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### **The Ethics of Contract Drafting**

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## ARTICLES

### THE ETHICS OF CONTRACT DRAFTING

by  
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*This Article provides the first comprehensive discussion of the ethical obligations and duties to non-clients of lawyers drafting contracts. It discusses fraudulent representations and warranties, errors, fraud, and “conscious ambiguity” in transcription, as well as “iffy” and invalid clauses, and argues that the standard for lawyer misconduct under the disciplinary rules should be consistent with the purposes of contract law, one of which is to promote trust between contracting parties. Additionally, this Article discusses lawyer liability for negligence to non-parties in contract drafting and contends that lawyers should be liable to non-parties only when they are third-party beneficiaries to the contract between the lawyer and client for the lawyer’s services. This Article concludes by arguing for a functional set of ethical rules for lawyers drafting contracts that reflects the increasing emphasis on cooperation, rather than competition, in the contracting process.*

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## I. INTRODUCTION

What ethical obligations and duties to non-clients do lawyers have in drafting contracts? While significant scholarly attention has been given to lawyers' professional responsibilities in negotiating contracts,<sup>1</sup> especially settlement agreements,<sup>2</sup> there has been little written, either by bar associations<sup>3</sup> or scholars,<sup>4</sup> on the ethics of contract drafting. The lawyer as

<sup>1</sup> For an overview of ethical issues in the negotiation of contracts, see generally Christopher Honeyman & Andrea Kupfer Schneider, *Catching Up with the Major-General: The Need for a "Canon of Negotiation,"* 87 MARQ. L. REV. 637 (2004); and James Q. Walker, *Ethics in Business Negotiations, Conflicts of Interest, and Advance Waivers, in STAYING OUT OF TROUBLE: WHAT EVERY ATTORNEY MUST KNOW ABOUT ETHICS* 2008, 181 PLI/NY 337. For discussion and criticism of the Model Rules of Professional Conduct regarding ethics in negotiations, see Peter R. Jarvis & Bradley F. Tellam, *A Negotiation Ethics Primer for Lawyers*, 31 GONZ. L. REV. 549, 551 (1996) (outlining five basic principles of ethics to guide lawyers during negotiations); Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 75-76, 151-81 (1993) (arguing that the duty of good faith and fair dealing dictates a duty to disclose material facts during precontractual negotiations); and Michael H. Rubin, *The Ethics of Negotiations: Are There Any?*, 56 LA. L. REV. 447, 454-56 (1995) (providing an overview of common ethical issues that arise in negotiations). See generally Douglas R. Richmond, *Lawyers' Professional Responsibilities and Liabilities in Negotiations*, 22 GEO. J. LEGAL ETHICS 249 (2009). This Article focuses exclusively on a lawyer's ethical obligations and duties to non-clients that arise when the lawyer drafts an agreement. While draft agreements are part of contract negotiation, so there is an interconnection between negotiating and drafting, this Article emphasizes written as opposed to oral communication.

<sup>2</sup> See SECTION OF LITIG., AM. BAR ASS'N, ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS (2002), available at <http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf> (outlining a set of guidelines drafted by the Litigation Section of the American Bar Association in response to concern over lawyers' roles in settlement negotiations). For criticism of these guidelines, see Brian C. Haussmann, Note, *The ABA Ethical Guidelines for Settlement Negotiations: Exceeding the Limits of the Adversarial Ethic*, 89 CORNELL L. REV. 1218, 1245-54 (2004). For further background and commentary regarding settlement negotiations, see Barry R. Temkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?*, 18 GEO. J. LEGAL ETHICS 179, 182, 213-25 (2004) (advocating for a "silent safe harbor" such that an attorney would have no obligation "absent court rule, principle of substantive law, or prior factual representation" to make any affirmative factual representations during settlement negotiations).

<sup>3</sup> The one ABA ethics opinion related to contract drafting discusses a lawyer's obligation to notify the opposing party of a scrivener's error in a contract. See ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 86-1518 (1986); but see Md.

drafter must be part advocate,<sup>5</sup> part educator,<sup>6</sup> part wordsmith,<sup>7</sup> and part scrivener.<sup>8</sup> This conflation of roles presents unique ethical challenges for the transactional lawyer. This Article seeks to fill a void in the ethics opinions and scholarly literature and offers a comprehensive examination of the ethics of contract drafting.

While the role of the lawyer has traditionally been defined as that of zealous advocate,<sup>9</sup> that role is not without limitation.<sup>10</sup> In the

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State Bar Ass'n, Comm. on Ethics, Op. 89-44 (1989) (holding no obligation to reveal the omission of a material term in a contract). *See also infra* Part II.B.1.

<sup>4</sup> At least two scholars have written on the issue. *See* Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361, 379-84 (2002) (discussing the professional discipline of lawyers who draft invalid contracts); *see generally* Christina L. Kunz, *The Ethics of Invalid and "Iffy" Contract Clauses*, 40 LOY. L.A. L. REV. 487 (2006) (discussing lawyers' ethical duties regarding the drafting of clauses that the lawyer knows are invalid, or knows could be invalid). This Article expands on the work of these authors to provide a more comprehensive understanding of lawyers' ethical obligations in drafting these and other types of contracts.

<sup>5</sup> *See* Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 153 (1999) [hereinafter Menkel-Meadow, *Non-Adversarial Lawyering*] (discussing how traditional notions of lawyers' professional obligations are premised on "particular conceptions of the lawyer's role, usually as an advocate").

<sup>6</sup> *See, e.g.*, Kimberlee K. Kovach, *The Lawyer as Teacher: The Role of Education in Lawyering*, 4 CLINICAL L. REV. 359, 360 (1998) (describing the lawyer's role, in particular as an intermediary between the legal system and client, as that of an "educator").

<sup>7</sup> *See, e.g.*, Albert M. Rosenblatt, *Lawyers as Wordsmiths*, 69 N.Y. ST. B.J., Nov. 1997, at 12, 12 ("[A] lawyer who does not use words—whether to sway juries, draft contracts, render advice, or compose briefs—is of no more use than a judge, who when asked to rule on a motion, quietly bastes a chicken or upholsters a chair.").

<sup>8</sup> *See, e.g.*, S.E.C. v. Gulf & W. Indus., Inc., 518 F. Supp. 675, 683 (D.D.C. 1981) (holding that the attorney-client privilege does not extend to a lawyer acting as a "mere scrivener," that is, a lawyer whose role during a negotiation is limited to writing notes and recording changes proposed by the various sides); Carol A. Needham, *When Is an Attorney Acting as an Attorney: The Scope of Attorney-Client Privilege as Applied in Corporate Negotiations*, 38 S. TEX. L. REV. 681, 691-92 (1997) (arguing that a lawyer is not acting as a lawyer for the purposes of privilege when he is "merely acting as a messenger" or scrivener); *but see* Steven Lubet, *There Are No Scriveners Here*, 84 IOWA L. REV. 341, 345-46 (1999) (challenging the idea that a lawyer is ever really a "mere scrivener" in the context of negotiations).

<sup>9</sup> *See* Murray L. Schwartz, *The Zeal of the Civil Advocate*, in *THE GOOD LAWYER* 150, 153 (David Luban ed., 1983) (describing the role of the zealous advocate as each party seeking to "put its best foot forward"); Robert P. Lawry, *Confidences and the Government Lawyer*, 57 N.C. L. REV. 625, 629 (1979) ("[A]t the heart of the Code of Professional Responsibility . . . the world is composed of two groups, clients and nonclients; . . . clients are to be embraced and nonclients are to be kept at arm's length.").

<sup>10</sup> Menkel-Meadow, *Non-Adversarial Lawyering*, *supra* note 5, at 153 (suggesting zealous advocacy is limited by lawyers' roles as "'officers of the court' with loyalties and allegiances to the public good, and sometimes, its agencies" and lawyers' duty "to practice justice"); *see also* Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 5-6 (1996) (critiquing the binary nature of the adversarial system).

transactional and out-of-court settlement contexts, there is no objective court or arbiter to monitor attorney behavior.<sup>11</sup> The contracting parties and, more important, their attorneys must police attorney conduct.<sup>12</sup> Even in the case of a “form” contract,<sup>13</sup> it is the attorney who is sought out by the consumer or employee trying to avoid an unfavorable contract who is most likely to discover unethical drafting. But without more clarity of lawyers’ ethical obligations in contract drafting, regulation and reporting are difficult.

Compounding this difficulty is the morass of case law defining when an attorney is liable to a non-client for negligent drafting.<sup>14</sup> Ex post,

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<sup>11</sup> See William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 372 (2001) (arguing that “[a] new model of civil litigation has emerged: a ‘transactional’ model” that has “more in common with business deals than . . . with traditional adversarial litigation, legislative activity, or executive management”). Contra Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 85 (1991) (“A major element of adversarial justice is the opportunity of both parties to present evidence and persuade a neutral, passive decision maker.”). For a general discussion of the role of the neutral decision maker in the adversarial context, see Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 942 (1996).

<sup>12</sup> Model Rule 8.3(a) states, “A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.” MODEL RULES OF PROF’L CONDUCT R. 8.3(a) (2008). For more information about the application of this rule, see generally Arthur F. Greenbaum, *The Attorney’s Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259 (2003); Nikki A. Ott & Heather F. Newton, *A Current Look at Model Rule 8.3: How Is It Used and What Are Courts Doing About It?*, 16 GEO. J. LEGAL ETHICS 747 (2003); Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-regulation*, 12 GEO. J. LEGAL ETHICS 175 (1999). For more about lawyer self-regulation in general, see Stephen M. Bainbridge & Christina J. Johnson, *Managerialism, Legal Ethics, and Sarbanes-Oxley Section 307*, 2004 MICH. ST. L. REV. 299, 311–13 (discussing attorneys’ duty under the Sarbanes-Oxley Act to report any corporate misconduct to the U.S. Securities and Exchange Commission), as well as Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1171–74 (2009).

<sup>13</sup> A “form contract,” also sometimes called a “contract of adhesion,” has been described as “a standard contract, usually in printed form, prepared by a party of superior bargaining power for adherence or rejection of the weaker party.” *Rogers v. Brown*, 986 F. Supp. 354, 359 (M.D. La. 1997) (quoting *Welch v. A.G. Edwards & Sons, Inc.*, 677 So. 2d 520, 524–25 (La. Ct. App. 1996)). For more on adhesion contracts, see generally W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 545–56 (1971) (discussing the enforceability of form contracts and contracts of adhesion). For a classic definition of a form contract, see Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983).

<sup>14</sup> See *infra* Part III. A lawyer who violates the Model Rules does not necessarily incur liability to a client or non-client for malpractice. See MODEL RULES OF PROF’L CONDUCT pmb. ¶ 20 (2008) (“Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily

ad hoc, and unclear tests<sup>15</sup> give attorneys uncertain guidance in drafting contracts and risk jeopardizing attorney loyalty to their clients.<sup>16</sup>

Attorneys should not be liable to non-clients absent fraud,<sup>17</sup> unless the non-client is a third-party beneficiary to the contract between the lawyer and his or her client for the attorney's services.<sup>18</sup> Such an approach makes the standard for third-party attorney liability and the Model Rules of Professional Conduct (Model Rules)<sup>19</sup> consistent as applied to lawyers drafting contracts.

Contract theory also illuminates lawyers' obligations in drafting contracts. Under any objective theory of contract, parties must manifest assent to the valid terms of their agreement regardless of whether there is any subjective "meeting of the minds."<sup>20</sup> Even the client who receives poor legal advice before signing a contract still assents to it. This Article does not discuss at length the lawyer's obligations to his or her own client

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warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability." A lawyer who commits malpractice, on the other hand, most likely has violated the Model Rules. *See id.* R. 1.1–1.4.

<sup>15</sup> *See, e.g.*, *Lucas v. Hamm*, 364 P.2d 685, 687 (Cal. 1961) (balancing factors, including "the policy of preventing future harm," in order to determine whether the beneficiary of a will could recover against the attorney who negligently drafted it).

<sup>16</sup> *See, e.g.*, *Favata v. Rosenberg*, 436 N.E.2d 49, 51 (Ill. App. Ct. 1982) (upholding privity requirement "because of the personal nature of the attorney-client relationship and the potential for conflicts of interest which might arise if such liability were extended to non-clients"); *Brooks v. Zebre*, 792 P.2d 196, 200 (Wyo. 1990) (stating "it is fundamental" that a lawyer cannot assume a duty to a third party in a contract without violating his primary duty to his client; that "[t]he situation emphasizes scriptural wisdom. 'No servant can serve two masters. For he will either hate the one and love the other, or he will cling to the one and despise the other.'" (quoting *Luke 16:13* (Richmond Lattimore Trans.))).

<sup>17</sup> Fraud has historically been an exception to the traditional common law requirement of privity. *See infra* note 163 and accompanying text.

<sup>18</sup> *See, e.g.*, *McIntosh County Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 547 (Minn. 2008) (permitting recovery where the third party is the "direct" and "intended" beneficiary of the attorney's legal services). *See infra* notes 178–82 and accompanying text.

<sup>19</sup> *See infra* Part II (discussing lawyers' professional obligations under the Model Rules for drafting contracts). To date, California is the only state that has not adopted professional conduct rules that mirror the ABA Model Rules of Professional Conduct. *See* Am. Bar Ass'n, *Alphabetical List of States Adopting Model Rules*, [http://www.abanet.org/cpr/mrpc/alpha\\_states.html](http://www.abanet.org/cpr/mrpc/alpha_states.html) (listing the dates of adoption of the Model Rules of Professional Conduct).

<sup>20</sup> 17 C.J.S. *Contracts* § 37 (2009) [hereinafter *Contracts*] ("A subjective meeting of the minds is not necessary for a binding, legally enforceable contract."). *But see* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 305–08 (1986) [hereinafter Barnett, *Consent Theory*] (advocating for a "consent theory" by which contracts are interpreted "with an eye towards honoring the actual intentions of the parties").

when drafting a contract<sup>21</sup> because those obligations are similar in any type of representation.<sup>22</sup> But the lawyer who engages in, counsels, or fails to disclose fraud threatens the core of any contract.<sup>23</sup> This Article seeks to define and proscribe such conduct. Conceptualizing contracting as cooperative rather than competitive is consistent with one of the purposes of contract law—to promote trust<sup>24</sup>—and offers the most promise for developing a set of functional ethical rules for lawyers in drafting contracts.

Part II of this Article looks at the application of Model Rules 1.2(d), 4.1(a) and (b), and 8.4 to attorneys drafting contracts. It considers three situations: (a) the lawyer who knowingly or recklessly drafts false representations and warranties; (b) fraud, conscious ambiguity, and errors in transcription by the lawyer or opposing lawyer; and (c) the lawyer who knowingly drafts an invalid or “iffy” contract provision.<sup>25</sup> Part III discusses the various approaches used in the case law to define a lawyer’s liability to non-parties and discusses cases that have arisen in the contract-drafting context concerning a lawyer’s liability to (a) non-parties and (b) the opposing party to the contract. Part IV offers the rationale for the ethical rules and third-party liability standard that

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<sup>21</sup> For such a discussion, see Kunz, *supra* note 4, at 493–99 (discussing the contract-drafting lawyer’s duties to his or her own client under the Model Rules).

<sup>22</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.1–1.18 (2008) (describing lawyers’ duties to their clients).

