

TRANSACTIONAL SKILLS TRAINING: CONTRACT DRAFTING—BEYOND THE BASICS

SCOTT J. BURNHAM*

My topic is ambiguity. Let me put this in context. One thing that can't be said enough is that when we talk about a transactional approach, what we are really talking about is the practice of preventive law. We are the ones preventing the problems from arising. Ambiguity is really an aspect of interpretation, and interpretation is actually the number one litigated issue in contracts. So by preventing ambiguity, what you are doing is preventing litigation from arising over the meaning of contract terms. By the way, it is worth pointing out that the incentives are all wrong—the heroes in the legal world are the litigators who win the big case for the client. But the real unsung hero is that person in the back room who, with a couple of little key strokes or by changing one word in the transaction prevented the problem from arising in the first place. Unfortunately, we don't get to reward that person as often we should. So I hope you will provide those incentives and try to reward that individual.

I am going to give you a few examples of ambiguity and how to cure it. But of course the real problem is to spot it. Ambiguity means there are at least two possible meanings and, to solve the problem, you have to recognize it. So can you see that there are two different meanings?

* Scott J. Burnham is a Professor of Law at The University of Montana School of Law Professor Burnham teaches Contracts, Commercial and Consumer Law, and Copyright Law. He teaches from the perspective of a practicing attorney, emphasizing preventive law rather than litigation. Before he began his teaching career at The University of Montana, he practiced in New York City from 1975-1981. Professor Burnham has been a visiting professor at the law schools at Santa Clara University, the University of Tennessee, Western New England College, the University of Nevada, Las Vegas, Hawaii, Cardozo, and Vytautas Magnus in Lithuania. As a Fulbright Senior Specialist, he has taught at the University of Montevideo in Uruguay and Can Tho University in Vietnam. Professor Burnham is a member of the American Law Institute (ALI). He received his J.D. and LL.M. degrees from New York University in 1974 and 1981 respectively.



This is a graphic illustration of this idea. While some people looking at this image see the old crone, others see the beautiful young woman. The question is, can you train yourself to see both? One of the skills you are working at when solving problems in ambiguity is critical reading. You are talking back to your draft. You are not reading passively, but actively trying to find those available meanings. It can also be a collaborative process—it can be helpful to have another set of eyes look at the document. Don't try to do it yourself, but have someone else read it and look at it. This can be helpful in solving the problem.

By the way, I looked into this from the malpractice point of view and found that the fact that a court interprets language against the lawyer is probably not malpractice.¹ One of the reasons courts say it is not malpractice is because *anybody* can spot an ambiguity. You don't have to be a lawyer. So the tip you can give to your students who are going to be lawyers is: always give a copy of the draft to your client to read and it is up to them to spot the ambiguities. The responsibility will not fall entirely on the lawyer. But, of course, we don't want to just avoid malpractice; we want to prevent these problems from arising. I love this warning from David Mellinkoff about drafting. That is a bit of a Freudian slip on my part, for the book is

¹ See, e.g., *Sutton v. Mytich*, 555 N.E.2d 93 (1990).

actually called *Legal Writing: Sense and Nonsense*.² Mellinkoff was sort of perverse; he thought there was no such thing as *drafting* and that it is all merely *writing*. But I think he didn't give allowance to the fact that in law school drafting is something different from writing. Anyway, he says, "Some day some one will read what you have written, trying to find something wrong with it. This is the special burden of legal writing, and the special incentive to be as precise as you can."³ So that's the warning to your students—to take care when they are writing.

On to some examples of ambiguity that you can use with students. One, of course, is that the word might have a different meaning in the trade than it has in the ordinary usage. Some of us teaching Contracts use a case where there was a horse that was available for breeding for the year 1966, and the issue was whether not making the horse available for breeding until July was a breach of contract.⁴ Both parties acknowledged that July was too late, and the judge said, wait a minute, the contract says, "for the year 1966," but it was clear to the parties that "the year 1966" meant the breeding year, not the calendar year. So that word had two meanings, one in the trade and one in ordinary usage.

By the way, in Montana they call me Mr. Contracts, because I am the only contracts professor in the only law school in the state. I mention this because even Mr. Contracts can get trapped by ambiguity problems. I drafted this contract for an artist client—he was a sculptor—between him and the foundry, and we said the foundry was going to cast panels for him at a price of \$100 per square foot. He sent a panel to the foundry that was two feet by five feet, and they sent a bill for \$1,500. I said, "wait a minute this is 10 square feet," and they said, "no, it is 15 square feet." We were thinking of the dimensions of the panel, and they were thinking of the surface area because it was three dimensional. They had 15 square feet of surface area that they were coating. So *square foot* meant something different to them than it meant to me, and I had to admit that their interpretation was probably better than mine. The lesson is to make sure that you understand the transaction in the context of the trade or business.

Students are very quick to say, "Oh this language is vague and ambiguous." Well, make sure you explain to them the difference between vagueness and ambiguity—that ambiguity is often opposite meanings, for example, black and white, whereas vagueness is a range of possibilities and usually within a fairly narrow range.

² DAVID MELLINKOFF, *LEGAL WRITING: SENSE AND NONSENSE* (1983).

³ *Id.* at 15.

⁴ *Taylor v. Johnston*, 539 P.2d 425 (Cal. 1975).

Those of you who teach Article 2 of the UCC have grown to love these vague terms like *prompt* and *reasonable* and *good faith*. Those are wonderful terms as far as I am concerned, and they are not to be avoided. So you can argue about whether *prompt* means ten days or twenty days; that's vague, but it's not ambiguous. So there is nothing wrong with being intentionally vague; you can decide whether you want shipment in ten days or you want prompt shipment. But you don't want to be intentionally or unintentionally ambiguous.

Here is another example of ambiguity; this is the so-called "golden rule of drafting." I once asked my students what is the "golden rule of drafting," and somebody finally said, "Draft unto others as you would have them draft unto you." I thought that was pretty good.

But the real golden rule of drafting is: "Never change your language unless you wish to change your meaning, and always change your language if you wish to change your meaning."⁵ Here is an example of this idea. This shareholder agreement starts off by talking about "sell, transfer, assign, pledge, encumber or otherwise dispose of or convey" and then later in the agreement it talks merely about "transfer:"

- "Except to the extent expressly permitted by this Agreement, Shareholders may not sell, transfer, assign, pledge, encumber or otherwise dispose of or convey (by operation of law or otherwise) shares of the Corporation."
- "If a shareholder proposes to transfer shares and dies prior to the closing of the sale and purchase contemplated by Section 1"

What happened to all those other forms of disposal? If you are going to use all of those methods the first time, you want to use them all the second time. And of course the best solution to this problem would be to have a definition that would define all of those forms of transfer as "transfer" and then use "transfer" from then on. The computer can be useful here to search for subsequent uses. We could search for *sell*, search for *transfer*, search for *assign*, and so forth throughout the agreement to see that the same language is used throughout. Now definitions are also a good way to avoid ambiguity. We of course all remember the chicken case,⁶ where one party thought *chicken* meant *broiler* and the other party thought *chicken* meant *stewer*. Wouldn't the parties have been sensible just to define what they meant by *chicken*? A good way to avoid ambiguity is to make sure your definitions work.

⁵ Scott J. Burnham, *Drafting and Analyzing Contracts* 227 (2003).

⁶ *Frigalment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960).

One way to do this is to use the “find and replace” function of your word processor. Every time you find the defined term, replace it with the definition, and then read it to see if it works. You don’t have to save the changes—this is just a technique for document checking.

I have an example from my practice that came up where the husband was supposed to pay base alimony of a \$100 a week, and then in each subsequent calendar year, he was going to pay the base alimony plus the cost of living increase:

- *Cost of living increase.* “Base alimony” is defined as \$100 per week. In the first calendar year, Husband shall pay Wife the base alimony. In each subsequent calendar year, Husband shall pay Wife the base alimony plus a cost of living increase. The cost of living increase is the base alimony multiplied by the inflation rate for the prior year as determined by the Department of Labor.

For example, assume in the first year he would pay \$100 a week, and the second year he would pay the base alimony plus the cost of living. Let’s say it went up 10 percent, he would then pay \$110 the second year. Well, assume it went up 10 percent in the third year. According to the formula he would pay the base alimony plus 10 percent, so he paid \$110 the third year:

- *Cost of living increase.* “Base alimony” is defined as \$100 per week. In the first calendar year, Husband shall pay Wife [\$100 per week]. In each subsequent calendar year, Husband shall pay Wife [\$100 per week] plus a cost of living increase. The cost of living increase is [\$100 per week] multiplied by the inflation rate for the prior year as determined by the Department of Labor.

So the third year he pays \$110, the wife says that’s not right, and he says, ha-ha that’s what it says in the contract. By the way, this is not really ambiguity because he is absolutely right that the language allows for only that one meaning, but of course the issue is, what did the parties intend to say? I told him he was going to lose, that a court was not going to interpret this as it was written, and I ended up being right. So then he said, “Well you didn’t really have your heart in that when you litigated it.” The takeaway from all this is: rewrite the definition or the defined term when it is used inappropriately.

Let's now look at *and* and *or*. There is a whole chapter in my book on the use of *and* versus *or*, which lends itself to a lot of problems in ambiguity.⁷ Here is a great example. This is from the Montana Lemon Law, so this is a statutory problem. It says the problem with the vehicle must affect the “use and market value or safety of the motor vehicle.”⁸ This is a great ambiguity: “affect the use and market value or safety.” Does it have to affect the use and market value *or* the safety, or does it have to affect the use *and* the market value or safety? See, it's a perfect ambiguity because either interpretation is valid. And once you see these problems, they are fairly easy to cure. I am a big fan of tabulation as a cure; we will look at that in a second.

