.*
2. An employee of ABC, Carl, will testify that the defect in ABC's shipment was due to a mistake made by an XYZ employee who provided the wrong specifications; *Jerry knows this is not true.*
3. Carl is an excellent witness; *Jerry knows from experience that Carl is a terrible witness.*
4. Our clients' dispute needs to get settled quickly because ABC is now negotiating with another potential customer and, if they reach a deal, ABC will not have the capacity to do any more work for XYZ; *Jerry knows ABC has the capacity to accommodate the new customer and XYZ.*
5. His reading of the applicable precedents suggests that XYZ's damages are far less than Janine says they are; *Jerry knows Janine's assessment of damages is probably accurate.*

Scenario #2 – Settlement of a Dispute: Jerry's Fibbing

Which of these inaccurate representations by Jerry are impermissible in the negotiation?

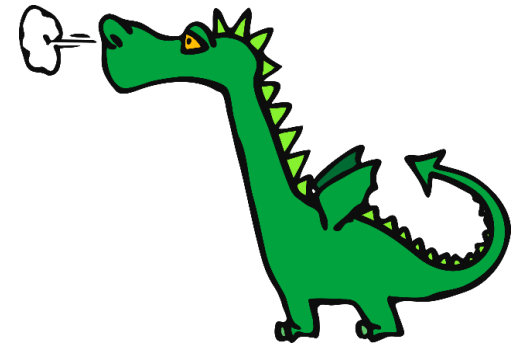
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 - Comment 1 to 4.01 of Texas Rule: "For example, certain types of statements ordinarily are not taken as statements of material fact because they are viewed as matters of opinion or conjecture.... Similarly, under generally accepted conventions in negotiation, a party's supposed intentions as to an acceptable settlement of a claim may be viewed merely as negotiating positions rather than as accurate representations of material fact."
 - ABA Formal Ethics Opinion 06-439 (2006): "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."

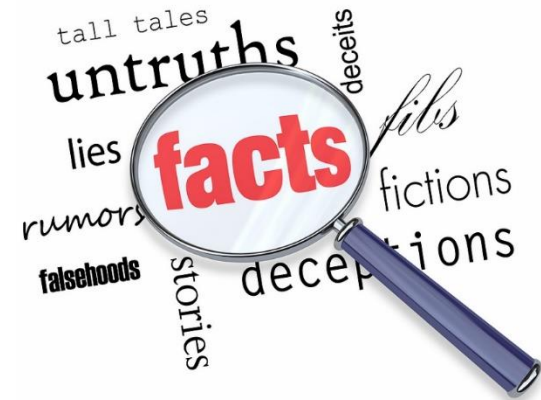


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- ABA Formal Ethics Opinion 06-439 (2006): An example of a false statement... for a lawyer representing a defendant to declare that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do 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.

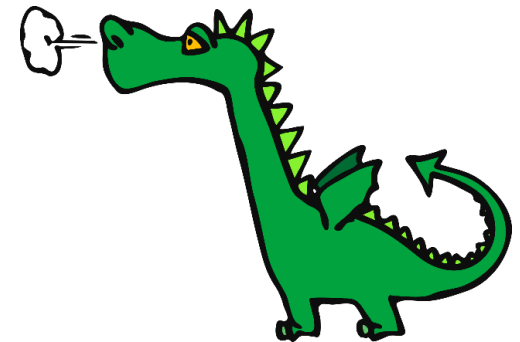


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3. Carl is an excellent witness; *Jerry knows from experience that Carl is a terrible witness.*

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- ABA Formal Ethics Opinion 06-439 (2006): A party in a negotiation... might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position.... 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.