<sup>23</sup> See Randy E. Barnett, *Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud*, 15 HARV. J.L. & PUB. POL’Y 783, 801–02 (1992) [hereinafter Barnett, *Rational Bargaining*] (“Unlike the case of force or duress, a manifestation of consent that is fraudulently induced *does* reflect the knowledge of the person consenting, but the resources actually received by the defrauded transferee do not conform to the description communicated by the transferor. Due to the transferor’s failure to deliver resources conforming to the rights he communicated and conveyed by his manifestation of consent, a legal remedy is needed to close the unjust gap that has arisen between the distribution of resources and the distribution of rights.”). It is arguable that fraud can interfere with assent. See *Contracts*, *supra* note 20, § 136 (“The general rule is that a person is bound by an agreement to which he or she has assented, where this assent is uninfluenced by fraud, violence, undue influence, or the like, and he or she will not be permitted to say that he or she did not intend to agree to its terms.”); see also *id.* § 37 (“An essential prerequisite to the creation of a contract is manifestation of mutual assent which must be gathered from the words or acts of the parties . . . . The undisclosed intention is immaterial in the absence of mistake, fraud, and the like . . . .”). For the contrary view, see Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349, 1356–57 (2009) (arguing that fraud is wholly separate from contract law and that a valid contract can exist in cases of fraud or misrepresentation); Andrew Kull, *Unilateral Mistake: The Baseball Card Case*, 70 WASH. U. L.Q. 57, 69–70 (1992) (arguing that fraud and mistake do not affect the formation of contract according to the prevailing “objective” view of contract formation).

<sup>24</sup> See *infra* notes 278–80 and accompanying text.

<sup>25</sup> For the definitions of invalid and “iffy” terms, see *infra* notes 135–36 and accompanying text.

this Article prescribes, and provides recommendations for the transactional lawyer who drafts contracts.

## II. LAWYERS' PROFESSIONAL OBLIGATIONS IN DRAFTING CONTRACTS

The Model Rules place only limited restrictions on a lawyer's conduct in drafting contracts. The Model Rules bar attorneys from knowingly making material misrepresentations and from assisting clients in pursuing illegal or fraudulent conduct.<sup>26</sup> Indeed, the Model Rules are premised on an adversarial system; they presume adverse parties, zealous advocates, and a neutral tribunal.<sup>27</sup> They were never designed to guide lawyers' transactional work, including the drafting of contracts, which is often non-adversarial and cooperative.<sup>28</sup>

Nevertheless, scholars have written about lawyers' ethical obligations in non-adversarial work, including contract drafting.<sup>29</sup> From this work has

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<sup>26</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2, 4.1; Amy J. Schmitz, *Ethical Considerations in Drafting and Enforcing Consumer Arbitration Clauses*, 49 S. TEX. L. REV. 841, 870 (2008).

<sup>27</sup> See Flowers, *supra* note 11, at 951–54 (discussing the history of the Model Rules and their basis in the adversarial system); cf. Menkel-Meadow, *Non-Adversarial Lawyering*, *supra* note 5, at 155 (discussing a need for “functional ethics” that would better account for lawyers' transactional, non-adversarial work). See also *supra* notes 9–10 and accompanying text (discussing the lawyer's role as zealous advocate).

<sup>28</sup> See, e.g., Timothy L. Fort & James J. Noone, *Banded Contracts, Mediating Institutions, and Corporate Governance: A Naturalist Analysis of Contractual Theories of the Firm*, 62 LAW & CONTEMP. PROBS., Summer 1999, at 163, 208 (“Innovations in relationship management forms may better serve emerging, non-adversarial forms of cooperative linkages. Thus, contract doctrine must recognize forms of human interaction other than the adversarial, opportunistic model offered by agency contracting.” (footnote omitted)). But see Steven R. Salbu, *The Decline of Contract as a Relationship Management Form*, 47 RUTGERS L. REV. 1271, 1297–98 (1995) (“Anglo-American jurisprudence has traditionally conceived transactions as adversarial. Precontract negotiations have been cast in terms of concessions made by parties with obverse interests, engaged in a zero-sum game. The most classic of contractual relations, that between buyer and seller, is couched in an elemental antagonism, shrouded only by the thin, often transparent veil of cordiality and business etiquette. Within this construction, buyer and seller each attempt to capture as much transactional advantage as possible, which is presumed to come through sacrifice of advantage yielded by the other transactor.” (footnotes omitted)).

<sup>29</sup> See generally, e.g., DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000); see also TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 377–82 (2007) (discussing ethical issues in contract drafting); Kimberlee K. Kovach, *Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards*, 39 IDAHO L. REV. 399, 418–29 (2003) (suggesting a new code of ethics for lawyers in non-adversarial representation); Martin H. Malin, *Ethical Concerns in Drafting Employment Arbitration Agreements After Circuit City and Green Tree*, 41 BRANDEIS L.J. 779, 801–11 (2003) (discussing “ethical and moral issues” in drafting arbitration agreements); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 707 (1981); Schmitz, *supra* note 26, at 847–56 (discussing attorneys' ethical

emerged one overarching consideration regarding contract drafting: the Model Rules prohibit lawyers from engaging in fraudulent-type behavior.<sup>30</sup>

The primary rules in the “fraud camp” include Model Rules 1.2(d), 4.1(b),<sup>31</sup> and 8.4(c). Rule 1.2(d) states that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.”<sup>32</sup> Rule 4.1 states that “[i]n 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.”<sup>33</sup> Finally, Rule 8.4(c) says, “It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”<sup>34</sup>

Two questions immediately arise. First, what constitutes fraud? Rule 1.0(d) defines “fraud” or “fraudulent” as “conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.”<sup>35</sup> Comment 5 adds, “This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.”<sup>36</sup>

By contrast, in most jurisdictions, a cause of action for fraud must include reliance and injury. In this context, fraud requires that: (i) a misrepresentation was made; (ii) the misrepresentation was made with scienter (i.e., the person making the misrepresentation knew it was false or made it recklessly without sufficient knowledge as to whether it was true); (iii) the party making the misrepresentation intended for the

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obligations as both advocates and advisors); Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 207–08 (2001).

<sup>30</sup> See STARK, *supra* note 29, at 380. Professor Stark introduces the concept of intersectionality: There is a spectrum of lawyer conduct in contract drafting from ethical to unethical and the question is where on the spectrum the attorney’s conduct lies. See *id.* However, because there is this spectrum, it is often unclear whether an attorney’s conduct is proscribed.

<sup>31</sup> Model Rule 4.1(a) also limits lawyer conduct in drafting contracts. It states that “[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.” MODEL RULES OF PROF’L CONDUCT R. 4.1(a) (2008).

<sup>32</sup> *Id.* R. 1.2(d).

<sup>33</sup> *Id.* R. 4.1(b). The attorney does not have to make this disclosure when prohibited by Model Rule 1.6, which is the lawyer’s duty of confidentiality. *Id.* Rule 1.6, however, has a permissive exception “to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order.” *Id.* R. 1.6. The law in question can be Model Rule 1.2(d), which is the lawyer’s obligation not to assist the client in conduct that he knows is fraudulent. See 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 37.6 (3d ed. 2010).

<sup>34</sup> MODEL RULES OF PROF’L CONDUCT R. 8.4(c).

<sup>35</sup> *Id.* R. 1.0(d).

<sup>36</sup> *Id.* R. 1.0 cmt. 5.

other party to the contract to rely upon it; (iv) the other party justifiably relied on the misrepresentation; and (v) the counterparty suffered injury as a result of the misrepresentation.<sup>37</sup> Although reliance and injury are not required under the Model Rules for an attorney to be culpable for fraud,<sup>38</sup> when they exist, a lawyer is almost certain to face discipline.

For example, in *In re Silverman*,<sup>39</sup> the court determined that an attorney engaged in “fraud” under the disciplinary rules because he submitted a prospectus and loan application that contained “omissions and affirmative misrepresentations, intended by [the attorney] to induce favorable decisions by the various parties,” and which, in fact, induced reliance and injury.<sup>40</sup> The prospectus contained “exaggerations” of his client’s worth and “knowing misrepresentations of highly material facts.”<sup>41</sup> The court held that the attorney’s conduct was fraudulent and a clear violation of the state’s ethics code, which proscribes conduct “involving dishonesty, fraud, deceit, or misrepresentation.”<sup>42</sup>

The second question that arises regarding the “fraud rules” is what is “knowingly”? Rule 1.0(f) defines “knowingly” as “actual knowledge of the fact in question,” adding “[a] person’s knowledge may be inferred from circumstances.”<sup>43</sup> Section 98 of the *Restatement (Third) of the Law Governing Lawyers* distinguishes “knowingly” under contract or tort law from “knowingly” under professional disciplinary rules.<sup>44</sup> A lawyer can be liable to third parties for a “reckless as well as [a] knowing misrepresentation,” but “[f]or purposes of professional discipline, the lawyer codes generally incorporate the definition of misrepresentation employed in the civil law of tort damage liability . . . including the elements of falsity, scienter, and materiality.”<sup>45</sup> A lawyer who recklessly makes a false statement or advises a client to engage in fraudulent conduct is likely not liable under the disciplinary rules.<sup>46</sup> Nevertheless, a lawyer is well-advised that reckless misconduct amounting to fraud is likely actionable by third parties.<sup>47</sup>

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<sup>37</sup> See RESTATEMENT (SECOND) OF TORTS § 525 (1977); PETER A. ALCES, LAW OF FRAUDULENT TRANSACTIONS § 2:3 (2006). See also Glenn D. West & W. Benton Lewis, Jr., *Contracting to Avoid Extra-Contractual Liability—Can Your Contractual Deal Ever Really Be the “Entire” Deal?*, 64 BUS. LAW. 999, 1013 (2009).

<sup>38</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.0 cmt. 5.

<sup>39</sup> 549 A.2d 1225 (N.J. 1988).

<sup>40</sup> *Id.* at 1237.

<sup>41</sup> *Id.*

<sup>42</sup> See *id.* at 1237 n.5 (quoting N.J. RULES OF PROF’L CONDUCT R. 8.4(c) (1988)). This New Jersey rule is “nearly identical” to Model Rule 8.4(c) of the Model Rules of Professional Conduct. See *Silverman*, 549 A.2d. at 1237 n.5.

<sup>43</sup> MODEL RULES OF PROF’L CONDUCT R. 1.0(f).

<sup>44</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 cmt. c (2000).

<sup>45</sup> *Id.*

<sup>46</sup> See RONALD T. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 4.1-2 (2009).

<sup>47</sup> See *infra* Part III.

The remaining discussion in Part II of this Article examines (a) the lawyer who knowingly drafts false representations and warranties; (b) fraud, conscious ambiguity, and errors in transcription by the lawyer or the lawyer for a counterparty<sup>48</sup> to a contract; and (c) the lawyer who knowingly drafts an invalid or “iffy” contract provision.

A. *Fraudulent Representations and Warranties*

A seller of goods, real estate, or a business, for example, gives representations and warranties to the buyer in order to induce the buyer to enter into a contract for sale.<sup>49</sup> A representation “is a statement of fact . . . as of a moment in time” (i.e., when the contract is signed) that is “intended to induce reliance.”<sup>50</sup> An attorney who knowingly drafts fraudulent representations in a contract on behalf of a client assists the client in fraud and violates Model Rule 1.2(d).<sup>51</sup> Additionally, even if the agreement is not executed, by incorporating representations into the terms of an agreement on behalf of a client that the attorney, but not the other party or its agent, knows are false, the attorney violates Rules 4.1(a)<sup>52</sup> and 8.4.<sup>53</sup> The lawyer violates these rules by indirectly

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<sup>48</sup> This Article uses “counterparty” to refer to a non-client party to the contract the lawyer is drafting. Of course, there can be more than one counterparty to a contract.

<sup>49</sup> See STARK, *supra* note 29, at 12.

<sup>50</sup> *Id.* By contrast, Professor Stark believes that a warranty is a promise that a statement of fact is true or will be true in the future. See *id.* at 13. For example, “the cup does not leak” is a representation, whereas “the cup will not leak” is a warranty. There is disagreement, however, whether the terms “warranty” and “representation” mean different things. Compare Kenneth A. Adams, *A Lesson in Drafting Contracts: What’s Up with “Representations and Warranties,”* BUS. L. TODAY, Nov./Dec. 2005, at 32, 33–35 (suggesting that the terms “representations” and “warranties” both “flag an assertion of fact, but . . . don’t affect the meaning of that assertion”), with Tina L. Stark, *Another View on Reps and Warranties,* BUS. L. TODAY, Jan./Feb. 2006, at 8, 8–9 (arguing that whether a statement is a representation or warranty affects the remedies available to a plaintiff if the assertion is false). A misrepresentation can give rise to a tort claim for fraudulent misrepresentation, whereas breach of warranty is a contract action. See *id.* at 9. In at least some states, a fraudulent warranty is not actionable. See West & Lewis, *supra* note 37, at 1014. In their article on extra-contractual reliance, Glenn West and Benton Lewis contend that whether statements are labeled “representations” or “representations and warranties,” they should not give rise to fraud claims when negotiated between sophisticated parties because they are risk-allocation devices subject to the agreed contractual remedies. See *id.* at 1033–35. Yet, West and Lewis also note that many courts distinguish between contract-based warranty claims and tort-based fraud claims, and fraud does vitiate a contract in certain cases. See *id.* at 1008–11.

<sup>51</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2008).

<sup>52</sup> See *id.* R. 4.1 cmt. 1 (“A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.”).

<sup>53</sup> It would seem that these ethical provisions do not prohibit lawyers from using negotiated representations and warranties to allocate risk because that conduct is not deceitful. See Myer O. Sigal, Jr. & Susan M. Freeman, *Ethical Considerations in Commercial Transactions,* in EQUIPMENT LEASING AND PROJECT FINANCE C749 ALI-ABA

representing that the statements are true. A lawyer also cannot directly represent to a third party that representations in the draft of an agreement are true, knowing that they are false.<sup>54</sup>

What if representations are true when the contract is executed, but circumstances change that make them false before they are certified as true at closing? Consider the following example.<sup>55</sup> A lawyer assists a client in the sale of a bookstore. The representations and warranties regarding the financials of the client's bookstore were truthful when the seller and buyer executed the contract. After execution of the contract, but prior to closing, the client informs the lawyer that the most recent financials for the bookstore show a significant downturn in sales from the information that had been provided to the buyer. The client can no longer truthfully certify that the representations and warranties are correct at the time of closing but the client wants to do so anyway.

If the lawyer continues to represent the client with regard to the sale, the lawyer must either counsel the client to disclose the changed financials (and not to certify the representations and warranties as accurate), or disclose the changed financials himself. For the lawyer to fail to do so violates Model Rule 4.1(b).<sup>56</sup> The attorney would not have to make this disclosure if prohibited by Rule 1.6, the lawyer's duty of confidentiality to the client.<sup>57</sup> But Rule 1.6 has a permissive exception "to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order."<sup>58</sup> The law in question is Rule 1.2(d), or the lawyer's obligation not to assist the client in conduct that he knows is fraudulent.<sup>59</sup> Consequently, the lawyer has no choice but to disclose the changed financials if the client will not do so and the lawyer and client wish for the lawyer to continue to represent the client with regard to the sale.<sup>60</sup>

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257, 270 (1992). While it is perhaps better for lawyers to use other contractual provisions to accomplish such risk-sharing, using representations and warranties in this way should not amount to misconduct, regardless of whether the statements are referred to as "representations" or "representations and warranties."

<sup>54</sup> See MODEL RULES OF PROF'L CONDUCT R. 4.1(a). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 (2000) ("A lawyer communicating on behalf of a client with a nonclient may not: (1) knowingly make a false statement of material fact or law to the nonclient . . .").

<sup>55</sup> See David Geronemus, *Lies, Damn Lies and Unethical Lies: How to Negotiate Ethically and Effectively*, BUS. L. TODAY, May/June 1997, at 12, 14–16.

<sup>56</sup> See MODEL RULES OF PROF'L CONDUCT R. 4.1(b).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* R. 1.6(b)(6).

<sup>59</sup> See HAZARD & HODES, *supra* note 33, § 37.6.