Now, on to misplaced modifiers. “Seller shall ship oranges and grapefruit from Florida.” Obviously the grapefruit has to come from Florida, but what about the oranges? Or “the employee shall receive severance benefits on termination of her employment by the company.” She quit, and she asked for severance benefits, and the company said, “Ha-ha, you only get severance benefits on termination by the company.” She said “No, I get severance benefits on termination of my employment by the company. And my employment by the company was terminated by me. Therefore I get severance benefits.” The issue is, what does “by the company” modify: termination or employment? The bad news for the company is that many courts resolve ambiguities like this by using the rule of *contra proferentem*. I tell students that translates as “screw the insurance company,” but it really means construe it against the drafter, for they are the one who caused the ambiguity to arise.

The next one is an example of a case litigated in Texas.⁹ The statute provided:

- No person shall be eligible to serve [on the] Supreme Court unless the person is licensed to practice law in this state and is, at the time of election, a citizen of the United States and of this state, and has attained the age of thirty-five years, and has been a practicing lawyer . . . at least ten years.

The person involved was elected and at the time of the election had not been a practicing lawyer for ten years, but would qualify at the time that he would have begun service. What does “at the time of election” modify? This tabulation makes clear that “at the time of election” modifies all of the items that follow it:

⁷ Scott J. Burnham, *Drafting and Analyzing Contracts* Ch. 7 (2003).

⁸ Mont. Code Ann. § 61-4-503 (2007).

⁹ *Sears v. Bayoud*, 786 S.W.2d 248 (Tex. 1990).

- No person shall be eligible to serve on the Supreme Court unless the person is licensed to practice law in this state and, at the time of election:
 - is a citizen of the United States and of this state;
 - has attained the age of 35 years; and
 - has been a practicing lawyer for at least 10 years.

Moving the modifier to the second tabulated item makes clear that “at the time of election” modifies only that item.

- No person shall be eligible to serve on the Supreme Court unless the person:
 - is licensed to practice law in this state;
 - is, at the time of election, a citizen of the United States and of this state;
 - has attained the age of 35 years; and
 - has been a practicing lawyer for at least 10 years.

Here is another example, from secured transactions.¹⁰

- Debtor grants creditor a security interest in all inventory, including but not limited to agricultural chemicals, fertilizers, and fertilizer materials sold to Debtor by Van Diest Supply Co. whether now owned or after acquired

The security interest was granted in inventory, but the issue was whether “sold to debtor by Van Diest Supply Co” modifies just the fertilizer and the fertilizer materials or whether it modifies all inventory. In other words, did the debtor grant a security interest in all inventory or just in the inventory sold to debtor by Van Diest?

Once you spot this problem, you can fairly easily solve it by moving the modifier closer to the term it is going to modify. One solution, indicating that it modifies only the second phrase, might be:

¹⁰ *Shelby County State Bank v. Van Diest Supply Co*, 303 F.3d 832 (7th Cir. 2002).

- Debtor grants creditor a security interest in all inventory (including but not limited to agricultural chemicals, fertilizers, and fertilizer materials sold to Debtor by Van Diest Supply Co.), whether now owned or hereafter acquired.

The other, indicating that it modifies the first, might be:

- Debtor grants creditor a security interest in all inventory sold to Debtor by Van Diest Supply Co., including but not limited to agricultural chemicals, fertilizers, and fertilizer materials, whether now owned or hereafter acquired.

So you can solve this problem once you spot it.

Another ambiguity problem arises when it is unclear whether you are talking about two classes or two characteristics of one class. This example comes from a litigated case involving a statute that said, “No person shall make telephone calls that are threatening and obscene.” Well the guy involved was prosecuted for violating this statute, and he said, “I admit that the phone call I made was obscene, but it wasn’t threatening. Therefore, I didn’t make a call that was ‘threatening and obscene.’” The court had no trouble saying that what the statute was really saying was that it prohibited two classes of phone calls. It was saying no person shall make telephone calls that are threatening, *and* no person shall make telephone calls that are obscene. There are other ways to solve the problem, too, again: *once you spot it*.

Two classes or two characteristics of one class?

- Ask whether the *and* is joining what could be part of two sentences, or is connecting two parts of a sentence.
- Rewrite for clarity or tabulate.

Punctuation can occasionally be a problem. In a case from Canada, the agreement provided: “The agreement shall continue in force for a period of five years from the date it is made, and thereafter for successive five year terms, unless and until terminated by one year prior notice in writing by either party.” So what does the phrase “unless and until terminated by one year prior notice” modify? One

party thought that they could terminate the agreement on one year's notice. The other party thought they could do that after the first five years.¹¹

Compare:

- The agreement shall continue in force for a period of five years from the date it is made, and thereafter for successive five year terms, unless and until terminated by one year prior notice in writing by either party.
- The agreement shall continue in force for a period of five years from the date it is made, and thereafter for successive five year terms unless and until terminated by one year prior notice in writing by either party.

The comma makes a big difference. I think the second example without the comma makes it clear that there is going to be a five year term without any early termination.

I think one of the most important instances of ambiguity arises when you discuss the difference between promises and conditions. In legislative drafting, *must* generally creates a condition. You will see in statutes language like “to obtain a driver’s license a person must pass the road test.” But in contract drafting my advice is not to use *must* to create conditions. You don’t want to say things like “buyer must submit notice of defects within 30 days of receipt.” Probably the drafter here was intending to say, “if you don’t submit notice of defects within 30 days, then it is too late to give notice.” In other words, it’s a condition. But courts don’t like conditions because the remedy for breach of a promise is damages while the remedy for failure of the condition is that the performance by the other party isn’t due. So to prevent the hardship caused by a condition, a court will say, “you were making a promise here, and what you were really saying was, ‘buyer *shall* submit notice of defects within 30 days.’ Therefore, if that wasn’t done, the seller is entitled to damages but still has to perform.” So if you want to create a condition you have to spell it out—“buyer must submit notice of defects within 30 days” becomes “*if* buyer does not submit notice of defects within 30 days, then seller has no obligation.” Once you realize that you can spell it out as an express condition, what you have is a condition without the necessity of a promise.

So, write on! (without ambiguity).

¹¹ Can. Radio-Television & Telecomm. Comm’n [CRTC] 2006-45 (July 28, 2006) (Can.), available at <http://www.crtc.gc.ca/eng/archive/2006/dt2006-45.htm>.

LARRY A. DiMATTEO*

CONTRACTS AND PRECEDENTS

I don't know how "beyond the basics" my presentation is beyond the presentations earlier. But I will go into more detail. Drafting through precedents involves the use of existing sources in the drafting process, including case and statutory law, and standard and model forms and templates.

Karl Llewellyn saw contract writings as an art form. In his famous book, *The Bramble Bush*,¹² written to law students, he states: "Drafting: I know no art more difficult." I think in listening to Scott Burnham and others we can see that unless you are very motivated and very concentrated and give it a concentrated effort, it is easy not to be a great drafter. Like Hercules in Dworkin's theory of the common law and the legal order, to be a master of contract writing you need to be a drafting super human; you must live in a perfect world in which you have complete knowledge of general business custom, a specific knowledge of trade usage and the client's business, a profound knowledge of every aspect of the law, superior writing skills, and be a master of utilitarian analysis.¹³ You need to excel in both the world of academics and the world of practice.

But in the "real world," where we are teaching law students how to create real world documents, we have time constraints, knowledge of law is less than perfect, and, of course, law is less than perfect. Even if we have a hypothetical perfect drafter, the law is imperfect in that it is constantly changing. Therefore, we have to continuously refresh ourselves in our drafting skills and in the substance of the law. The problem is that unlimited legal fees are not an option. The time allocated to drafting will vary between the size of the deal and the size of the client, but beware, if you want to put less time into something—for example for a smaller client—of course you still have the issues of not doing a good job and malpractice. That said the other real world complication in drafting is the other side might actually want some input. This is what I always found disturbing in practice!

* Larry A. DiMatteo is the Huber Hurst Professor of Contract Law and Legal Studies at the Warrington College of Business, University of Florida. Professor DiMatteo received his J.D. from the Cornell Law School, LL.M. from Harvard Law School and Ph.D. from Monash University (Australia). He is the former Chair of the Department of Management at the University of Florida and past Editor in Chief of the *American Business Law Journal*.

¹² KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1930).

¹³ See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); Ronald Dworkin, *Law as Interpretation*, 60 TEXAS L. REV. 527 (1981).

I. WHAT KIND OF DRAFTING?

This Part examines the two main drafting methodologies: precedent-based drafting and zero-based drafting. Precedent-based drafting refers to the use of materials external to the transaction. These external sources include standard, previously-used, and model contracts or forms. Zero-based drafting is the creation of contract clauses from the particulars of the transaction, statutes, and the case law.

A. Precedent-Based Drafting

So what types or techniques of drafting should we use? Clearly we live in a world of precedent-based drafting: using some sort of standard form or intra-firm generated materials, such as contracts used in prior dealings or through some basic research finding form contracts used in specific trades or by use of the Internet. On the positive side, the use of form or model contract forms is cost effective, and a standard form may be industry accepted. So in real estate, there is a standard real estate contract that is prepared by the local realtor board, maybe in association with the local or state bar association, and generally you are going to be able to adequately serve your client if you use such a form. Real estate model contracts will generally take in account both the buyer's and seller's interests.

Standard or model forms are often used as templates. Suppose that you are in a medium or large sized firm. No transactions are ever going to be identical. Although, they might be, as Karl Llewellyn would say, "of the same situation or transaction-type."¹⁴ Examples of different transaction types include sales, franchise, lease, asset-based financing, such as secured transactions and mortgage lending contracts. But the form or prior agreement is only helpful to a certain point, because the deals in a given transaction-type could be in many ways completely different. On the negative side, the precedent document is only as good as the initial drafter, may be dated, and may favor the wrong party. George Kuney stated yesterday that the drafter needs to use a form that is a pro-client form or a prior agreement written on behalf of the client in a deal in which the client possessed superior bargaining power.¹⁵

Most firms, large and small, have represented clients on both sides of a transaction (lender-borrower, landlord-tenant, buyer-seller, assignor-assignee) and

¹⁴ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 268-271 (1960).

