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# Ethical Issues in Drafting Corporate Agreements

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# Honesty/Ethics in Professions

## 2022 GALLUP Poll

Question: Please tell me how you would rate the honesty and ethical standards of people in these different fields – Very High, High, Average, Low or Very Low?

% who responded Very High or High for:

≥75	Nurses
≥50	Medical doctors, High school teachers, Pharmacists, Police officers
≥25	Judges, Clergy, Accountants, Bankers
<b>21</b>	<b>Lawyers</b>
≤20	Business executives, Advertising practitioners, Car salespeople, Members of Congress, Telemarketers

<https://news.gallup.com/poll/467804/.aspx>



# ABA Model Rules of Professional Conduct

## Preamble

“As negotiator, a lawyer seeks a result advantageous to the client but consistent with the requirements of honest dealings with others...A lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious...In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities **to clients, to the legal system and to the lawyer’s own interest** in remaining an ethical person while earning a satisfactory living.”



# Ethical Issues in Drafting Corporate Agreements - Outline

- A. Who is the Client?
- B. Advocacy vs. Fairness
- C. Communicating with Represented Parties
- D. Metadata
- E. Alternative Fee Arrangements

## A. Who is the Client?

### Interrelated Parties in a Transactional Setting

- Whether in-house or outside counsel, a lawyer in a transactional matter should understand exactly, and be clear about, **who he or she is representing**.
- This is particularly important in deals involving related parties, such as:
  - A parent and a subsidiary entity
  - A corporation and its founder
  - A partnership and its partners
- Comment 34 to Model Rule 1.7:
  - “A lawyer who represents a corporation or other organization **does not**, by virtue of that representation, **necessarily represent any constituent or affiliated organization**, such as a parent or subsidiary.”

## A. Who is the Client?

### Interrelated Parties in a Transactional Setting

- There should **be documentation** identifying the client.
- If appropriate, the documentation would also explicitly identify **who is not the client**.
  - Engagement Letter, both as to client and matter
  - In-house lawyers face greater risk of creating unintentional lawyer-client relationships
- Pay attention to who pays legal fees.



## A. Who is the Client?

### Interrelated Parties in a Transactional Setting

- The lawyer should ensure that non-client parties fully understand who she represents as well.
- Comment 10 to Model Rule 1.13:
  - “There are times when the organization’s interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, **and that such person may wish to obtain independent representation.**”



## A. Who is the Client?

### Interrelated Parties in a Transactional Setting

- Representing multiple parties in a transaction can create efficiencies and decrease costs.
  - A lawyer representing an organizational client may be asked to also represent one or more constituents of the organization, such as a director or officer.
  - A lawyer representing one potential investor in a start-up company may be asked to represent other similarly situated investors as well.
- But doing so is subject to conflict of interest rules.

## A. Who is the Client?

### Interrelated Parties in a Transactional Setting

- Model Rule 1.7(a):
  - A lawyer cannot represent a client if the representation of such client would “**be directly adverse to another client**” or if “there is a significant risk that the representation of one . . . client[] [would] be materially limited by the lawyer’s responsibilities to another client...”
- Model Rule 1.7(b):
  - Accordingly, a lawyer can represent multiple parties to a transaction only if (1) the lawyer reasonably believes that she “will be able to provide **competent and diligent representation**” to each client and (2) “**each affected client gives informed consent, confirmed in writing.**”
- Comment 28 to Model Rule 1.7(a):
  - In a negotiation, “common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them.”



## A. Who is the Client?

### Interrelated Parties in a Transactional Setting

- As such, a lawyer must fully understand the interests and goals of each party when determining whether she can represent both of them in a transaction.
- The lawyer must also fully explain the effects of joint representation to each prospective client before they may consent thereto.
- Furthermore, the lawyer must be alert as the transaction progresses to make sure the clients' interests do not diverge at a later time.



## A. Who is the Client?

### Interrelated Parties in a Transactional Setting

#### In-house Joint Representation of Parent and Subsidiary

- An in-house lawyer may be asked to represent a subsidiary company.
- While she may jointly represent the parent and the subsidiary on matters of mutual interest, outside counsel should be retained for the subsidiary if the interests of the two companies diverge.
- If joint representation is undertaken, even while interests align, consider documenting the nature and scope of the representation.