<sup>60</sup> This is a different result than Mr. Geronemus reaches in his article. Mr. Geronemus says that if the lawyer cannot convince his client to disclose the changed financials, the lawyer cannot disclose them and must withdraw. See Geronemus, *supra* note 55, at 15–16. However, in 1997, when Mr. Geronemus was writing his article, there was no exception to the duty of confidentiality for disclosure "to comply with other law or a court order." See HAZARD & HODES, *supra* note 33, § 37.6. The 2002

The lawyer also could decide to withdraw from representation if the client insists on not disclosing the new financials.<sup>61</sup> If the lawyer withdraws, he is most likely not “assisting” the client in any fraud because the lawyer counseled against certifying the representations and warranties without further disclosure and modification. This is true even if the client fails to disclose the new financials and falsely certifies the representations and warranties as true at the time of closing. Moreover, in this case, Rule 1.6 permits, but does not require, the attorney to disclose to the buyer or the buyer’s lawyer that the representations and warranties are no longer true if, to do so, is necessary to avoid “substantial injury to the financial interests or property” of the buyer.<sup>62</sup> In other words, the seller’s attorney may both withdraw from representation (under Rule 1.16(b)) and disclose to the buyer’s attorney that the contractual representations are no longer truthful (under Rule 1.6(b)(2)). Indeed, this is likely the most prudent course of action for the attorney; it makes it clear the attorney is not “assisting” in any fraudulent conduct by the seller.<sup>63</sup>

A lawyer must also not be involved in knowingly preparing a fraudulent offering statement. The *Restatement (Third) of the Law Governing Lawyers* gives this example:

Client has contracted to sell interests in Client’s business to Buyer. As part of the arrangement, Lawyer for Client prepares an offering statement to be presented to Buyer. Lawyer knows that information in the statement, provided by Client, is materially misleading; the information shows Client’s business as profitable and growing, but Lawyer knows that its assets are heavily encumbered, business is

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amendments to the Model Rules added this exception. *See id.* There was also no permissive exception to the duty of confidentiality for an attorney to disclose confidential information to prevent his or her client from causing “substantial injury to the financial interests or property of another.” *See* MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(2). The 2003 amendments to the Model Rules added such an exception after the Enron bankruptcy and other financial scandals occurred. *See* ROTUNDA & DZIENKOWSKI, *supra* note 46, § 1.6-1. Consequently, Mr. Geronemus’s hypothetical lawyer, practicing in 1997, had no choice but to withhold disclosure.

<sup>61</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 1.16(b) (“[A] lawyer may withdraw from representing a client if . . . the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent . . .”).

<sup>62</sup> *See id.* R. 1.6(b)(2).

<sup>63</sup> For more regarding the question of whether the withdrawal of the seller’s attorney should be noisy or not, see Geronemus, *supra* note 55, at 15–16; ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 92-366 (1992) (requiring withdrawal from representation of client when the lawyer has reason to believe “that her services or work product are being used or are intended to be used by a client to perpetuate a fraud” and permitting “noisy” withdrawal under such circumstances). The 2003 addition of the permissive exception for disclosure in Rule 1.6(b)(2) expressly allows such “noisy withdrawal.”

declining and unprofitable, and the company has substantial debts. Lawyer's knowing actions assisted Client's fraud.<sup>64</sup>

Lawyer, in this case, violated Rule 1.2(d) by drafting the fraudulent offering statement.<sup>65</sup> This is a clear-cut example of fraud at the "unethical" end of the spectrum of lawyer conduct in drafting contracts.

### B. *Transcription Fraud, Ambiguity, and Errors*

This next subpart looks at a lawyer's ethical obligations to disclose a scrivener's error in the transcription of an agreement and to refrain from fraud, and in some cases ambiguity, in drafting.

#### 1. *Scrivener's Errors*

Prior to the enactment of the current Model Rules of Professional Conduct,<sup>66</sup> on February 1, 1977, the Association of the Bar of the City of New York issued an ethics opinion stating that an attorney was obligated under then-prevailing Canons 15 and 41 to inform opposing counsel of a computing error that benefitted the attorney's client.<sup>67</sup> The opinion advised that this duty existed even if the attorney's client expressly disapproved of disclosure.<sup>68</sup> In the order giving rise to the opinion, the court entered judgment against the client and opposing counsel mistakenly requested less money than his client was entitled to under the judgment.<sup>69</sup> The ethics opinion, stating that "[a]n attorney must obey his own conscience and not that of his client," advised that the attorney had an affirmative duty to report the error if for no other reason than to prevent the court from taking "action which is not in accordance with the

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<sup>64</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 cmt. c, illus. 1 (2000).

<sup>65</sup> See ROTUNDA & DZIENKOWSKI, *supra* note 46, § 4.1-2.

<sup>66</sup> In 1908, the American Bar Association ("ABA"), which had existed as a professional organization for lawyers since 1878, adopted the Canons of Professional Ethics to guide lawyers' conduct. Louis Parley, *A Brief History of Legal Ethics*, 33 FAM. L.Q. 637, 637 (1999). By 1969, the ABA reformed and revised the Canons, to create the Model Code of Professional Responsibility. *Id.* at 639. After much criticism from practitioners over the Code's lack of clarity, the ABA reexamined it (over a six-year period through the Kutak Commission), creating in 1983 the current Model Rules of Professional Conduct. *Id.* at 639-40. In 2002, the ABA again significantly revised the Model Rules. See generally Lonnie T. Brown, Jr., *Ethics 2000 and Beyond: Reform or Professional Responsibility as Usual?*, 2003 U. ILL. L. REV. 1173.

<sup>67</sup> N.Y. City Op. No. 477 (1939), *reprinted in* OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS' ASSOCIATION 260, 260-61 (1958).

<sup>68</sup> See *id.* at 261.

<sup>69</sup> See *id.* at 260-61.

Court's decision."<sup>70</sup> The lawyer had this obligation even though neither he nor his client was a party to deception or fraud.<sup>71</sup>

This duty to disclose a scrivener's error made by opposing counsel continues under the Model Rules and is applicable to an opposing counsel's errors in drafting an agreement. ABA Informal Ethics Opinion 86-1518, applying Model Rule 1.2(d), discusses this duty to inform opposing counsel of an inadvertent omission of a contract provision.<sup>72</sup> Where a transcription of an agreement contains a scrivener's error, an attorney cannot allow his or her client to benefit from the mistake and must notify the other party's attorney.<sup>73</sup>

In ABA Informal Ethics Opinion 86-1518, the attorney for party A discovered that the lawyer for party B inadvertently omitted a material provision to an agreement between party A and party B, a provision without which party B would not have agreed to the contract.<sup>74</sup> The opinion advised that the lawyer for party A had an obligation to correct the error and not allow his client to take "unfair advantage" of the mistake.<sup>75</sup> The client's right to receive zealous representation, or "to expect committed and dedicated representation [pursuant to Model Rule 1.2,] is not unlimited."<sup>76</sup> If party A's lawyer were to capitalize on the error, he would have raised a "serious question" about whether he violated Rules 1.2(d), 4.1(b), and 8.4(c).<sup>77</sup> The opinion also advised that

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<sup>70</sup> *Id.* at 261 (internal quotation marks omitted) (quoting CANONS OF PROF'L ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK Canon 15 (1908)).

<sup>71</sup> *Id.* This obligation is arguably analogous to the lawyer's obligation to refrain from conduct "involving dishonesty" under Model Rule 8.4(c). *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2008).

<sup>72</sup> ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 86-1518 (1986).

<sup>73</sup> *See id.*

<sup>74</sup> *Id.*

<sup>75</sup> *See id.*; *see also* Patrick Emery Longan, *Ethics in Settlement Negotiations: Foreword*, 52 MERCER L. REV. 807, 814-15 (2001) (discussing a lawyer's duty to disclose factual scrivener-type errors of opposing counsel, but stating that disclosure of opposing counsel's "conscious but erroneous judgment about what valuation is best for his or her client" is discretionary); Geronemus, *supra* note 55, at 14 (stating that "[a]lthough [ABA Informal Opinion 86-1518] does not clearly state that a lawyer must inform his or her adversary of [the mistaken omission of an indemnity provision], that is clearly the better practice. The Opinion cautions that the client does not have a right to try to capitalize on the error . . ."). While the Opinion reserves judgment on whether the attorney would have had an obligation to disclose the error if his client had discovered it, the attorney likely would have had a duty to do so under Model Rule 4.1(b). *See* MODEL RULES OF PROF'L CONDUCT R. 4.1(b). *But see* Md. State Bar Ass'n, Comm. on Ethics, Op. 89-44 (1989) ("[T]he Committee is of the opinion that you are under no obligation to reveal to the other counsel his omission of a material term in the transaction. Based on the facts set forth in your letter, it does not appear that you or your client have made any false statement of material fact or law to the other side at any time during the negotiations, and, furthermore, the omission in no way is attributable to a fraudulent act committed by you or your client.").

<sup>76</sup> ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 86-1518.

<sup>77</sup> *See id.*

the attorney for party A had no obligation to inform his client of the error because “the decision on the contract ha[d] already been made by the client.”<sup>78</sup> The client had agreed to the contract with the term that party B’s lawyer omitted.<sup>79</sup> Of course, it might be more practical for the attorney under these facts to disclose the mistake to his or her client and encourage the client to agree to disclosure.

Similarly, an attorney who takes advantage of a scrivener’s error to settle a lawsuit could be engaging in fraud under Rule 8.4. The State Bar of New Mexico issued an advisory opinion in response to a lawyer’s request for advice upon receiving a check from an insurance company for \$14,000 to settle a lawsuit, when the company’s previous offer had been \$1,400 (and the insurance company had apparently intended to send a check for \$1,400).<sup>80</sup> While the Bar condemned the insurance company’s tactic of intending to issue a check for far below the \$10,000 that the attorney communicated it would take to settle his client’s personal injury lawsuit, the Bar cited ABA Informal Advisory Opinion 86-1518 and concluded that the attorney should disclose to the company its apparent error “to act with honesty and to avoid a possible fraud.”<sup>81</sup>

Lawyers cannot ethically permit clients to capitalize on a scrivener’s error of the opposing party’s counsel. This is generally consistent with contract law—a contract containing a scrivener’s error will not be enforced, but will be rewritten to reflect the parties’ actual agreement.<sup>82</sup>

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<sup>78</sup> *Id.* The attorney only had the obligation to fulfill “reasonable client expectations,” and the agreement with the term omitted due to the scrivener’s error was not within “reasonable client expectations.” *See id.*; *see also* Nathan M. Crystal, *The Lawyer’s Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055, 1089 (1999). In a case such as this, the attorney had implied authority from the client to disclose the mistake. *See* Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension Between Confidentiality Requirements and Contemporary Lawyers’ Career Paths*, 31 J. LEGAL PROF. 199, 219 & n.105 (2007).

<sup>79</sup> ABA Comm. on Ethics & Prof’l Responsibility, Informal Op. 86-1518.

<sup>80</sup> State Bar of N.M., Ethics Advisory Op. 1987-11 (1987), *available at* <http://www.nmbar.org/legalresearch/ethicsadvisoryopinions.html>.

<sup>81</sup> *Id.* (citing ABA Comm. on Ethics & Prof’l Responsibility, Informal Op. 86-1518). *See also In re Gallagher*, 26 P.3d 131, 135–36 (Or. 2001) (holding that when attorney knew that opposing party was under the mistaken belief that checks tendered in settlement were for the amount to which the parties had agreed, the lawyer had an obligation to notify the opposing party and should not have negotiated the checks, disbursed the proceeds, and refused to return the overpayment).

<sup>82</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 155 (1981) (“Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected.”). *See also Parrish v. City of Carbondale*, 378 N.E.2d 243, 248 (Ill. App. Ct. 1978) (reforming easement where provision left out of agreement by mutual mistake); *Olds v. Jamison*, 238 N.W.2d 459, 463 (Neb. 1976) (“[I]f a clause was inserted in a deed by mistake on the part of the scrivener who drew it, then the mistake was mutual, because it was contrary to the real intention and agreement of the parties. The fact that one of the parties to a contract

## 2. *Fraud and Ambiguity in Transcription*

When parties represented by attorneys negotiate a sophisticated agreement, an attorney for one party prepares a draft, the other party comments, the parties negotiate, and another draft is prepared.<sup>83</sup> The attorneys exchange draft agreements back and forth and often either show their proposed changes via redline or blackline, or make written comments on the other party's draft.<sup>84</sup> At least three types of situations that arise when attorneys propose and exchange draft language can raise questions as to a lawyer's ethical obligations: (a) If attorneys have established a practice of highlighting proposed changes when negotiating an agreement, does that practice impose a duty on the attorneys to highlight material alterations? (b) Should an attorney knowingly draft written terms in an agreement that differ materially from the terms the parties have negotiated, without disclosing the differences to the counterparty to the agreement? (c) Should an attorney knowingly draft an ambiguous provision in a written agreement without disclosing the ambiguity to the counterparty, when the provision that the parties negotiated is unambiguous?

### a. *Fraud*

Although *Hennig v. Ahearn*<sup>85</sup> involved a non-attorney's liability to a contract's counterparty, its facts are illustrative of the first situation and the ethical issues it raises. In this Wisconsin case, the president of a corporation, without his attorney's knowledge or assistance, changed a material provision of an executive compensation agreement before asking a company executive to sign it.<sup>86</sup> The president did not alert the executive or his attorney to the alteration, a departure from how the

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denies that a mistake was made does not prevent a finding of mutual mistake nor prevent reformation."); *Davenport v. Beck*, 576 P.2d 1199, 1201 (Okla. Ct. App. 1977) ("The law under these circumstances is that where by reason of a scrivener's mistake an instrument omits or contains terms or stipulations contrary to the common intention of the parties . . . a court of equity will consider it a mutual mistake common to both parties[,], that is, the scrivener left out or included provisions neither party intended[,], and therefore correct the error in a manner that will place the parties in the position they would have occupied had the error not occurred." (internal quotation marks omitted)). For more information about scrivener's errors, see *supra* note 8.

<sup>83</sup> See, e.g., James B. Egle & Jennifer E. Annen, *Contract Law: Duty to Reveal Changes*, WIS. LAW., Oct. 2001, at 18, 18; Claire A. Hill, *Why Contracts Are Written in "Legalese,"* 77 CHI.-KENT L. REV. 59, 62-70 (2001) (explaining the complicated process by which complex business contracts are negotiated and drafted); Edward L. Rubin, *The Nonjudicial Life of Contract: Beyond the Shadow of the Law*, 90 NW. U. L. REV. 107, 109-10 (1995) (discussing the contracting practices of business lawyers—particularly drafting and negotiation).

<sup>84</sup> See, e.g., James Veach, *Commutation Agreements: Drafting a Clear and Comprehensive Contract*, in REINSURANCE LAW & PRACTICE 2005: NEW LEGAL & BUSINESS DEVELOPMENTS IN A CHANGING GLOBAL ENVIRONMENT, 879 PLI/COMM 467, 479-80 (2005).

<sup>85</sup> 601 N.W.2d 14 (Wis. Ct. App. 1999).

<sup>86</sup> *Id.* at 19.

parties' attorneys had highlighted the numerous changes proposed when negotiating the agreement back and forth and how "the evolving terms of the agreement were expressly discussed among the parties and their attorneys."<sup>87</sup> The executive signed the agreement; neither he nor his attorney reviewed the entire agreement, nor did they note the material change.<sup>88</sup> The executive sued the president and the corporation for misrepresentation and reformation of the contract; at the close of the plaintiff's case at trial, the court entered judgment for the defendants because there was insufficient evidence to support the plaintiff's claims.<sup>89</sup>

On appeal, the court first held that a jury could find that the president had a duty to disclose, under Wisconsin law, the last-minute alteration that he had made to the executive's compensation agreement.<sup>90</sup> The question was whether the executive had a "reasonable expectation of disclosure."<sup>91</sup> The court concluded that the plaintiff had presented credible evidence of a claim for intentional misrepresentation or fraud, and left it to the trial court to determine whether there was credible evidence of the plaintiff's negligent and strict liability misrepresentation claims.<sup>92</sup>

The court next turned to whether the executive's reliance was reasonable. The defendants contended that because the executive was experienced in business, represented by counsel, and had 30 hours to review the agreement, and because the terms of the agreement were unambiguous, the plaintiff could not have relied on any non-disclosure.<sup>93</sup> The court found that whether it was reasonable for the executive to rely on the president's silence as to the last-minute alteration to the compensation agreement was a question of fact for the jury.<sup>94</sup> The court refused to hold that "a party must read each and every word of successive drafts of a complex commercial document in order to ensure that another party has not surreptitiously inserted a significant last-minute change,"<sup>95</sup> which explains, in part, why an attorney has ethical obligations to non-clients in drafting contracts.