¹⁵ See *supra* George W. Kuney & Tina L. Stark, *Transactional Skills Training: Contract Drafting—The Basics*.

have developed forms or model contracts over time. Tina Stark warns that the drafter should start, not with the finished product in using an existing contract or template, but with the initial draft of the template or prior agreement—that way you can see the changes made during the drafting of the previous document and determine the reason for the changes.¹⁶ Such a study of the evolution of a contract will unveil the issues that the drafter faced in writing the contract. This will help guide the current drafter in modifying the contract to reflect the specific facts of the current transaction.

B. Zero-Based Drafting

Zero-based or customized drafting directs the drafter to the law in an area (cases, statutes, and regulations) in writing the contract. I don't think that's really done enough anymore—but clearly it can be done and should be done for certain types of clauses. I have selected the covenant not-to-compete (see Part III) as one that provides a perfect example as to not using any sort of form possessing a boilerplate covenant not-to-compete without independent analysis and customization. This allows the drafter to update the contract for changes in the law and, if we are playing to the judge, using state law to “guide” the court in its review of these types of highly scrutinized clauses. The issues in clauses, such as covenants not-to-compete, anti-assignment, and liquidated damages (see list below), are the things we learn in first-year contracts. These types of clauses are highly scrutinized because of public policy concerns and therefore use of state law (statutes and cases) is necessary in drafting an enforceable clause. The cons to this sort of drafting is that it is not particularly cost effective, so the ultimate solution is that you want to use a template but then customize at least some of the clauses that are really the operative ones and the ones that are most scrutinized by the courts. The following is a list of some of the most highly scrutinized clauses in contracts:

- Quality Term
- Force Majeure
- Confidentiality Clause
- Anti-Assignment Clause
- Indemnification
- Choice of Law/Forum Clause
- Arbitration Clause
- Exculpatory Clause
- Liquidated Damage Clause
- Time is of the Essence Clause
- Renewal Clause
- Covenant not to Compete

¹⁶ TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO (2007).

II. HOW TO CHOOSE THE RIGHT PRECEDENT DOCUMENT

I went to work for a large law firm fresh out of law school and my first assignment was writing a commercial lease. The partner gave me a four-inch thick digest of alternative commercial lease terms. It was an old, yellowed text. It consisted of a rotisserie of one-sided to less one-side clauses. There were, for example, 11 different versions of a particular term going from pro-landlord to pro-lessee. And, without any guidance, I just willy-nilly picked one of the more moderate versions thinking: “Okay, we don’t want to get too obnoxious here.” It was really the fault of the senior lawyer in not giving me any context—what type of client, what type of deal—there was none of that. Now, I don’t know if it was just a training exercise. I just hope to God the partner never used it. Instead of the rotisserie method, it is more efficient and likely to produce a higher quality outcome, to use an intra-firm contract from a similar transaction, and then focus on the uniqueness of your transaction (even though it’s the same transaction-type) and work from there.

So how do we choose the precedent document? The Internet makes it easy to find a form, depending on whether the industry is a structured or an unstructured industry; whether the transaction is more of a local, state, national, or an international transaction; and depending on whether it is a single-party or a two-party constituency (for example, model forms are often used by both sellers and buyers in a given industry or transaction-type). The real estate contract, used in an ordinary purchase and sale of a home, is a model form where both parties sign the bottom and that is it, that is the contract. In the sale of goods transaction, contracting parties use various forms as offers and acceptances, such as purchase orders, written confirmations, price quotations, and pro-forma invoices. The exchange of these often one-sided forms creates the “battle of the form” scenario addressed by UCC Section 2-207. Scholars and judges have not been able to agree on a uniform application of Section 2-207 in any realistic way. So if you have a form that is industry accepted and both parties are familiar with it, clearly you are starting off closer to the end state than you would if you are starting from scratch. Many forms are available through the local bar, state bar, private form companies at the state level, CLE, and “within” state statutes.

A. Using State Statutes When Creating Precedent-Based Forms

In some states, statutes provide the parameters of enforceability for certain types of contracts. New York Real Property Law has relatively detailed provisions governing residential leases. For example, it provides a boilerplate term for security deposit clauses.

B. Use of Model Form Contracts

In drafting international contracts, the International Chamber of Commerce (ICC) produces excellent, party-neutral model form agreements and contract term manuals (such as, a force majeure clause manual). These types of organization or industry-generated model contracts are especially helpful because foreign agency and employment laws vary among countries. The current list of ICC model contracts and clauses include:

- Model Commercial Agency Contract
- Model Confidentiality Agreement
- Model International Franchising Contract
- Model Distribution Contract
- Model Contract for Turnkey Supply of an Industrial Plant
- Model Mergers and Acquisitions Contract
- Model Occasional Intermediary Contract
- Model Sales Contract
- Model Clauses on Electronic Contracting
- Handbook for Global Sourcing
- Force Majeure Clause

The ICC continues to produce model forms including a new Model Trademark License, Model Technology Transfer Contract, and Model Subcontracting Contract.¹⁷

¹⁷ The ICC provides this description of its model contracts:

The Commission on Commercial Law and Practice (CLP) develops ICC model contracts and ICC model clauses which give parties a neutral framework for their contractual relationships. These contracts and clauses are carefully drafted by experts of the CLP Commission without expressing a bias for any one particular legal system. The idea behind ICC model contracts and clauses is to provide a sound legal basis upon which parties to international contracts can quickly establish an even-handed agreement acceptable to both sides. The contracts are the products of some of the finest legal minds in the field of international commercial law. They are constructed to protect the interests of all the parties, combining a single framework of rules with flexible provisions allowing the parties to insert their own requirements.

International Chamber of Commerce, "Model Contracts and Clauses," *available at* <http://www.iccwbo.org/policy/law/id272/index.html>.

C. “Twelve Tips” in Selecting & Using Standard and Model Forms

An important asset in building quality model clauses and contracts that may be useable with customization in future contract drafting is the contract or contract clause checklist. The checklist may consist of previously used contract language and transaction-specific facts and issues. Mostly, a checklist should provide a series of questions to be answered by the drafting attorney. The following list of twelve tips provides a checklist for selecting and using forms in general. Part III will discuss how a checklist can be developed for specific clauses. It will examine the issues relevant to drafting a covenant not-to-compete.

1. Find state-specific forms.
2. Find industry-specific forms.
3. Find annotated forms.
4. Revise for style.
5. Update forms for substance & law.
6. Take into account deal-specific issues.
7. Ask client meaning of unfamiliar terms (business or trade usage).
8. Always ask: What provisions should be added?
9. Compare forms from different sources.
10. Compare different drafts of internally-generated forms (from first to final drafts).
11. Never change your language within a form unless you wish to change its meaning throughout.
12. Always consider the source.

The best form books are state and industry specific. This is based on the simple fact that what is legal and what is considered appropriate varies from state to state and industry to industry. Annotated forms provide the best protection against using a form based upon the law of an inapplicable state or on outdated law. Even annotated and recently updated forms will lag behind recent changes in state law. For example, in late 2008, the Governor of New York signed into law the “Broadcast Employees Freedom to Work Act” to provide that certain non-compete agreements involving broadcast employees are void and unenforceable.¹⁸ This is

¹⁸ Assembly Bill 2124; Senate Bill 2393. See Governor Press Release (August 8, 2008), available at <http://www.ny.gov/governor/press/index.html>.

from a state that has generally deferred to the courts in determining the enforceability of covenants not-to-compete.

The drafting attorney should review all forms along three parameters: (1) as noted above, the attorney must research any recent changes in state law. This is especially true for contracts and clauses that have been highly scrutinized by the courts in the past. (2) A form should be reviewed not only for substantive correctness, but also for clarity and style. (3) Review the form's language to take into account deal specific issues, and ask the client the meaning of unfamiliar (trade) terms. Questioning the client's understanding of the meaning of certain contract terms, based on business custom or trade usage, and the like can be an important source of information (especially if you are new to the profession). Another best practice is to compare forms; don't rely on a single form. If it is an internal, firm-developed form, you should compare earlier versions with later versions to determine how the previous transactions are different from the current transaction. Always consider the source (Wikipedia is not a great source!). Finally, *Farnsworth on Contracts*, along with more transaction specific treatises, are excellent sources for determining the legal issues involved in drafting and enforcing particular contract clauses.¹⁹ *Farnsworth* provides clear and concise analysis of most areas of contract law. Now clearly, it is a national treatise, so it may not be as useful from a state-specific point of view. But, I find a good general treatise like *Farnsworth* a very practical aid in drafting.

D. Reasonable Person Theory of Drafting

The best approach to contract writing is to apply a reasonable person theory of drafting.²⁰ This is not a novel approach. But, it is important to recognize that just because your client may have superior bargaining power, an attorney advantage (such as a big firm versus a small firm attorney who just does not have the resources and time to give to a lengthy negotiation, contract drafting, and review), that does not mean the drafting attorney should take advantage and write a heavily one-sided contract. The drafter should write a contract that provides for his client's concerns, but also one that is deal-preserving and with the judge in mind.²¹ This is especially true for clauses disfavored by the courts.

¹⁹ E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS (3d ed. 2008).

²⁰ See generally Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment* 48 S.C. L. REV. 293 (1997) (exploring the roots of the reasonable person standard and how it has been fabricated).

²¹ See IAN MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONSHIPS (1980).

The drafting of a contract that withstands the application of the reasonable person standard applied by the courts will ultimately be in your client's best interest. For there to be a role for the business lawyer in balancing the self-interest of their clients (narrow view of lawyer's role) with the mutual interests of both parties (broader view of the lawyer's role as expanding the pie to be divided), the lawyer should be involved at the earlier stages of negotiations.²² Ronald Gilson argues that lawyers should engage in joint solving problems to increase the size of the pie to be received by each party to the transaction.²³ The contract can be both pro-client and pro-contract relationship at the same time. The contract creates contract rights that are enforceable in court, but its main purpose is as a planning device where the contracting parties' interests are aligned. Ian Macneil succinctly stated that: "In transactions no sensible line can be drawn between bindingness of planning and bindingness of obligation. Transactional obligation is founded on specific planning, and therefore, to the extent that planning is binding, so is the obligation."²⁴ In sum, a contract drafted by the reasonable person encourages performance, not breach. As a planning device the goal is to prevent the enforcement of contract rights through litigation.