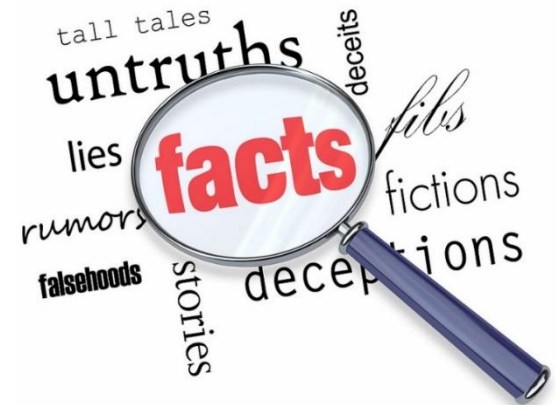


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4. Our clients' dispute needs to get settled quickly because ABC is now negotiating with another potential customer and, if they reach a deal, ABC will not have the capacity to do any more work for XYZ; *Jerry knows ABC has the capacity to accommodate the new customer and XYZ.*

Scenario #2 – Settlement of a Dispute: Jerry's Fibbing

4. Our clients' dispute needs to get settled quickly because ABC is now negotiating with another potential customer and, if they reach a deal, ABC will not have the capacity to do any more work for XYZ; *Jerry knows ABC has the capacity to accommodate the new customer and XYZ.*
- ABA Formal Ethics Opinion 06-439 (2006): A party in a negotiation... 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 dependence upon the supplier with which it is negotiating.
 - The State Bar of California [Formal Opinion No. 2015-194](#) (2015): 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... 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.

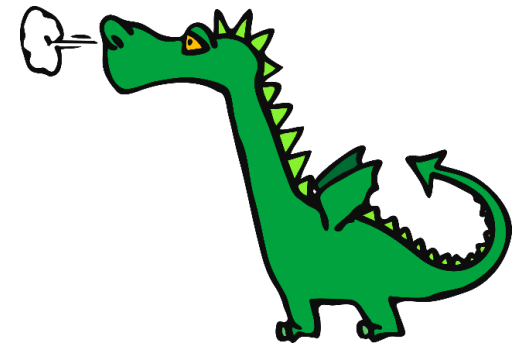


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5. His reading of the applicable precedents suggests that XYZ's damages are far less than Janine says they are; *Jerry knows Janine's assessment of damages is probably accurate.*

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 - ABA Formal Ethics Opinion 06-439 (2006): A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position... 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.



Communication with One Represented by Counsel

ABA Rule 4.2

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.

Texas Rule 4.02

(a) 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

(b) In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Scenario #3 – Negotiating the IOI

- You are general counsel for Bernie's Mittens Inc. Bernie's Mittens has been targeting a complementary business, Birx's Scarves LLC, for some time. You've gotten the green light from your business development team and you have provided an indication of interest to the CEO of Birx's Scarves. There has been some back and forth on the IOI and the CEO mentions that "at some point, I'm going to have to run this by legal."



Scenario #3 – Negotiating the IOI

Given this scenario, what is permissible under Rule 4.2/4.02?

1. You can proceed on all points directly with the CEO and trust she will loop in legal at the point when she typically would in a similar situation.
2. You can proceed dealing directly with the CEO until she has looped in legal but only on business points.
3. You should cease all discussions until the CEO loops in legal;

Scenario #3 – Negotiating the IOI

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- ~~2. You can proceed dealing directly with the CEO until she has looped in legal but only on business points.~~
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TX Comment 4 to Rule 4.02–4. 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, without the consent of the lawyer for the organization or entity of government involved. This Rule is based on the presumption that such persons are so closely identified with the interests of the organization or entity of government that its lawyers will represent them as well.

Scenario #3 – Negotiating the IOI

- 2. You can proceed dealing directly with the CEO until she has looped in legal but only on business points.**

Scenario #3 – Negotiating the IOI

2. You can proceed dealing directly with the CEO until she has looped in legal but only on business points.

- Risky; could make legal vs. business point argument but sometimes that can get fuzzy.
- However, certain commentators say permissible with caution.

Scenario #3 – Negotiating the IOI

3. You should cease all discussions until the CEO loops in legal.

Scenario #3 – Negotiating the IOI

3. You should cease all discussions until the CEO loops in legal.

- Safest approach.
- What if your CEO sent the IOI to Birx's Scarve's CEO?
- What if CEO's transmission of IOI was at your direction?

Scenario #3 – Negotiating the IOI

Other points in the M&A context:

- Broad vs. narrow interpretation of the Rules; specifically “cause or encourage someone to communicate...” What about lawyer’s suggestion to investment banker to discuss a business term with other principal?
- Sometimes, consent is implied (private placement memorandum which is sent directly to potential investors.)

Scenario #4 – “Just say this....”