## A. Who is the Client?

### When an Organization Is the Client

- Model Rule 1.13(a):
  - “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”
- A lawyer’s duty is to act in the **best interests of the organization** at all times.
  - Personal dealings with constituents of the organization (officers, directors or other employees) do not lessen the lawyer’s responsibilities to the organization and the lawyer may not let such dealings hinder the performance of her responsibilities. *Restatement (Third) of the Law Governing Lawyers* (2000), §96 cmt. b.
- If instructions from two or more constituents differ, the lawyer should consult with **a higher authority** in the organization as to what is the correct protocol to follow.



## A. Who is the Client?

### When an Organization Is the Client

- If it appears at any point during the representation that the organization's interests may differ from those of the constituents with whom the lawyer is dealing (e.g., the founder, the chief executive officer or the general counsel), then the lawyer should **reiterate that she represents the organization** and not the individual constituents.
- Comment 10 to Model Rule 1.13:
  - “There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation.”

## A. Who is the Client?

### When an Organization Is the Client

- As part of the duty to represent an organizational client, a lawyer has an obligation to take steps to prevent reasonably foreseeable harm to the organization.
- Model Rule 1.13(b):
  - If a lawyer for an organization learns that an officer, employee or other person is acting in a way that (i) violates a legal obligation to the organization and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interests of the organization.
- Comments 4 and 5 to Model Rule 1.13(b):
  - Includes steps such as asking for reconsideration or, depending on the seriousness of the matter, **referring the matter to a higher authority**, including the board of directors.

# Fraudulent Misrepresentations

## Empirical Studies by Art Hinshaw and Others

- The results of certain empirical studies indicate that approximately one-quarter of attorney respondents were unable to correctly identify the proper ethical response in four run-of-the-mill negotiation situations.
- **Conclusion:** Following the rules is the norm, but a significant number of practicing lawyers fail to apply negotiation ethics standards in typical negotiation contexts.
- Three major contributing factors: (i) too many lawyers **have only a superficial understanding of rules** that are more complicated than they appear; (ii) lawyers frequently take their “**zealous advocate**” role too far, thereby placing client loyalty above other important values such as respect for truth and justice; and (iii) the practice of law and the people who are drawn to it **are highly competitive**.


Art Hinshaw, Peter Reilly and Andrea Kupfer Schneider,  
*Attorneys and Negotiation Ethics: A Material Misunderstanding?*

# Fraudulent Misrepresentations

## Empirical Studies by Art Hinshaw and Others

- “[I]n actual practice adherence to ethical rules tends to decrease.”
  - The surveys do not replicate typical pressures that are present in the practice of law. No clients were complaining or exerting other pressures, and advancement potential and other business considerations were absent in the surveys.
  - “Particularly in harder economic times when they fear losing clients, lawyers may be more willing to lie on a client’s behalf than they would on their own... Studies have shown that threat perception increases the likelihood of deceptive behavior..”
  - “One scholar has even suggested that dishonesty is so prevalent among attorneys in negotiation that all attorneys owe it to their clients to assume that the other party’s attorney will not be truthful in a negotiation.”

Art Hinshaw, Peter Reilly and Andrea Kupfer Schneider,  
*Attorneys and Negotiation Ethics: A Material Misunderstanding?*



## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

- Negotiators must seek advantageous results for the client while engaging in honest dealings with others.
- Model Rule 4.1(a):
  - “In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.”
- This seemingly simple rule requires truthfulness in a lawyer’s statements to others.

## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

- Model Rule 4.1 has been interpreted to prohibit not only outright lying but also partial truths and omissions and perhaps literally true statements made with the intent to mislead.
- Comment 1 to Model Rule 4.1:
  - “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. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that **the lawyer knows is false**. Misrepresentations can also occur by partially true but misleading statements or omissions that are the **equivalent of affirmative false statements.**”



## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

#### Elements of Model Rule 4.1(a)

- Knowingly
  - Model Rule 1.0(f):
    - “‘Knowingly,’ ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.”

## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

#### Elements of Model Rule 4.1(a)

- “Material” and “Statement of Fact”
  - The concept of “material facts” under the rule is the key, because only **material facts** fall under the requirement of truthfulness.
    - Whether a fact is “material” is sometimes a difficult issue, but consider whether the “existence or nonexistence” is “essential” to the matter at hand, or whether an average, prudent person would consider the **fact important in making a decision.**
  - However, certain matters that are crucial to the negotiation are specifically identified as not being “material facts.” Examples include:
    - Price or value of the thing being negotiated,
    - Intentions to settle at a particular point, and
    - In some cases, the existence of an undisclosed principal.

## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

#### Elements of Model Rule 4.1(a)

- In carving out these important topics from the definition, the Model Rule defers to commonly accepted negotiation customs.
- Comment 2 to Model Rule 4.1(a):
  - “Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of **price or value** placed on the subject of a transaction and a party’s intentions as to an **acceptable settlement** of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.”
- The exceptions related to price and a party’s intention seem to cover a substantial number of statements tactically made during negotiations, as generally both sides of a negotiation **would recognize that such statements do not constitute factual statements.**



## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

#### Elements of Model Rule 4.1(a)

- Note also that the language of Comment 2 to Model Rule 4.1 uses “generally accepted” and “ordinarily” (twice). These words seem to allow for **an assertion to be made that a particular statement in a particular negotiation does not fall within the exception.**
- Model Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false. It does not cover false statements that are made unknowingly, that concern immaterial matters or that relate to neither fact nor law.



## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

*Restatement (Third) of the Law Governing Lawyers (2000), §98 and cmt. c.:*

- A lawyer must not knowingly make a false statement of material fact or law to a non-client.
- However, certain statements, such as those relating to price or value, are considered non-actionable hyperbole and not misstatements of fact or law. In other words, those statements are “mere puffing,” a kind of exaggerated sales talk that is allowed.



## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

- **Lying v. Puffery**
  - Fundamental understanding that lawyers often employ some deceptive tactics.
  - Negotiations involve a certain amount of “puffing” and embellishment that is expected, as participants attempt to obtain the terms their client’s desire.
    - Consider the comparative sophistication of the parties (including counsel), since sophisticated parties will likely find it harder to assert that they were misled by a statement.
  - Puffery, in this context, means exaggerating or overemphasizing certain facts in an attempt to gain a bargaining advantage.

## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

- Lying v. Puffery

- Examples include:
  - Indicating unwillingness to bargain (e.g., “My client will not accept less than \$125 million under any circumstances.”);
  - Playing up the interest of other potential bidders (e.g., “You are not the only one interested in this deal.”); and
  - Other statements about the negotiating position or process (e.g., “This is our bottom line,” or “You have one week to consider.”)
- Both **the context** in which the statement is made and how the statement is made determine whether it constitutes an impermissible misrepresentation or mere puffery.
- While **puffery is not actionable** under the Rules, **objectively untrue statements are**.

## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

- Example – Guess whether the following statement was found to be actionable:

A lawyer represented the Dufts, who were selling their interest in a piece of land **to an unsophisticated party**. Without disclosing (a) that the land was actually owned by a joint venture, requiring member consent for a conveyance of interest or (b) that there were construction liens and unpaid taxes on the property, the attorney told the proposed buyers, among other things:

“[The property] is a lot of property for the money.”

## *Live Content Slide*

*When playing as a slideshow, this slide will display live content*

# **Poll: 1. Were the Statements and Actions by the Attorney:**

## B. Advocacy vs. Fairness


### Duty of Candor to Third Parties

- Example – Guess whether the following statement was found to be actionable:

A lawyer represented the Dufts, who were selling their interest in a piece of land **to an unsophisticated party**. Without disclosing (a) that the land was actually owned by a joint venture, requiring member consent for a conveyance of interest or (b) that there were construction liens and unpaid taxes on the property, the attorney told the proposed buyers, among other things:

“**[The property] is a lot of property for the money.**”


**Actionable!** The attorney claimed that the statement was not actionable fraud, because it was a mere opinion of value. But, statements of opinion regarding quality, value or the like may be considered misrepresentations of fact where the parties are not on equal footing and do not have equal knowledge or means of knowledge. *Jeska v. Mulhall*, 71 Or. App. 819 (1985).



## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

- Omissions and Half-Truths
  - Misrepresentation by omission is also prohibited under Model Rule 4.1.
  - A lawyer generally has no affirmative duty to inform opposing counsel of relevant facts, unless she has caused a misunderstanding.
  - A lawyer making and failing to correct a statement that, while true when made, subsequently becomes untrue, may violate Model Rule 4.1 by making an omission that is the equivalent of a false statement.



## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

- Examples continued...

A lawyer negotiated a deal on behalf of her client, leaving the opposing side to memorialize the agreement in a final draft. When she reviewed the final draft, she noticed that an agreed-upon provision that disfavored her client was missing. Rather than pointing out the error, she allowed the transaction to close.

## *Live Content Slide*

*When playing as a slideshow, this slide will display live content*

**Poll: 2. Were the Actions by the Attorney:**

## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

- Examples continued...

A lawyer negotiated a deal on behalf of her client, leaving the opposing side to memorialize the agreement in a final draft. When she reviewed the final draft, she noticed that a key agreed-upon provision that disfavored her client was missing. Rather than pointing out the error, she allowed the transaction to close.

**Actionable!:** The ABA Ethics Committee has opined that under Model Rule 4.1 (b) (and probably also Model Rule 8.4), the lawyer should point out the error to the other side and would not breach her duty to her client by not consulting with the client first. *ABA Informal Op. 86-1518*.

By contrast, in another case, a lawyer was not held to have a duty to the other party to assure that written documentation accurately reflects oral agreements. In this case, however, the lawyer had no knowledge of an omitted provision, a key requirement for a Model Rule 4.1 violation. *Fox v. Pollack*, 181 Cal. App.3d 954 (1986).



## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

“[Negotiations are] a dance of nuance and strategy, of cajolery and intimidation, of exaggeration and minimization. The problem is locating the demarcation between acceptable advocacy—a tolerable adversarial, hyperbolic presentation of inferences, implications and conclusions about symptoms, causes and effects—and unacceptable fraud by outright lying.” *State v. Marks*, 758 So. 2d 1131 (Fla. Dist. Ct. App. 2000).

## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

- **Crime or Fraud by Client**

- Model Rule 4.1(b):

- “In the course of representing a client a lawyer shall not knowingly...fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”

- Comment 3 to Model Rule 4.1:

- “...Ordinarily, a lawyer can avoid assisting a client’s crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client’s crime or fraud.”

## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

- **Crime or Fraud by Client**

- Model Rule 1.6(a):

- “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [Rule 1.6(b)].”

- Model Rule 1.6(b):

- “A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- 1) to prevent reasonably certain death or substantial bodily harm;
      - 2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;
      - 3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result in or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s service...”



## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

#### **Beware: California does not follow the Model Rules**

- California imposes a fiduciary duty on lawyers to maintain confidentiality by statute.
- Section 6068 of the California Business and Professions Code requires the lawyer “to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”
- The duty of confidentiality encompasses all information relating to the representation, and can include information learned from sources other than the client.

## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

- California Rules of Professional Conduct Rule 1.6(a)(*Previously Rule 3-100(A)*):
  - “A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) **unless the client gives informed consent**, or the disclosure is permitted by paragraph (b) of this rule.”
- Comment 1 to CRPC Rule 1.6 (*Previously Rule 3-100*):
  - “Paragraph (a) relates to a lawyer's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a lawyer: ‘To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.’”

## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

- CRPC Rule 1.6(b) (*Previously Rule 3-100(B)*):


“A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) to the extent that the lawyer reasonably believes the disclosure is necessary to prevent a criminal act that the **lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.**”

- Comment 3 to CRPC Rule 1.6 (*Previously Rule 3-100*):

“Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures... Paragraph (b)...narrowly permits a lawyer to disclose information...even without client consent.”

- Comment 4 to CRPC Rule 1.6 (*Previously Rule 3-100*):

“Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a lawyer reasonably believes is likely to result in death or substantial bodily harm to an individual.”



## B. Advocacy vs. Fairness

### Duty of Candor to Third Parties

- Comment 6 to CRPC Rule 1.6 (Previously Rule 3-100):

“Disclosure permitted under paragraph (b) is **ordinarily a last resort**, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing information...as permitted by paragraph (b), the lawyer must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm.”