III. DEVELOPING A DRAFTING CHECKLIST: COVENANTS NOT-TO-COMPETE

As stated earlier, the development of checklists is an important safeguard in the drafting of specific contract clauses. I will use the covenant not-to-compete as an example. The main point to understand in such clauses or agreements is that there is no general law of covenants not-to-compete. Each state has variations, some of them quite unique. Some states attack such covenants with a default rule of voiding the covenant, subject to listed exceptions for the protection of trade secrets, goodwill in the sale of a business or the confidentiality of specialized training.²⁵ One state voids all covenants not-to-compete as illegal.²⁶ Most states have adopted a rule of reason approach. Under the rule of reason approach, there is no one-size-fits-all covenant not-to-compete. The drafter must be guided by the applicable statutes and case law of a given state. And the penalties for getting it wrong can be severe. The

²² Jonathan C. Lipson, *Doing Deals in School*, BUS. L. TODAY, Sept./Oct. 2005, at 51. "[M]ost good business lawyers routinely: help plan the deal, investigate the facts and the law as the deal develops, help negotiate, and draft the paperwork." *Id.* at 53.

²³ Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984).

²⁴ Ian Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 776 (1994).

²⁵ See, e.g., GEORGIA STATUTES § 13-8-2.1.

²⁶ CAL. BUS & PROF CODE § 16600.

State of Georgia, for example, is one of the few states that does not allow for blue penciling (reforming) of covenants not-to-compete. Most states would use reformation to modify a covenant to make it reasonable in terms of time, scope, and geographic range, but not Georgia. If a Georgia court finds that any part of a clause is unreasonable, then the law directs them to void it. This is an example where a reasonable person drafting approach would better serve the client. An example of a generic checklist for drafting covenants not-to-compete would take the following factors into account:

A. The Law

- See if there is a relevant state statute.
- Check recent case law.
- Review the reasonableness of the restrictions on scope, geography, and duration in relation to precedents.

B. Factual Considerations

- Type of Employee: Do different employees require different covenants?
- Type of Industry, Business: Is there an industry standard regarding such covenants?

C. Other Drafting Considerations

- Does the covenant adequately describe the proprietary interests being protected by the covenant?
- Is there a reasonable relationship between the proprietary interest being protected and the covenant's restrictions?
- Does the covenant treat differently different types of termination (non-voluntary for cause; non-voluntary without cause; voluntary)? Does the covenant or contract define "cause"? Does the covenant provide separate remedies for the different types of termination?
- Will the covenant be signed pre-employment, during duration of employment, or at termination of employment?
- Is consideration being given for the signing of the covenant?
- Are past benefits linked to the honoring of the covenant? Are past benefits (such as bonuses, training costs) linked to a minimum length of employment?

- Are future benefits linked to the honoring of the covenant (e.g., pension contributions, exercise of stock options)?
- Are remedies, such as liquidated damages, provided for in the covenant?
- Does the covenant or contract include anti-solicitation restrictions (customers and co-employees)? Does the covenant or contract provide for strict employee confidentiality obligations? Does the employer “treat” information as confidential? Does the covenant distinguish between basic human capital development and specialized training?
- How does the covenant relate to other terms of the contract, such as liquidated damages clause, merger clause, severability clause, termination clause, remedies clause, notice clause)?

D. Best Practices

- Review employee-related materials and policies provided by the company.
- Review covenants periodically. Rewrite based on changes in the law and changes in an employee’s position within the company.
- Is enforceability or deterrence (scare tactic) the primary purpose of the covenant? If the former, then reasonable person theory should be used in its drafting. If a goal is to prevent litigation (and to be relationship-preserving), then reasonable person drafting and procedural fairness (especially in the case of involuntary termination) principles should be utilized. *Provide clear notice provisions relating to the covenant!*

In the field of covenants not-to-compete (employment context) there are numerous state statutes that really tell you what you can do or what you can’t do in writing a covenant not—to-compete, and they vary drastically from state to state. A sampling of state statutes is a way of educating the drafter on the nuances of the law of restrictive covenants.

IV. SAMPLING OF STATE STATUTES

California: Covenants are *void ab initio*.

Every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void. CAL. BUS & PROF CODE § 16600.

Drafting Point: The drafter will have to focus his drafting on anti-solicitation and confidentiality provisions in the contract.

Colorado

Any covenant not-to-compete which restricts the right of any person to receive compensation shall be void, but this shall not apply to: (1) Any contract for the purchase and sale of a business or the assets of a business; (2) Any contract for the protection of trade secrets; (3) Any contractual provision providing for recovery of the expense of educating and training an employee who has served an employer for a period of less than two years; and (4) Executive and management personnel and officers and employees who constitute professional staff to executive and management personnel.

Any covenant not-to-compete in an employment, partnership, or corporate agreement between physicians which restricts the right of a physician to practice medicine upon termination of such agreement, shall be void; except that all other provisions of such an agreement enforceable at law, including provisions which require the payment of damages in an amount that is reasonably related to the injury suffered by reason of termination of the agreement, shall be enforceable. Provisions which require the payment of damages upon termination of the agreement may include, but not be limited to, damages related to competition. COLORADO REVISED STATUTES § 8-2-113.

Drafting Points: The Colorado statute differentiates between upper management and other employees. It also differentiates physician employees and partners from other types of employees and partners. The drafter should describe the type of employee as executive and management personnel. The statute also allows for the protection of educating and training employees who leave after serving less than a two year tenure. The drafter should describe any such training and education in the covenant or incorporate by reference to the training documents.

Florida

A court shall not enforce a restrictive covenant unless it is set forth in a writing signed by the person against whom enforcement is sought and the person seeking enforcement proves the existence of one or more legitimate business interests justifying the restrictive covenant. "Legitimate business interest" includes: (1) trade secrets; (2) valuable confidential business or professional information that otherwise does not qualify as trade secrets; (3) substantial relationships with specific prospective or existing customers, patients, or clients; (4) customer, patient, or client

goodwill associated (with the employment); and (5) extraordinary or specialized training.

If a person seeking enforcement of the restrictive covenant establishes prima facie that the restraint is reasonably necessary, the person opposing enforcement has the burden of establishing that the contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the established legitimate business interest or interests.

In determining the reasonableness in time of a post-term restrictive covenant not-to-compete predicated upon the protection of trade secrets, a court shall apply the following rebuttable presumptions: (1) In the case of a restrictive covenant sought to be enforced against a former employee, agent, or independent contractor, a court shall presume reasonable in time any restraint 6 months or less in duration and shall presume unreasonable in time any restraint more than 2 years in duration; (2) In determining the enforceability of a restrictive covenant, a court shall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought; (3) A court shall construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement. A court shall not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract; (4) A court shall enforce a restrictive covenant by any appropriate and effective remedy, including, but not limited to, temporary and permanent injunctions. The violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant. No temporary injunction shall be entered unless the person seeking enforcement of a restrictive covenant gives a proper bond, and the court shall not enforce any contractual provision waiving the requirement of an injunction bond or limiting the amount of such bond; and (5) In the absence of a contractual provision authorizing an award of attorney's fees and costs to the prevailing party, a court may award attorney's fees and costs to the prevailing party in any action seeking enforcement of, or challenging the enforceability of, a restrictive covenant. A court shall not enforce any contractual provision limiting the court's authority under this section. FLORIDA ANNOTATED STATUTES § 542.335.

Drafting Points: There are numerous drafting points provided by the Florida statute including: (1) Expressly link the covenant to a “legitimate business interest” by describing in detail the type of extraordinary or specialized training received by the employee; the “confidential business or professional information provided to the employee;” the “substantial relationships [the employee has developed] with specific

prospective or existing customers, patients, or clients; the trade secrets that the employee was given access; and the type of goodwill the employee was given or obtained in developing relationships with customers, patients, or clients. (2) Draft within the duration time periods provided in the statute. (3) Be sure to make use of the “rebuttable presumptions” provided for in the statute. (4) Do not contractually limit in the covenant to avoid the statute’s bond requirements. (5) Insert a provision for the collection of attorney’s fees directly into the covenant.

Georgia

Employee “means an executive employee, officer, manager, or key employee; research & development personnel or other persons or entities in possession of confidential information that is important to the business; any other person in possession of selective or specialized skills, learning, or abilities or customer contacts or customer information.”

An employee may agree in writing for the benefit of an employer to refrain, for a stated period of time following termination, from soliciting or accepting, or attempting to solicit or accept, directly or by assisting others, any business from any of such business's customers, including actively sought prospective customers, with whom the employee had material contact during his employment for purposes of providing products or services that are competitive with those provided by the employer's business. No express reference to geographic area or the types of products or services considered to be competitive shall be required. A duration of two years or less shall be presumed to be reasonable.

An employee may agree in writing for the benefit of an employer to refrain, for a stated period of time following termination, from recruiting or hiring, or attempting to recruit or hire, directly or by assisting others, any other employee of the employer or its affiliates. A duration of three years or less shall be presumed to be reasonable.

Activities, products, or services shall be considered sufficiently described if a reference to the activities, products, or services is provided and qualified by the phrase “of the type conducted, authorized, offered, or provided within one year prior to termination,” or similar language. Further, the phrase “the areas where the (employee) is working at the time of (termination)” shall be considered sufficient as a description of areas if the person or entity bound by the restraint can reasonably determine the maximum reasonable scope of the restraint at the time of termination. GEORGIA STATUTES § 13-8-2.1.

Drafting Points: Use the definition of employee provided in the statute and stay within the durational guidelines: two years or less for anti-solicitation of customers and three years or less for anti-solicitation of employees. Finally, describe the types of products, services, or activities associated with the employee's job.

New York

No specific statutory law, except for a recently enacted law with a very narrow, targeted focus, that deals with covenants not-to-compete.

Drafting Point: A thorough search of the case law is required.