The court further stated that reformation of the contract would be appropriate if the plaintiff made a unilateral mistake and the defendants engaged in "fraud or inequitable conduct."<sup>96</sup> The court quoted section 166 of the *Restatement (Second) of Contracts*, which states:

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<sup>87</sup> *Id.* at 23.

<sup>88</sup> *Id.* at 20.

<sup>89</sup> *Id.* at 21.

<sup>90</sup> *Id.* at 23.

<sup>91</sup> *See id.* at 22–23.

<sup>92</sup> *Id.* at 25–26.

<sup>93</sup> *Id.* at 24.

<sup>94</sup> *Id.* at 24–25.

<sup>95</sup> *Id.* at 25.

<sup>96</sup> *Id.* at 26.

If a party's manifestation of assent is induced by the other party's fraudulent misrepresentation as to the contents or effect of a writing evidencing or embodying in whole or in part an agreement, the court at the request of the recipient may reform the writing to express the terms of the agreement as asserted,

(a) if the recipient was justified in relying on the misrepresentation . . . .<sup>97</sup>

Thus, under this analysis, if the president failed to disclose the last-minute alteration so that the executive would sign the agreement without knowledge of the change, the president's conduct was fraudulent.<sup>98</sup> The court found that the failure of the plaintiff or the plaintiff's attorney to exercise reasonable care in reviewing the agreement did not bar the plaintiff's claim for reformation as long as his reliance on the president's non-disclosure (the terms of the written agreement) was justified.<sup>99</sup> The failure to read does not provide an absolute bar to relief in a contract action.<sup>100</sup>

If the executive's attorney had assisted his client in making the last-minute alteration to the contract without disclosing it, the attorney could have violated several disciplinary rules.<sup>101</sup> For example, if the last-minute alteration was fraudulent, the attorney would have assisted in his client's fraud under Model Rule 1.2(d)<sup>102</sup> and failed to disclose it under Rule 4.1(b).<sup>103</sup> Two commentators believe it is a "false statement of material fact" under Rule 4.1(a) for an attorney not to disclose a last-minute material alteration to a third person under these circumstances, knowing

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<sup>97</sup> *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 166 (1981)).

<sup>98</sup> *See id.* at 26–27 ("A, seeking to induce B to make a contract to sell a tract of land to A for \$100,000, makes a written offer to B. A knows that B mistakenly thinks that the offer contains a provision under which A assumes an existing mortgage and that it does not contain such a provision, but does not disclose this to B for fear that B will not accept. B is induced by A's non-disclosure to sign the writing, which is an integrated agreement. A's non-disclosure is equivalent to an assertion that the writing contains such a provision . . . and amounts to a fraudulent misrepresentation. At the request of B, the court will reform the writing to add the provision for assumption." (quoting RESTATEMENT (SECOND) OF CONTRACTS § 166 cmt. a, illus. 4 (1981))).

<sup>99</sup> *Id.* at 27.

<sup>100</sup> *Cf. Egle & Annen, supra* note 83, at 18 ("In such cases, an opportunity exists for an unscrupulous party preparing the final draft to revise, add, or delete sections without informing the other party. Where the agreement is long and the revision is subtle, it might get past the unsuspecting opposing counsel. Should the duty to read apply under such circumstances?").

<sup>101</sup> The attorney could have also been liable to the plaintiff for fraud under the traditional exception to the rule that an attorney has no liability to a third party. *See infra* note 163 and accompanying text. At least in Wisconsin, and perhaps elsewhere, an attorney can "assume a duty to 'point out' changes in an agreement by its course of conduct during negotiations." *See Egle & Annen, supra* note 83, at 18 & nn.3–4 (citing *Hennig*, 601 N.W.2d at 18).

<sup>102</sup> *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2008).

<sup>103</sup> *See id.* R. 4.1(b).

that the other party would not agree to the change.<sup>104</sup> And, while there is no relevant authority in this context where the attorneys followed a practice of marking their proposed alterations, it arguably would have been “dishonest” under Rule 8.4 for an attorney not to disclose a material alteration.<sup>105</sup> At least part of the purpose of contract law is to “fortif[y] trust insofar as it provides grounds for confidence that another will perform a promise.”<sup>106</sup> Promises are not trustworthy if they are made through an attorney’s sleight of hand because their enforceability could become subject to challenge.

If the attorney in this case was asked to assist the client, he should have withdrawn from representation rather than making the alteration without disclosing it.<sup>107</sup> If the president went ahead and made the alteration, delivered the document to the executive, and the attorney knew about it but was no longer involved in representing the executive or his corporation with regard to the agreement, Rule 4.1(b) would not apply.<sup>108</sup> Here, a permissive exception to the attorney’s duty of confidentiality would allow, but not require, the attorney to disclose the alteration.<sup>109</sup> Rule 1.6 says:

- (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 paragraph (b).

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<sup>104</sup> See Egle & Annen, *supra* note 83, at 21 & n.28; see also MODEL RULES OF PROF’L CONDUCT R. 4.1(a).

<sup>105</sup> Rule 8.4(c) is considered to be broader than Rule 4.1. See Richmond, *supra* note 1, at 270–71 (“Rule 8.4(c) does not require a statement; deceit and dishonesty can also be based on the concealment or omission of facts or information. Conduct that may not legally be characterized as deceit or fraud, or which would not count as a misrepresentation as a matter of criminal or tort law, may still evince dishonesty for purposes of discipline under Rule 8.4(c). . . . [L]awyers violate Rule 8.4(c) even if their dishonesty misleads no one or causes no harm. Unlike Rule 4.1, Rule 8.4(c) has no materiality requirement, although courts occasionally graft one onto it.” (footnote omitted)).

In *In re Conduct of Eadie*, an attorney was disciplined for violating Oregon’s version of Rule 8.4(c) when he executed a settlement agreement between Shon (his client) and a woman named Burke regarding the termination of an easement over Shon’s property. 36 P.3d 468, 477 (Or. 2001). The court held that the attorney engaged in misrepresentation when he “intentionally failed to disclose a material fact—namely, that he intended to seek costs—to obtain Burke’s acquiescence to settle her dispute with Shon.” *Id.* In other words, an attorney cannot, consistent with Rule 8.4(c), mislead the other party in a settlement agreement by failing to disclose his intentions to seek costs from the court. See *id.*

<sup>106</sup> Anthony J. Bellia Jr., *Promises, Trust, and Contract Law*, 47 AM. J. JURIS. 25, 27 (2002).

<sup>107</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.16(a); see also ROTUNDA & DZIENKOWSKI, *supra* note 46, § 4.1-3(a).

<sup>108</sup> See MODEL RULES OF PROF’L CONDUCT R. 4.1(b).

<sup>109</sup> See *id.* R. 1.6.

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

....

- (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.<sup>110</sup>

Because the executive was substantially harmed in agreeing to the alteration (his compensation was significantly lower), the attorney, if he had known about it, *could have* disclosed the alteration to the executive's attorney before the executive signed it.

A set of ethical questions also arises if an attorney knowingly fails to memorialize an oral agreement consistent with what the parties intended and does not disclose to the counterparty or its attorney that he or she has failed to do so. The counterparty's attorney should read closely the initial draft of the agreement.<sup>111</sup> Because such careful review would be expected of an attorney, it is less conceivable than in *Hennig* that the counterparty justifiably relied on a misrepresentation, as required for a fraud claim and violation of Rules 1.2(d) and 4.1(b).<sup>112</sup> Yet, Rule 4.1(a) prohibits the drafting attorney from knowingly making "a false statement of material fact or law to a third person,"<sup>113</sup> and if the attorney represents that a writing reflects the parties' agreement when she knows it does not, the attorney has violated this rule. Such conduct can also be "deceitful" or "dishonest" under Rule 8.4(c)<sup>114</sup> as it threatens the trust that is part of the fabric of contract law.<sup>115</sup>

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<sup>110</sup> *Id.*

<sup>111</sup> See Egle & Annen, *supra* note 83, at 18 ("Careful counsel read every word of the initial draft. The parties discuss the initial draft, negotiate terms, and prepare revised drafts. When reviewing subsequent drafts, however, counsel may focus their attention on changes discussed by the parties during the course of negotiations."); John D. Calamari, *Duty to Read—A Changing Concept*, 43 *FORDHAM L. REV.* 341, 341 (1974) ("Every lawyer learned early in the course on contracts that a party may be bound by an instrument which he has not read."); Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 *U. MIAMI L. REV.* 1263, 1267–68 (1993) (arguing that the duty to read makes the most sense in the context of negotiated contracts or contracts with experienced businesspeople because "[o]ne expects the average businessperson to be able to learn the meaning of the contract terms with relative ease and to voice any disagreement with such terms").

<sup>112</sup> See *infra* note 174 (explaining the reliance requirement for fraud).

<sup>113</sup> See MODEL RULES OF PROF'L CONDUCT R. 4.1(a).

<sup>114</sup> See *id.* R. 8.4(c).

<sup>115</sup> See *infra* notes 278–80 and accompanying text.

b. *Conscious Ambiguity*

A more subtle form of an attorney not memorializing accurately an oral agreement is where an attorney uses “conscious ambiguity” in drafting.<sup>116</sup> The attorney knowingly includes a clause in an agreement with two contradictory meanings or two provisions that contradict.<sup>117</sup> If parties attach different meanings to an ambiguous provision or set of provisions, and the drafting attorney’s client knew or had reason to know of the other party’s understanding, the court will interpret the contract consistent with the meaning held by the other party.<sup>118</sup>

The Delaware Court of Chancery applied this principle of interpretation in *United Rentals, Inc. v. RAM Holdings, Inc.*<sup>119</sup> Cerberus Partners, L.P. (Cerberus) organized a group of shell companies to buy the world’s largest equipment lessor, United Rentals, Inc. (URI), in a mega-billion dollar deal.<sup>120</sup> The Cerberus-led entities and URI entered into an Agreement and Plan of Merger (Merger Agreement), in which those entities agreed to buy URI for \$34.50 per share and then merge into URI.<sup>121</sup> The merger was never completed; in November 2007, Cerberus backed out of the deal.<sup>122</sup> Cerberus offered to compensate URI one hundred million dollars, the amount of the reverse break-up fee specified in the Merger Agreement, or to renegotiate the terms of the

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<sup>116</sup> See generally Gregory M. Duhl, *Conscious Ambiguity: Slaying Cerberus in the Interpretation of Contractual Inconsistencies*, 71 U. PITT. L. REV. 71 (2009).

<sup>117</sup> Professors William Eskridge Jr. and Phillip Frickey explain “ambiguity” as opposed to “vagueness”: “Ambiguity creates an ‘either/or’ situation, while vagueness creates a variety of possible meanings.” WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY* 839 (1988). For more on the difference between vagueness and ambiguity, see E. Allan Farnsworth, “*Meaning*” in the *Law of Contracts*, 76 YALE L.J. 939, 953 (1967) (“Ambiguity, properly defined, is an entirely distinct concept from that of vagueness. A word that may or may not be applicable to marginal objects is vague. But a word may also have two entirely different connotations so that it may be applied to an object and be at the same time both clearly appropriate and inappropriate, as the word ‘light’ may be when applied to dark feathers. Such a word is ambiguous.”). Using vagueness in drafting contracts can achieve many economic efficiencies; the same efficiencies are not obtained by using ambiguous language. See Duhl, *supra* note 116, at 76 & n.28.

<sup>118</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 201(2) (1981) (“Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.”).

<sup>119</sup> 937 A.2d 810, 835–36 (Del. Ch. 2007).

<sup>120</sup> *Id.* at 814.

<sup>121</sup> *Id.* at 814–15.

<sup>122</sup> *Id.* at 827.

deal.<sup>123</sup> URI refused and brought an action in the Delaware Court of Chancery for specific performance.<sup>124</sup>

While there was a provision in the Merger Agreement that gave URI the right to specific performance, that provision was subject to section 8.2(e), which provided the one hundred million dollar break-up fee as the exclusive remedy for breach of the Merger Agreement by either party before closing.<sup>125</sup> Vice Chancellor Chandler found that section 8.2(e) mooted the specific performance provision because Cerberus and the defendant entities understood that the Merger Agreement excluded the possibility of specific performance, and because URI knew or should have known of the defendants' understanding.<sup>126</sup> Vice Chancellor Chandler concluded that "[b]ecause the evidence in this case shows that defendants understood this Agreement to preclude the remedy of specific performance and that plaintiff knew or should have known of this understanding . . . plaintiff has failed to meet its burden and [judgment should be entered] in favor of defendants."<sup>127</sup>

Vice Chancellor Chandler called this principle of interpretation the "forthright negotiator principle."<sup>128</sup> URI's lawyers knew that the attorneys for Cerberus did not agree to the remedy of specific performance.<sup>129</sup>

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 815–16.

<sup>126</sup> *Id.* at 836.

<sup>127</sup> *Id.* at 813.

<sup>128</sup> *Id.* at 835–36.

<sup>129</sup> See Posting to M&A Law Prof Blog, <http://lawprofessors.typepad.com/mergers/2007/12/uriCerberus-the.html> (Dec. 27, 2007) ("URI/Cerberus: The Final Word"). Professor Steven Davidoff, a frequent mergers and acquisitions legal commentator, summarized the negotiation process in United Rentals:

I think we now have a confident view of how the negotiation occurred. Throughout the contract negotiation process the Cerberus side made it clear at all times that its contracting policy did not permit it to allow the Seller a specific performance remedy and the URI side pushed at all times to get them on the hook if the financing was available. URI tried to do that that [sic] in many ways on all three agreements (merger agreement, limited guarantee, equity commitment letter) without making all the progress they wanted.

The Cerberus legal team was under strict orders to keep the out clear to their side; Simpson [Thacher & Bartlett LLP] via [Eric] Swedenburg ultimately was under pressure to get Cerberus signed up as best he could. I believe he was lucky that the other side allowed 9.10 to stay in subject to 8.2(e) even if 8.2(e)'s final sentence added by [Peter] Ehrenberg reduced URI's optionality to force it to accept the payment of the reverse termination fee in a Cerberus breach. And, think about it, one can reasonably conclude from the evidence that URI and Simpson adopted this strategy deliberately—if so, they did a fantastic job given their hand even if Swedenburg was found not to be a forthright negotiator (there are other explanations here but for now let's take this one). According to Chandler, he almost succeeded and no doubt Chandler realized the higher probabilities of being reversed on summary judgment versus a trial and that must have factored into his thinking to deny summary judgment to URI. Sloppy drafting helped URI much more than Cerberus. At the time the deal was

Perhaps the drafting by URI's lawyers does not rise to the level of "dishonesty" under Model Rule 8.4 because Cerberus's lawyers knew about and did not object to the ambiguity in the Merger Agreement, and with sophisticated attorneys on each side, the attorneys could police each other.<sup>130</sup> The conduct of URI's attorneys was even condoned by Harvard Law School Professor John C. Coates IV, an expert for URI, who stated in a report he submitted in the case that attorneys commonly use shortcuts such as "notwithstanding" and "subject to" to save time and costs in editing buyout and merger and acquisition agreements.<sup>131</sup>

The Model Rules do not proscribe the ambiguous drafting by URI's attorneys. But neither is it proscribed and it undercuts the function of contract law to build trust,<sup>132</sup> at least in cases unlike *United Rentals*, where the counterparty is unaware of, and did not specifically agree to, ambiguity in the contract. Parties depend on unambiguous writing so they know to what they are manifesting assent and what agreement they can rely on the law to enforce.<sup>133</sup> Conscious ambiguity, at its extreme, is "dishonest" and could violate Rule 8.4.