## C. Communicating with Represented Parties

### The “No-Contact Rule”

- Model Rule 4.2:

“In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

- Comment 3 to Model Rule 4.2:

“The Rule applies even though the **represented person initiates or consents to the communication**. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.”

## C. Communicating with Represented Parties

### The “No-Contact Rule”

- Comment 7 to Model Rule 4.2:

“In the case of a represented organization, **this Rule prohibits communications with a constituent of the organization** who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or **whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability**. Consent of the organization’s lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.”

## C. Communicating with Represented Parties

### The “No-Contact Rule”

- Each state has adopted a rule of professional conduct that relates to and governs communications with represented persons.
- Regarding communications with represented organizations, statutes vary and can prohibit communications:
  - only with high-level employees who can bind the organization in the matter on which the organization is represented;
  - with managerial employees;
  - with any person whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability; or
  - with an employee whose statement may constitute an admission on the part of the organization.

## C. Communicating with Represented Parties

### Client Communication with Other Parties

- The ABA Ethics Committee has acknowledged that **parties to a matter retain the right to communicate directly with each other**, even if they are represented by counsel.
- However, Comment 4 to Model Rule 4.2 makes clear that a lawyer may not make a communication prohibited by the Rule through the acts of another, and Model Rule 8.4 prohibits a lawyer from using the client to contact a represented party when doing so herself would constitute a violation of Model Rule 4.2.
- In other words, it is professional misconduct for a lawyer to seek to **circumvent prohibitions** in the Model Rules through the actions of another person (i.e., her client).

## C. Communicating with Represented Parties

### Client Communication with Other Parties

- The ABA Ethics Committee has determined that lawyers can help clients achieve their own goals by talking to the other side and that lawyers may even suggest this approach.
- “Parties to a legal matter have the right to communicate directly with each other. A lawyer may advise a client of that right and may assist the client regarding the substance of any proposed communication. The lawyer’s assistance need not be prompted by a request from the client. Such assistance may not, however, result in overreaching by the lawyer.” *ABA Formal Op. 11-461*.
- A lawyer may even advise the client on what to say, draft talking points or edit documents. *Id.*



## C. Communicating with Represented Parties

### Client Communication with Other Parties

- So where is the line between permissible advice and impermissible assistance?
  - Drafting a document for a client to give to a represented party?
  - Editing a document a client has drafted?
  - Suggesting that your client speak to a represented opposing client?
  - Scripting a conversation for a client?

## C. Communicating with Represented Parties In-House Counsel

- The ABA has stated that:
  - Model Rule 4.2 “generally **does not prohibit** a lawyer who represents a client in a matter involving an organization from communicating with the organization’s inside counsel about the subject of the representation without obtaining the prior consent of the entity’s outside counsel.” *ABA Formal Op. 06-443*.
- Reasoning behind the ABA opinion:
  - “The protections provided by [Model] Rule 4.2 are not needed when the constituent of an organization is a lawyer employee of that organization who is acting as a lawyer for that organization. When communications are lawyer-to-lawyer, it is not likely that the inside counsel would inadvertently make harmful disclosures.” *Id.*
- This exception may not be absolute in a negotiations setting.



## D. Metadata

### What is metadata?

- Metadata is non-visible data, created by the author, stored within an electronic document.
  - Examples include the track changes and comments features of Microsoft Word.
- Attorneys and others sometimes inadvertently or unknowingly send metadata behind an electronic document to another attorney.

## D. Metadata

### Model Rules that Apply

- **First Issue:** A transactional attorney should ensure that metadata is not sent to an opposing party.
  - If an attorney fails to erase metadata before sending, she may violate her ethical duty to preserve the confidentiality of information relating to the representation of her client. See Model Rule 1.6.
  - The sending attorney may also violate the duty of competent representation. See Model Rule 1.1.
- **Second Issue:** What should a transactional attorney do if she inadvertently receives metadata from the opposing party? Competing Considerations:
  - Attorney's duty to respect the rights of third parties and not to engage in dishonest conduct. See Model Rules 4.4 & 8.4(c).
  - Attorneys must act with reasonable diligence and represent their clients with zeal in advocacy upon the client's behalf. See Model Rule 1.3 cmt. 1.