KENNETH A. ADAMS*

INFORMATION TECHNOLOGY IN DRAFTING

I have a grand total of 15 minutes to talk about use of information technology in contract drafting, so I'm going to split the presentation into thirds: five minutes on general background, five minutes on a race through some technologies, and five minutes on what it might mean to you all and your students.

A. General Background

Listening to yesterday's presentations, my initial reaction to hearing the discussion about incorporating doctrine and negotiation in transactional skills courses was, "Gee, my life is simpler," because my focus is limited to the language of contracts—not what you say in a contract, but how you say it. So how does that focus manifest itself? Well, I moonlight at the University of Pennsylvania Law School, where I teach their first-ever contract drafting course to a grand total of 20 students a year. But most of my time I spend roaming the land, giving public and in-house seminars on contract drafting. I also write: I am the proud proprietor of the sole contract-drafting blog, and I have my book, *A Manual of Style for Contract Drafting*,²⁷ the second edition of which will be coming out this summer.

* Kenneth A. Adams is the principal of AdamsDrafting. He applies his expertise in four different ways. He consults with corporations on how to improve their contract drafting. He conducts public and in-house seminars. He teaches at the University of Pennsylvania Law School. And he has written extensively on contract drafting—his book "A Manual of Style for Contract Drafting" is a best-seller for the ABA.

²⁷ KENNETH A. ADAMS, *A MANUAL OF STYLE FOR CONTRACT DRAFTING* (2d ed. 2008).

I'm unapologetic about my relatively narrow focus. I've found that if you have rigorous control over how you say whatever you want to say a contract, everything else becomes a whole lot easier. By contrast, if you're drafting on autopilot and regurgitating the language of precedent contracts, everything becomes a lot messier. You're going to spend a lot more time, and therefore a lot more money, drafting contracts, negotiating and closing deals, and monitoring performance under a contract, and you are going to greatly increase the chances of there being some unfortunate blowup down the road due to an ostensibly minor drafting glitch. It's as if you were trying to build some grand edifice with faulty construction materials.

Now, mainstream contract drafting is nothing if not a matter of drafting on autopilot and regurgitating language that has been around for years. That's why I think that mainstream contract drafting is a dysfunctional mess. You can pretty much see that in any contract taken at random. It doesn't really matter how exalted the law firm that prepared it, or how substantial the company is that is behind it. If you want to see an example of embarrassing mainstream contract drafting, I suggest you have a look at the merger agreement dated March 18, 2008, between Bear Stearns and JPMorgan.

So you have the choice between drafting on autopilot and a more rigorous approach. But contract drafting is an industrial-scale, precedent-driven team sport, so change is very hard to achieve.

At the heart of the issue of change is whether you are going to look at contract drafting as a craft or a commodity. Often lawyers talk about personal drafting styles. They suggest that over time junior associates will develop a personal drafting style, or they describe how someone else has a drafting style that is different from their own.

If you buy into the notion of drafting styles, you're approaching contract drafting as a craft. It's as if you're in your cottage turning out artisanal tables and chairs, and I'm in my cottage turning out rather different tables and chairs. That's not so great for contract drafting.

I would like contract drafting to be a commodity. I compare contract language to software code. Contract language is limited and stylized, and it doesn't have any voice. It shouldn't really be about explaining stuff, it shouldn't be about persuading. Instead, it's about regulating conduct. So if you accomplish a given drafting goal one way and I accomplish it another way, the odds are that one of us is being less efficient than the other. What I try to do is winnow through contract language and pick out the most effective usages. Life would be simpler if we all used the same, most-efficient usages. And once contract language is standardized, you

can treat the contract process as a commodity. Instead of lawyers treating contract drafting as a cottage industry, they can adopt a production-line mentality.

In the legal profession no one ever made a change solely in the interest of quality—there has to be money behind it somewhere. So for purposes of this discussion, it's relevant that law departments are increasingly being asked to do more with shrinking budgets, increasing outside counsel costs, and increasing compliance demands. And at the same time a series of nifty information-technology tools have become available, so that we not only have a climate conducive to commoditization, we also have the means to accomplish it. Let's look at some of those tools now.

B. Nifty Information Technology Tools

In the materials you have my article from the journal *Perspectives*²⁸ that discusses what I think the problems are with contract drafting, and you have my ACC Docket article,²⁹ which discusses the technologies that we're going to have a brief look at now.

Different technologies can be used to help make the process of drafting contracts more commoditized. One that I found quiet interesting is called Wordsensa. A few months ago a company approached me to ask how they might go about boiling down 45 different confidentiality agreements in order to produce a new template. My first thought was that you should throw them all in the trash and start essentially from scratch, but instead I suggested that they could use Wordsensa, which is a technology that will take dozens, hundreds, thousands of documents, analyze them, and present in endlessly sophisticated tables an analysis of what the common elements are in those documents and what their differences are. So if you're dealing with high-volume documentation, Wordsensa may be of interest.

But the technology of greatest interest to me involves document assembly, which is the process of automatically compiling contracts using pre-approved contract language. One document-assembly technology is QShift, by Ixio. It's intended for companies that have a medium volume of contracts. The idea is you load pre-approved contract language on a server, including optional clauses and annotations. In preparing a contract from that pre-approved language, the user

²⁸ Kenneth A. Adams, *Teaching Contract Drafting: The Two Elephants in the Room*, 14 *Perspectives: Teaching Legal Research and Writing* 92 (2006).

²⁹ Kenneth A. Adams & Brian C. Quinn, *Transitional Your Contract Process from the Artistic to the Industrial*, ACC Docket (Dec. 2007).

selects whichever clauses work best for that transaction, reads whatever annotations are necessary, and inputs any information required. So instead of reinventing the wheel, the user is able to focus on strategy. And the user is discouraged from monkeying with the pre-approved language.

If you deal with a high volume of contracts, you could use DealBuilder, which is a logic-driven document-assembly software. It's for any company that has templates that it uses hundreds or thousands of times a year. The user—ideally it would be a business person, to reduce the burden on the legal function—answers an online questionnaire, specifies what the transaction is, what the product is, what the price is, what the territory is, who the customer is, provides any other required information and makes any other required selections, and then clicks “Done.” If any elements of the completed questionnaire are out of the ordinary, a red flag is raised, the legal department is sent an email, and the draft is in limbo until the matter can be properly addressed. On the other hand, if everything is okay, the system pulls together the specified contract language and you end up with a draft that you've prepared in a fraction of the time that it takes using traditional methods

As regards collaboration technologies, I've been impressed by Litera IDS. Often a given draft contract has to be reviewed by lots of different people, and the process of handling many sets of comments can get unwieldy. Litera IDS allows you to manage the process.

As for checking drafts, the best-known tool is Deal Proof, which is sold by West. When you are done with your draft, you can run it through Deal Proof, which will, among other things, compile lists of open points, flag inconsistencies in how you use strings of nouns or verbs, and spot problems in how you've used defined terms.

I just learned of a tool launched a few weeks ago, Lexicon, that like Deal Proof checks how defined terms are used in a contract, but for a fraction of the price. Whereas Deal Proof is a subscription-based product, Lexicon is available for a one-time license fee of \$80.

Finally, something that's not significant for drafting purposes but for closing a transaction—signature-automation solutions. They're becoming very popular. EchoSign is just one of a number of different flavors of such software.

C. Impact on You and Your Students

What does all this mean for you and your students? These technologies aren't anything that you can use in your class; they only make sense if you use them consistently to handle a lot of contracts.

Actually, one technology you can use in your class is a numbering utility called the Numbering Assistant, by Paying Consulting Group. It makes it a lot easier to use Word's styles function. For any drafting goal, there is going to be one most efficient way of doing things. I take that approach with layout—how you position blocks of text on a page, and how you enumerate them. And it would make sense if all contracts produced by a given organization were to look the same. That goes for contracts drafted by my students, too. So after I devised my preferred enumeration scheme, I contacted Payne Consulting Group, who agreed to incorporate the two versions of my scheme as default options in the Numbering Assistant. So if you have the Numbering Assistant, it's a simple matter to apply my numbering schemes to a contract. That's why I have my students use it.

But back to the more general question of how use of information technology in contract drafting is relevant to your students. I don't want to be mucking around with my car's engine—instead, I just want to drive the car. Similarly, when it comes to drafting a new contract, I want to be able to focus on strategy and negotiation, rather than re-inventing the wheel. We now have the tools to allow us to do that, and economic pressures are increasingly moving things in that direction. For example, mid-market loan documentation is being created by banks using a document-assembly tool called Laser Point. And two document-assembly solutions are being used in the construction industry.

So everything points to the increased commoditization of contract drafting. What are the obstacles? Well, not the technology. And as regards price, that's simply a matter of a straightforward cost-benefit analysis. The main obstacles are cultural—given that contract drafting is so precedent-driven, effecting change requires overcoming considerable inertia.

Ultimately, it would make sense for law firms and companies to outsource much of their contract drafting. There's nothing stopping a vendor from compiling a online library of document-assembly templates and making it available to law firms and companies on a subscription basis. If a user says, "I need a confidentiality agreement," they can go online and created a customized draft by answering questions rather than rummaging around for precedent.

So for purposes of your students, use of information-technology tools in contract drafting is simply a matter of consciousness raising—suggesting to your students that in the future their drafting will be more a matter of focusing on strategy and less a matter of re-inventing the wheel.

J. LYN ENTRIKIN GOERING*

Just to be a member of this panel is rather intimidating for me. I have used both Kenneth Adams's blog and his book as well as Scott Burnham's book in my teaching. I am still very much learning how to do this, as many of you are as well. So I feel like an interloper on the panel.

What I have to say can be compressed into a fairly short time frame. I am really here to promote the teaching of pervasive ethics as you teach transactional drafting. Tina Stark said it very well yesterday, and I would like to spin off on what she left us with: It is important to incorporate ethics, to whatever extent that we can, in every aspect of the transactional law curriculum: the cases, the fact patterns, all of it. I think it's really important for a variety of reasons and I will not go through a lot of the philosophy.