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executed, it may be that URI took a calculated risk that Cerberus wouldn't take the reputational hit of walking and (unfortunately) was wrong.

*Id.*

<sup>130</sup> See Duhl, *supra* note 116, at 74.

<sup>131</sup> Expert Report of Professor John C. Coates IV at 2, 11, *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810 (Del. Ch. 2007), available at [http://lawprofessors.typepad.com/mergers/files/102xx\\_expert\\_report\\_12062007.pdf](http://lawprofessors.typepad.com/mergers/files/102xx_expert_report_12062007.pdf). Specifically, Professor Coates states in his report:

Another reason that such legal drafting techniques are used is they reduce the amount of blacklining and editing that must be reviewed by the numerous parties who must approve and sign off on the final documentation. If, for example, drafters can add a single sentence that contains the phrase "subject to" or "notwithstanding," the various interested parties . . . can simply look at the one sentence to see the meaning of the change. If, on the other hand, a sentence is added while other sentences are modified or deleted to reflect the meaning of the new sentence and eliminate any potential apparent conflicts, more blacklining, on more pages, will have to be reviewed and evaluated by each party.

*Id.* at 11.

<sup>132</sup> See *infra* notes 278–80 and accompanying text.

<sup>133</sup> See Barnett, *Consent Theory*, *supra* note 20, at 302 ("In contract law, this informational or 'boundary defining' requirement means that an assent to alienate rights must be *manifested* in some manner by one party to the other to serve as a criterion of enforcement. Without a manifestation of assent that is accessible to all affected parties, that aspect of a system of entitlements that governs transfers of rights will fail to achieve its main function. At the time of the transaction, it will have failed to identify clearly and communicate to both parties (and to third parties) the rightful boundaries that must be respected. Without such communication, parties to a transaction (and third parties) cannot accurately ascertain what constitutes rightful conduct and what constitutes a commitment on which they can rely. Disputes that might otherwise have been avoided will occur, and the attendant uncertainties of the transfer process will discourage reliance.").

*C. “Iffy” and Invalid Clauses*

When a lawyer drafts a form contract<sup>134</sup> that most, if not all, consumers will sign without receiving legal advice, the question arises as to whether the lawyer may draft an invalid<sup>135</sup> or “iffy”<sup>136</sup> term.<sup>137</sup> Currently, lawyers are proscribed from drafting “invalid” terms only in some circumstances; however, lawyers should be required to avoid drafting or otherwise conspicuously disclose terms they know are invalid in all circumstances.

Professor Christina Kunz, discussing invalid and “iffy” contract clauses under the Uniform Commercial Code, writes that “[Model] Rule 1.2 is violated when a lawyer suggests burying or actually buries an invalid provision in a contract (perhaps using obscure language or an unobvious location) or forwards a contract draft to the other party while aware that the draft contains this kind of concealment.”<sup>138</sup> Professors Geoffrey Hazard and William Hodes confirm that such result is possible, but the Model Rules do not make it explicit:

The highest court of State recently held that a certain clause in a consumer goods contract is unconscionable and therefore unenforceable. A retail store in State nevertheless insists that its

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<sup>134</sup> See *supra* note 13.

<sup>135</sup> An “invalid” clause is one that is illegal. An example of an invalid clause is a provision that disclaims the implied warranty of habitability in a residential lease even though the law prohibits the landlord from disclaiming the warranty. See, e.g., FLA. STAT. ANN. § 83.47(1) (West 2004) (“A provision in a rental agreement is void and unenforceable to the extent that it . . . [p]urports to limit or preclude any liability of the landlord to the tenant . . . arising under law.”); *Knight v. Hallsthammar*, 623 P.2d 268, 272 (Cal. 1981) (“[The] implied warranty of habitability and . . . public policy which generally prohibits waiver of that warranty is consistent with California’s statutory pattern of landlord-tenant relations.”). Additionally, an invalid clause could be a provision or provisions that make an agreement unconscionable. See, e.g., U.C.C. § 2-302(1) (2002) (“If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”).

<sup>136</sup> An “iffy” clause is one in which the drafting attorney has at least a good-faith, but not certain, belief that it is valid in at least some of the jurisdictions in which it is used; if the attorney does not have that belief, the clause is invalid. Cf. MODEL RULES OF PROF’L CONDUCT R. 3.1 (2008) (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”).

<sup>137</sup> Understanding the lawyer’s ethical obligations in this context is critical because the lawyer’s client relies on the lawyer to comply with the law. See Christine E. Parker, Robert Eli Rosen & Vibeke Lehmann Nielsen, *The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation*, 22 GEO. J. LEGAL ETHICS 201, 208 (2009) (“In the simplest sense, a lawyer regulates a client’s conduct toward compliance by providing the means for the client to comply with the law . . . through drafting standard form contracts . . .”).

<sup>138</sup> Kunz, *supra* note 4, at 495.

lawyer, L, continue to include the clause in its contracts, on the grounds that the great majority of consumers will not know it is unenforceable and thus will comply with its terms anyway.

The Proposed Final Draft of Rule 1.2(d) . . . included language that would have prohibited the preparation of an instrument “containing terms the lawyer knows or reasonably should know are legally prohibited.” The ABA House of Delegates deleted this provision, however, before promulgation of the Model Rules in 1983. The Ethics 2000 Commission . . . did not recommend restoration of the deleted text. Given this drafting history, it would seem that L could not now be disciplined merely for including [an invalid] clause in the contract.

On the other hand, if the clause is likely to mislead customers as to their rights, use of the clause might be held to constitute fraud. If so, the general prohibition in Rule 1.2(d) against assisting in fraud would again be applicable.<sup>139</sup>

The inquiry is not simply whether the clause is valid or invalid; for the lawyer to run afoul of the Model Rules, the lawyer knowingly had to assist his or her client in deceiving the consumer as to his or her rights.<sup>140</sup>

Professor Paul Carrington agrees that the drafting of invalid clauses is impermissible if it misleads parties as to their rights.<sup>141</sup> He discusses the example of an attorney who decided to draft release-waivers for minors participating in a bicycle race.<sup>142</sup> The lawyer knew that the consents would be invalid if challenged because of the age of the minors.<sup>143</sup> Professor Carrington argues that the attorney’s actions amounted to fraud<sup>144</sup> and

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<sup>139</sup> HAZARD & HODES, *supra* note 33, § 5.12, at 5-39 to 5-40 (illus. 5-13). For more on the Ethics 2000 Commission, see Brown, *supra* note 66, at 1174–79.

<sup>140</sup> This deception would most likely occur at the time the consumer considers some sort of redress against the drafting party, as “[i]t is no secret that consumers neither read nor understand standard form contracts” before execution. Meyerson, *supra* note 111, at 1269 & n.28 (citing *Davis v. M.L.G. Corp.*, 712 P.2d 985, 992 (Colo. 1986) (en banc) (automobile rental agent testifying that she had never seen any customer read the reverse side of the rental agreement); *Unico v. Owen*, 232 A.2d 405, 410 (N.J. 1967) (“The ordinary consumer goods purchaser more often than not does not read the fine print . . .”); *Holiday of Plainview, Ltd. v. Bernstein*, 350 N.Y.S.2d 510, 512 (Dist. Ct. 1973) (stating that “it is true that defendant[] (as have many before him and probably many will after him) failed to read the entire contract”)); *see also* Carrington, *supra* note 4, at 364–65 (“[T]he reality is that most of the ‘contracts’ that most of us make as consumers are never read . . . . Frequently, as is often the case with insurance policies, the purchaser may not even have an opportunity to read or sign the written instrument because it is delivered after the transaction has been performed.”).

<sup>141</sup> *See* Carrington, *supra* note 4, at 371–73.

<sup>142</sup> *See id.* at 371. The lawyer in Professor Carrington’s example assumes that a certain percentage of injured minors’ parents will be chilled from suing his client by the mere existence of the release. *See id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 372.

he should be held morally and legally accountable.<sup>145</sup> Still, Professor Carrington acknowledges that the Model Rules themselves do not explicitly authorize discipline in all cases of lawyers who draft unconscionable contracts.<sup>146</sup>

Consequently, whether an attorney who drafts an “invalid” provision in a form contract violates Model Rule 1.2 depends on whether the lawyer intended to deceive consumers through use of the provision.<sup>147</sup> However, a consumer cannot assent to an illegal contract provision,<sup>148</sup> so

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<sup>145</sup> *Id.* at 373. Professor Carrington frames the issue as follows:

Lawyers writing standard form contracts for clients to use in recording transactions with parties not represented by counsel have a professional duty to restrain their zeal. It is my impression that many lawyers are unaware of such a duty. As a consequence, many cause injustice and expose themselves and their firms not only to such appropriate moral sanctions as the contempt of fellow citizens and other lawyers, but also to some risks of tort liability and professional discipline.

*Id.* at 361. While there are limitations on a lawyer’s role as a zealous advocate, the question is what are those limitations? *See supra* notes 9–10 and accompanying text (discussing the lawyer’s role as a zealous advocate). This Article seeks to enable lawyers to think about those limitations.

<sup>146</sup> Carrington, *supra* note 4, at 380 (“The Kutak Commission that drafted the Model Rules proposed a prohibition against a lawyer assisting a client to conclude an agreement ‘that the lawyer knows or reasonably should know is illegal, contains legally prohibited terms, would work a fraud, or would be held to be unconscionable as a matter of law.’ The latter term was intended to incorporate into the Rules the standard of Section 2-302 of the Uniform Commercial Code. It was criticized as too indeterminate to serve as the standard for quasi-criminal professional discipline. Perhaps that was the reason the provision was deleted in the final draft of the Rules.” (footnotes omitted)).

<sup>147</sup> An attorney who drafts an invalid contract provision can also implicate other Model Rules. For example, in *Florida Bar v. Frederick*, the court broadly interpreted Rule 8.4(d), the rule prohibiting “conduct prejudicial to the administration of justice” to apply not only to “conduct ‘in a judicial proceeding,’” but to all “conduct in connection with the practice of law.” 756 So. 2d 79, 87 (Fla. 2000) (quoting FLA. STAT. ANN. BAR RULE 4–8.4(d) (West 2008)). The lawyer in *Frederick* was subject to discipline for, among other things, requiring his clients to sign contracts saying they would not initiate disciplinary action against him. *See Frederick*, 756 So. 2d at 81. The lawyer alleged that Model Rule 8.4(d) applied only to lawyers engaged in discriminatory behavior against protected classes. *Id.* at 86–87. The court held, however, that the rule’s commentary specifically discussing discriminatory behavior only broadened the rule, and did not constrict it. *Id.* at 87. In *Frederick*, requiring clients to sign contracts that they would not bring disciplinary actions against a lawyer was “conduct prejudicial to the administration of justice.” *Id.* (quoting FLA. STAT. ANN. BAR RULE 4–8.4(d) (quotation marks omitted)).

<sup>148</sup> *See* Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 46–48 (1995) (“[F]reedom of contract has its limits. Even where there exists an offer, acceptance, and consideration, a court will not enforce a contract whose subject matter is illegal or contrary to public policy. . . . Sometimes a contract contains one illegal—and hence, unenforceable—provision along with other, perfectly legal, terms. Such a contract presents the court with three options. First, the court might simply rewrite the offending provision to make it conform to public policy. . . . Second, the court might refuse to enforce the entire contract, legal and illegal terms alike. . . . Finally, the court might sever the illegal provision and enforce the

no honest purpose for putting such a provision in the contract generally exists in the first place, especially when consumers are vulnerable because of their lack of bargaining power.<sup>149</sup> A lawyer engaged in the difficult line drawing necessary to distinguish between whether a contract provision is valid or invalid in certain jurisdictions, or concerned that the law might change, can disclose conspicuously in the agreement itself that a provision might be invalid. Such disclosure would avoid any risk of disadvantage to his or her client.<sup>150</sup> Disclosure signals that the contracting parties did not assent to the provision (if it is invalid), just as does omitting the provision altogether.

Here is an example from the warranty for the ShamWow! cleaning cloth.<sup>151</sup> The product comes with a warranty that states:

**Square One Entertainment Inc.** is not responsible for scratches or other damage arising from the use of the *Shamwow!* product where foreign materials or debris are present for products such as eyeglasses, sunglasses, camera lenses or other lenses, computer screens, television screens, LCD screens, cell phones, jewelry, silver, or other products.<sup>152</sup>

This appears to be a limitation on consequential damages.<sup>153</sup> Yet, the warranty continues with a section titled “State Law”: “This warranty gives

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remainder of the otherwise valid contract. The law has adopted this third approach, with an important restriction. A court will sever an illegal term and enforce the remainder of an otherwise valid contract, but only where the illegal term ‘is not an essential part of the agreed exchange.’” (quoting RESTATEMENT (SECOND) OF CONTRACTS § 184 (1981)).

<sup>149</sup> Moreover, a contract may be unenforceable due to procedural unconscionability. See generally Craig Horowitz, *Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts*, 33 UCLA L. REV. 940, 944–45 (1986) (“Procedural unconscionability refers to the actual bargaining process during the formation of the contract. The most typical type of bargaining misconduct results in oppression and surprise to the consumer. . . . Oppressive contracts involve no negotiation over the terms of the agreement. The party signing the deal has no reasonable choice in the matter and cannot go elsewhere in the market to obtain better terms.”).

In New York, for example, courts determining whether or not there is procedural unconscionability will focus on the “size and commercial setting of the transaction, whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was a disparity in bargaining power.” *Gillman v. Chase Manhattan Bank*, 534 N.E.2d 824, 828 (N.Y. 1988) (citation omitted).

<sup>150</sup> Cf. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2008) (“Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation . . .”).

<sup>151</sup> See ShamWow! Home Page, <http://www.shamwow.com>.

<sup>152</sup> ShamWow! Limited Warranty (on file with the author).

<sup>153</sup> Consequential damages are typically characterized as “such [damages] as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.” *Hadley v. Baxendale*, 156 Eng. Rep. 145, 152 (Ex. 1854). See also JOSEPH M. PERILLO, CALAMARI

you specific legal rights, and you may also have other rights which vary from State to State. Some States do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.”<sup>154</sup> This provision makes consumers aware that the consequential damage waiver might be ineffective in certain jurisdictions and that they should consult an attorney before deciding whether to seek recovery of consequential damages under the warranty.

In agreements where both parties are represented by counsel, the counterparty’s attorney should be able to advise that party as to the validity of the terms in the contract. Because the attorney’s knowledge is imputed to the client,<sup>155</sup> there is less risk that the counterparty will be defrauded and disadvantaged by conduct that could violate the Model Rules.<sup>156</sup> Yet, as contracts are signals to contracting parties as well as to third parties of the terms to which the parties have consented,<sup>157</sup> even in transactions where all parties are represented by counsel, the attorney-drafter should conspicuously disclose a contract provision that is invalid.

The functional ethics of contract drafting necessitates broadening the definition of “dishonesty” in Model Rule 8.4 to encompass lawyers who draft, but do not conspicuously disclose, invalid provisions in contracts. The more difficult scenario is the “iffy” provision—i.e., where the provision could be invalid, but the lawyer has a good-faith basis for thinking it is valid.<sup>158</sup> It is likely that inclusion of “iffy” clauses is permissible under the Model Rules. Although a lawyer’s judgment must be informed,<sup>159</sup> he or she is not liable for the “true state of the law” if the

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AND PERILLO ON CONTRACTS § 14.5, at 570 (5th ed. 2003) (damages that are “deemed to be contemplated” by the promisor are “frequently known as ‘special’ or ‘consequential’ damages”).