David represents Blouse Barn, a local women’s clothing store in connection with a lawsuit against its neighbor, Café Tropical, over some un-neighborly discharge of sewage that wiped out all of Blouse Barn’s inventory. Alexis represents Café Tropical in the litigation. The attorneys have a cordial but strained relationship given their long history as attorneys in the small town in which they live. While the lawyers have been unable to reach a settlement, Alexis has an idea.

Alexis tells Twyla, the owner of Café Tropical to call the owner of Blouse Barn and just say this: “Johnny Rose is a very wealthy man who has told me that he would buy both of our stores to develop a shopping mall in their place, but I don’t think he will buy them because of the lawsuit between our stores.” Twyla, Alexis says, should ask that the owner of Blouse Barn dismiss the lawsuit to allow the sale to go forward.



Scenario #4 – “Just say this....”

Was Alexis’ advice to Twyla, the owner of Café Tropical, a violation of the Texas Ethics Rules?

1. No. The statement about the man wanting to buy the stores qualifies as mere puffery and opinion.
2. Yes, if Johnny Rose never told her that he would buy the stores.
3. Yes, because she directed her client to contact someone she knows is represented by counsel about the subject matter of the lawsuit.
4. Both 2 and 3.

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- 3. Yes, because she directed her client to contact someone she knows is represented by counsel about the subject matter of the lawsuit.**
- 4. Both 2 and 3.**

Scenario #4 – “Just say this....”

The statement about Johnny Rose is probably a statement of material fact, and thus, the statement, if made by an attorney to another attorney would be improper.

ABA Rule 4.1/Texas Rule 4.01: “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...”

Scenario #4 – “Just say this....”

Texas is explicit about not *causing or encouraging* another to communicate:

Texas Rule 4.02 (a) 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...

Comment 1 to Rule 4.02: Paragraph (a) of this Rule is directed at efforts to circumvent the lawyer-client relationship existing between other persons, organizations or entities of government and their respective counsel. It prohibits communications that in form are between a lawyer's client and another person, organization or entity of government represented by counsel where, because of the lawyer's involvement in devising and controlling their content, such communications in substance are between the lawyer and the represented person, organization or entity of government.

Alexis is not permitted to advise her client to communicate directly with the owner of Blouse Barn.

Respect for Rights of Third Persons

ABA Rule 4.4

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Texas Rule 4.04

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) (b) A lawyer shall not present, participate in presenting, or threaten to present:

(1) criminal or disciplinary charges solely to gain an advantage in a civil matter; or

(2) civil, criminal or disciplinary charges against a complainant, a witness, or a potential witness in a bar disciplinary proceeding solely to prevent participation by the complainant, witness or potential witness therein.

