This paper offers a nuts-and-bolts view of Texas Disciplinary Rules of Professional Conduct and the Texas Lawyer’s Creed in the context of negotiation hypotheticals. For the most part, the hypotheticals represent common negotiation situations that raise ethics issues for attorneys.

Unfortunately, ethics for lawyers is often the subject of jokes. Many if not most articles about lawyer ethics begin, somewhat apologetically, with reference to the many jibes at lawyers throughout history. The jokes and attacks are understandable in light of the job of an attorney. An attorney must advocate a client’s position to the edge of the ethical rules. Within limits, an attorney is called on to discredit honest witnesses, to win the case for the client even if that victory is not in the best interest of justice or society, and to negotiate the best possible deal for the client. The successful lawyer, no matter how ethical, is likely to have displeased a number of people over the years, and at least some of those unhappy people will believe that they were cheated by an unscrupulous attorney. It is a fact of life.

In America, lawyer ethics have probably been the subject of jokes since the first English-American lawyer, Thomas Lechford of the Massachusetts Bay Colony, was disbarred for jury tampering only a few years after he arrived in the colony. It was not until 1887 that the Alabama Bar Association adopted the first code of legal ethics in the United States.\(^1\) In 1908, the ABA adopted the Canons of Professional Ethics. In 1969, the ABA revised the 1908 canons as the Code of Professional Responsibility. The ABA House of Delegates adopted the Model Rules of Professional Conduct in August 1983.\(^2\) The ethics rules of forty-five states and the District of Columbia are based on the Model Rules.\(^3\) Ohio and Nebraska\(^4\) still use the Model Code. New York uses a combination of the Model Code and the Model Rules. California,\(^5\) Iowa,\(^6\) and Maine\(^7\) have adopted their own, unique ethics rules.
The Texas Disciplinary Rules of Professional Conduct are based substantially on the ABA Model Rules of Professional Conduct. The discussion will focus primarily on the Texas Disciplinary Rules of Professional Conduct and the Texas Lawyer’s Creed. Relevant portions of the Rules and the Creed appear at the end of this paper. The Rules can be the basis of a misconduct charge against a Texas attorney. (Rule 8.04) However, the Rules do not specify any penalty. By contrast, the Creed is expressly “aspirational,” aspiring to conduct above and beyond the Rules.\(^8\)

Finally, before beginning the hypothetical discussions, I note three aspects of attorney ethics that startled me as I prepared this paper:

1. The ethics rules of all states intentionally permit lawyers to lie in negotiations in certain circumstances.

2. Although most lawyers today spend little time in court, and although the “vast bulk” of negotiations take place outside litigation, very few ethics opinions concern negotiation, and almost none of those opinions concern negotiations outside litigation.\(^9\)

3. Negotiations today often involve parties from distant geographic locations represented by attorneys who are bound by differing ethical rules – thus creating an uneven playing field depending on the applicable ethics rules. See “Applicable Law #2,” infra.\(^10\)
Lies and Silence – Material Facts

The Texas Disciplinary Rules permit a lawyer to make a wide range of misrepresentations. In short, it is not a violation of the rules of ethics for a Texas lawyer to lie in negotiations and in other situations.¹¹

Despite this permission to lie, my experience is that most Texas lawyers do not lie and do not condone or tolerate lies. However, a small minority seem almost compelled to lie. Still, I find it interesting that most Texas lawyers follow a stricter standard than the adopted Texas Disciplinary Rules.

Probably the most common ethical issues in licensing negotiations concern lies and silence. Despite occasional lobbying efforts to impose a duty of good faith and honesty upon lawyers, today’s ethical rules in almost all states permit a lawyer to lie on occasion or to remain silent in certain situations when the opposition is ignorant of certain facts.¹² The limits on such conduct generally concern questions of fraud, materiality, and client confidences.¹³

The following hypotheticals are generally governed by Rule 4.01 of Texas Disciplinary Rules of Professional Conduct and Rule 1.15 Declining or Terminating Representation, but other rules may occasionally also impact the issue.

Lies and Silence Hypothetical: You represent Supplier in a negotiation that will involve some delivery of products and services by Supplier. Assume that you know that each statement described below is false and that you intend to mislead the opposition with the statement. (Rule 4.01 only prohibits a misrepresentation if the lawyer knows it is false and intends to mislead.)

Which of the following misrepresentations are permitted under current Texas ethical rules, even though you know the statement to be false and intend to deceive?
**Misrepresenting Your Client’s minimum price:** Your client, Supplier, will allow you to go as low as $1200 per unit for this deal, but that she expects you to get as high a price as you can.

Can you make any of the following misrepresentations (assume that each is a misrepresentation)?

“Supplier will not accept a price less than $1400 per unit.”

“Supplier will not accept a price less than $2000 per unit.”

“Supplier will not accept a price less than $4000 per unit.”

“Supplier will not accept a price less than $10,000 per unit.”

**Misrepresenting Your Client’s prior prices:** Your client, Supplier, has often accepted a price per unit of $1,000. Purchaser’s counsel asks what the usual price has been. Can you make any of the following misrepresentations (assume that each is a misrepresentation):

“Our past prices have been in the range of $1500 per unit.”

“We have never accepted a price less than $1,200.”

In your presence, your client states: “Most other prices have been at $2,000 per unit per year.”

Can you remain silent about this misrepresentation?

If a duty is triggered at some level, where is the line drawn? $5,000?

**New price information:** As above, your client, Supplier, has often accepted a price per unit of $1,000. Purchaser’s counsel asks what the usual price has been. You tell him the
truth. Just before the agreement is to be executed, your client, Supplier, (with you acting as counsel) signs five new agreements with other parties at $500 per unit. At Supplier’s insistence, the five new agreements all have confidentiality provisions prohibiting disclosure of the agreement terms. Your client tells you not to mention the new agreements or the new rates to Purchaser.

What do you do about your prior statement to Purchaser and its counsel?

What do you say if Purchaser’s counsel asks if Supplier has any new agreements?

**Misrepresenting competing offers or value or authority:** Two potential distributors are interested in an exclusive agreement for the US. Distributor A has offered $1,000,000 per year as a license fee. Distributor B has not made any specific offer. Supplier asks you to tell Distributor B that you now have a competing offer of $1,200,000. (Remember that the offer is really $1,000,000.)

Can you make any of the following misrepresentations (assume that each is a misrepresentation):

“We now have a competing offer of $1,200,000.”

“We have had discussions with another person who might be willing to offer $1,200,000.”

“I appreciate your coming up to $1,000,000, but I am not authorized to accept anything more than $1,200,000.”

“My client really wants to license the US and Canada together, and the price for that would be $2,000,000, but I might be able to talk him out of it if you give him $1,400,000.”
**False demands:** Supplier has told you – or you simply know from your long experience with Supplier – that, so long as Supplier obtains a license fee above $1,000,000 for a distribution arrangement, Supplier does not really care one way or another about (1) whether the agreement is limited to the US or is worldwide, (2) whether the agreement is for one year, five years, ten years, or is perpetual, (3) whether the agreement includes an IP indemnity by Supplier, (4) whether the agreement requires Distributor to carry insurance, or (5) whether the agreement includes an arbitration provision.

Can you represent to Distributor during negotiations that any of these provisions are important to Supplier, and then use them as bargaining chips to achieve the license fee that Supplier desires?

**Other negotiating misrepresentations:** Assume that you do not believe that the following statements are true.

Can you make the statements without violating Texas ethical rules?

“This technology will be worth three times this amount in two years.”

“You’ll never regret this agreement.”

**Untrue flattery:** You think the opposing attorney is not only incompetent but also the biggest jerk you have ever met. But you also assess that he is easily flattered and that a few choice words will dispose him favorably toward your position.

Can you tell him that your firm is always looking for good lawyers and that after the deal is closed he should come talk to you about a position at the firm?

Can you make statements such as these if you believe them?
**Silence after Supplier’s misrepresentation of a contractual right or obligation:** You learn (1) that your client, Supplier, has misrepresented that it can grant certain rights that you know Supplier does not have and (2) that Supplier has promised to include in the agreement a geographic territory that is already licensed on an exclusive basis to another distributor.

Can you remain silent?

**Silence about newly discovered prior art that probably would invalidate the only patent:** The technology is protected by a single patent. You have discovered that a serious prior art issue exists that will probably invalidate the patent. Can you remain silent about this prior art?

**Silence about the key person leaving:** Assume that the service that your client provides is heavily dependent on service by the owner of the corporation. You know – because you are handling the negotiations – that the owner is about to sell the business and has no intention of remaining involved in the business. Her absence will almost certainly destroy the value of the service.

Can you remain silent about whether the owner – the key person for providing the service – is leaving?

Would it matter if Purchaser is not represented by counsel?

**Silence when Supplier makes a misrepresentation about an advantage:** In the past, Supplier has told you that her services saves customers $1000 per product manufactured. In your presence, Supplier tells Purchaser that the service will save Purchaser $1500 per product manufactured.

Can you remain silent after Supplier’s misrepresentation?
Silence when Supplier makes a second misrepresentation about an advantage:
Recently, five new purchasers began using Supplier’s service. At the same time, those five purchasers also purchased new machinery that cut their manufacturing costs by $500 per unit. Supplier told you about this and admitted to you that the new machinery was the sole cause of this cost savings. In your presence, Supplier tells Purchaser: “Five new customers cut their costs by $500 per unit after using our service.”

Can you remain silent after Supplier’s misrepresentation?

Assume that Supplier did not tell Purchaser about this cost savings. Knowing that the cost saving is not related to Supplier’s service, can you tell Purchaser: “Five new customers cut their costs by $500 per unit after using our service”? 