Many of your law schools, like Washburn, teach a free-standing course in ethics. That course is dictated by the ABA accreditation requirements, and it's generally the way law schools comply with those requirements. But there is a lot of literature supporting the benefits of pervasive teaching of ethics by incorporating it into all doctrinal courses and of course skills courses. I think that's what Tina briefly promoted yesterday, and I want to give you some additional ideas on how to do more of that.

I am a legal writing professor. I don't know very much about transactional law and, as much as I admire people like Tina and those of you who have a corporate background and know how to put together mergers and acquisitions, I lack that background. So I sort of got dragged into this kicking and screaming.

* J. Lyn Entrikin Goering is an Associate Professor of Law at Washburn University School of Law and until August 2008 was Director of Washburn's Legal Analysis, Research and Writing Program. Before attending law school, Professor Goering was employed as a legislative fiscal analyst for the Kansas Legislature. During law school she was editor-in-chief of the *Washburn Law Journal*. She later worked as a research attorney for Justice Richard Holmes of the Kansas Supreme Court. Thereafter, she served as administrative assistant to Chief Justice Robert Miller and then to Chief Justice Holmes. She was a law clerk to federal district court Judge Dale Saffels before joining the Topeka law firm of Wright, Henson, Somers, Sebelius, Clark & Baker. She was later an Assistant Kansas Attorney General in the Legal Opinions and Government Counsel Division and established a solo practice in before joining the Washburn Law School faculty in 2003.

I tend to work into my course things that I am familiar with, like legislation. I am hoping that that will be the next generation of drafting courses, as we are not even beginning to talk about that very much in the legal curriculum. I think there is a lot of commonality to both contract and statutory drafting. For example, binding legal language is common to both. But as far as business background is concerned, I don't have that.

What I do believe though, is that students very much want these kinds of drafting courses. We started offering a survey drafting course at Washburn about four years ago. It included some contract drafting, some objective legal writing, judicial opinion writing, and a little bit of legislative drafting. We have yet to meet the demand for these courses and, although I don't feel like an expert on teaching transactional drafting, I can tell you and reiterate for those who are just embarking on this that our students cannot get enough of it. They know what they need, they know this is what they can market to employers, and they want more of it.

Starting next year, we are going to be offering both Writing for Law Practice, the survey course we started teaching four years ago, as well as Transactional Drafting each year. We are a fairly small law school. We have 150 entering students per class, and I think we may be able to begin to stem the tide this fall by offering each course at least once or twice a year. But it's not uncommon at all for us to have 25 students on a waiting list to get into these courses, and the students literally storm into the Dean's office asking for more. So I do think it's an indication of the future of legal education, and the need for more drafting courses is something that I am really glad we are all here to address. I am here learning with you.

I want to just talk a little bit about why we should bother to teach ethics at all in our drafting courses. There are so many different things that we need to be teaching in the contract drafting course, and you are hearing a lot about all the impressive ideas you can incorporate. We need to bother because this is the best way to teach ethics; I strongly believe that. All of us have taken a free-standing professional responsibility course. Students hear about the Model Rules of Professional Conduct ad nauseam and all those war stories about—well, my students call them “bad lawyer cases.” It's really not the best way to learn professional ethics because you are not incorporating those stories, those ethical issues into the very thing the students are more interested in learning. That is why I think it is best to incorporate these stories and these ethical issues into teaching transactional drafting, and that is the best way to teach ethics—in context. I have some ideas about how to do that. I am going to give you some cutting-edge ideas that I think your students will enjoy hearing about. They are articulated in more detail in the bibliography I've prepared for you.

So why do we need to do this? Because students want to know it and they get engaged when you talk to them about what kinds of issues they are going to come across in practice. I have only been teaching for five years. I practiced for a long time and I was amazed that these issues came up literally almost every week. In my practice, thorny ethical dilemmas often crossed my desk. And the Model Rules don't answer them; they answer them even less so in the transactional area because as some of you may know, the ethical rules are highly focused on litigation, much like our legal education curriculum.

The model rules were not designed for the transactional drafting student and certainly not for the transactional drafting practitioner, and I think that gives us even more reason to incorporate ethical issues into transactional drafting courses because the answers are not in the Model Rules. They are largely not addressed in the commentary either, and as a matter of fact, an argument can be made that the rules were actually a little bit more clear prior to the 1983 promulgation of the Model Rules than they are now. Over time they have been become diluted, and that leaves a lot of judgment for our students to have to address how to handle these dilemmas in private practice.

So students want to know about ethical issues. They get excited and engaged, and that's what it's about when we teach adult students. Parenthetically, I have always thought it was a little odd that we call it "pedagogy"—derived from the Greek for "lead the child"—after all, none of our students are 16. They are all at least of majority age. I think the word "andragogy," meaning the process of engaging adult learners in the structure of the learning experience, may be more correct. If you read at all about the literature of andragogy, all the things that we have been talking about over these last two days are very pertinent if you get into the theory of andragogy as opposed to pedagogy. It leads you to recognize our duty as legal educators to provide this kind of instruction in every course that we teach. I think it's a really wonderful message, and if you gather anything from my few minutes here, I would like you to remember how important it is for us as legal educators to warn our students of the things that they are going to come across in private practice.

Quickly, I am going to move ahead to some things that I think you can incorporate that I think your students will find interesting. I am just going to hit on three. The first one is metadata. Most of us have heard about the e-discovery rules and the obligations we now have as litigating attorneys to retain and produce metadata when we are in discovery mode. What you may not have thought about is that metadata is something that we incorporate all the time when we are electronically transmitting drafts of a contract from associate to associate within a

firm and to opposing counsel when you are negotiating a contract and transmitting things electronically to the other side.

Now, metadata is the hidden data that's buried in the files. My students have to teach me how to find it, but they know how. One right-clicks one's mouse on the document and selects "properties" on a Windows computer. When doing so, you can find out who authored the document and when they last amended the document, for example. That's one kind of metadata.

Beyond that, how many of you understand and have taught in your courses how to use Microsoft Word's "track changes" feature when modifying a contract? Surprisingly, the students don't understand how to use that drafting tool very well. I was amazed when I taught transactional drafting that maybe one or two students in the class understood how to use track changes and all these other interesting and really efficient tools that one can use to modify, edit, and draft documents, even compare and merge documents. These are simple techniques, and we are not even to the level of Google Docs. I am not even there yet. But—these techniques that you can use with electronic technology to draft contracts—once you convert the document to final form, all that metadata stays in there. So think about the potential minefield of information if you happen to transmit that document as an attachment to the other side, and they go in and find out that there was a comment added to the draft contract, like perhaps, "Are you kidding? Never in a million years are we going to agree to that!" Or, "You know our clients have given us this top-dollar figure, and we are not going above that." You have the risk of transmitting a lot of confidential data, and if you are not aware that it's in there, you are risking a breach of client confidentiality.

Two major issues have come up involving metadata that I think are fascinating. First of all, an ABA ethics opinion was recently issued suggesting that we as attorneys know all about metadata and that we know enough that it's our ethical responsibility to "scrub" that metadata before transmitting that document to anybody. Well, I didn't know very much about this a month or so ago when I was preparing this talk, and I imagine many of you don't know about it either. But according to the ABA opinion, we have a presumed understanding of that information, that technology. So think about it: You now know you are in ethical trouble if you aren't aware of that, if you don't have the scrubbing technology and you are not aware that when you transmit that information, it can potentially put you at risk of an ethical breach.

Now the more interesting issue, I think, and the more controversial one, is if you are on the *receiving* end of a document that includes confidential information

buried and embedded in that metadata (which just means data about data, of course). In that situation, are you committed to mine it? Do you have an obligation to your client to look inside to show the original with all the comments and amendments that you have received? How many people think that's permissible? Is it permissible for you to mine that data? How many people think it's not permissible? Who doesn't know? What's going on here, and how do we resolve the dilemma?

You can imagine how students might really get engaged in hearing about this. The truth is there is a split of authority. The earlier opinions that came out of New York said it's absolutely impermissible to mine the data from an electronic document you receive from the other side because what you are doing is undermining attorney-client confidentiality by intruding into that confidential information and knowingly trying to get that data.

The earlier ethics opinions came out agreeing with New York, kind of like the old rule that some of you will remember: What if you get a document that's inadvertently transmitted to the wrong party? Do you have an ethical obligation to send it back to alert the other side? That's kind of what the rule says: What you have to do is alert the other side that you have it, and whether or not you have the ethical opportunity to read it depends upon the version of the ethical rules that apply in your jurisdiction.

The new opinions on using metadata are really split after the New York opinions came out and a couple of other states got on board saying it's not permissible. The ABA issued a formal ethical opinion in 2006 saying it's perfectly permissible to mine the metadata for all it's worth. So since that time, at least the ABA's opinion very much assumes that attorneys should know about scrubbing metadata and the obligation to do so. If you send it without scrubbing the metadata, it's mineable by the opponent, so be aware that there is a split of authority.

More recently, a couple of jurisdictions, specifically Maryland and the District of Columbia, have followed the ABA opinion on that issue. What we really have now is a split in the ethical opinions on the issue. So, again, this is something I think your hi-tech students are going to relate to—this issue of what to do with metadata.

The next issue—and this something Larry DiMatteo mentioned briefly—well, not briefly, at some length—what do you do with an unenforceable contract clause? Is it ethically permissible to draft a contract when you know that you are incorporating a clause that is, as a matter of law, unenforceable?

There are not necessarily any clear answers on that question either. Over the last 25 years, the ethical rules have actually become more lenient on that point. If

you go back and look at the original proposals in 1983, there was actually language proposing to ethically bar attorneys from knowingly incorporating unenforceable clauses into contracts. Guess what? In the final version of those rules that were promulgated in 1983, that proposed rule disappeared. It is very interesting to talk to your students about what political pressures were brought to bear to cause the final draft to eliminate those kinds of obligations for transactional lawyers. That, in and of itself, is an important thing to teach our students—the politics of ethical rules for attorneys. There really aren't clear rules on that issue, and of course these are the kinds of dilemmas that students are going to get into in private practice. The rules permit them to knowingly include an unenforceable clause in an agreement, but does that mean they should? Students have both a moral code as well as professional ethical code that they are going to have to use as a guide when dealing with these issues in private practice.