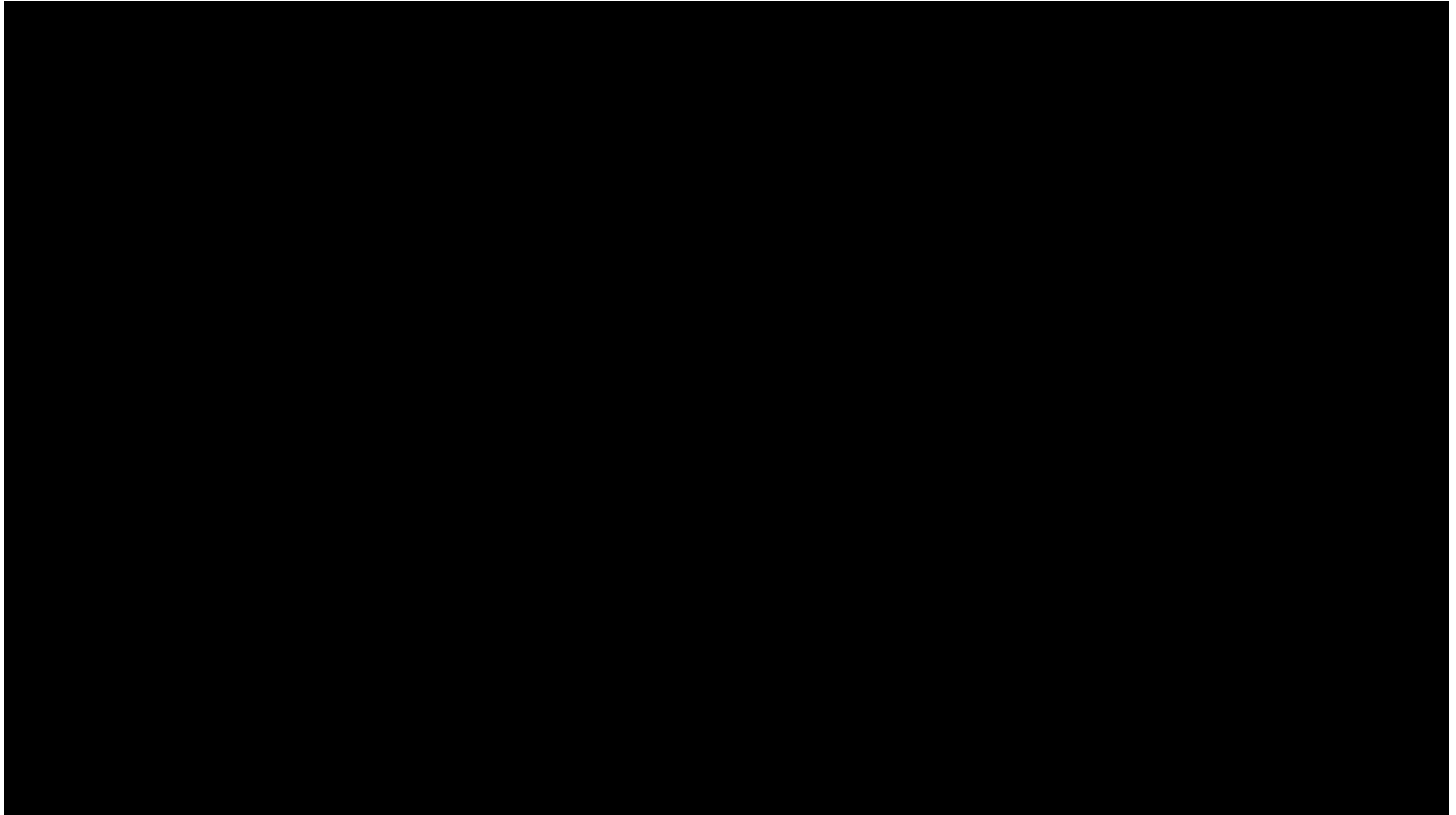
Respect for Rights of Third Persons

ABA Rule 4.4

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Texas Rule 4.04

Bad Behavior



Bad Behavior

Rule 4.4/4.04: In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

**Bigger, Better Cuss Words
Advocated by Professor
'Gadzooks' and 'Zounds'
Have Lost Their Power, He
Says; All Emphasis Gone.**

[Source: Des Moines Tribune, Iowa, December 22, 1928; Letters of Note on Twitter;
<https://twitter.com/yesterdaysprint/status/1353483631679787010/photo/1>]

Scenario #5 – Metadata and a Settlement Agreement

Taylor represents her client in litigation against a party represented by Kanye. The opposing parties and counsel do not like each other, and relations are tense – but they agree to settle. They agree that Kanye will draft a settlement agreement and send it to Taylor for her review.

Taylor is aware that Microsoft Word documents contain “metadata” that can provide valuable insight into opposing counsel’s thought process by tracking changes in the document or discovering comments that have been deleted.

Kanye does not know what metadata is, and in particular, does not know of the hidden metadata in the settlement agreement. He fails to scrub the draft of the settlement agreement before sending it to Taylor. Because of the contentiousness of the litigation and her lack of respect for Kanye, she does not inform Kanye of the metadata. Instead, she “mines” the document for metadata and retrieves the information, thereby gaining valuable insight into Kanye’s thought process. Based on what she learns, she makes changes to his initial draft of the agreement.



[Source: <https://www.legalethictexas.com/Ethics-Question-of-the-Month>; Ethics Question of the Month, January 2021]

Scenario #5 – Metadata and a Settlement Agreement

Has Taylor violated the Texas ethics rules?

1. Taylor did when she mined the document for metadata.
2. No, she did not.



Scenario #5 – Metadata and a Settlement Agreement

Has Taylor violated the Texas ethics rules?