Silence when Supplier is about to roll out a new technology that obsoletes the current technology: Because of your close relationship with Supplier, you know that Supplier will roll out a new technology in matter of months that Supplier hopes will obsolete the technology of the current agreement.

Can you remain silent about the new technology?

If you can remain silent under the above facts, will any additional facts change the conclusion? Suppose that the currently negotiated agreement is for five firm years, with yearly payments.

ANSWERS:

Misrepresenting Supplier’s minimum price: Comment 1 to Rule 4.01 suggests that false statements about one’s minimum or maximum price are always permitted because of generally accepted conventions and because the statements are statements of opinion.
Further, as one commentator explained, “to conceal one’s true position, to mislead an opponent about one’s true settling point, is the essence of negotiation.”\textsuperscript{14}

Would everyone agree that such a statement is never a false statement of material fact?\textsuperscript{15}

**Misrepresenting Supplier’s prior royalties:**

**Misrepresenting competing offers or value or authority:**

Rule 4.01 (a) prohibits a lawyer from making “a false statement of material fact or law to a third person.” What is not clear is whether (1) a fact is always material, and any misstatement about the fact is prohibited, or (2) materiality applies both to the identity of the fact and to the quantity of the misstatement. Presumably, the amount of prior royalties and the amount of any competing offers are material, but is even a slight misrepresentation prohibited?\textsuperscript{16}

In a 1989 article,\textsuperscript{17} Scott S. Dahl reported the results of a survey of fourteen Austin attorneys\textsuperscript{18} and their quick impressions\textsuperscript{19} of several hypotheticals posing ethical issues in negotiations (the “Dahl Austin Survey”). The hypotheticals were not set in a licensing context, but references to that survey will refer to the survey results by analogizing to the hypotheticals in this paper. In the analogous hypothetical from the Dahl Austin Survey concerning prior royalties:\textsuperscript{20}

Most agreed that the statement would be an impermissible misrepresentation.

One attorney might make this misrepresentation, but only if there were no possibility of being sued for it.

Two attorneys thought the statement was permissible puffing.
One attorney posited that the amount of the license fee itself (not the relative differences, but the contract total itself) could make the statement too small to rise to the level of a “material misrepresentation.”

In the Dahl Austin Survey\textsuperscript{21} of fourteen attorneys, hypothetical #8 concerned the attorney’s agreement authority. Dahl reported:

Almost all would refuse to lie about their authority and their client’s bottom line.

Three generally ask their clients to withhold authority so they can truthfully say that they do not have it.

Most had stock phrases such as:

“\textit{I can’t recommend}” or

“\textit{I don’t think . . . .}”

Two indicated that they saw nothing wrong with making blatantly dishonest statements.

One stated: “Everyone knows you’re lying about your authority.”

One said that puffed statements are “typical tools of negotiating.”

\textbf{New price information:} The Dahl Austin Survey\textsuperscript{22} of fourteen Austin attorneys used a similar hypothetical (#4). The facts create a tension between the duty to disclose material facts (Rule 4.01(b)) and the duty of confidentiality (Rule 1.05). Probably, if Supplier refuses to permit you to disclose the new information, you must withdraw pursuant to Rule 1.15. The Dahl Austin Survey reported the following results:

Ten attorneys would not disclose the new information in negotiations.
Many would press the client to disclose and would explain to the client the hazards of less than full disclosure, but they would take no affirmative action.

One would signal to the other side that he possesses information he cannot communicate.

One would withdraw if the client refused to turn over the new information because it is material.

Two would encourage the client to disclose the new information and would threaten to withdraw if the client refused.

If Purchaser’s counsel asks if Supplier has any new agreements, the analogous hypothetical from the Dahl Austin Survey of fourteen attorneys reported:

Most would disclose the new information or withdraw if the client refused to cooperate.

One would evade by saying that he would get back to them.

One would say that he must ask his client.

One would say: “I got what you got.”

One would say: “I don’t have any information available at this time to disclose.”

**False demands:** Literally, Rule 4.01 appears to prohibit false demands. However, false demands are the very essence of negotiations. Perhaps false demands fall under the permitted exclusions of Comment 1 to Rule 4.01. Perhaps also one’s conclusion will depend on the materiality of the false demand.

The Dahl Austin Survey reported (Hypothetical 7):

Most indicated that they made false demands in the course of their practices.
One viewed the practice dubiously, suggesting that it undermines credibility and is not an appropriate negotiating tactic.

Three characterized the practice as “unethical.”

**Other negotiating misrepresentations:** These false statements should be viewed as opinion, puffing, or speculation and not prohibited by Rule 4.01.

**Untrue flattery:** These false statements are not material and therefore not prohibited by Rule 4.01.

The “Silence” examples bring in not only Rule 4.01, but also Rule 1.05 concerning confidential information. The Texas rules permit a lawyer to reveal confidential information in some situations and require a lawyer to reveal confidential information in others.

Rule 4.01(b) prohibits failure to disclose a material fact when “necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.” 27 Rule 1.15 may require withdrawal if the attorney cannot convince the client to cease the fraud.

Rule 1.05 provides that a lawyer may reveal confidential information if necessary “to prevent the client from committing a criminal or fraudulent act” (1.05(c)(7)) or “to rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyers services had been used.” (1.05(c)(8))

If the lawyer has confidential information clearly establishing that the client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, a lawyer must reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act. (1.05(e))
**Silence after Supplier’s misrepresentation of a contractual right or obligation:** The two misrepresentations about what Supplier has the right to license are probably fraudulent and require disclosure under Rule 4.01(b). Rule 1.15 may require withdrawal if the attorney cannot convince the client to cease the fraud. Perhaps reasonable minds might differ on the issue of fraud, but the lawyer’s duty to her client probably may also compel her to disclose the “error” to avoid problems for the client.\(^{28}\)

**Silence about newly discovered prior art that probably would invalidate the only patent:** Rule 4.01 does not prohibit silence about such prior art because Rule 4.01(b) only prohibits failure to disclose a material fact when “necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.” Failure of the lawyer or client to disclose the prior art is certainly not a criminal act. It is also difficult to call such silence fraud. The patent is not invalid until a court finally determines the matter. Until then, the issue is one of speculation and opinion, not fact. It is interesting to note that failure to disclose such prior art is deemed inequitable conduct (long ago called “fraud on the Patent Office”), and is grounds for loss of a patent as unenforceable.

**Silence about the key person leaving:** This example is troubling. We as lawyers are accustomed to distinguishing fact from opinion and speculation. I could easily argue that another person’s subjective, changeable intent to leave is certainly not a material fact that I must disclose. It does not amount to a criminal act or fraud. But the effect of the silence is devastating.

Withholding vital information may affect your reputation and how opposing counsel will deal with you in the future,\(^{29}\) but that does not determine whether withholding the information is an ethical violation.
The Dahl Austin Survey\textsuperscript{30} included a hypothetical (#5) somewhat similar to this example. (It concerned a house that would be demolished.) With perhaps some liberality of analogizing, the results of that survey suggest:

None would disclose Supplier’s intention.

Two expressed misgivings about misleading Purchaser.

If Purchaser did not have counsel, the survey respondents suggested:

Most would still not disclose.

One would strongly advise Purchaser to obtain counsel.

**Silence when Supplier makes a misrepresentation about an advantage:**

**Silence when Supplier makes a second misrepresentation about an advantage:**

**Silence when Supplier is about to roll out a new technology that obsoletes the current technology:**

These examples explore the boundaries between “puffery” and “material misrepresentation” and “fraud.”\textsuperscript{31} My own conclusion is that each is a prohibited “material misrepresentation” if made by the lawyer. However, whether either constitutes a fraudulent act by the client (which would permit but not require disclosure) is not clear.

In 2002, the ABA published its Ethical Guidelines for Settlement Negotiations. The guidelines seem to suggest that a lawyer should correct mistakes induced by either the lawyer or the client.\textsuperscript{32}

In Texas, even if the client’s conduct is fraudulent, the lawyer may not disclose the lies but must withdraw.\textsuperscript{33}
The second “advantage” misrepresentation does not actually involve a literal misrepresentation. The author who suggested a similar example concluded:

The statement is, therefore, an intentionally misleading, sly use of language. It is reminiscent of former President Clinton’s response to a question before the grand jury about his deposition testimony: “It depends on what the meaning of “is” is. The lawyer who engages in this type of deception is more clever, perhaps, than a straightforward liar, but the lawyer is no less worthy of condemnation. Once again, however, we can rely on the power of reputation to deter lawyers (at least those who care about their reputations) from engaging in these tactics. Word gets around.\textsuperscript{34}
Lies and Silence Part II – Snake Oil

You represent a Supplier, technology service provider. In the past, Supplier has told you and her many purchasers that her service saves $1000 per product manufactured. Through your help with many past agreements, she has become very wealthy.

At a dinner, celebrating her good fortune, Supplier tells you, quite confidentially, that the service is essentially a placebo and does absolutely nothing for the purchasers. It adds no value to the products or services.

Supplier has always relied on you to handle the negotiations and expects that same practice with a currently pending negotiation – including your “selling” job.

Can you continue to represent your client in these negotiations?

What can you say in future negotiations about the value of the services?

If you are currently involved in a negotiation for Supplier, what obligation do you have to Supplier? What obligation do you have to the other side?

Assume that you learned of the placebo effect after you told the most recent purchaser that Supplier’s service would save at least $1,000 in costs per product manufactured. What obligation do you have to Supplier? What obligation do you have to the other side?

What can or should you do about past transactions?