## D. Metadata

### Diverging Opinions Regarding Mining

- The ABA and certain jurisdictions have issued formal ethics opinions regarding metadata and the conclusions of such opinions have differed.

\*<https://www.law360.com/articles/879721/mind-your-metadata-ethics-rules-on-hidden-data>

- The ABA has stated that mining for metadata is ethically permissible. *ABA Formal Op. 06-442*.
  - Model Rule 4.4(b) requires a receiving lawyer who knows or should know that the metadata transmission was inadvertently sent to promptly **notify the sender**.
  - Model Rule 4.4(b) does not, however, require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer.



## D. Metadata

### New York Rules

- The New York State Bar Association's Committee on Professional Ethics has stated that:
  - regarding the sending of metadata, “[l]awyers have a duty under DR 4-101 to use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets”; and
  - regarding mining for metadata, “in light of the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship, use of technology to surreptitiously obtain information that may be protected by the attorney-client privilege, the work product doctrine or that may otherwise constitute a ‘secret’ of another lawyer's client would violate the letter and spirit of these Disciplinary Rules.”



## D. Metadata

### New York Rules

- The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics has stated, regarding a recipient of metadata notifying a sender, “it is essential as an ethical matter that a receiving attorney promptly notify the sending attorney of an inadvertent disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary to prevent any further disclosure.”



## D. Metadata

### Texas Rules

- The State Bar of Texas Committee on Professional Ethics has issued an opinion (Opinion 665):
  - Regarding the sending of metadata: “Lawyers...have a duty to take **reasonable measures** to avoid the transmission of confidential information embedded in electronic documents, including the employment of reasonably available technical means to remove such metadata before sending such documents to persons to whom such confidential information is not to be revealed pursuant to the provisions of Rule 1.05.”
  - Regarding mining for metadata: “**There is no specific provision** in the Texas Disciplinary Rules **requiring a lawyer to take or refrain from taking any particular action in such a situation.**”



## D. Metadata

### Texas Rules

- Regarding mining for metadata, the State Bar of Texas Committee on Professional Ethics has also stated that:
  - “[A]lthough the Texas Disciplinary Rules do not prohibit a lawyer from searching for, extracting, or using metadata and do not require a lawyer to notify any person concerning metadata obtained from a document received, a lawyer who has reviewed metadata must not, through action or inaction, convey to any person or adjudicative body information that is misleading or false because the information conveyed does not take into account what the lawyer has learned from such metadata.”
  - “For example, a Texas lawyer, in responding to a question, is not permitted to give an answer that would be truthful in the absence of metadata reviewed by the lawyer but that would be false or misleading when the lawyer’s knowledge gained from the metadata is also considered.”

## D. Metadata

### Brief Comparison Chart of Certain Jurisdictions

Jurisdiction / Source	What is the Sender's Duty When Transmitting Metadata?	May the Recipient Review or "Mine" Metadata?	Must the Recipient Notify Sender if Metadata is Found?
ABA	None	Yes	Yes
Arizona	Reasonable Care	No	Yes
Florida	Reasonable Care	No	Yes
Maryland	Reasonable Care	Yes	No
Minnesota	Reasonable Care	Fact Specific	Yes
New York	Reasonable Care	No	Yes
Oregon	Reasonable Care	Yes	No
Washington, D.C.	Reasonable Care	No	Yes
Wisconsin	Reasonable Care	Yes	Yes

- American Bar Association

## D. Metadata

### Other Digital Pitfalls – Bcc'ing Clients & Autofill

- New York, North Carolina and Alaska State Bars have addressed blind copying or “bcc'ing” clients in emails to opposing counsel or third parties as a way of keeping clients in the loop.
  - Not deceptive for a lawyer to bcc her own client.
  - Could put the attorney-client privilege at risk if client inadvertently replies to all with a message to discuss strategy, the client's views, or other privileged information.
- *Charm v Kohn* (Mass. Super. Ct. Sept. 30, 2010) – Massachusetts court found that blind copying gave rise to a foreseeable risk that the client would reply to all recipients.
- Best Practice: Send the email to opposing counsel first and then forward it, separately, to the client.
- Beware of “autofill” in Outlook: Always double check recipients of emails to avoid sending privileged information to unintended recipients.