Finally, one of the most interesting issues that's very recently come up is actually a wonderful segue from Ken Adams's talk about outsourcing. For economic reasons, outsourcing all kinds of legal services is growing by leaps and bounds. There are companies in India that major law firms are contracting with to provide legal support services. It's a multibillion-dollar industry. Well, what are the ethical issues associated with that? Attached to the bibliography is a two-page brochure that I downloaded from the Internet a couple of days ago. It shows you that these outsourcing companies are specifically marketing contract drafting services, so the people in India, who may be very well-qualified attorneys in India, are available for a small fee that equates to about an \$8,000 annual salary to draft contracts. That means what? Outsourcing contract drafting to firms in other countries is undermining the potential market for United States-trained lawyers that we are teaching to do this very work.

So this is something that has become a huge issue just in the last five years, given the obvious economic benefits for U.S. law firms. The question is whether it is ethical for a law firm to outsource its contract-drafting work—and contract review work—to an India company, staffed by lawyers that are neither law trained in the United States nor licensed in the United States? Ethical? What do you think?

New York came out with an ethical opinion saying, sure, you can do that as long as you meet certain conditions. First, you have to avoid aiding a non-lawyer in an unauthorized legal practice. So as long as you make sure you do that, it's okay. Second, you must ensure competent representation. Of course, that's obvious—a basic ethical rule—make sure that the outsourced representation is competent. Third, preserve client confidences. You have to make sure that the outsourcing company is avoiding conflicts of interest. What if that multi-billion dollar firm over

there is representing the other side reviewing the contracts that your client has drafted? You also have to make sure that you ensure appropriate billing, and finally, if necessary, obtain your client's consent for outsourcing that work to a third party.

Now, as long as you meet all those conditions, a New York 2006 ethical opinion says it's perfectly okay to outsource your work to a non-licensed attorney in India. I don't know of any other ethical opinion that has come out on that very issue, but you can see that this is obviously an ethical minefield for the outsourcing law firm. There are some interesting articles, largely written by student authors, that are cited in the bibliography on this issue and whether or not it's ethical. I think this is the issue of the next decade: how we are going to handle this, because the economic pressures are huge on law firms.

Just within this last month, a very interesting case was filed in the federal district court in the District of Columbia by a large law firm that some of you may have heard of: MacIntosh and Hennessey. The firm asked for a declaratory judgment and injunctive relief on this very issue: whether or not it's ethically permissible to send data overseas to India lawyers. In particular, they included George W. Bush as a named defendant in that suit because the concern relates to the Fourth Amendment as the government had been monitoring Internet communications overseas.

The issue is whether or not that's an invasion that breaches client confidentiality. But beyond that, the real underlying issue, if you read the pleadings, is whether the law firm has to get the client's consent to outsource the work to an international law firm. If so, the firm wants to know if it's unfair competition essentially for opposing law firms to be sending their contract drafting and other kinds of litigation support services overseas when others can't do that at a competitive economic cost. These of course are very, very interesting issues.

I hope you will think about incorporating some of these kinds of novel ethical questions in your transactional drafting classes. Both you and your students will enjoy the discussions these issues trigger, and your students will learn a great deal about how to grapple with the ethical issues that so often arise in the context of transactional law practice.

SELECTED RESOURCES**Teaching Ethics in Context: Transactional Drafting*****Textbooks:***

Deborah L. Rhode, *Professional Responsibility: Ethics by the Pervasive Method* Ch. XII, XIII (Aspen 2d ed. 1998) (hypotheticals involving contracts and corporate law).

Marc I. Steinberg, *Lawyering and Ethics for the Business Attorney* 33-36, 91-93 (West 2d ed. 2007) (hypotheticals involving drafting; client confidentiality and multiple representation dilemmas; appendix includes sample engagement letters, multiple representation letters, waiver of conflict letter, and joint defense agreement).

E. Wendy Trachte-Huber & Stephen K. Huber, *Mediation and Negotiation: Reaching Agreement in Law and Business* (LexisNexis rev. 2d ed. 2007).

Melissa H. Weresh, *Legal Writing: Ethical and Professional Considerations* (LexisNexis 2006).

Richard Zitrin, Carol M. Langford & Nina W. Tarr, *Legal Ethics in the Practice of Law* (LexisNexis 3d ed. 2007).

ABA Reports:

ABA Section of Legal Education and Admission to the Bar, *Teaching and Learning Professionalism: Report of the Professionalism Committee* (1996) (suggesting more pervasive strategies for teaching professional responsibility).

Articles:

Laura Appleman, *Teaching Legal Ethics: A Beginner's Perspective*, <http://legaethicsforum.typepad.com/blog/2006/03/index.html> (March 23, 2006) (discussing pros and cons of various strategies for teaching professional responsibility).

Jack T. Camp, *Thoughts on Professionalism in the Twenty-First Century*, 81 *Tulane L. Rev.* 1377, 1393-1396 (2007) (urging law schools to integrate ethics and professionalism in substantive courses as well as specialized ethics courses; noting that no law school has yet adopted such an integrated curriculum).

Mary C. Daly and Bruce A. Green, *Teaching Legal Ethics In Context*, 70 N.Y. State Bar J. 6 (May/June 1998).

Mary C. Daly, Bruce A. Green & Russell G. Pearce, *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 Law & Contemp. Probs. 193 (1995) (describing Fordham Law School's contextual approach to teaching ethics, "a studied examination of ethical dilemmas in a single practice area," as a supplement to the traditional survey course).

Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 William & Mary L. Rev. 357 (1998).

Charles C. Lewis, *The Contract Drafting Process: Integrating Contract Drafting in a*

Simulated Law Practice, 11 Clinical L. Rev. 241, 261 (2005) ("Any contract drafting course should include an ethical component Although the students may know the ethical rules, they sometimes have a hard time seeing an ethical issue when it actually confronts them.").

Therese Maynard, *Teaching Professionalism: The Lawyer as a Professional*, 34 Ga. L. Rev. 895, 925 (2000) ("[W]e do a real disservice to students if we fail to give explicit instruction and guidance on . . . values of professionalism as part of each and every course of the law school curriculum").

Russell G. Pearce, *Legal Ethics Must Be the Heart of the Law School Curriculum*, 26 J. Legal Educ. 159 (2002) (urging adoption of a pervasive ethics curriculum, which teaches how identify and analyze ethical questions in practice settings in which ethics is not the primary focus).

Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. Legal Educ. 31 (1992).

Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, 58 Law & Contemp. Probs. 139 (1995) (making the case for Stanford Law School's pervasive approach to teaching legal ethics).

Deborah L. Rhode, *Teaching Legal Ethics*, 51 St. Louis U. L.J. 1043, 1051-1057 (2007) (describing alternative teaching strategies) ("In an ideal world, the topic [of professional responsibility] would be integrated throughout the core curriculum and given focused attention in a range of upper-level courses, particularly clinics.").

Tina L. Stark, *Ethics of Drafting Agreements*, Sixth Annual Municipal Law Institute, 205 PLI/Crim. 127 (2006) (discussing three hypotheticals involving ethical issues in contract drafting) (available on Westlaw).

Celia R. Taylor, *Teaching Ethics in Context: Wood v. Lucy, Lady Duff-Gordon in the First Year Curriculum*, 28 Pace L. Rev. 249 (2008).

Margaret Graham Tebo, *A Treacherous Path: Ethics Rules May Seem Clear, But in the Changing World of Commerce They Can Become Murky*, 86 A.B.A. J. 54 (Feb. 2000).

Metadata

ABA Standing Committee on Professional Responsibility, Formal Opinion No. 06-442, *Review and Use of Metadata* (Aug. 5, 2006), available at <http://www.delawarelitigation.com/ABAethicsOpMetadata.pdf> (interpreting Model Rule 4.4(b) as revised in 2002, which does not preclude a receiving attorney from mining metadata received from opposing counsel).

Alabama Bar Ethics Opinion No. 2007-02 (concluding that an attorney acts unethically by mining metadata from an electronic document received from another party).

Cal. State Bar Standing Comm. on Prof. Resp. & Conduct, Formal Op. No. 2007-174 (opining that attorney, who had been retained to negotiate and execute royalty agreement entrusting client's secret invention to corporation for commercial development, was ethically obligated to release electronic drafts of transactional document to client's newly retained attorney, and to strip any metadata reflecting confidential information belonging to other clients).

D.C. Bar Ethics Comm., Legal Ethics Op. 341 (2007) (concluding that receiving lawyer may review metadata in electronic file received from opponent absent prior knowledge that metadata was sent inadvertently).

Florida Bar Ethics Op. No. 06-02 (September 15, 2006) (concluding that a lawyer who receives electronic document should not try to obtain information from metadata that lawyer knows or should know is not intended for receiving lawyer, and should notify sender of inadvertently received information via metadata in electronic document).

Maryland State Bar Ass'n, Inc., Comm. on Ethics, Ethics Docket No. 2007-09 (concluding that recipient attorney, subject to legal standards or requirements, does not violate ethical obligations by reviewing or making use of metadata without first determining whether sender intended to include the information; and sending attorney has an ethical obligation to take reasonable measures to avoid disclosure of confidential information or work product materials embedded in electronic discovery).

New York City Law Ass'n Comm. on Prof. Ethics, Op. No. 738 (March 24, 2008) (concluding that a lawyer who receives electronic documents from adversary that contain inadvertently produced metadata is ethically obligated to refrain from searching it, and may not take advantage of opponent's breach of ethical duty to scrub documents of metadata before sending).

New York State Bar Ass'n Comm. on Prof. Ethics, Op. No. 782 (2004) (concluding that a lawyer has an ethical duty to monitor against improper disclosure of metadata).

New York State Bar Ass'n Comm. on Prof. Ethics, Op. No. 749 (2003) (using computer technology to access client confidences and secrets revealed in metadata amounts to impermissible intrusion into attorney-client relationship).