Rather than the placebo issue, assume instead that the $1,000 cost savings has been legitimate in the past. However, recent economic changes will reduce the cost savings in the future to only $500 per product. You are in the middle of negotiations. Before you learned of this economic change, you told Purchaser that in the past, Supplier’s service saved prior purchasers $1,000 per product.

What are your obligations?
What are your obligations if Purchaser asks if you have current information about the cost savings?

**ANSWERS:**

This situation is governed by at least three rules: 1.02 Scope and Objectives of Representation, 1.05 Confidentiality of Information, and 4.01 Truthfulness in Statements to Others.

The threshold question is whether the client’s conduct in the above hypothetical criminal or fraudulent. If the conduct is criminal or fraudulent, then Rule 102 applies, and Rule 102(c) prohibits assisting the client in the criminal or fraudulent conduct. Rule 1.15 may require withdrawal if the attorney cannot convince the client to cease the fraud.

Rule 102 (d) and (e) will also apply if the disclosure of the placebo effect is “confidential information.” Rule 105(a) defines “confidential information” quite broadly, so there should be little doubt that the disclosure is “confidential information.”

If the conduct is criminal or fraudulent and if the disclosure of the placebo effect is “confidential information,” and if the criminal or fraudulent act is likely to result in substantial injury to the financial interests or property of another, then Rule 102(d) requires the lawyer to promptly make reasonable efforts to dissuade the client from committing any future crime or fraud.

If the conduct is criminal or fraudulent and if the disclosure of the placebo effect is “confidential information,” then Rule 102(e) requires the lawyer to “make reasonable efforts under the circumstances to persuade the client to take corrective action.”

Rule 105 generally requires the lawyer to keep the client’s confidence. However, Rule 105 does permit the lawyer to disclose a client’s confidential information in certain circumstances and requires disclosure in others. A lawyer would be required to disclose
the placebo effect (1) for future crimes or frauds by the client if “likely to result in death or substantial bodily harm to a person” (Rule 105(e).), and (2) if “necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.” (Rule 105(f).) Otherwise, the lawyer is permitted, but not required, to disclose the placebo effect (1) if necessary “to prevent the client from committing a criminal or fraudulent act” (Rule 1.05(c).), or (2) if “necessary to rectify the consequences of a clients criminal or fraudulent act in the commission of which the lawyers services had been used” (Rule 1.05(c).), or as a defense to a lawsuit. (Rule 1.05(d).)

Rule 1.15 may require withdrawal if the attorney cannot convince the client to cease the fraud.

Finally, Rule 4.01 prohibits the lawyer from knowingly failing to disclose a material fact when “necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.”

In Texas, even if the client’s conduct is fraudulent, the lawyer may not disclose the lies but must withdraw.36

In the analogous hypothetical from the Dahl Austin Survey:37

All would pressure Supplier to tell the truth to the past Purchasers.

If Purchaser refused, most would not inform the past Purchasers. The majority viewed such a disclosure as an impermissible breach of client confidentiality. One attorney would ask a grievance committee of the state bar association for permission to tell the past Purchasers.

If Purchaser refused, three attorneys would tell the past purchasers the truth because it would be a continuing crime.
You represent a Supplier, technology service provider. Purchaser has no attorney.

In the negotiations, the parties agree:

(1) that Supplier may increase prices at the beginning of each year by no more than 3%; and

(2) that Supplier must provide several specific minimum levels of service.

They ask you to draft the provisions.

As you begin drafting and as you think over the price increase issue, you decide that a better gauge than a straight percentage is the relevant CPI. The relevant CPI this year is 5.2%. You decide also that Supplier should have the right to accumulate increases from year to year.

When you get to the specific minimums, you decide that Purchaser is better served by a more ambiguous “reasonable efforts” obligation as opposed to the specific obligations.

You draft the provisions in accordance with your “better” thoughts. You deliver the draft to the parties telling them that the provisions are “essentially” the parties’ agreement.

After Purchaser reads the draft, Purchaser asks you specifically about the language of each provision. You tell Purchaser that the CPI is about 3% now, and that this (your language) is the proper way to draft price increase clauses. As to the specific obligations, you tell Purchaser that “as a matter of law, reasonable efforts will certainly include the specific obligations that had been discussed.”

Have you violated any Texas rules of ethics?
Suppose instead that Purchaser is represented by counsel. Purchaser, not his counsel, calls you about the price increase clause. You and Purchaser have the discussion described above. Have you violated any Texas rules of ethics?

**ANSWERS:**

The situations described above are governed by Rule 4.01(a) which prohibits a knowing false statement of material fact or law. Each is also governed by Sections 3 and 4 of the Creed which provide:

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

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

When the other party is not represented by counsel, this situation is governed by Rules 4.03 which provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

When the other party is represented by counsel, this situation is governed by Rules 4.02(a) which prohibits contact with the other counsel’s client “unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”
Billing Issue

You have recently completed a very complex agreement negotiation for Client A. The agreement required substantial research and discussions with other attorneys who had prepared similar agreements. The negotiations lasted for eight months (not continuous) and resulted in a very detailed sixty-page agreement. You billed Client A at your standard hourly rate, and Client A paid, grumbling as he did so. The bill was quite steep.

Client B approaches you with an almost identical situation. You realize that you can provide an almost complete agreement to Client B in a matter of a few hours.

Do you bill Client B at your standard hourly rate or at the same or a similar amount that you charged Client A, or something in between?

**ANSWER:**

Rule 1.04 only prohibits an unconscionable fee. Otherwise, Rule 1.04 permits the lawyer to charge a reasonable fee considering several factors. For the above example, the following factors appear relevant:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. the fee customarily charged in the locality for similar legal services;
3. the amount involved and the results obtained;
4. the time limitations imposed by the client or by the circumstances;
5. the nature and length of the professional relationship with the client;
6. the experience, reputation, and ability of the lawyer or lawyers performing the services.
Applicable Law

**Applicable Law #1:** You represent Supplier in a negotiation. You are a Texas attorney, practicing in Texas, and licensed in Texas and Washington, D.C. Supplier is a Delaware corporation its sole office in Colorado Springs, Colorado. Purchaser is a Japanese company represented by a California attorney. The licensed activity will be in Michigan.

What state ethics rules govern your conduct in the negotiations?\(^{38}\)

**Applicable Law #2:** You are a Texas attorney representing a Texas Supplier of a high-tech product in a three-way negotiation involving a Southeast Asia manufacturer and a purchaser distributor in the Louisiana. All negotiations occur by fax, email, and telephone. All expected performance by each party will occur in its home city.

As almost always occurs, choice of law for the transaction is given no attention by anyone until the agreement is almost final and the attorneys fill in the boilerplate. Negotiations have already progressed for over one year, but never did anyone discuss choice of law. After a brief thirty second discussion, the attorneys cannot agree on an applicable law and agree to omit the clause.\(^{39}\)

Since you are from Texas, you prudently followed Texas ethics rules during the negotiations. During negotiations:

1. You did not knowingly make any false statement of material fact or law;
2. You disclosed material facts if necessary to avoid making you a party to a criminal act; and
3. You did not knowingly assist your client in a fraud.
The in-house attorney for the Southeast Asian manufacturer is subject only to his country’s laws. The jurisdiction for the attorney in Southeast Asia has not adopted any rules of ethics.


Does one party have an unfair advantage in negotiations because of the differing ethical standards?

Consider also that under the Texas Lawyer’s Creed, you try (1) to identify all changes in any drafts and (2) to draft language that accurately reflects the agreement.^{41} One or both of the other attorneys may not have that aspiration.

Do you have an obligation to clients to advise them that an attorney from another jurisdiction may have less ethical restrictions than a Texas attorney?

How should the absence of ethical obligations on opposing counsel affect your negotiation strategy?

Have you ever thought of these differences in ethics obligations in any negotiation? If not, what does that say about the relevance and impact of the ethical rules on every day practice? Do you expect that the difference in ethical rules binding each lawyer will really affect his or her actions?
Opponent’s Mistake

While some efforts at ethical rules have concerned mistakes by the opposition, no Texas rule directly addresses opposition mistakes. Consider whether any of the following examples raise ethical issues. Assume that neither you nor your client have done anything to cause the mistake or to affirm the mistake.

Wrong technology: You represent a potential Supplier of a technology in a negotiation. During negotiations, statements by the potential purchaser reveal that the customer has come to your client because of a mistake. The potential purchaser was referred to your customer by another customer who has used your client’s technology and a competitor’s technology. The statements by the potential purchaser reveal that the potential purchaser was impressed by the competitor’s technology, not by your client’s technology. The potential purchaser has simply confused the two technologies.

Do you have any ethical obligation to correct the mistake?

Would your obligation change if Purchaser was a sole proprietor who did not have counsel?

Wrong price: Working for free, you represent your brother-in-law in a negotiation that – if successful – will become the basis of a small start-up business for him and your sister. Supplier is a billion dollar multinational company represented by one of the largest law firms in the world. The negotiations were short because Supplier dominates the industry and took a “take it or leave it” position as to its form agreement. In fact, Supplier and its attorneys were arrogant and rude throughout the negotiations. They frequently were late for meetings, “forgot” about scheduled calls, and were often insulting about your lawyering skills.
Despite all this, your brother-in-law elected to take it. You receive the agreement, signed by Supplier, and notice a mistake. The quoted $100 per unit price appears as a $900 per unit price.

Do you have any ethical obligation to correct the mistake?

Would your answer change if the mistake were larger or smaller?

If your brother-in-law signed and returned the agreement before you found the mistake, do you have any obligation to notify Supplier of the mistake?