<sup>154</sup> ShamWow! Limited Warranty (on file with the author).

<sup>155</sup> See RESTATEMENT (THIRD) OF AGENCY § 5.03 (2006).

<sup>156</sup> See Kunz, *supra* note 4, at 492 (“In that situation, the law imputes counsel’s knowledge to their client, the principal, in determining whether a third person (the other party) has been defrauded or otherwise disadvantaged under the [Model Rules of Professional Conduct].”).

<sup>157</sup> See Barnett, *Consent Theory*, *supra* note 20, at 302 (“[A]ssent to alienate rights must be *manifested* in some manner by one party to the other to serve as a criterion of enforcement. Without a manifestation of assent that is accessible to all affected parties, that aspect of a system of entitlements that governs transfers of rights will fail to achieve its main function. . . . [I]t will have failed to identify clearly and communicate to both parties (and to third parties) the rightful boundaries that must be respected.”).

<sup>158</sup> See *supra* note 136 and accompanying text.

<sup>159</sup> See, e.g., *Copeland Lumber Yards, Inc. v. Kincaid*, 684 P.2d 13, 14 (Or. Ct. App. 1984) (“When an area of law is unsettled, a choice between possible courses of action necessarily involves judgment. However, professional judgment, by definition, must be *informed*, and that requires a lawyer to make a reasonable effort to develop an understanding of the problem.”).

law is itself unsettled.<sup>160</sup> In *DuPont v. Brady*,<sup>161</sup> for example, the court held a lawyer was not responsible for advising his client that a tax deduction was permissible because no specific statute, regulation, or case specifically said it was not, and the lawyer used his judgment in concluding that it was.<sup>162</sup> Most lawyers drafting contracts are advocates and not neutrals, and it confounds their role to require them to opine on the validity of a contract term when they do not know whether it is valid.

### III. LAWYERS' LIABILITY TO THIRD PARTIES

Because attorneys generally do not have a fiduciary relationship with non-clients, the traditional rule is that they are only liable to third parties in cases of fraud or improper motive.<sup>163</sup> The attorney's liability to a

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<sup>160</sup> See, e.g., *Davis v. Damrell*, 174 Cal. Rptr. 257, 259 (Ct. App. 1981) (“[N]o liability will attach ‘for lack of knowledge as to the true state of the law where a doubtful or debatable point is involved.’” (quoting *Sprague v. Morgan*, 8 Cal. Rptr. 347, 350 (Dist. Ct. App. 1960))).

<sup>161</sup> 646 F. Supp. 1067, 1071, 1076 (S.D.N.Y. 1986), *rev'd*, 828 F.2d 75 (2d Cir. 1987).

<sup>162</sup> The case law is split on whether a lawyer must advise his or her client if there are uncertainties in the law. Compare *id.* (holding there is an ethical duty to advise client of uncertainty), with *Davis*, 174 Cal. Rptr. at 260–61 (holding there is no obligation to advise client that law is unsettled). Perhaps the question is at least one for a jury. See *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 817–18 (Minn. 2006) (holding that jury question exists as to whether firm's representation fell below the standard of care where firm failed to advise client of uncertainty in the law).

<sup>163</sup> The U.S. Supreme Court first articulated this rule in 1879 when it adopted the reasoning of the English court in *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842), and held,

Where there is fraud or collusion, the party will be held liable, even though there is no privity of contract; but where there is neither fraud or collusion nor privity of contract, the party will not be held liable, unless the act is one imminently dangerous to the lives of others, or is an act performed in pursuance of some legal duty.

*Sav. Bank v. Ward*, 100 U.S. 195, 205–06 (1879). The rule from *Savings Bank* has been applied in numerous state cases. See, e.g., *TJD Dissolution Corp. v. Savoie Supply Co.*, 460 N.W.2d 59, 63 (Minn. Ct. App. 1990) (“[T]he current Minnesota rule is that an attorney is not liable to a non-client for negligent advice unless the attorney acted with malice or committed fraud or another intentional tort.”); *Maneri v. Amodeo*, 238 N.Y.S.2d 302, 304 (Sup. Ct. 1963) (“[An attorney] is liable to a third party only when he is guilty of fraud or collusion or of a malicious or tortious act.” (citations omitted)); *Scholler v. Scholler*, 462 N.E.2d 158, 163 (Ohio 1984) (“[A]n attorney is immune from liability to third persons arising from his performance as an attorney in good faith on behalf of, and with the knowledge of his client, unless such third person is in privity with the client or the attorney acts maliciously.” (quoting *Petrey v. Simon*, 447 N.E.2d 1285, 1289 (Ohio 1983)) (quotation marks omitted)); *Green Spring Farms v. Kersten*, 401 N.W.2d 816, 823 (Wis. 1987) (“[A]n exception to the general rule of attorney immunity from liability to nonclients exists when an attorney's conduct is fraudulent with respect to nonclients.”). Cf. *Egle & Annen*, *supra* note 83, at 18 & nn.3–4 (noting that, under Wisconsin law, parties may assume a duty to point out changes made to a successive draft of a contract “by its course of conduct

counterparty to a contract should not be extended, unless the counterparty is a third-party beneficiary to the lawyer's contract for services with the lawyer's client.<sup>164</sup> There are three reasons commonly cited for limiting lawyer liability to non-clients for negligence, all of which apply in the context of lawyers drafting contracts.<sup>165</sup>

First, liability to third parties for negligence may undermine an attorney's duty to advocate zealously for his or her client and to fulfill his or her duties of confidentiality, loyalty, and care.<sup>166</sup> Such liability could

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during negotiations" (citing *Hennig v. Ahearn*, 601 N.W.2d 14, 18 (Wis. Ct. App. 1999)). The duty described by Egle and Annen could extend to attorneys, but could be limited to cases where the attorney acts fraudulently, so the duty is consistent with the traditional rule of attorney liability.

For more on the threat that fraud poses to contracting, see Barnett, *Rational Bargaining*, *supra* note 23, at 799–803.

<sup>164</sup> Of course, the lawyer should proceed with caution to avoid any conflict of interest when the counterparty to a contract is also a third-party beneficiary to the lawyer's contract with his or her client for services. However, this caution aside, lawyers are ethically permitted to represent both parties to a contract if certain conditions are met. MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2008) (permitting concurrent representation if lawyer believes he can provide each client competent representation, the representation is not prohibited by law, the parties are not involved in the same litigation, and each party provides written informed consent). It is not uncommon in a transactional setting for a lawyer to represent both parties to a contract. See John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 757–59 (discussing multiple client representation). The more interesting issue, however, arises when it is unclear whether the attorney "represents" both parties. See, e.g., *Franko v. Mitchell*, 762 P.2d 1345, 1351 (Ariz. Ct. App. 1988) (finding genuine issues of material fact as to whether a lawyer represented both his client and his client's girlfriend when he drafted a loan agreement between them). In a case where client A, for the benefit of B, secures the lawyer's services to draft a contract between A and B, the lawyer may be liable to B under the doctrine of third-party beneficiary, even if B is not the lawyer's client. See generally Kevin H. Michels, *Third-Party Negligence Claims Against Counsel: A Proposed Unified Liability Standard*, 22 GEO. J. LEGAL ETHICS 143, 152–55 (2009) (explaining the third-party beneficiary doctrine). The third-party beneficiary doctrine (as explained further in this introduction to Part III) is derived from a basic tenet of contract law that "parties to a contract have the power, if they so intend, to create a right in a third person." RESTATEMENT (SECOND) OF CONTRACTS § 304 cmt. b (1981).

<sup>165</sup> A lawyer is generally liable only to her client for negligence. See generally 7 AM. JUR. 2D *Attorneys at Law* § 201 (2007) ("An attorney who fails in his or her duty, causing actual loss to the client, is liable for the damages sustained."); 14 AM. JUR. *Trials* § 1 (1968) ("An attorney is liable for the damages suffered by his client resulting from a breach of the duties imposed by this [fiduciary] relationship, such as acquiring a personal interest conflicting with those of his client, disclosing or using confidential information, and defrauding the client. He is also liable for damages his clients suffer because of his negligence in representing them, and it is to the handling of cases of this nature that this Article is directed.").

<sup>166</sup> See *McIntosh County Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 545 (Minn. 2008) (citing *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 379 (Minn. 1989) ("[Such liability] would undermine the attorney's duty to zealously represent the client and resolve all doubts in favor of the client.")). See also *Barcelo v. Elliott*, 923 S.W.2d 575, 578–79 (Tex. 1996) ("This will ensure that attorneys may in all cases

pose a conflict of interest for the lawyer who has duties to his or her client and duties to third parties.<sup>167</sup> While there are limitations on a lawyer's zealous representation in cases of fraud<sup>168</sup> or dishonesty,<sup>169</sup> those are practices, unlike carelessness, that undermine the integrity of the contracting process itself.<sup>170</sup>

Second, attorney liability for negligence to non-clients could undermine the trust between client and attorney.<sup>171</sup> For example, a client may second guess whether his or her attorney's advice regarding the inclusion or omission of a particular contract provision is advantageous to the client, or whether the attorney is simply trying to avoid personal liability (i.e., hedging his or her bets) in case the contract goes awry. The law enforces promises to encourage trust;<sup>172</sup> creating attorney liability to third parties could undermine the same trust that the lawyer was retained to create.

Finally, a third reason has emerged in the context of contract drafting: permitting lawyer liability may "encourage a party to contractual negotiations to forego personal legal representation and then sue counsel representing the other contracting party for legal malpractice if the resulting contract later proves unfavorable in some respect."<sup>173</sup> In other words, the courts are worried there will be a free-rider problem; parties that should have their own counsel will rely on the counterparty's counsel yet sue that counsel if the agreement turns out unfavorable.<sup>174</sup>

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zealously represent their clients without the threat of suit from third parties compromising that representation.").

<sup>167</sup> See *McIntosh County Bank*, 745 N.W.2d at 545. See also *Favata v. Rosenberg*, 436 N.E.2d 49, 51 (Ill. App. Ct. 1982) ("Also, we are hesitant to extend liability to a non-client because of the personal nature of the attorney-client relationship and the potential for conflicts of interest which might arise if such liability were extended to non-clients."); John H. Bauman, *A Sense of Duty: Regulation of Lawyer Responsibility to Third Parties by the Tort System*, 37 S. TEX. L. REV. 995, 1031 (1996) (arguing that potential conflicts of interest limit lawyers' liability to third parties).

<sup>168</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(d).

<sup>169</sup> See *id.* R. 8.4(c).

<sup>170</sup> See *supra* note 23 and accompanying text.

<sup>171</sup> See *McIntosh County Bank*, 745 N.W.2d at 545 (citing *L & H Airco*, 446 N.W.2d at 379 ("It would also undermine the trust between the attorney and client, which is an essential element of the relationship.")).

<sup>172</sup> See *infra* notes 278–80 and accompanying text.

<sup>173</sup> *Chalpin v. Brennan*, 559 P.2d 680, 682 (Ariz. Ct. App. 1976) (denying malpractice claim by a non-client party to a contract and holding that privity with attorney is required for all malpractice claims).

<sup>174</sup> This is also critical because some degree of reliance on the professional is necessary to fulfill the "causation" requirement for tort claims such as professional negligence. See Comment, *Professional Negligence*, 121 U. PA. L. REV. 627, 655–56 (1973) ("[A] possible test for measuring the extent of liability for negligence is that of reasonable reliance. This means that a professional would be liable to those who reasonably rely on his negligent actions to their detriment, regardless of their actual relationship with him. Reliance as a justification for imposing liability espouses a policy decision that those who innocently and reasonably rely on a professional's

In light of these reasons, states have taken four approaches to defining a lawyer's liability to non-parties for negligence: (a) limiting liability to those with whom the lawyer is in privity; (b) extending liability beyond clients to third-party beneficiaries of the lawyer's contract with the client for the lawyer's services; (c) the California balancing approach; and (d) the "composite" approach of the *Restatement (Third) of the Law Governing Lawyers*.<sup>175</sup> Underlying each approach, the general rule is the same: lawyer liability to non-clients for negligence is the *exception* to the rule that lawyers are not liable to non-clients.<sup>176</sup>

The privity approach is that only "those who have entered into a contract for legal services with the lawyer" may sue an attorney for negligence.<sup>177</sup> Therefore, an attorney would not be liable to anyone, other than his or her own client, for any negligence arising from the drafting of a contract. This approach is the most protective of lawyers and also the easiest for courts to apply. It is simple: no liability.

The third-party beneficiary exception to the traditional rule is slightly broader. It is based on a basic principle of contract law: parties can contractually create rights in third persons, and third persons can enforce those rights.<sup>178</sup> States that apply this approach permit recovery by third parties who are the "direct" and "intended" beneficiary of the attorney's services.<sup>179</sup> It is not critical, however, whether the party seeking recovery is a beneficiary to the contract the lawyer is drafting, though this is sometimes the case.<sup>180</sup> Rather, it is crucial whether the party is a third-party beneficiary to the contract between the lawyer and the client for the attorney's services.<sup>181</sup> There have been cases, however where the

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work should not be required to bear a loss admittedly caused by another's negligence. And it limits liability so that a professional is liable only to those who reasonably rely on his work."). Thus, once a court permits liability in the first place, reliance by third parties would likely increase as well. The "causation" element would then be easier to satisfy for third parties suing lawyers in negligence.

<sup>175</sup> See Michels, *supra* note 164, at 150. In his comprehensive article, Kevin Michels discusses the various theories under which states have held (or not held) attorneys liable to third parties. The scope of Michels's article extends beyond drafting contracts, and addresses a variety of potential lawyer shortcomings—e.g., the failure to investigate, negligent drafting of wills, and fraudulent legal opinions. *See id.* at 180–97. This Article focus solely on malfeasance in contract drafting.

<sup>176</sup> *See id.* at 150–58.

<sup>177</sup> See ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 301:602 (2004). *See also* 1 RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 7.7, at 810 n.1 (2005) (citing cases in which courts have adopted the rule); ARK. CODE ANN. §§ 16-22-310, 16-114-303 (2006) (codifying privity rule).

<sup>178</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 304 cmt. b (1981).

<sup>179</sup> *See, e.g., McIntosh County Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 547 (Minn. 2008).

<sup>180</sup> *See infra* Part III.B.

<sup>181</sup> *See, e.g., McIntosh County Bank*, 745 N.W.2d at 544–49 (involving a claim brought by the purchaser of an interest in a debt against the attorney who negligently drafted the loan documents between the predecessor of interest in the debt and the borrower).

counterparty of a contract has alleged that she is a third-party beneficiary of the contract for the attorney's services.<sup>182</sup>

The third approach, the so-called "California balancing" approach, weighs a set of factors to determine whether to hold an attorney liable to a non-client in a given case.<sup>183</sup> This approach is based largely on public policy, rather than on contract or tort law. The factors were originally announced in *Biakanja v. Irving*<sup>184</sup> and included:

the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy for preventing future harm.<sup>185</sup>

This test has been criticized as "ad hoc, unworkable, vague, difficult to use in practice, and of little use to a party to determine, in advance, the scope of possible duties."<sup>186</sup> The California balancing test has never been applied in a published case to permit recovery by a non-client against an attorney in a dispute arising from the drafting of a contract. It has been applied in malpractice cases arising primarily, if not exclusively, from the drafting of a will.<sup>187</sup>

Finally, there is the approach of sections 51(2) and 51(3) of the *Restatement (Third) of the Law Governing Lawyers*, which set forth the "limited circumstances" in which a lawyer owes a duty of care to non-clients.<sup>188</sup> According to the *Restatement*, lawyers owe a duty to non-clients in situations where the non-client (1) is a prospective client (which is not relevant to the situations described in this Article);<sup>189</sup> (2) is invited to rely

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<sup>182</sup> See, e.g., *Franko v. Mitchell*, 762 P.2d 1345, 1351–54 (Ariz. Ct. App. 1988) (involving a contract for a loan between two parties who were involved in a romantic relationship; although the attorney represented one party, the second party claimed the contract was drafted solely for her benefit). See *infra* Part III.B for a discussion of this case.