## E. Alternative Fee Arrangements

### The Client's Business Case

- Companies are changing the way they buy legal services.
- Alternative fee arrangements are seen as an effective way to manage legal costs.
- Clients want alternative fee arrangements because of:
  - Lower costs – reduce inefficiencies and increase productivity
  - Greater predictability – all or some fee risk transferred to the law firm
  - Competition – easier to compare law firms
  - Alignment of legal costs to realized benefit – focus on results and outcomes that add value for the client



## E. Alternative Fee Arrangements

### The Firm's Business Case

- Can be highly profitable – may lead to higher profit margins from increased efficiency and compensation for taking fee risk (i.e., the firm can make more money on lower revenues)
- Can be a competitive advantage – the firm can tangibly show its cost advantage
- Can improve collectability – alternative fees may be more likely to be fully collected because they are negotiated up-front
- Can be mutually beneficial – leading to stronger relationships



## E. Alternative Fee Arrangements

### Different Types of Fee Arrangements

#### **Hourly Based**

- Capped Fees
- Budgets
- Firm Estimates
- Unbundled Fees
- Blended Rates
- Partner-Based Rate Structures
- Phased Billing

#### **Flat Fee**

- Retainer Arrangements
- Task-Based Flat Fees
- Percentage Fees



## E. Alternative Fee Arrangements

### Different Types of Fee Arrangements

#### **Contingency Fee**

- Incentive and Value Billing
- Incentive Billing
- Value Billing
- Result-Based Billing
- Investment in Client

Frequently, contingency fees in M&A transactions are tied to the success of a deal, or sometimes, the defeat of an unwanted takeover. *ABA Formal Op. 94-389*.



## E. Alternative Fee Arrangements

### Ethical Issues

- Fee agreements may raise ethical issues if structured in a manner that **inappropriately incentivizes lawyers to waste time, cut corners or tailor their legal advice to protect their own interests.**
- There are certain Model Rules and other state ethical rules that address some of these ethical issues.
- The Model Rules do not necessarily address every potential fee arrangement that may be created, but they provide a series of boundaries and guidelines that a lawyer should examine when negotiating any alternative fee arrangement (or any amendment to any agreement).
- Regardless of the alternative fee chosen, **a lawyer should document** the agreement with the client clearly and be proactive in managing alternative fee arrangements.



## E. Alternative Fee Arrangements

### Model Rules Regarding Fees

- Model Rule 1.1:

A lawyer must “provide competent representation to a client,” which in turn requires “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

- Comment 5 to Model Rule 1.1:

“Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake... An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible.”



## E. Alternative Fee Arrangements

### Model Rules Regarding Fees

- Model Rule 1.3:

A lawyer must “act with reasonable diligence and promptness in representing a client.”

- Comment 1 to Model Rule 1.3:

“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.”

- Comment 10 to Model Rule 1.7:

“[T]he lawyer's own interests should not be permitted to have an adverse effect on representation of a client.”



## E. Alternative Fee Arrangements

### Model Rules Regarding Fees

- The primary rule for attorney billing arrangements is Model Rule 1.5.
- Model Rule 1.5(a):
  - “A lawyer shall not make an agreement for, charge, or collect an **unreasonable fee** or an unreasonable amount for expenses.”
- A lawyer’s fee must be “reasonable,” and the Rule sets out factors for determining the reasonableness of fees.



## E. Alternative Fee Arrangements

### Model Rules Regarding Fees

- Factors to be considered in determining whether a given fee is “reasonable” include (without limitation):
  - time and labor required, the novelty and difficulty of the matter and the skill requisite to perform the legal service properly;
  - likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
  - fee customarily charged in the locality for similar legal services;
  - time limitations imposed by the client or the circumstances;
  - nature and length of the professional relationship with the client; and
  - whether the fee is fixed or contingent.



## E. Alternative Fee Arrangements

### Model Rules Regarding Fees

- Nothing in the Model Rules expressly prohibits a lawyer from entering into a contingent fee agreement.
- In fact, Model Rule 1.5(c) generally permits contingent fees.