**Mistake of law:** You represent a potential Supplier of a technology in a negotiation. Negotiations become heated over insurance obligations. During discussions, Purchaser’s attorney proposes that the agreement be silent on the insurance issue because he understands that your client is required by law to carry Purchaser as an additional insured. You know that he is dead wrong.

Do you have any ethical obligation to correct the mistake?

Ethics aside, should you tell the other side of their mistake?

Assume that Purchaser’s attorney is actually correct about the law – as it existed until yesterday. You know that the Texas Legislature just yesterday changed the law so that the insurance obligation no longer applies. Now do you have any ethical obligation to correct the mistake?

Would your obligation change if Purchaser was a small sole proprietor who did not have an attorney and it was the Purchaser who made the mistake of law?

**Other mistakes:** You represent a potential supplier of a technology in a negotiation. Negotiations have finished, and you receive signed copies from the purchaser for your
client’s signature. Before you approve the agreement for your client’s signature, you discover a mistake in the agreement.

The mistake is that the last clause to be hammered out – an indemnity obligation that your client owes to the purchaser – has been omitted. Do you disclose the error to the purchaser?45

The mistake is that the right of “no-cause” termination – which the parties agreed to give to supplier only – is now given to both parties. Do you disclose the error to the purchaser?

The mistake is that the right of “no-cause” termination – which the parties agreed to give to supplier only – is now given to both parties. Do you disclose the error to the purchaser?

ANSWERS:

Rule 4.01 prohibits only (1) knowingly making “a false statement of material fact or law,” and knowingly failing “to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.” Rule 1.15 may require withdrawal if the attorney cannot convince the client to cease a fraud.

So long as the facts do not implicate any of these prohibitions – and occasional situations of the opposition’s errors may do so – a Texas lawyer has no duty to correct the opponent’s mistake.46

One commentator argues that it is “inconsistent with a lawyer’s duty of zealous advocacy to require the correction of any misapprehension under which the other side labors” even if caused by the lawyer’s side of the bargaining table.47 Rather than correcting an
opponent’s misconception caused by an independent source, a simple avoidance or polite change of subject should suffice to avoid ethical violations.\textsuperscript{48}

As to the “scrivener’s mistakes,” the Texas Lawyer’s Creed does not expressly apply. A lawyer has an affirmative obligation to provide accurate documents to the opposition.\textsuperscript{49} But the creed does not proscribe conduct with respect to the opposition’s mistakes.

The ABA Committee on Ethics and Professional Responsibility concluded that a lawyer has a duty to correct “scrivener” mistakes. Informal Op. 86-1518 (1986). In fact, the ABA opined that the lawyer does NOT have a duty to inform his client of the error because “there is no ‘informed decision,’ in the language of Rule 1.4, [Texas Rule 1.04] that [the client] needs to make; the decision on the contract has already been made by the client.” Id. The ABA noted that the Comment to Rule 1.2 [Texas Rule 1.02] permits the lawyer to decide the “technical” means to carry out the objective of the representation, without consultation with the client. Finally, the ABA noted:

The client does not have a right to take unfair advantage of the error. The client’s right pursuant to Rule 1.2 to expect committed and dedicated representation is not unlimited. Indeed, for A’s lawyer to suggest that A has an opportunity to capitalize on the clerical error, unrecognized by B and B’s lawyer, might raise a serious question of the violation of the duty of A’s lawyer under Rule 1.2(d) not to counsel the client to engage in, or assist the client in, conduct the lawyer knows is fraudulent. In addition, Rule 4.1(b) admonishes the lawyer not knowingly to fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client, and Rule 8.4(c) prohibits the lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

\textit{Id.}

Ethics aside, the lawyer should consider the legal effect of a mistake on the validity of the agreement. See Stare v. Tate, 98 Cal. Rptr. 264 (Cal. App. 2d 1971) (Court allowed wife
to revoke divorce settlement based on wife’s serious unilateral mistake in the valuation of the property which was known to husband’s attorney.).

The Dahl Austin Survey\textsuperscript{50} included a hypothetical (#6) similar to the change in law situation described above. Dahl reported:

None would educated Purchaser or signaled him about the change in the law.

Ten would not have referred to prior law to support their case.

Two would affirmatively exploit Purchaser’s ignorance of the change, but they would have avoided misrepresenting the actual law. For example, one suggested that he might have said, “The law is on our side.”

What effect would silence on each mistake have on the lawyer’s reputation?
Stubborn Client #1

Getting your client to “see the light”: You represent a defendant in a patent infringement action. The patent owner has made a settlement offer that includes a license to your client with a continuing royalty. You believe that it is a fantastic opportunity for your client. However, your client does not see it that way. Despite your best arguments, your client refuses to accept the offer. You believe the client is being extremely unreasonable.

May you ask the judge to help your client see the light?

May you ask your client’s husband to help your client see the light?

May you ask a friend of your client to help your client see the light?

Change the context to mediation. May you ask the mediator to help your client see the light?

Change the context to a regular negotiation – not litigation. Your client has refused what you think is a fantastic offer for a license. May you ask a friend of your client to help your client see the light?

ANSWER:

The hypothetical is governed primarily by Rule 1.02(a) which requires a lawyer to abide by a client’s decisions: “(1) concerning the objectives and general methods of representation,” and “(2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law.”

Additionally, a lawyer must beware of revealing a lawyer’s confidences as prohibited by Rule 1.05.
This hypothetical is discussed in detail in Patrick Emery Longan, A Symposium: Ethical Issues in Settlement Negotiations Symposium Introduction, 52 Mercer L. Rev. 807 (Spring 2001). Longan noted that “[w]hen this hypothetical was presented at the 2001 Winter Meeting of the ABA Litigation Section leadership, it sparked the most heated discussion of the day.” Id. at n. 59. The technique is frequently used to great effect, but critics decry the tactic as disloyal and a breach of confidence. Id.

**Stubborn Client #2**

**Settlement talks:** The following hypothetical is governed primarily by Rule 4.04, but again, other rules may also affect the situation.

You represent an accused patent infringer in a patent infringement action. Counsel for the patent owner has made settlement overtures, indicating that the patent owner is willing to grant a license. Your client has told you that she will never settle. In fact, a week before the overtures from the patent owner, she told you emphatically that you should never negotiate.

However, in every hearing, the judge has commented: “This case is still here? You know it should settle. I do not want to have to try this mess.”

From past experience, you know that the judge is deadly serious and will penalize whatever party the judge believes stood in the way of settlement. You also believe that settlement negotiations are likely to provide valuable “discovery” and will probably delay trial – something that would benefit your client.

How do you advise your client?

Should you try to convince the client to explore settlement?
ANSWER

Rule 4.04 Respect for Rights of Third Persons prohibits means “that have no substantial purpose other than to embarrass, delay, or burden a third person.” A lawyer therefore cannot engage in settlement negotiations if the negotiations have no substantial purpose other than delay.

Nothing in the rules prohibits use of negotiations to obtain information.

One author counsels that the best course would be for the client to authorize the lawyer to negotiate to discover if an acceptable settlement can be reached. With such marching orders, the lawyer can avoid the prohibition of Rule 4.04.51
Insider Information

**Information that could help your client:** You represent a technology supplier in a negotiation. The purchaser wants an exclusive license. Your client has asked you to try to get a license fee of $1,000,000, but will accept as low as $750,000. You are dating a person who works with the other side, and she tells you that they are willing to pay up to $2,000,000 in up-front fees.

What are your obligations?

**Conflicting opportunity:** You represent a potential distributor – a large well-established corporation – in a negotiation. Your girlfriend works for the supplier. She tells you she might be able to get the distribution rights for a company she could start up with your help, but that as a start up, the supplier would demand a $2,000,000 up front fee, while the supplier might settle for no up-front fee from your client. She asks you to help her set up the company. This looks like a great opportunity.

What are your obligations?

**ANSWERS:**

Both hypotheticals are governed by Rule 4.04(a) which prohibits using “methods of obtaining evidence that violate the legal rights of such a person.” When considering whether the “insider information” may be used adversely against the opponent, the information is “confidential information” and use would violate the opponent’s rights.

ABA Formal Opinion 94-383 is also relevant to both hypotheticals. That opinion advises that a lawyer should notify opposing counsel if she receives confidential information. It is not clear whether Texas ethics rules require such disclosure. In fact, Rule 1.05(b) might prohibit such disclosure unless disclosure to the opponent is required by Rule
1.05(c)(7) if “the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.”

When considering whether the lawyer may use the third-party “insider information” in competition with the lawyer’s client, Rule 1.05 Confidentiality of Information comes into play. The information is now treated as “confidential information” of the lawyer-client relationship. Rule 1.05(a). Rule 1.05(b)(2) prohibits use of the information “to the disadvantage of the client unless the client consents after consultations.”

The second hypothetical also requires application of Rule 1.06 concerning conflict of interest. Rule 1.06(b)(2) prohibits a lawyer from representing a person if the representation is “adversely limited . . . by the lawyer’s . . . own interests.”
You are approached by an inventor and his investor partner to assist with a start up corporation to license the inventor’s many valuable inventions. To save money, the inventor and investor agree that you can act for both of them. The start-up plan includes formation of a corporation, an IPO, and numerous future public offerings. You are drafting a license of the inventor’s technology to the corporation.

What are your obligations to the corporation, to the inventor, and to the investor as you address the common clauses in the license?