<sup>183</sup> See Michels, *supra* note 164, at 155.

<sup>184</sup> 320 P.2d 16 (Cal. 1958).

<sup>185</sup> *Id.* at 19. In this case, the court found a notary public, who was not an attorney, liable to a beneficiary of a will for failing to have the will properly attested. *Id.* The factors in *Biakanja* were subsequently applied in a case in which the court found that an attorney who drafted a will could be liable to a beneficiary for negligent drafting. See *Lucas v. Hamm*, 364 P.2d 685, 687–88 (Cal. 1961). Although the court in *Lucas* spent time discussing when a third party could recover from an attorney for malpractice, the plaintiffs in *Lucas* lost. The beneficiaries lost their benefit under the will owing to the application of the Rule Against Perpetuities, and the court said, in effect, that nobody understands the Rule, and the failure to deal with it properly is not negligence. See *id.* at 690.

<sup>186</sup> See Michels, *supra* note 164, at 156 (internal quotation marks and footnotes omitted).

<sup>187</sup> See *supra* note 185 and accompanying text.

<sup>188</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 cmt. a (2000).

<sup>189</sup> *Id.* § 51(1).

(and does rely) on the lawyer's opinion or legal services;<sup>190</sup> (3) is intended by the client to benefit from the lawyer's services;<sup>191</sup> or (4) is owed certain enumerated fiduciary duties by the client (also not relevant here).<sup>192</sup> Thus, in the contract-drafting context, the *Restatement* would appear to permit recovery primarily in third-party beneficiary cases.

All of these approaches to liability are, from a practical standpoint, rarely used against a lawyer drafting a contract. For example, there are very few reported cases where one party to a contract sues the attorney of the other party to the contract. Where there is a dispute over a contract term, the party ordinarily challenges the term to avoid the contract<sup>193</sup> or sues the attorney's client for breach. Still, there have been a few cases in which courts have addressed attorney liability for contract drafting. The cases can be divided into two categories: cases where the issue is the attorney's liability to a non-party to the contract, which are discussed in Part III.A, and cases where the issue is the attorney's liability to a counterparty to the contract, which are discussed in Part III.B.

#### A. Attorney Liability to Non-Parties

For the reasons previously discussed, courts have not found attorneys liable to non-parties for negligence in drafting contracts.<sup>194</sup> However, non-parties who are third-party beneficiaries to the contract between the lawyer and the client for the lawyer's services should be able to recover from the attorney for professional negligence because, in those cases, both the lawyer and client are aware of, and agree to proceed in light of, the overlapping and diverging interests between the client and the non-party.<sup>195</sup>

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<sup>190</sup> See *id.* § 51(2)(a). See also Michels, *supra* note 164, at 159 (describing the "invitation" to rely as limited to "an express undertaking with the nonclient to deliver an opinion, analysis, or other service").

<sup>191</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(3). The intent-to-benefit standard is analogous to third-party beneficiary law. See Michels, *supra* note 164, at 157–58 (describing the standard as a "modified version of third-party beneficiary law").

<sup>192</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(4).

<sup>193</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981) ("A voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract."); see also *id.* § 7 cmt. b ("Typical instances of voidable contracts are those where one party was an infant, or where the contract was induced by fraud, mistake, or duress, or where breach of a warranty or other promise justifies the aggrieved party in putting an end to the contract.").

<sup>194</sup> For additional cases regarding attorney liability to non-clients, see Joan Teshima, Annotation, *Attorney's Liability, to One Other than Immediate Client, for Negligence in Connection with Legal Duties*, 61 A.L.R.4TH 615 (1988).

<sup>195</sup> The Model Rules prohibit attorneys from representing clients if there would be a concurrent conflict of interest, unless the parties consent to the representation. MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2008) ("A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client;

The Minnesota Supreme Court faced the issue of whether an attorney was liable for negligent drafting to a non-party to a contract in *McIntosh County Bank v. Dorsey & Whitney, LLP*.<sup>196</sup> In that case, Dorsey & Whitney, LLP (Dorsey) represented M & S bank in the negotiation and drafting of two loan agreements with the St. Regis Mohawk Tribe (Tribe).<sup>197</sup> The Tribe defaulted and defended on the ground that the contracts were unenforceable because the National Indian Gaming Commission did not approve the pledge agreement to the loans.<sup>198</sup> McIntosh County Bank (McIntosh), a plaintiff in the case,<sup>199</sup> was one of many banks that had purchased an interest in the loans and sued Dorsey for negligence in drafting the contracts that the Tribe alleged were unenforceable.<sup>200</sup> The question before the court was when (if ever) a lawyer drafting a contract owes a duty of care to a non-party to the contract.<sup>201</sup>

The Minnesota court adopted a third-party beneficiary approach, outlining a limited exception to the general rule that attorneys owe a duty only to their clients in the absence of fraud.<sup>202</sup> The court stated, “[I]n order for a third party to proceed in a legal malpractice action, that party must be a direct and intended beneficiary of the attorney’s services.”<sup>203</sup> A “direct” beneficiary of a transaction, the court said, is where “the transaction has as a central purpose an effect on the third party and the effect is intended as a purpose of the transaction.”<sup>204</sup> For the third party to be an “intended” beneficiary, the court said, “the attorney must be aware of the client’s intent to benefit the third party.”<sup>205</sup> The court

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or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”). For more information about consent to conflict of interest, see *supra* note 164 and accompanying text.

<sup>196</sup> 745 N.W.2d 538 (Minn. 2008).

<sup>197</sup> *Id.* at 541. The loans were made for the purpose of building a casino. *Id.*

<sup>198</sup> *Id.* at 543.

<sup>199</sup> M & S filed for bankruptcy in January 2002. The bankruptcy trustee brought the action on behalf of M & S against Dorsey. *Id.* at 543–44.

<sup>200</sup> *See id.* at 544.

<sup>201</sup> *See id.* at 545.

<sup>202</sup> *Id.* at 545, 547.

<sup>203</sup> *Id.* at 547; *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981) (“Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.”). Whether the third party may proceed in a malpractice action is not necessarily related to whether the lawyer violated the disciplinary rules, see *supra* note 14, but some courts use a violation of a disciplinary rule as evidence of malpractice.

<sup>204</sup> *McIntosh County Bank*, 745 N.W.2d at 547.

<sup>205</sup> *Id.* at 548. Additionally, the court held that *if a duty is owed*, the *extent* of that duty is to be determined by considering the so-called *Lucas* factors. *Id.* at 547. The *Lucas* factors derive from *Lucas v. Hamm*, 364 P.2d 685, 687 (Cal. 1961), and were adopted by the Minnesota Supreme Court in *Marker v. Greenberg*, 313 N.W.2d 4, 5

held that the purpose of the loan agreements was not to benefit McIntosh, but to close the loans, and even if the purpose was to benefit McIntosh, Dorsey was not aware of that intent.<sup>206</sup> The court was mindful of the duties of confidentiality, loyalty, and care that a lawyer owes to his or her client,<sup>207</sup> and refused to extend the lawyer's liability to a non-client where both the lawyer and the client did not expressly acknowledge that the lawyer intended to benefit the non-client. The Minnesota Supreme Court reversed the court of appeals, and found that the district court's order of summary judgment on this issue in favor of Dorsey was appropriate.<sup>208</sup>

In cases where the non-party is a third-party beneficiary to the lawyer's contract with his or her client for services, the client and lawyer are aware of the risk of any conflict, and the non-party should be able to proceed with any claim against the lawyer for negligent drafting. But the liability of an attorney to a non-client should not be extended further. In a recent article, Professor Kevin H. Michels suggests that attorney liability for negligence should extend to non-clients in cases in which the attorney has a nexus-based relationship with the plaintiff and no attorney-specific limitation precludes the imposition of such a duty.<sup>209</sup> Michels does not apply his theory to negligent contract drafting. When drafting a contract, except with third-party beneficiaries, it is unlikely that the attorney creates a "nexus-based relationship" with a non-party to the contract by intending to "influence with information," or induce reliance by, a non-party.<sup>210</sup> A contract involves parties consenting to the exchange of rights;<sup>211</sup> the lawyer drafts the contract to facilitate that exchange of rights (as opposed to rights *the parties* create by relying on the contract) and, in the ordinary case, the lawyer does not intend for the contract

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(Minn. 1981). In *Lucas*, the court stated, "[T]he determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm." *McIntosh County Bank*, 745 N.W.2d at 546 (quoting *Lucas*, 364 P.2d at 687) (alteration in original). The court in *McIntosh County Bank* stated that in the case of wills, gifts by deed, and trust agreements, the lawyer and client usually intend for a third party (e.g., beneficiary, donee) to benefit from the lawyer's services, which distinguishes those cases from the case before the court. *See id.* at 548.

<sup>206</sup> *McIntosh County Bank*, 745 N.W.2d at 548.

<sup>207</sup> *See id.* at 545.

<sup>208</sup> *Id.* at 549.

<sup>209</sup> *See Michels, supra* note 164, at 160–65.

<sup>210</sup> *See id.* at 160. Professor Michels discusses attorney acts and omissions, in addition to communications, but contract drafting is attorney communication. That is not always the case with negotiations.

<sup>211</sup> *See Barnett, Consent Theory, supra* note 20, at 270 ("Properly understood, contract law is that part of a system of entitlements that identifies those circumstances in which entitlements are validly transferred from person to person by their consent.").

language to induce reliance by non-parties. Even if the lawyer is aware of the possibility that the contract could induce reliance by non-parties, that possibility is too uncertain to subject the attorney to liability.

*B. Attorney Obligations to Counterparties*

Even though an attorney intends to induce reliance by a counterparty, extending attorney liability for negligent drafting to counterparties fails the second part of Michels's test.<sup>212</sup> There is, in this context, an attorney-specific limitation on creating a duty. A contract is a bargained-for exchange;<sup>213</sup> a lawyer has a duty of loyalty to his or her client to get the "best" bargain possible.<sup>214</sup> Imposing a duty on an attorney to a counterparty undermines that obligation, just as how a lawyer cannot generally represent and be loyal to two sides to a deal.<sup>215</sup> Such liability also potentially undermines the client's trust in the contracting process.<sup>216</sup> The only exception should be where a counterparty is a third-party beneficiary to the contract between the client and the lawyer for the

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<sup>212</sup> See Michels, *supra* note 164, at 162–65.

<sup>213</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) ("Except [in some enumerated circumstances], the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.").

<sup>214</sup> See John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1331–38 (2003) (discussing the lawyer's duty of zealous advocacy in representing a client in negotiation; advocating for a collaborative law approach and noting that using every permissible tough position, although zealous, may actually harm the client, and is not required under the rules).

<sup>215</sup> Lawyers should be cautious about agreeing to represent both sides of a contract. See Dzienkowski, *supra* note 164, at 797–98 (stating that although the Model Rules were "drafted with the underlying assumption that multiple clients should be able to hire one lawyer and consent to an agreement[,] . . . [t]he law of professional responsibility should not allow a lawyer-intermediary to complete an agreement without examining the effect of the agreement on each party's best interests"). Courts and bar associations generally prefer individuals seek their own legal counsel in most situations. See *id.* at 759 ("Over the years . . . several courts and bar associations strongly discouraged the simultaneous representation of buyers and sellers of real estate because this situation involved such a serious conflict of interest. In the context of divorce practice, the courts and bar associations viewed the fault nature of the proceedings as creating an impermissible conflict of interest between the spouses.").

<sup>216</sup> See *infra* notes 278–80 and accompanying text. The same analysis applies to a lawyer drafting a "form" contract. The lawyer's duty is to draft terms that are in the client's best interest while obeying the law. Imposing a duty of due care to consumers who are parties to a "form" contract the attorney drafts risks interfering with the lawyer's duties to the client and chilling lawyers. A lawyer, torn between loyalty to the client and a duty to the consumers who do business with the client, might decide not to draft or review "form" contracts altogether. The consumer can always challenge the contract against the lawyer's client, and the disciplinary rules place limits on attorney conduct. See *supra* Part II.

lawyer's services, and the lawyer and client are aware of the potential conflict.<sup>217</sup>

The courts in the following cases faced the issue of whether an attorney was liable to a counterparty to a contract for negligent drafting. In *Chalpin v. Brennan*, Arizona's court of appeals in a case of first impression adopted the traditional privity rule that attorneys do not have a duty of care to non-clients.<sup>218</sup> Brennan, corporate counsel for Mobile Gardens, drafted "merged contracts for option and an employment-management agreement which contain[ed] certain material misrepresentations of fact."<sup>219</sup> Chalpin, a non-party to the merged contracts, filed suit against Brennan for negligence, alleging that he relied on the misrepresentations when deciding to purchase stock in Mobile Gardens.<sup>220</sup>

The court held that Chalpin could not recover from Brennan for legal malpractice because there was no contract for legal services between them.<sup>221</sup> Without addressing whether Brennan actually made factual misrepresentations, the court held that Brennan's overriding duty of "zealous representation" to his client, Mobile Gardens, was incompatible with any duty to third parties.<sup>222</sup> To hold otherwise, the court held, would encourage reliance by third parties on their adversary's legal counsel, causing them to forgo seeking legal representation.<sup>223</sup> The court stated that the proper remedy for Brennan's alleged misrepresentations was through disciplinary proceedings,<sup>224</sup> apparently for fraud.<sup>225</sup> What the court curiously failed to address was why the plaintiff could not sue the attorney for fraud, as opposed to professional negligence, where privity is not required.<sup>226</sup> Fraud is an ethical violation, and a defense to enforceability of a contract, so holding an attorney liable for fraud would not have interfered with the attorney's loyalty to his client. The plaintiff should therefore have been allowed to proceed against the attorney on that basis.

It is unclear whether the outcome of *Chalpin* would be the same today. Indeed, the strict privity requirement the court adopted in *Chalpin* was "disapproved of" in *Donnelly Construction Co. v.*

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<sup>217</sup> This third-party beneficiary theory was alleged, albeit unsuccessfully, in *Franko v. Mitchell*, 762 P.2d 1345, 1351-52 (Ariz. Ct. App. 1988). See *infra* notes 233-50 and accompanying text.

<sup>218</sup> 559 P.2d 680, 681-82 (Ariz. Ct. App. 1976).

<sup>219</sup> *Id.* at 681.

<sup>220</sup> *See id.*

<sup>221</sup> *Id.* at 682.

<sup>222</sup> *Id.*

<sup>223</sup> *See id.*

<sup>224</sup> *Id.* Indeed, Brennan was in fact disbarred from practicing law in the state of Arizona. *Id.* at 682 n.1.

<sup>225</sup> *See id.* at 681.

<sup>226</sup> *See supra* note 163 and accompanying text.

*Oberg/Hunt/Gilleland*.<sup>227</sup> In *Donnelly Construction Co.*, the court permitted a contractor to recover from an architect who negligently drafted plans and specifications, even though the contractor and the architect were not in privity of contract.<sup>228</sup> Although the court did not expressly overrule *Chalpin*, it stated, “There is no requirement of privity in this state to maintain an action in tort.”<sup>229</sup>

The court in *Franko v. Mitchell* essentially affirmed this finding from *Donnelly Construction Co.* and set forth Arizona’s framework for determining lawyer liability, which permits recovery if the attorney owed a duty to a third party that is derivative of his or her duty to the client and certain policy factors weigh in favor of imposing liability.<sup>230</sup> The third party cannot recover from the attorney unless “there was negligence between the attorney and his client” or a fiduciary relationship between the attorney and the third party.<sup>231</sup> This approach raises the same risks in the negligent-drafting context as the court raised in *Chalpin*—parties to contracts might rely on their counterparties’ counsel and forgo representation or rely on their own judgment.<sup>232</sup> Attorneys might also have conflicting loyalties if some interests of the parties to the contract coincide (so that the attorney could be negligent to both sides), even though other interests differ.