David Hricik, *Mining for Embedded Data: Is It Ethical to Take Intentional Advantage of Other People's Failures?*, 8 N.C. J. L. & Tech. 231 (2007) (criticizing ABA Formal Op. No. 06-442 as wrongly assuming that everyone knows about embedded data in electronic documents).

David Hricik & Chase Edward Scott, *Metadata: The Ghosts Haunting e-Documents*, 13 Ga. B. J. 16 (No. 5, Feb. 2008) (describing metadata in drafted documents and providing detailed instructions on alternatives for removing metadata), (available at http://www.gabar.org/communications/georgia_bar_journal/, select "archives") (last visited May 20, 2008).

David Hricik & Chase Edward Scott, *Metadata: Ethical Obligations of the Witting and Unwitting Recipient*, 13 Ga. B. J. 30 (No. 6, April 2008) (available at http://www.gabar.org/communications/georgia_bar_journal/, select "current issue") (reviewing conflicting ethical opinions in various jurisdictions concerning ethical obligations of attorneys who receive electronic documents with embedded metadata).

Boris Reznikov, *To Mine or Not to Mine: Recent Developments in the Legal Ethics Debate Regarding Metadata*, 4 Shidler J. L. Com. & Tech. 13 (2008), available at

<http://www.lctjournal.washington.edu/Vol4/a13Reznikov.html> (summarizing conflicting views about whether attorneys may ethically mine data outside discovery context).

Drafting Unenforceable or Unconscionable Clauses

Paul D. Carrington, *Unconscionable Lawyers*, 19 Ga. St. U. L. Rev. 361 (2002) (noting with dismay that ABA Model Rules of Professional Conduct do not explicitly authorize professional discipline for lawyers who draft unconscionable contract provisions).

Christina L. Kunz, *The Ethics of Invalid and “Iffy” Contract Clauses*, 40 Loy. L.A. L. Rev. 487 (2006).

Deborah L. Rhode, *Professional Responsibility: Ethics by the Pervasive Method* 532-536 (Aspen 2d ed. 1998) (discussing ethical considerations of drafting unenforceable contract clauses).

William T. Vukowich, *Lawyers and the Standard Form Contract System: A Model Rule That Should Have Been*, 6 Geo. J. Legal Ethics 799 (1993) (arguing that ABA Model Rules should prohibit drafting contracts that include unenforceable or unconscionable terms).

Misrepresentation in Settlement Negotiations

Nathan M. Crystal, *The Lawyer’s Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 Ky. L. J. 1055 (1999) (arguing that a lawyer acts unethically by failing to disclose material information when nondisclosure amounts to misrepresentation or violates discovery rules or other law).

Ausherman v. Bank of America Corporation, 212 F. Supp. 2d 435, 445-452 (D. Md. 2002) (discussing duty of candor and truthfulness in Model Rule of Professional Conduct 4.1; rejecting counsel’s argument that alleged misrepresentation during settlement negotiations was merely “settlement bluster”).

Scrivener’s Errors and Alterations

ABA Informal Opinion 85-1518 (1986) (when parties to a contract agree on a particular business issue but drafter whose client the agreed provision favors inadvertently omits the negotiated term from the draft contract, the lawyer for the

other party has an ethical duty to point out the mistake and need not advise his client before doing so).

Becker v. Port Dock Four, Inc., 752 P.2d 1235 (Ore. Ct. App. 1988) (legal malpractice action for failing to include negotiated conditions in a deed conveying real property, as required by land sales contract drafted by defendant; plaintiff's comparative negligence for failing to read deed before signing was properly submitted to jury).

Hennig v. Ahearn, 601 N.W.2d 149 (Wis. App. 1999), *pet. for rev. denied* (Oct. 26, 1999) (jury question whether corporation's president intentionally misrepresented crucial term of executive compensation agreement by remaining silent about last-minute change, after all other contract changes had been clearly highlighted during earlier negotiation phases).

Wright v. Pennamped, 657 N.E.2d 1223 (Ind. App. 1995) (drafting attorney assumes an ethical duty to disclose any changes in loan agreement to other parties prior to execution).

Multiple Representation

In re Key, 582 S.E.2d 400 (S.C. 2003) (public reprimand against respondent for misconduct in representing both buyer and seller of commercial real property negotiated by the parties themselves; counsel conceded conflict of interest and failure to obtain informed waivers from clients).

Texas Professional Ethics Opinion 176 (May 1958) (attorney who represented both corporation and its general superintendent in drafting pre-negotiated employment contract could not ethically represent superintendent in wrongful discharge action), *available at* <http://www.txethics.org/> (last visited May 20, 2008).

Conflicts of Interest

McMahon v. Eke-Nweke, 503 F. Supp. 2d 598 (E.D.N.Y. 2007) (denying attorney's motion for summary judgment in client's action alleging breach of fiduciary duty by entering into unconscionable apartment lease with client).

Jones v. Rabanco, Ltd., 2006 WL 2237708 (W.D. Wash. 2006) (disqualifying plaintiff's counsel for conflict of interest based upon the firm's former representation of defendant's wholly owned subsidiary in prior contract dispute with third party).

Outsourcing Legal Work

Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 *Georgetown J. of Int'l Law* 401 (2007).

Arin Greenwood, *Manhattan Work at Mumbai Prices*, *ABA Journal* (October 2007).

Alison M. Kadzik, Student Author, *The Current Trend to Outsource Legal Work Abroad and the Ethical Issues Related to Such Practices*, 19 *Georgetown J. of Legal Ethics* 731 (2006).

Darya V. Pollak, Student Author, *"I'm Calling My Lawyer . . . In India!": Ethical Issues In International Legal Outsourcing*, 11 *UCLA J. Int'l L. & Foreign Aff.* 99 (2006).

Mark Ross, *Legal Process Outsourcing (LPO): 2007 and Beyond*, *Law Practice Today* (ABA Law Practice Mgmt. Section Feb. 2008), available at <http://www.abanet.org/lpm/lpt/articles/mgt02081.shtml>

Keith Woffinden, Student Author, *Surfing the Next Wave of Outsourcing: The Ethics of Sending Domestic Legal Work to Foreign Countries Under New York City Opinion 2006-3*, 2007 *B.Y.U. L. Rev.* 483 (2007).

Ass'n of the Bar of the City of New York Comm. on Professional and Judicial Ethics, Formal Op. 2006-03 (Aug. 2006), available at <http://www.abcnyc.org/Ethics/eth2006.htm> (concluding that a N.Y. lawyer may ethically outsource legal support services overseas to non-lawyer under specified conditions that avoid aiding non-lawyer in unauthorized practice of law, ensure competent representation, preserve client confidences, avoid conflicts of interest, ensure appropriate billing, and when necessary, obtain client consent).

Lexadigm, Inc., *Practical and Ethical Considerations of Legal Outsourcing*, presentation to Harry Phillips American Inn of Court, Univ. Club of Nashville (Feb. 20, 2007), available at [http://www.lexadigm.com/docs/Practical and Ethical Considerations of Legal Outsourcing_Lexadigm.pdf](http://www.lexadigm.com/docs/Practical%20and%20Ethical%20Considerations%20of%20Legal%20Outsourcing_Lexadigm.pdf)

Newman McIntosh & Hennessey, LLP v. Acumen Legal Services (India) Pvt., Ltd., No. 1:08-cv-00787-CKK (D.D.C.) (filed May 12, 2008) (complaint for declaratory judgment and injunctive relief concerning electronic transmission of client data from U.S. law firm to overseas legal process outsourcer).

Naming Drafting Attorney as Fiduciary

Paula A. Monopoli, *Drafting Attorneys as Fiduciaries: Fashioning an Optimal Ethical Rule for Conflicts of Interest*, 66 U. Pittsburgh L. Rev. 411, 428 (2005), available at <http://ssrn.com/abstract=829126> (criticizing MRPC 1.8 and ABA Formal Op. 02-426, when read together, as “ambiguity at best and contradiction at worst”).

Model Rules of Prof. Conduct R. 1.8(c) cmt. 8 (“This rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client’s estate or to another potentially lucrative position.”)

ABA Comm. on Ethics and Prof’l Resp., Formal Op. 02-426 (addressing whether a drafting attorney may serve as fiduciary for client’s estate or trust).

State Bar of Georgia, Formal Advisory Op. No. 91-1 (addressing ethical propriety of will drafter also serving as executor).

Aiding Unauthorized Practice of Law

Jeffrey M. Aresty & Peter D. Lepsch, *Professional Responsibility in a Global World: A Lawyer’s Role Redefined in the Age of the Virtual Practice*, 8 New Eng. J. of Int’l & Comp. Law 37, 51-65 (2002) (ethical issues pertaining to online legal advice).

Cynthia L. Fountaine, *When is a Computer a Lawyer?: Interactive Legal Software, Unauthorized Practice of Law, and the First Amendment*, 71 U. Cin. L. Rev. 147 (2002).

Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 1999 WL 47235 (N.D. Tex. Jan. 22, 1999) (holding that computerized document drafting with defendant’s Quicken Family Lawyer amounted to unauthorized practice of law by adapting content of online form to user’s responses), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999) (mooting case in light of amendment to Tex. Govt. Code § 81.101 redefining “practice of law” to exclude computer software if the product clearly states it is not a substitute for attorney’s advice).

Cleveland Bar Ass’n v. Sharp Estate Services, Inc., 837 N.E.2d 1183 (Ohio 2005) (enjoining respondent and other estate planning services from engaging in unauthorized practice of law).

Disciplinary Council v. Wheatley, 837 N.E.2d 1188 (Ohio 2005) (disciplining attorney for facilitating non-attorneys in marketing estate plans and living trusts in a manner that engaged in unauthorized practice of law).

Neb. Ethics Advisory Op. for Lawyers No. 06-10 (opining that contractually and financially associating with non-lawyer estate planning business, which solicited clients and prepared mass-produced documents for execution by clients after attorney review, raised a host of potential ethical violations).