The investor tells you, “in confidence,” that he intends to force the inventor out as soon as possible. What obligation do you have to the inventor or the investor?^54

The inventor demands that you withdraw as counsel. The investor asks you to stay. What do you do?^55

Can you represent the inventor and the investor when you have represented the investor for five years in many different deals?^56

**ANSWER:**

This situation is called an “intermediation.” In an “intermediation,” the attorney is counsel for the situation more than she is counsel for the parties.^57 For a discussion of intermediation, see David Hricik, Selected Ethical Issues in Licensing, Understanding the Intellectual Property License 1998, Practicing Law Institute.

The hypothetical is governed primarily by Rules 1.05 Confidentiality of Information; 1.06 Conflict of Interest: General Rule; and 1.07 Conflict of Interest: Intermediary, but other rules may also affect the situation. The most directly on point is Rule 1.07. In relevant part, it provides:
1.07 Conflict of Interest: Intermediary

(a) A lawyer shall not act as intermediary between clients unless:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decision to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

(d) Within the meaning of this Rule, a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests.
(e) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyers firm may engage in that conduct.

**Comment:**

Confidentiality and Privilege

6. A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation, except as to such clients. See Rules 1.03 and 1.05. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the general rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

7. Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

In an intermediation, if one client discloses an intent to act adversely to the interest of another client, the lawyer not only may but probably must disclose the information to the threatened client.\(^{58}\)
In an intermediation, if one client demands that the attorney withdraw, then the attorney must withdraw from the entire situation, not just the representation of one client. Rule 1.07(c).

Finally, a lawyer should not enter into an intermediation if he does not believe that he can represent clients “impartially.” Rule 1.07(a)(3).
You are negotiating a distribution agreement for a potential distributor. Through a long, hard negotiation, bad feelings have arisen between you and the other attorney. You are convinced that he is not honestly communicating your client’s positions to his client. You are convinced that he is trying to kill the deal.

What should you do?

Should you send communications directly to the supplier?

Should you have your client contact the supplier?

What should you do if the supplier calls to discuss a point with you?

**ANSWER**

Rule 4.02(a) and (b) prohibit a lawyer from communicating with the other lawyer’s client or encouraging another to communicate with the other lawyer’s client, “unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”

However, Comment 2 notes that the rule does not apply to communications between the parties, “as long as the lawyer does not cause or encourage the communication without the consent of the lawyer for the other party.”

The ABA has opined that the lawyer may have her client communicate directly with the other client. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 362 (1992). However, the lawyer must walk a fine line in this case to avoid causing or encouraging the communication. This is one of the few areas of negotiation that generates any ethics opinions because of the predictable reaction when opposing counsel discovers the communication.\(^{59}\)
Playing Your Client

You represent Supplier in a negotiation. Supplier leaves the negotiations to you. You know that Supplier would like a price of $1,000,000. However, you are also convinced that Supplier is not being realistic. You believe that you will be extremely lucky to get any offer - from any purchaser - higher than $600,000. You want to serve your client well, but you want your client to feel like a winner in the negotiation. You feel that Supplier’s current expectations need a good dose of realism.

Purchaser’s initial offer is $400,000. After a day of negotiations, you have talked Purchaser up to $500,000.

You call Supplier that night and tell him about the $400,000 offer. Hoping to bring your client to reality, you do not tell your client about the end-of-the-day $500,000 offer. Instead, you tell Supplier that with another day of hard negotiations, you might move Purchaser up to $550,000.

Have you served your client well or have you violated an ethics obligation?

Could you instead tell the client that the initial offer was $300,000?

ANSWER:

The hypothetical is governed primarily by Rule 1.03(a):

A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

The comment to Rule 1.03 adds a relevant comment – requiring prompt communication of offers to the client, but only for settlement of a civil controversy or for a plea bargain:
A lawyer who receives from opposing counsel either an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable.

This comment does not seem to apply to a negotiation outside the dispute context.

The comment also describes situations where an attorney may withhold information from a client, but the situations described are not relevant.

In the analogous Dahl Austin Survey\(^6\) hypothetical (#3):

Many were adamant that the attorney should tell Supplier everything without delay and were offended by the notion of hiding something.

A few conceded that colleagues engage in this practice.

One attorney had no ethical qualms about “low-balling” the other side but did have misgivings about “low-balling” his client to make the client feel like a winner.

One found nothing objectionable.

One might wait until the second negotiation before telling a client who would view the small increase as “losing.”

One might postpone telling Supplier about the second offer or might tell Supplier that the offer was lower than it actually was.

One suggested that feeding the offers to Supplier in small doses was the appropriate course of action.
Extraneous Issues

You represent Supplier, a large corporation, in a negotiation with Purchaser, a small, sole proprietorship. Purchaser is not represented by counsel. You have learned that Purchaser is an undocumented alien. The negotiations are almost complete. The currently agreed price is $50,000. Supplier asks that you try to squeeze a bit more out of Purchaser, say $60,000, by making veiled threats about Purchaser’s immigration status.

What do you do?

ANSWER:


The Dahl Austin Survey included a similar hypothetical (#6(c)). Dahl reported:

About half would discuss the illegal alien status with the opposing side but would refrain from making a threat.

Some feared a threat would be illegal.

Four would not raise the issue.

Three would consider making the threat.
1.02 Scope and Objectives of Representation

(a) Subject to paragraphs (b), (c), (d), and (e), (f), and (g), a lawyer shall abide by a client's decisions:

(1) concerning the objectives and general methods of representation;

(2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law; ...

(b) A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.

(c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.

(d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.

(e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyers services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.
(f) When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

... 

Comment:

Scope of Representation

1. Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the objectives to be served by legal representation, within the limits imposed by law, the lawyer's professional obligations, and the agreed scope of representation. Within those limits, a client also has a right to consult with the lawyer about the general methods to be used in pursuing those objectives. The lawyer should assume responsibility for the means by which the client's objectives are best achieved. Thus, a lawyer has very broad discretion to determine technical and legal tactics, subject to the client's wishes regarding such matters as the expense to be incurred and concern for third persons who might be adversely affected.

2. Except where prior communications have made it clear that a particular proposal would be unacceptable to the client, a lawyer is obligated to communicate any settlement offer to the client in a civil case; and a lawyer has a comparable responsibility with respect to a proposed plea bargain in a criminal case.

3. A lawyer should consult with the client concerning any such proposal, and generally it is for the client to decide whether or not to accept it. This principle is subject to several exceptions or qualifications. First, in class actions a lawyer may recommend a settlement of the matter to the court over the objections of named plaintiffs in the case. Second, in insurance defense cases a lawyer's ability to implement an insured client's wishes with respect to settlement may be qualified by the contractual rights of the insurer under its
policy. Finally, a lawyer’s normal deference to a client’s wishes concerning settlement may be abrogated if the client has validly relinquished to a third party any rights to pass upon settlement offers. Whether any such waiver is enforceable is a question largely beyond the scope of these rules. But see comment 5 below. A lawyer reasonably relying on any of these exceptions in not implementing a client’s desires concerning settlement is, however, not subject to discipline under this Rule.

Limited Scope of Representation

4. The scope of representation provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer’s services are made available to the client. For example, a retainer may be for a specifically defined objective. Likewise, representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. Similarly when a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The scope within which the representation is undertaken also may exclude specific objectives or means, such as those that the lawyer or client regards as repugnant or imprudent.

5. An agreement concerning the scope of representation must accord with the Texas Disciplinary Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.01, or to surrender the right to terminate the lawyer’s services or the right to settle or continue litigation that the lawyer might wish to handle differently.

6. Unless the representation is terminated as provided in Rule 1.15, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer’s representation is limited to a specific matter or matters, the relationship terminates when the matter has been resolved. If a lawyer has represented a client over a substantial period in a variety of matters, the client may sometimes assume that the lawyer will continue to serve on a
continuing basis unless the lawyer gives notice to the contrary. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the clients affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

Criminal, Fraudulent and Prohibited Transactions

7. A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a clients conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

8. When a client’s course of action has already begun and is continuing, the lawyers responsibility is especially delicate. The lawyer may not reveal the clients wrongdoing, except as permitted or required by Rule 1.05. However, the lawyer also must avoid furthering the clients unlawful purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required. See Rule 1.15(a)(1)

9. Paragraph (c) is violated when a lawyer accepts a general retainer for legal services to an enterprise known to be unlawful. Paragraph (c) does not, however, preclude
undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise.

10. The last clause of paragraph (c) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

11. Paragraph (d) requires a lawyer in certain instances to use reasonable efforts to dissuade a client from committing a crime or fraud. If the services of the lawyer were used by the client in committing a crime or fraud paragraph (e) requires the lawyer to use reasonable efforts to persuade the client to take corrective action.

1.03 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment:

1. The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps to permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel either an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the
client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Comment 2 to Rule 1.02.

2. Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. Moreover, in certain situations practical exigency may require a lawyer to act for a client without prior consultation. The guiding principle is that the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the clients best interests, and the clients overall requirements as to the character of representation.

3. Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impractical, as for example, where the client is a child or suffers from mental disability; see paragraph 5. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

4. In some circumstances, a lawyer may be justified in delaying transmission of information when the lawyer reasonably believes the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure
would harm the client. Similarly, rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.04(d) sets forth the lawyers obligations with respect to such rules or orders. A lawyer may not, however, withhold information to serve the lawyers own interest or convenience.

Client Under a Disability

5. In addition to communicating with any legal representative, a lawyer should seek to maintain reasonable communication with a client under a disability, insofar as possible. When a lawyer reasonably believes a client suffers a mental disability or is not legally competent, it may not be possible to maintain the usual attorney-client relationship. Nevertheless, the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client's own well being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children’s opinions regarding their own custody are given some weight. The fact that a client suffers a disability does not diminish the desirability of treating the client with attention and respect. See also Rule 1.02(e) and Rule 1.05, Comment 17.