“A fee may be contingent on the outcome of the matter for which the service is rendered... A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.”



## E. Alternative Fee Arrangements

### Model Rules Regarding Fees

- Comment 3 to Model Rule 1.5:

“In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee.”



## E. Alternative Fee Arrangements

### Model Rules Regarding Fees

- Comment 5 to Model Rule 1.5:

“An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount **when it is foreseeable that more extensive services probably will be required**, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction.”



## E. Alternative Fee Arrangements

### Model Rules Regarding Fees

#### Reasonableness of an Alternative Fee

- The timing of when “reasonableness” is determined may be critical.
- “[W]hen assessing the reasonableness of a contingent fee, only the circumstances reasonably ascertainable **at the time of the transaction** should be considered.” *ABA Formal Op. 00-418*.
- However, a fee agreement that is reasonable at the beginning of an engagement may become excessive due to circumstances later arising, and a lawyer may be required to reduce a fee.



## E. Alternative Fee Arrangements

### Model Rules Regarding Fees

#### Beware of Conflicts of Interest

- Because establishing alternative fee arrangements will involve negotiations with the client on how best to arrange the engagement, the Model Rules addressing business relationships with clients are relevant.
- Model Rule 1.8(a) strictly limits the circumstances in which lawyers may “enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client.”
- Any business arrangement between a lawyer and a client must objectively be “fair and reasonable” to the client after full written disclosure to the client of the terms of the transaction.



## E. Alternative Fee Arrangements

### Model Rules Regarding Fees

- Determining that the fee is reasonable under Rule 1.5(a) does not, in and of itself, resolve whether the requirement of Rule 1.8(a) that the transaction and terms be “fair and reasonable to the client” has been met.
- Comment 1 to Model Rule 1.8:

“A lawyer’s legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client...”
- Model Rule 1.8(b):

In negotiating any type of agreement with a client, “[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these [Model] Rules.”

## E. Alternative Fee Arrangements

### ABA Formal Opinion 94-389

- The ABA recognized that contingent fees employed in the mergers and acquisitions arena are often either partially or totally dependent on the consummation of a takeover or successful resistance of such a takeover.
- The ABA indicated that it is ethical to charge contingent fees in transactional matters as long as the fee is appropriate and reasonable and the client has been fully informed of the availability of other billing arrangements.
- Of course, the lawyer should not agree to the contingency fee structure if she thinks it could impair her independent judgment with respect to the matter at hand.

## E. Alternative Fee Arrangements Trends

- **71.7%:** The percentage of law firm leaders, in 2022, that believed non-hourly billing would be a permanent change in the legal industry. That is up from 28 percent who believed in 2009 but down from 81% who believed in 2015.

\* [http://www.altmanweil.com//dir\\_docs/resource/28BC6AB5-10E9-418D-AED2-B63D1145F989\\_document.pdf](http://www.altmanweil.com//dir_docs/resource/28BC6AB5-10E9-418D-AED2-B63D1145F989_document.pdf)

- **63%:** The percentage of law departments using some combination of hourly billing rates and alternative fee arrangements in 2022 (up from 42% in 2015), according to a recent survey of 1,275 chief legal officers by the Association of Corporate Counsel.

\*<http://m.acc.com/vl/public/Surveys/loader.cfm?csModule=security/getfile&pageid=1476738&page=/legalresources/resource.cfm&qstring=show=1476738&fromLibrary=1&title=ACC%20Chief%20Legal%20Officers%202018%20Survey%20%20Executive%20Summary&recorded=1>

## E. Alternative Fee Arrangements

### Some Alternatives!

- M&A hourly fees might escalate up. There could be a larger discount until a letter of intent is executed, a modest discount until a definitive agreement is executed and a premium or top-up if the transaction closes.
- M&A transactions could also be divided into different phases, each with its own fixed fee. For example, a flat fee for due diligence, another flat fee for negotiating a letter of intent, etc.
- Under a “collar” arrangement, the firm submits to the client a budget for the M&A transaction. The firm retains a portion of the projected fees as a bonus if it comes in under budget, but is also responsible for a portion of overages. There may be a safety valve built in on overages.

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