- ~~1. Taylor did when she mined the document for metadata.~~
2. No, she did not.
 - Texas Ethics Opinion 665: “. . . although the Texas Disciplinary Rules do not prohibit a lawyer from searching for, extracting, or using metadata and **do not require a lawyer to notify any person concerning metadata obtained from a document received....**”



Scenario #5 – Metadata and a Settlement Agreement

What about Kanye?

Has Kanye violated the ethics rules?

1. Yes, he disclosed client confidential information.
2. No, he did not, because he didn't know about the existence of metadata in the document.



Confidentiality of Information: ABA Model Rule 1.6

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
 - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
 - ...
 - (6) to comply with other law or a court order...
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client

Confidentiality of Information: Texas

Rule 1.05

(a) Confidential information includes both privileged information and unprivileged client information

(b) Except as permitted by paragraphs (c) and (d), or as required... a lawyer shall not knowingly:

(1) Reveal confidential information of a client or a former client to:

(i) a person that the client has instructed is not to receive the information; or

(ii) anyone else, other than the client, the clients representatives, or the members, associates, or employees of the lawyers law firm

...

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation

...

(d) A lawyer also may reveal unprivileged client information

(1) When impliedly authorized to do so in order to carry out the representation.

(2) When the lawyer has reason to believe it is necessary to do so in order to:

(i) carry out the representation effectively

...

Confidentiality of Information: Texas Rule 1.05

Texas Ethics Opinion 665:

“... a lawyer’s duty of competence requires that lawyers who use electronic documents understand that metadata is created in the generation of electronic documents, that transmission of electronic documents will include transmission of metadata, that the transmitted metadata may include confidential information, that recipients of the documents can access metadata, and that actions can be taken to prevent or minimize the transmission of metadata. Lawyers therefore have a duty to take reasonable measures to avoid the transmission of confidential information embedded in electronic documents, including the employment of reasonably available technical means to remove such metadata before sending such documents to persons to whom such confidential information is not to be revealed pursuant to the provisions of Rule 1.05.” [emphasis added]

Kanye violated the Texas Rules.

Attorney Client Privilege in Transactions

– Practice Tip

- General rule: In a sale of a business involving a change of control, any attorney-client privilege protecting communications between the seller and its counsel, including any communications regarding the transaction, will transfer to the buyer if the underlying purchase agreement does not expressly state otherwise.
- *Commodity Futures Trading Commn. V. Weintraub* (U.S. Supreme Court, 1985) – “when control of a corporation passes to new management, the authority to assert and waive the corporation’s attorney-client privilege passes as well.”
- Consequences from not addressing privilege in the purchase agreement (for example: emails exchanged about whether certain liability should be disclosed prior to closing)
- Texas courts have generally followed *Weintraub*.



Attorney Client Privilege in Transactions – Practice Tip

Sample Asset Purchase Agreement Language:

Excluded Asset:

“any attorney-client privilege and attorney work-product protection of the Sellers or associated with the Business as a result of legal counsel representing the Sellers or the Business, including in connection with the transactions contemplated by this Agreement; (ii) all documents subject to the attorney-client privilege and work-product protection described in the foregoing clause (i); and (iii) all documents maintained by the Sellers relating to the drafting, negotiation, execution, delivery and performance of this Agreement, any other transaction document or any agreements with any other bidder in connection with any sale process previously conducted by or in which the Sellers were previously involved, including the sale process leading to the entry into this Agreement.”

Attorney Client Privilege in Transactions – Practice Tip

Sample Stock Purchase Agreement Language:

“Purchaser, on behalf of itself and its Affiliates (including after the Closing, the Companies) acknowledges and agrees that all confidential communications between the Seller, on the one hand, and Company Counsel, on the other hand, in connection with the Acquisition Engagement (such communications, “Protected Communications”) shall be deemed to belong solely to the Seller, and not the Companies, Purchaser or any of their respective Affiliates, and shall not pass to or be claimed, held, or used by Purchaser or the Companies or any of their respective Affiliates upon or after the Closing.”

Practical Takeaways

1. Do your homework, know your counterpart.
2. Ask strategic questions such as, “Is there anything we have yet to discuss that would materially impact this deal?”
3. When in doubt, don’t.

[Source: Ethics and Negotiation, 25 No. 4 Disp. Resol. Mag. 32 (Fall 2019)]

Ethics in Negotiations: Transactions, Contracts, and Litigation

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