1.04 Fees

(a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.

(b) Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

1.05 Confidentiality of Information

(a) Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of Evidence or of Rule 5.03 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates. Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

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

(1) Reveal confidential information of a client or a former client to:
(i) a person that the client has instructed is not to receive the information; or

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

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultations.

(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

(c) A lawyer may reveal confidential information:

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

(2) When the client consents after consultation.

(3) To the client, the clients representatives, or the members associates, and employees of the lawyers firm, except when otherwise instructed by the client.

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.

(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.
(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyers associates based upon conduct involving the client or the representation of the client.

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a clients criminal or fraudulent act in the commission of which the lawyers services had been used.

(d) A lawyer also may reveal unprivileged client information.

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

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

(i) carry out the representation effectively;

(ii) defend the lawyer or the lawyers employees or associates against a claim of wrongful conduct;

(iii) respond to allegations in any proceeding concerning the lawyers representation of the client; or

(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent
revelation reasonably appears necessary to prevent the client from committing the
criminal or fraudulent act.

(f) A lawyer shall reveal confidential information when required to do so by Rule
3.03(a)(2), 3.03(b), or by Rule 4.01(b).

1.06 Conflict of Interest: General Rule

... 

(b) In other situations [other than litigation] and except to the extent permitted by
paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that persons interests are materially
and directly adverse to the interests of another client of the lawyer or the lawyers firm; or

(2) reasonably appears to be or become adversely limited by the lawyers or law firm’s
responsibilities to another client or to a third person or by the lawyers or law firms own
interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially
affected; and

(2) each affected or potentially affected client consents to such representation after full
disclosure of the existence, nature, implications, and possible adverse consequences of
the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter
represent any of such parties in a dispute among the parties arising out of the matter,
unless prior consent is obtained from all such parties to the dispute.
(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer’s firm may engage in that conduct.

**Comment:**

**Loyalty to a Client**

1. Loyalty is an essential element in the lawyer’s relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer must take effective action to eliminate the conflict, including withdrawal if necessary to rectify the situation. See also Rule 1.16. When more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by this Rule and Rules 1.05 and 1.09. See also Rule 1.07. Under this Rule, any conflict that prevents a particular lawyer from undertaking or continuing a representation of a client also prevents any other lawyer who is or becomes a member of or an associate with that lawyers firm from doing so. See paragraph (f).

...  

**Conflict with Lawyers Own Interests**

4. Loyalty to a client is impaired not only by the representation of opposing parties in situations within paragraphs (a) and (b)(l) but also in any situation when a lawyer may
not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyers own interests or responsibilities to others. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b)(2) addresses such situations. A potential possible conflict does not itself necessarily preclude the representation. The critical questions are the likelihood that a conflict exists or will eventuate and, if it does, whether it will materially and adversely affect the lawyers independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. It is for the client to decide whether the client wishes to accommodate the other interest involved. However, the clients consent to the representation by the lawyer of another whose interests are directly adverse is insufficient unless the lawyer also believes that there will be no materially adverse effect upon the interests of either client. See paragraph (c).

5. The lawyers own interests should not be permitted to have adverse effect on representation of a client, even where paragraph (b)(2) is not violated. For example, a lawyers need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.01 and 1.04. If the probity of a lawyers own conduct in a transaction is in question, it may be difficult for the lawyer to give a client detached advice. A lawyer should not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Meaning of Directly Adverse

6. Within the meaning of Rule 1.06(b), the representation of one client is directly adverse to the representation of another client if the lawyers independent judgment on behalf of a client or the lawyers ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyers representation of, or responsibilities to, the other client. The dual representation also is
directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not constitute the representation of directly adverse interests. Even when neither paragraph (a) nor (b) is applicable, a lawyer should realize that a business rivalry or personal differences between two clients or potential clients may be so important to one or both that one or the other would consider it contrary to its interests to have the same lawyer as its rival even in unrelated matters; and in those situations a wise lawyer would forego the dual representation.

Full Disclosure and Informed Consent

7. A client under some circumstances may consent to representation notwithstanding a conflict or potential conflict. However, as indicated in paragraph (c)(1), when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the clients consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the full disclosure necessary to obtain informed consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

8. Disclosure and consent are not formalities. Disclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent. While it is not required that the disclosure and consent be in writing, it would be prudent for the lawyer to provide potential dual clients with at least a written summary of the considerations disclosed.
9. In certain situations, such as in the preparation of loan papers or the preparation of a partnership agreement, a lawyer might have properly undertaken multiple representation and be confronted subsequently by a dispute among those clients in regard to that matter. Paragraph (d) forbids the representation of any of those parties in regard to that dispute unless informed consent is obtained from all of the parties to the dispute who had been represented by the lawyer in that matter.

10. A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

11. Ordinarily, it is not advisable for a lawyer to act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated and even if paragraphs (a), (b) and (d) are not applicable. However, there are circumstances in which a lawyer may act as advocate against a client, for a lawyer is free to do so unless this Rule or another rule of the Texas Disciplinary Rules of Professional Conduct would be violated. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in a matter unrelated to any matter being handled for the enterprise if the representation of one client is not directly adverse to the representation of the other client. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for declaratory judgment concerning statutory interpretation.

Interest of Person Paying for a Lawyers Service

12. A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyers duty of
loyalty to the client. See Rule 1.08(e). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel’s professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyers professional independence.

Non-litigation Conflict Situations

13. Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer’s relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

14. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation may be permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

15. Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration it may be unclear whether the client is the fiduciary or is the estate or trust including its beneficiaries. The lawyer should make clear the relationship to the parties involved.
16. A lawyer for a corporation or other organization who is also a member of its board of
directors should determine whether the responsibilities of the two roles may conflict. The
lawyer may be called on to advise the corporation in matters involving actions of the
directors. Consideration should be given to the frequency with which such situations may
arise, the potential intensity of the conflict, the effect of the lawyers resignation from the
board and the possibility of the corporations obtaining legal advice from another lawyer
in such situations. If there is material risk that the dual role will compromise the lawyers
independence of professional judgment, the lawyer should not serve as a director.

1.07 Conflict of Interest: Intermediary

(a) A lawyer shall not act as intermediary between clients unless:

(1) the lawyer consults with each client concerning the implications of the common
representation, including the advantages and risks involved, and the effect on the
attorney-client privileges, and obtains each clients written consent to the common
representation;

(2) the lawyer reasonably believes that the matter can be resolved without the necessity of
contested litigation on terms compatible with the clients best interests, that each client
will be able to make adequately informed decisions in the matter and that there is little
risk of material prejudice to the interests of any of the clients if the contemplated
resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken
impartially and without improper effect on other responsibilities the lawyer has to any of
the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the
decision to be made and the considerations relevant in making them, so that each client
can make adequately informed decisions.
(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

(d) Within the meaning of this Rule, a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests.

(e) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.

**Comment:**

1. A lawyer acting as intermediary may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. For example, the lawyer may assist in organizing a business in which two or more clients are entrepreneurs, in working out the financial reorganization of an enterprise in which two or more clients have an interest, in arranging a property distribution in settlement of an estate or in mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

2. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship; hence, the requirement of written consent. Moreover, a lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed. See also Rule 1.06 (b).
3. The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

4. In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations, the risk of failure is so great that intermediation is plainly impossible. Moreover, a lawyer cannot undertake common representation of clients between whom contested litigation is reasonably expected or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients interests can be adjusted by intermediation ordinarily is not very good.

5. The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each clients case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege

6. A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation, except as to
such clients. See Rules 1.03 and 1.05. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the general rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

7. Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Consultation

8. In acting as intermediary between clients, the lawyer should consult with the clients on the implications of doing so, and proceed only upon informed consent based on such a consultation. The consultation should make clear that the lawyers role is not that of partisanship normally expected in other circumstances.

9. Paragraph (b) is an application of the principle expressed in Rule 1.03). Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

10. Under this Rule, any condition or circumstance that prevents a particular lawyer either from acting as intermediary between clients, or from representing those clients individually in connection with a matter after an unsuccessful intermediation, also prevents any other lawyer who is or becomes a member of or associates with that lawyers firm from doing so. See paragraphs (c) and (e).
Withdrawal

11. In the event of withdrawal by one or more parties from the enterprise, the lawyer may continue to act for the remaining parties and the enterprise. See also Rule 1.06 (c) (2) which authorizes continuation of the representation with consent.
1.15 Declining or Terminating Representation

(a) A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw, except as stated in paragraph (c), from the representation of a client, if:

(1) the representation will result in violation of Rule 3.08, other applicable rules of professional conduct or other law;

(2) the lawyers physical, mental or psychological condition materially impairs the lawyers fitness to represent the client; or

(3) the lawyer is discharged, with or without good cause.

(b) Except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyers services that the lawyer reasonably believes may be criminal or fraudulent;

(3) the client has used the lawyers services to perpetrate a crime or fraud;

(4) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyers services, including an obligation to pay the lawyers fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.

**Comment:**

1. A lawyer should not accept representation in a matter unless it can be performed competently, promptly, and without improper conflict of interest. See generally Rules 1.01, 1.06, 1.07, 1.08, and 1.09. Having accepted the representation, a lawyer normally should endeavor to handle the matter to completion. Nevertheless, in certain situations the lawyer must terminate the representation and in certain other situations the lawyer is permitted to withdraw.

