



# Presenters

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# How “Ethics” Can Clash With Advocacy

- As an attorney, you have two primary obligations:
  1. To your client: Be a “zealous” advocate for your client to achieve the best results.
  2. To the courts and to Opposing Counsel: To be honest and upright, and to comply with the law and with the rules of professional conduct.





# Dondi Properties Corp. v. Commerce Sav. and Loan Ass'n

- “A lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.”
- “Lawyers should treat each other, the opposing party, the court, and members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.”

## Rule of Thumb: If you have to ask...

- Why skate so close to the edge? You don't want to “win” a state bar complaint or a lawsuit against you.
- Your reputation matters, in court, and in your community.
- Word gets around, even in large communities—thanks to listservs, review sites (such as Avvo), and social media.

# Primary Sources of Ethical Rules

- The ABA Model Rules of Professional Conduct, which have been adopted by nearly all states.
- In Texas—Texas Disciplinary Rules of Professional Conduct, (amended September 1, 2021 to conform to ABA Rules).
- State law and local court rules, (generally beyond scope of this presentation).
- Your conscience.

# Rule Number One: No Lying Allowed

ABA 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.

# Examples of prohibited lies during negotiation (no close calls here):

- My client underwent surgery yesterday for a rotator cuff repair, (if she didn't).
- My client paid \$10,0000 to plaintiff for the materials, (if he didn't).
- The statute of limitations for breach of an oral contract in this state is three years, (if it isn't).
- My client will simply file for bankruptcy if she loses at trial, (if you know she wouldn't qualify for bankruptcy protection).

# TX DRPC Equivalent to ABA Rule 4.1

## Rule. 4.01, Comm. 1. False Statements of Fact

- Depends on the circumstances. For example:
  - Statements of opinion or conjecture
    - Estimates of price or value
  - Parties intentions as to settlement—simply negotiating positions
  - Transactions being undertaken on behalf of undisclosed principal
- Violations only if know they are false and intend to mislead.

# What about “puffing” or exaggerating?

“This car is in perfect condition—like new!”



## (ABA Rule 4.1, Comm.2)

“Generally accepted conventions in negotiating” are ethical.

Estimates of price or value

- “The business is worth at least \$100,000.”

Party’s intentions as to the litigation

- “If we don’t get \$100,000 I will go to trial without further negotiation.”

Party’s intentions as to settlement

- “I won’t take less than \$100,000.”

Party’s intentions as to the negotiation process

- “If we don’t get an offer of \$100,000 by noon, this mediation is over and we’re out of here.”



## It Is Not Against Ethical Rules If...

1. You know what you are saying is a lie;
2. They know what you are saying is a lie;  
and
3. You know they know what you are saying is a lie.

BUT WHY BE THAT LAWYER?

# Penalty for violating Rule 4.1

- Private reprimand
  - Public reprimand
  - Suspension
  - Disbarment
  - Sanctions
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- <https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemswithanAttorney/GrievanceEthicsInfo1/MisconductPunishment.htm>

# TX DRPC 4.01: Truthfulness in Statement to Others

- “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.”
- What’s a third person in this context?

# Person Defined Per Texas Government Code

- “Person” includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. TEX. GOV'T CODE ANN. § 311.005(2)

# Being truthful: Not just a moral issue

- *Fire Insurance Exchange v. Bell*, 643 N.E.2d 310 (Ind. 1994)
- During negotiations, lawyer represents that policy limits are \$100K. Plaintiff accepts settlement in that amount, then learns the limits were actually \$300K.
- Plaintiff sues for fraud and wins.
- Appellate court: Plaintiff entitled to rely on opposing counsel's material misrepresentations during negotiations.
- The evidence must show that he had knowledge of the object and purpose of the conspiracy; that there was an understanding or
- *Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ)

Or...

- *Slotkin v. Citizens Casualty of New York*, 614 F.2d 301 (2d Cir. 1980, cert. denied)
- Defense counsel recklessly asserts there is only \$200K in coverage. Plaintiffs sue for fraud when they find out it was really \$1 million...and win.

