

TRANSACTIONS

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SPECIAL REPORT 2009

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INTRODUCTION TO THE SPECIAL REPORT

In May 2008, the Center for Transactional Law and Practice at Emory University School of Law held a conference entitled “Teaching Drafting and Transactional Skills—The Basics and Beyond.” The well-attended conference, directed by Tina L. Stark, included sixty-five presentations. The conference was also an opportunity for Emory to debut Professor Stark, who has long worked in this field of education and training, as its first Professor in the Practice of Law and the Executive Director of Emory’s Center for Transactional Law and Practice.

Tina arranged for each session of the conference to be taped and invited *Transactions: The Tennessee Journal of Business Law* to publish the proceedings so that a wider audience might benefit from the conference. *Transactions* accepted the invitation to publish. To expedite publication, the recordings were transcribed in India. This presented several unique (and amusing) challenges to the Indian translators and the *Transactions* editorial staff. *Transactions* edited each transcribed presentation to improve readability and remove distractions. During the editorial process, the *Transactions* editorial staff sought to preserve the informal tone of the presentations rather than replacing it with the more formal tone of a traditional law review article. The conference speakers were also involved in the editorial process. Ultimately, almost all of the conference sessions were transcribed and edited into articles acceptable to the speakers. These articles comprise this Special Report.

The University of Tennessee College of Law’s Clayton Center for Entrepreneurial Law, which sponsors *Transactions*, has endeavored to blend skills and substance training into the College of Law’s business law curriculum for almost fifteen years. Through its Concentration in Business Transactions, the *Transactions Journal*, and its visiting professor program (which recruits experienced, practicing attorneys to act as full-time visiting professors of law), the Clayton Center seeks to improve the training of business lawyers in both transactional and litigation practice. Publishing this Special Report is another step forward in that direction. We thank Professor Stark for giving us the opportunity to make this contribution to the literature.

We hope that you will find these articles interesting, enjoyable, and useful, and that the ideas expressed by the conference speakers will aid in teaching drafting and transactional skills to law students.

George W. Kuney
W.P. Toms Distinguished Professor of Law and
Director, Clayton Center for Entrepreneurial Law
The University of Tennessee College of Law

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).

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