Mandatory Withdrawal

2. A lawyer ordinarily must decline employment if the employment will cause the lawyer to engage in conduct that the lawyer knows is illegal or that violates the Texas Disciplinary Rules of Professional Conduct. Rule 1.15(a)(1); cf. Rules 1.02(c), 3.01, 3.02, 3.03, 3.04, 3.08, 4.01, and 8.04. Similarly, paragraph (a)(l) of this Rule requires a lawyer to withdraw from employment when the lawyer knows that the employment will result in a violation of a rule of professional conduct or other law. The lawyer is not obliged to
3. When a lawyer has been appointed to represent a client and in certain other instances in litigation, withdrawal ordinarily requires approval of the appointing authority or presiding judge. See also Rule 6.01. Difficulty may be encountered if withdrawal is based on the client’s demand that the lawyer engage in unprofessional conduct. The tribunal may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer’s statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. See also Rule 1.06(e).

Discharge

4. A client has the power to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer’s services, and paragraph (a) of this Rule requires that the discharged lawyer withdraw. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

5. Whether a client can discharge an appointed counsel depends on the applicable law. A client seeking to do so should be given full explanation of the consequences. In some instances the consequences may include a decision by the appointing authority or presiding judge that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

Mentally Incompetent Client

6. If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer (see paragraphs 11 and 12 of Comment to Rule 1.02), and in any event the
discharge may be seriously adverse to the clients interests. The lawyer should make special effort to help the incompetent client consider the consequences (see paragraph 5 of Comment to Rule 1.03) and in some situations may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.02(e).

Optional Withdrawal

7. Paragraph (b) supplements paragraph (a) by permitting a lawyer to withdraw from representation in some certain additional circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the clients interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. A lawyer is not required to discontinue the representation until the lawyer knows the conduct will be illegal or in violation of these rules, at which point the lawyers withdrawal is mandated by paragraph (a)(1). Withdrawal is also permitted if the lawyers services were misused in the past. The lawyer also may withdraw where the client insists on pursuing a repugnant or imprudent objective or one with which the lawyer has fundamental disagreement. A lawyer may withdraw if the client refuses, after being duly warned, to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

8. Withdrawal permitted by paragraph (b)(2) through (7) is optional with the lawyer even though the withdrawal may have a material adverse effect upon the interests of the client.

Assisting the Client Upon Withdrawal

9. In every instance of withdrawal and even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the
client. See paragraph (d). The lawyer may retain papers as security for a fee only to the extent permitted by law.

10. Other rules, in addition to Rule 1.15, require or suggest withdrawal in certain situations. See Rules 1.01, 1.05 Comment 22, 1.06(e) and 1.07(c), 1.11(c), 1.12(d), and 3.08(a).

4.01 Truthfulness in Statements to Others

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

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

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

Comment:

False Statements of Fact

1. Paragraph (a) of this Rule refers to statements of material fact. Whether a particular statement should be regarded as one of material fact can depend on the circumstances. For example, certain types of statements ordinarily are not taken as statements of material fact because they are viewed as matters of opinion or conjecture. Estimates of price or value placed on the subject of a transaction are in this category. Similarly, under generally accepted conventions in negotiation, a party’s supposed intentions as to an acceptable settlement of a claim may be viewed merely as negotiating positions rather than as accurate representations of material fact. Likewise, according to commercial conventions, the fact that a particular transaction is being undertaken on
behalf of an undisclosed principal need not be disclosed except where non-disclosure of
the principal would constitute fraud.

2. A lawyer violates paragraph (a) of this Rule either by making a false statement of
law or material fact or by incorporating or affirming such a statement made by another
person. Such statements will violate this Rule, however, only if the lawyer knows they
are false and intends thereby to mislead. As to a lawyers duty to decline or terminate
representation in such situations, see Rule 1.15.

Failure to Disclose A Material Fact

3. Paragraph (b) of this Rule also relates only to failures to disclose material facts.
Generally, in the course of representing a client a lawyer has no duty to inform a third
person of relevant or material facts, except as required by law or by applicable rules of
practice or procedure, such as formal discovery. However, a lawyer must not allow
fidelity to a client to become a vehicle for a criminal act or a fraud being perpetrated by
that client. Consequently a lawyer must disclose a material fact to a third party if the
lawyer knows that the client is perpetrating a crime or a fraud and the lawyer knows that
disclosure is necessary to prevent the lawyer from becoming a party to that crime or
fraud. Failure to disclose under such circumstances is misconduct only if the lawyer
intends thereby to mislead.

4. When a lawyer discovers that a client has committed a criminal or fraudulent act
in the course of which the lawyer’s services have been used, or that the client is
committing or intends to commit any criminal or fraudulent act, other of these Rules
require the lawyer to urge the client to take appropriate action. See Rules 1.02(d), (e), (f);
3.03(b). Since the disclosures called for by paragraph (b) of this Rule will be necessary
only if the lawyers attempts to counsel his client not to commit the crime or fraud are
unsuccessful, a lawyer is not authorized to make them without having first undertaken
those other remedial actions. See also Rule 1.05.
Fraud by a Client

5. A lawyer should never knowingly assist a client in the commission of a criminal act or a fraudulent act. See Rule 1.02(c).

6. This rule governs a lawyer’s conduct during the course of representing a client. If the lawyer has terminated representation prior to learning of a clients intention to commit a criminal or fraudulent act, paragraph (b) of this Rule does not apply. See Fraud under TERMINOLOGY.

4.02 Communication with One Represented by Counsel

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

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

(c) For the purpose of this rule, organization or entity of government includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.
(d) When a person, organization, or entity of government that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited by paragraph (a) from giving such advice without notifying or seeking consent of the first lawyer.

Comment:

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

2. Paragraph (a) does not, however, prohibit communication between a lawyers client and persons, organizations, or entities of government represented by counsel, as long as the lawyer does not cause or encourage the communication without the consent of the lawyer for the other party. Consent may be implied as well as expressed, as, for example, where the communication occurs in the form of a private placement memorandum or similar document that obviously is intended for multiple recipients and that normally is furnished directly to persons, even if known to be represented by counsel. Similarly, that paragraph does not impose a duty on a lawyer to affirmatively discourage communication between the lawyers client and other represented persons, organizations or entities of government. Furthermore, it does not prohibit client communications concerning matters outside the subject of the representation with any such person, organization, or entity of government. Finally, it does not prohibit a lawyer from furnishing a second opinion in a matter to one requesting such opinion, nor from discussing employment in the matter if requested to do so. But see Rule 7.02.
3. Paragraph (b) of this Rule provides that unless authorized by law, experts employed or retained by a lawyer for a particular matter should not be contacted by opposing counsel regarding that matter without the consent of the lawyer who retained them. However, certain governmental agents or employees such as police may be contacted due to their obligations to the public at large.

4. In the case of an organization or entity of government, this Rule prohibits communications by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization that relates to the subject of the representation and with those persons presently employed by such organization or entity whose act or omission may make the organization or entity vicariously liable for the matter at issue, without the consent of the lawyer for the organization or entity of government involved. This Rule is based on the presumption that such persons are so closely identified with the interests of the organization or entity of government that its lawyers will represent them as well. If, however, such an agent or employee is represented in the matter by his or her own counsel that presumption is inapplicable. In such cases, the consent by that counsel to communicate will be sufficient for purposes of this Rule. Compare Rule 3.04(f). Moreover, this Rule does not prohibit a lawyer from contacting a former employee of a represented organization or entity of a government, nor from contacting a person presently employed by such an organization or entity whose conduct is not a matter at issue but who might possess knowledge concerning the matter at issue.

4.03 Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
Comment:

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer’s representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel. With regard to the special responsibilities of a prosecutor, see Rule 3.09.

4.04 Respect for Rights of Third Persons

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

III. LAWYER TO LAWYER

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

1. I will be courteous, civil, and prompt in oral and written communications.

2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.

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

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

5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are cancelled.

...  

9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.
10 I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.
End Notes

1. University of Miami Law Library website,  
http://library.law.miami.edu/ethicsguide.html

2. The ABA has amended the Model Rules as recently as August 2002.

3. Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; District of Columbia; Florida; Georgia; Hawaii; Idaho; Illinois; Indiana; Kansas; Kentucky; Louisiana; Maryland; Massachusetts; Michigan; Minnesota; Mississippi; Missouri; Montana; Nevada; New Hampshire; New Jersey; New Mexico; New York; North Carolina; North Dakota; Oklahoma; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Texas; Utah; Vermont; Virginia; Washington; West Virginia; Wisconsin; Wyoming.


6. With the exception of Iowa Rules 6 and 8 of the lawyers’ duties to other counsel, the preamble and remaining rules derive from the Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit.

http://www.judicial.state.ia.us/regs/conduct.asp

7. 

8. The Creed provides in separate parts:

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

and

“The desire for respect and confidence by lawyers from the public should provide the members of our profession with the necessary incentive to attain the highest degree of ethical and professional conduct. These rules are primarily aspirational. Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.”


10. Michael Rubin noted that a lawyer may have difficulty identifying which ethical rules he would be bound by. Michael H. Rubin, *The Ethics of Negotiations: Are There Any?*, 56 La. L. Rev. 447 (Winter, 1995).

11. “[T]o mislead an opponent about one’s true settling point is the essence of negotiation.”


“If it is true that lawyers succeed in the degree to which they are effective in negotiations, it is equally true that one’s effectiveness in negotiations depends in part upon one’s willingness to lie.” Gerald Wetlaufer, The Ethics of Lying in Negotiations, 75 Iowa L. Rev. 1219 (July, 1990).

12. The comments to Model Rule 4.1 provide that a “lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.” Model Rules of Prof’l Conduct R. 4.1; See Brian C. Haussmann, The ABA Ethical Guidelines for Settlement Negotiations: Exceeding the Limits of the Adversarial Ethic, 89 Cornell L. Rev. 1218, 1238-39 (July, 2004).