The facts of *Franko v. Mitchell* are particularly alarming. In *Franko*, an unmarried couple, Franko and Markoff, entered into a contract for Franko to loan money to Markoff to begin his own business.<sup>233</sup> The couple sought the assistance of an attorney, Mitchell, purportedly “to protect” Franko.<sup>234</sup> Mitchell drafted the contract and both parties signed.<sup>235</sup> Franko thought that she was protected if Markoff defaulted by an “interest” in the eventual sale of Markoff’s home and an insurance policy on his life, but Markoff never took out the required life insurance and Franko could not reach the proceeds on the sale of Markoff’s home.<sup>236</sup> The loan was therefore uncollectible.<sup>237</sup>

There was some question as to whether Mitchell was in fact Franko’s attorney; the court held that there was enough evidence to sustain an inference that he was.<sup>238</sup> The more interesting issue, however, was whether, even if Mitchell was not Franko’s attorney, he was liable to her

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<sup>227</sup> 677 P.2d 1292, 1295–96 (Ariz. 1984).

<sup>228</sup> *Id.* at 1296.

<sup>229</sup> *Id.* at 1295.

<sup>230</sup> 762 P.2d 1345, 1354 (Ariz. Ct. App. 1988).

<sup>231</sup> *Id.*

<sup>232</sup> See *supra* note 223 and accompanying text.

<sup>233</sup> *Franko*, 762 P.2d at 1347.

<sup>234</sup> *Id.* at 1348.

<sup>235</sup> *Id.* at 1349.

<sup>236</sup> *Id.* at 1347.

<sup>237</sup> *Id.* at 1350.

<sup>238</sup> *Id.* at 1351.

under a third-party beneficiary theory. Franko argued that the sole purpose of the contract was to protect her.<sup>239</sup> The court noted that Markoff told Franko that they should have a lawyer prepare “the loan documentation to provide the protection Markoff wanted Franko to have.”<sup>240</sup> Even with this evidence, the court rejected the third-party beneficiary claim.<sup>241</sup>

The court stated that third-party beneficiary claims are possible, despite the absence of privity between the lawyer and third party.<sup>242</sup> The court set forth a two-part test to determine third-party liability.<sup>243</sup> First, the court said “any duty owed by an attorney to a third party is derivative of the duty owed by that attorney to his client.”<sup>244</sup> Thus, “at a minimum, there must be an allegation that the defendant attorney was negligent towards his client.”<sup>245</sup> Second, if there is a duty, the court must apply a balancing test to determine whether liability should be imposed.<sup>246</sup> This balancing test, originally introduced in *Fickett v. Superior Court of Pima County*,<sup>247</sup> balances:

the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injuries suffered, the moral blame attached to the defendant’s conduct, and the policy of preventing future harm.<sup>248</sup>

Franko could not get past the first inquiry—she could not show that the attorney was negligent to his own client, Markoff.<sup>249</sup> It is notable how the court established a framework that in effect substituted its own ad hoc judgment for whether an attorney could owe a duty of care to a counterparty to a contract, for the client’s and attorney’s own judgment. The court should have asked whether Franko was a third-party beneficiary to the attorney’s contract with Markoff for legal services.<sup>250</sup> If she were, Mitchell assumed a duty of care to Franko, regardless of the outcome of the court’s two-part test. The court’s approach, in the contract-drafting context, was wrong.

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<sup>239</sup> *See id.* at 1352.

<sup>240</sup> *Id.* at 1347.

<sup>241</sup> *Id.* at 1352.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 1354.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> 558 P.2d 988 (Ariz. Ct. App. 1976) (holding that an attorney for a former guardian who misappropriated an incompetent person’s funds could be held liable to successor guardian for negligence).

<sup>248</sup> *Id.* at 990.

<sup>249</sup> *Franko*, 762 P.2d at 1355.

<sup>250</sup> *See supra* notes 178–82 and accompanying text.

The court in *Brooks v. Zebre* did not apply third-party beneficiary law at all in concluding that a counterparty to a contract could not sue the attorney who drafted it for negligent drafting.<sup>251</sup> In *Brooks*, an attorney (Zebre) drafted an unconscionable contract involving the sale of Brooks's ranch to the Arambels (Zebre's client).<sup>252</sup> The district court rescinded the contract.<sup>253</sup> Still, Brooks sought to recover damages from Zebre under the theories of negligence, gross negligence, and fraud.<sup>254</sup> The issue in the case was whether Zebre could be held liable to Brooks (who is a non-client) under any of the theories alleged.<sup>255</sup>

The Supreme Court of Wyoming affirmed the entry of summary judgment in favor of Zebre and dismissed all claims.<sup>256</sup> For the negligence claim, the court held that an attorney owes *no* duty to an adversarial non-client, which Brooks was, because any duty would have violated his or her primary duty to the client.<sup>257</sup> The court also found that "no private cause of action in favor of a non-client can be found attributable to violations of the disciplinary rules relating to attorneys."<sup>258</sup> As to the plaintiff's fraud claim, the court held that the plaintiff did not plead any actual misstatement or omission by the attorney.<sup>259</sup> Yet, as the dissent noted, the drafting of the unconscionable contract itself, compounded by Zebre encouraging Brooks to sign the contract without advice of her lawyer, should have been enough to impose liability on Zebre for fraud.<sup>260</sup>

In fact, the dissent pointed out that the relationship between Brooks and the Arambels was *not* adversarial: there was no litigation involved, and Brooks was not represented by an attorney.<sup>261</sup> Moreover, the dissent argues that even if it would otherwise have been an adversarial relationship, Zebre assumed the responsibility of an advising attorney to Brooks when he advised her *not* to hire her own counsel.<sup>262</sup> Therefore, the dissent found that Brooks should have been able to pursue his negligence claims.<sup>263</sup> The critical question that the majority and dissent did not address was whether both Zebre *and* the Arambels agreed that Zebre could protect both the Arambels and Brooks, a question that third-party beneficiary law would have answered.

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<sup>251</sup> 792 P.2d 196, 201 (Wyo. 1990).

<sup>252</sup> *Id.* at 197.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 200.

<sup>256</sup> *Id.* at 202.

<sup>257</sup> *Id.* at 200 (citing *Hughes v. Housley*, 599 P.2d 1250 (Utah 1979)).

<sup>258</sup> *Id.* at 201.

<sup>259</sup> *Id.* at 202.

<sup>260</sup> *See id.* at 228 (Urbigkit, J., dissenting).

<sup>261</sup> *Id.* at 203.

<sup>262</sup> *Id.* at 220.

<sup>263</sup> *Id.* at 203, 220–21.

Despite the rousing dissent in *Brooks*, the reality is that taken together, *Franko* and *Brooks* show how difficult it is for counterparties to a contract to succeed on a claim for negligence against the attorney who drafted the contract.

#### IV. RATIONALE AND RECOMMENDATIONS

Part IV examines the rationale for the functional interpretation of the ethical rules discussed in this Article and offers recommendations for how lawyers drafting contracts can comply with the disciplinary rules and avoid third-party liability.

##### A. *Rationale*

In a contract, by definition, parties mutually assent to an exchange of rights.<sup>264</sup> One of the roles of lawyers drafting contracts is to facilitate that exchange and promote trust that promises will be enforceable.<sup>265</sup> Thus, it is contract law itself that should help define the ethical rules for attorneys in the contract-drafting context.

First, although fraud does not necessarily preclude assent,<sup>266</sup> it creates a disparity between the rights the parties agreed to exchange and the resources that they actually exchanged. The gap is created in part because parties lose trust when they do not receive the resources that they believed they exchanged. If, for example, a lawyer drafts a fraudulent representation as to certain goods in a sales contract, the lawyer makes an “intrinsic” misrepresentation as to the goods.<sup>267</sup> Laws, as do the ethical rules, remedy such an “unjust gap.”<sup>268</sup> Negligence by a contracting party generally does not give the other party to the contract such a remedy, at least when the misrepresentation is not material.<sup>269</sup> The

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<sup>264</sup> See *supra* note 211. See also U.C.C. § 1-201 (2008) (defining “contract,” stating it “means the total legal obligation that results from the parties’ agreement as determined by [the Uniform Commercial Code] as supplemented by any other applicable laws” (alteration in original)).

<sup>265</sup> See *infra* notes 278–80 and accompanying text.

<sup>266</sup> See *supra* note 23 and accompanying text.

<sup>267</sup> See Barnett, *Rational Bargaining*, *supra* note 23, at 802.

<sup>268</sup> See *id.*

<sup>269</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981) (“If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.”). Technically, negligent misrepresentation is an equitable defense to contractual enforcement (specific performance) and neither contract nor tort law should provide relief for negligent misrepresentation, except where the doctrine of promissory estoppel is invoked to impose liability. See Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1042–43 & n.83 (2009). However, the doctrines of “fraudulent and material misrepresentation” could be employed to void a contract for negligent misrepresentation. See *id.* Further, a maker of a negligent or innocent misrepresentation could be liable in tort. See RESTATEMENT (SECOND) OF TORTS § 552

fact that the disciplinary rules do not remedy fraud that is reckless, as opposed to fraud that is knowing,<sup>270</sup> reflects concern for only disciplining attorneys for “knowing” misconduct rather than an inconsistency between contract rules and ethical rules.

Second, parties cannot assent to invalid terms.<sup>271</sup> For example, if a lawyer drafts a “form” warranty in which the seller disclaims any right of the buyer to recover consequential damages for personal injury, that clause is unenforceable.<sup>272</sup> The consumer cannot assent to that disclaimer, and placing such a provision in a warranty prevents consumers and third parties from relying on the warranty and trusting that it is enforceable. Prohibiting an attorney from drafting invalid clauses, or requiring conspicuous disclosure that an invalid provision might be unenforceable, is consistent with contractual assent.

Third, ambiguous language interferes with contractual enforcement. It creates the risk that the court will enforce a bargain other than that to which the parties thought they were assenting, which interferes with trust in contractual relationships.<sup>273</sup> Further, contracts define to the contracting parties and to others the rights exchanged, while ambiguous language threatens the “boundary defining” function of contract law.<sup>274</sup> Consequently, a functional interpretation of Model Rule 8.4 in the contract-drafting context could preclude “conscious ambiguity.”

#### B. Recommendations

The following are recommendations for attorneys to fulfill their ethical obligations and not incur liability to third parties when drafting contracts.

- The lawyer should not knowingly or recklessly include false representations in a contract or warranties that the client cannot fulfill, and should use other provisions of the contract to allocate risk. The lawyer should also use due care in drafting representations and warranties. If the client incurs liability to the

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(1977) (“One who . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.”); *id.* § 552C (“One who . . . makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.”).

<sup>270</sup> See *supra* notes 43–47 and accompanying text.

<sup>271</sup> See *supra* note 148 and accompanying text.

<sup>272</sup> See U.C.C. § 2-719(3) (2002).

<sup>273</sup> See Duhl, *supra* note 116, at 77.

<sup>274</sup> See *supra* note 133 and accompanying text.

counterparty for misrepresentation,<sup>275</sup> the attorney risks incurring liability to his or her client.

- When drafting a contract, the attorney should mark all proposed changes in each draft using, for example, “track changes,” redline, or blackline, and insist that opposing counsel do the same. The lawyer should carefully review the final agreement line-by-line with the client before the client signs it. The lawyer should reveal any transcription error to opposing counsel, but consider whether first to discuss the error with his or her client.
- Attorneys should avoid ambiguous, as opposed to vague, language when drafting. They should clarify ambiguity in draft language proposed by opposing counsel.
- Lawyers should not include provisions in agreements that they know are invalid, especially in “form” contracts. As an alternative, when in doubt as to a provision’s validity, a lawyer can disclose conspicuously that the provision might be invalid in certain jurisdictions.
- When retained by a client to draft an agreement, the lawyer should include language in the retainer agreement that no third party is a “direct” or “intended” beneficiary of the lawyer’s services, unless the lawyer and the client agree for the lawyer to assume a duty to the third party and the lawyer can do so without sacrificing his or her loyalty to the client.
- When drafting an agreement on behalf of a client where the counterparty does not have an attorney, the lawyer might suggest that the counterparty hire an attorney, and, if he or she cannot afford to do so, the attorney should consider recommending that the client hire an attorney on his or her behalf, particularly when a disparity of bargaining power exists (e.g., the counterparty is an employee).<sup>276</sup> That might not be met with unalloyed enthusiasm by the client, so another alternative is for the lawyer to suggest that the counterparty seek representation from a law school clinic or other free legal services provider.

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<sup>275</sup> If an attorney makes a fraudulent, negligent, or even innocent misrepresentation, the client may be liable to the counterparty for damages caused. *See supra* note 269. Accordingly, the client may then seek indemnity from his attorney, assuming it was the attorney’s fault, under a standard malpractice claim. *See* 7 AM. JUR. 2D *Attorneys at Law* § 201 (2007) (“An attorney who fails in his or her duty, causing actual loss to the client, is liable for the damages sustained.”).

<sup>276</sup> The current Model Rule 4.3, which addresses how a lawyer should deal with unrepresented persons, says “a lawyer shall not state or imply that the lawyer is disinterested” and “[t]he lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel.” MODEL RULES OF PROF’L CONDUCT R. 4.3 (2008). Assuming the lawyer does these two things, he has no additional obligation to help the unrepresented person obtain counsel. *Id.* R. 4.1.

## V. CONCLUSION

Functional ethical rules for contract drafting come from contract law itself. But that ethic only begins the dialogue. While regulatory rules proscribe attorney misconduct, they fail to give any prescription for the values and norms attorneys should adopt in transactional drafting.

Legal educators have increasingly recognized the need to teach law students professional values as distinct from ethical rules of responsibility.<sup>277</sup> Honesty, integrity, and trustworthiness are among those values.<sup>278</sup> They facilitate the increased emphasis in contract drafting and negotiation on cooperation, and the decreasing emphasis on competition. This shifting emphasis helps enable lawyers to build the trust among commercial parties<sup>279</sup> that is critical to the success of business relationships.<sup>280</sup> Those values also could be at the core of how lawyers draft “form” contracts with language that is clearer and easier to read, helping consumers gain confidence in the companies with whom they do business. The professionalism of transactional lawyers is critical to improving the trust at the core of economic relationships. How to instill and teach this professionalism is where the dialogue must turn next.

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<sup>277</sup> See, e.g., Richard K. Greenstein, *Against Professionalism*, 22 GEO. J. LEGAL ETHICS 327, 329, 369–71 (2009) (arguing that “the foundation of professional ethics perversely undermines sound ethical reasoning,” and that law schools should solve the issue by fundamentally changing the way ethics is taught).

<sup>278</sup> See, e.g., Minnesota State Bar Association, MSBA Student & Professionalism Committee, Honesty, Integrity, and Trustworthiness, <http://www2.mnbar.org/committees/professionalism/CoreValue2.pdf>.

<sup>279</sup> See Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 52 (1985) (advocating a cooperative approach to negotiation where “two negotiators . . . seek to reach an agreement which is fair and equitable to both parties and seek to build an interpersonal relationship based on trust”).

<sup>280</sup> See G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 VAND. L. REV. 221, 255 (1991) (“Parties prefer to deal based on trust because it lowers the transaction costs inherent in the alternative approach of bargaining based on mutual suspicion . . . . Business dealings grounded entirely in trust are rare . . . . Perhaps even more unusual, however, are successful business dealings that lack trust as a strong part of the relationship.”).