Okay, no affirmative misrepresentations.  
What about nondisclosure?

Generally, you have no obligation to volunteer info during negotiations.



Do I have to volunteer the following?



Client or Key Witness is moving to Taiwan and  
will not be in the country on the trial date.

- Nope, but . . .

Client has obtained an estimate showing the  
work can be done for only \$50,000

- Nope.

Next year, a newly enacted statute will cap  
damages in this case.

- Nope.

Client has found a new job so he has no future  
wage loss.

- Nope.

## Of course, there are exceptions...ABA Formal Opinion 95-397 (1995):

- Death of litigation client must be disclosed
  - Could affect damages, e.g., in personal injury cases in most states
  - You no longer represent decedent; you might represent estate or personal representative
- Must inform opposing counsel of client's death at *first communication*.

# Of course, there are exceptions...ABA Formal Opinion 95-397 (1995):

- Don't be too clever. Not okay to say:
  - "He's out of pain" or
  - "He's resting now."

# Another exception to nondisclosure: assisting fraud or crime.

- ABA Model Rule 4.1(2):
  - “Lawyer shall not fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure prevented by attorney-client communications privilege.”
- Note: “Shall not fail to disclose” means “must disclose.”

Also included in Texas DRPC 4.01 (b)



# ABA: No specific rule requiring that lawyer share settlement offers with clients.

- But it is implicit in a lawyer's obligation to keep client informed about the case (ABA Model Rule 1.4)
- And is explicitly observed in ABA Model Rule 1.4, comment 2: "...a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance..."

## Texas DRPC Rule 1.02

- “...a lawyer shall abide by a client’s decisions...whether to accept an offer of settlement of a matter, except as otherwise authorized by law.”
- Comment 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.

We suggest having clear conversation with client, explaining your strategy

## Restriction of Law Practice Rules:

- A lawyer shall not participate in offering or making: ... an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.  
(ABA Model Rule 5.6)
- A lawyer shall not participate in offering or making: ... an agreement in which restriction on the lawyer's right to practice is part of the settlement of a suit or controversy...  
(TX DRPC 5.06(b))

# Can You Take Advantage of Adversary's Error?

- Following lengthy negotiations, the parties reach a detailed agreement. Opposing counsel agrees to draft the agreement.
- A week later, opposing counsel sends you the proposed settlement, signed by her and her client.
- You review the agreement carefully. An element of the deal, unfavorable to your client, has been omitted.
- Must you call this to the attention of opposing counsel, or may you sign and return it—as is?

# Might not be a disciplinary offense...but it's close.

- Probably no rule prohibiting you from signing the agreement “as is.”
- But American Bar Association Section of Litigation: Ethical Guidelines for Settlement Negotiations, § 4.3.5: “It would be unprofessional, if not unethical, knowingly to exploit a drafting error or similar error concerning the contents of a settlement agreement.”
- Presenter’s comment: May win the battle but lose war of trust and credibility.

## What are “Standard Settlement Terms”?

- “This confirms the agreement between the parties to settle for X dollars based, with other standard settlement terms.”
- Can lead to post-settlement litigation or bad relationships between attorneys and clients.

# Better Pre-Settlement Agreement Practice

- “This confirms the agreement between the parties to settle for X dollars, with other terms such as a no rehire clause, indemnification clause, and an agreement not to release all claims to date, known or unknown.”
- “This agreement is subject to approval by the Harris County Appraisal District Board of Directors...”
- “may be withheld if property made subject of this suit sells or is offered for sale prior to Board’s approval.”
- “This agreement is also subject to Plaintiff’s timely compliance with...”



## In conclusion

- Lying is bad. Puffing is allowed.
- Only few scenarios require disclosure of information during negotiations.
- Better to have clear conversation with clients and opposing counsel.

Thank you!