13. “As is evident from the plain language of both the Model Rules and Model Code, a lawyer may not affirmatively lie in the course of settlement discussions. In practice, however, misrepresentations sometimes contain elements of affirmative statements and material omissions.” However, blatant instances of intentional fraud and affirmative misrepresentations may not be tolerated by courts. See Barry R. Temken, Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?, 18 Geo. J. Legal Ethics 179 (Fall/Winter 2004).


15. “[T]he lawyer should feel free to lie about his or her authority. Another strategy, however, and one that may be more effective in the long run, is simply to deflect any questions of authority with statements such as, ‘You know neither one of us can discuss our authority-let’s talk about a fair settlement of this case.’ You may be ethically
permitted to lie about your authority, but if you do it, and the other lawyer catches you at it, he or she will not trust you again.” Patrick Emery Longan, A Symposium: Ethical Issues in Settlement Negotiations Symposium Introduction, 52 Mercer L. Rev. 807 (Spring 2001).

16. One author suggests that absolute truth about such matters is required. Patrick Emery Longan, A Symposium: Ethical Issues in Settlement Negotiations Symposium Introduction, 52 Mercer L. Rev. 807 (Spring 2001); Another suggests that the ability to mislead and misdirect an adversary is generally considered a virtue among lawyers. Barry R. Temken, Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?, 18 Geo. J. Legal Ethics 179, 183 (Fall/Winter 2004).


18. The survey included fourteen Austin attorneys with experience in negotiating who came from the following areas:

3 personal injury
2 solo-practitioners
2 insurance defense
2 litigators
1 general business (including bankruptcy)
1 securities
1 corporate law
1 tax and estate
1 administrative law.

19. Each attorney had forty minutes to answer a series of questions.


24. “In an increasingly competitive legal market, and in the perceived absence of judicial oversight or repercussions for hardball tactics, lawyers frequently push the envelope in an effort to impress or gain advantage for clients.” Barry R. Temken, Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?, 18 Geo. J. Legal Ethics 179, 183 (Fall/Winter 2004).

25. “It is a standard negotiating technique ... for one side to include a series of demands about which it cares little or not at all. The purpose of including these demands is to increase one’s supply of negotiating currency. One hopes to convince the other party that one or more of these false demands is important and thus successfully to trade it for some significant concession. . . . Such behavior is untruthful in the broadest sense; yet at least in collective bargaining negotiation its use is a standard part of the process and is not thought to be inappropriate by any experienced bargainer.” White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 Am. B. Found. Res. J. 926, 932.


27. The Restatement defines a fraudulent misrepresentation as one “of fact, opinion, intention or law made for the purpose of inducing another to act or to refrain from action in reliance upon it.” Restatement (2nd) Torts, §525 (1977).
In an analogous situation, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility concluded that where a mutual release is premised on the client’s misrepresentation that she was unable to transfer her interest in real estate, the lawyer must disclose the truth to opposing counsel. Opinion 97-107 (August 21, 1997).

Though discussed in the context of disclosing the death of a client during negotiations, these comments seem relevant: “The most obvious motivation for withholding such information, aside from sloth or inadvertence, is intentionally to deceive one’s adversary. A lawyer who fails to disclose the death of a client is guilty, at a minimum, of sharp practice and harsh dealings and is hardly deserving of the trust or respect of professional colleagues.” Barry R. Temken, Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?, 18 Geo. J. Legal Ethics 179, 207 (Fall/Winter 2004).

Scott S. Dahl, Ethics on the Table: Stretching the Truth in Negotiations, 8 Rev. Litig. 173 (Spring, 1989).


While there is no general obligation “to correct the erroneous assumptions of the opposing party or opposing counsel, the duty to avoid misrepresentations and misleading conduct implies a professional responsibility to correct mistakes induced by the lawyer or the lawyer’s client and not to exploit such mistakes.” Am. Bar Ass’n Section of Litigation, Ethical Guidelines for Settlement Negotiations, 56-57 (emphasis added)
Rule 1.15 may require withdrawal if the attorney cannot convince the client to cease a fraud. See Patrick Emery Longan, A Symposium: Ethical Issues in Settlement Negotiations Symposium Introduction, 52 Mercer L. Rev. 807 (Spring 2001).


New York County Lawyers’ Association Committee on Professional Ethics, Opinion No. 686, July 9, 1991. www.nycla.org/library/ethicsopinions.htm. “If, during a negotiation, the lawyer makes an oral representation based on information from the client, which is still being relied upon by the other side, and the lawyer discovers the information was materially inaccurate, the lawyer may withdraw the representation even if the client objects. The Code does not require the lawyer to disclose the misrepresentation.”


Hypothetical 1 in the Dahl Austin Survey.

This hypothetical was suggested by Michael H. Rubin, The Ethics of Negotiations: Are There Any?, 56 La. L. Rev. 447 (Winter, 1995). Rubin cites NASCO, Inc. v. Calcasieu Television & Radio, Inc., 124 F.R.D. 120 (W.D. La. 1989), aff’d and remanded, 894 F.2d 696 (5th Cir. 1990), noting: “a Massachusetts lawyer was sanctioned by a federal judge in Louisiana under the court’s ‘inherent powers.’ In considering possible reciprocal discipline, the Massachusetts Supreme Court dismissed the complaint after a complete review of the record, finding ‘no support’ for the charges or the sanctions. In re McCabe, 583 N.E.2d 233 (Mass. 1991).”
This fact really should have no bearing on the ethics issue. We add it just to clarify that the parties never agree on a governing law. However, in almost all multi state or international negotiations, the majority of the discussions occur before any final agreement on governing law. The ultimate choice of governing law probably should not govern the ethical standards of the prior discussions.

Judge Rubin argued for two “precepts” for negotiation ethics:

1. The lawyer must act honestly and in good faith.
2. The lawyer may not accept a result that is unconscionably unfair to the other party.


See Texas Lawyer’s Creed Section III, 3 and 4.

While this paper concerns Texas’ ethics rules, the reader may wish to see also the ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1518 (1986) (A lawyer has a duty to correct mistakes.).

ABA Litigation Section, Ethical Guidelines for Civil Settlement Negotiations (Draft 2001), Guideline 4.3.7:

4.3.7. Exploiting Opponent’s Mistake. In the settlement context, a lawyer should not attempt knowingly to obtain benefit or advantage for himself or herself or his or her client as a result of an opponent’s mistake which has been induced by the lawyer or which is obviously unintentional. Further, a lawyer may have an affirmative duty to disclose information in settlement negotiations if he or she knows that the other side is operating on the basis of a mistaken impression of material fact.


See Texas Rule 4.03.

See Texas Rule 4.03.


Compare the negotiation context to a judicial proceeding. Under Model Rule 3.3(a)(3), a lawyer should disclose to a court “legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.” Also, under DR 7-102(A)(2), a lawyer cannot “[k]nowingly advance a claim or defense that is unwarranted under existing law” unless he can support his assertion with a good faith argument “for an extension, modification or reversal of existing law.”


49. The Creed provides:

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

4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.
Scott S. Dahl, Ethics on the Table: Stretching the Truth in Negotiations, 8 Rev. Litig. 173 (Spring, 1989).


See also Committee on Professional Ethics and Grievances v. Johnson, 447 F.2d 169 (3d Cir. 1971).

This situation highlights the necessity of an engagement letter and a clear identification of who your client or clients may be. If you have joint clients, then you absolutely should have a written agreement acknowledging that you cannot and will not hold any information in confidence from either person.

Rule 1.07(c).

Jeffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering, 520 (1992 Supp.) (If any one client asks the lawyer to withdraw, the client cannot consent to the lawyer representing the other party).

Jeffrey R. Pennell, Ethics, Professionalism and Malpractice Issues in the State Planning and Administration, C 126 ALI-ABA 67 (1995) (“it should be possible for the parties to agree that any party may continue to utilize the services of the attorney even if another party decides to withdraw from the intermediation.”).

Rule 1.07(a)(3).


See Patrick Emery Longan, A Symposium: Ethical Issues in Settlement Negotiations Symposium Introduction, 52 Mercer L. Rev. 807 (Spring 2001) (“By having the client rather than the lawyer make the contact, the hope is that the information can be conveyed without the risk of the lawyer taking advantage of the other party. Once the offer is conveyed, the lawyer must be careful not to respond to inquiries from the represented party about the proposal, but the lawyer should refer all questions to the other lawyer. If the other party states that the lawyer has been fired, that fact should be confirmed, preferably in writing from the lawyer concerned. Without that assurance, the lawyer must proceed as if the other lawyer’s representation is continuing.”).

Cf. Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Opinion 96-160 (October 29, 1996)(Lawyer representing potential defendant in a defamatory action may permit client to meet alone with potential plaintiff even though the potential plaintiff is represented by counsel, and potential defendant may bring settlement check to meeting.); Oregon State Bar Legal Ethics Committee, Opinion 1997-147 (February 1997)(Attorney may allow client to meet with opposing party without counsel but may not use client to relay information to opposing party.); Bar Association of San Francisco, Legal Ethics Committee, Opinion 1985-1 (Lawyer should not discourage client from negotiating directly with opposing party even though represented by counsel, but inappropriate to use client as indirect means to communicate with opposing party.).

Model Code EC 9-2: A “lawyer should fully and promptly inform his client of material developments in the matters handled for the client.”

See Rule 1.03.

Scott S. Dahl, Ethics on the Table: Stretching the Truth in Negotiations, 8 Rev. Litig. 173 (Spring, 1989).