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The Ethics of Non-Traditional Contract Drafting

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THE ETHICS OF NON-TRADITIONAL CONTRACT DRAFTING

*Lori D. Johnson**

Abstract

A new generation of contract drafters faces increasing commentary advising them to change traditional contract terms into plain language constructions. Yet, traditional, tested terms have consistent meanings, and when these meanings benefit client objectives, advocates should consider retaining them. This article posits that failing to do so can impact a lawyer's ethical obligations. Specifically, an attorney's duties of competence, allocation of authority, diligence, and communication under the Model Rules of Professional Conduct require careful thought about modernizing tested contract terms. These duties require the ethical drafter to research whether the use of a traditional, tested term advances a client goal more effectively, and communicate with the client concerning the risks associated with the potential change.

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I. INTRODUCTION

“My biggest problem with modernity may lie in the growing separation of the ethical and the legal.” ~ Nassim Nicholas Taleb

The modern transactional attorney’s daily practice consists of structuring, counseling, advising, negotiating and drafting the terms of clients’ contracts, down to the smallest detail. In essence, using language to bring to life the often complex and delicate arrangements between parties entering into business relationships. The words of a contract can carry millions of dollars worth of importance, can provide the client with rights, or strip them away, depending on how an opposing party or court interprets them. Therefore, every time a transactional lawyer makes a language choice, they are engaging a form of client advocacy, attempting to prepare a contract that sits at the

intersection of applicable law, client interests, and the business deal.¹

Why then, do the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules) provide such scarce guidance to transactional practitioners engaged in contract drafting choices?² The modern transactional attorney is buffeted with choices on how best to structure the language of a client's contract. The lawyer, the law firm, and even the client may have tested forms, and today's drafter may also be trained in the benefits of the plain-language approach to drafting. The way in which the Model Rules apply to transactional attorneys must evolve to provide guidance to attorneys grappling with these competing voices.

This Article seeks to clarify the role of the modern transactional attorney, and show that heightened ethical responsibilities exist when seeking to rephrase traditional, tested contract language into modern prose. Specifically, the competence and diligence duties imposed by the Model Rules require particularly careful research, consideration, and cost-consciousness to be assured that the new construction will efficiently and effectively achieve the client's goals. Further, enhanced communication with the client is required to determine the client's risk tolerance in connection with proposed untested language.

This Article will proceed in five parts. Part II will provide background on the growing influence of the plain language movement on contract drafting style. Part III will review current modes of understanding ethical obligations of contract drafters and examine the weaknesses of those modes. Part IV will explore additional means of regulating the behavior of modern drafters of sophisticated contracts. Part V will undertake case studies concerning particular language choices and duties to clients. Finally, Part VI will recommend potential changes to the way ethical rules are interpreted and applied to drafters of complex contracts.

II. THE PLAIN LANGUAGE MOVEMENT'S IMPACT ON DRAFTING

As the number of law students leaving law school with a foundation in contract drafting instruction increases, so too does the tension between the traditional drafting style employed by some seasoned practitioners, and the influence of the relatively recent call by certain commentators for a broader use of plain language in contract drafting.³

1. TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* 3, 369 (Wolters Kluwer Law & Bus. 2d ed. 2014) [hereinafter STARK, *DRAFTING CONTRACTS*].

2. *Id.* at 455 (noting that there are no Model Rules specifically applicable to transactional practice).

3. Lori D. Johnson, *Say the Magic Word: A Rhetorical Analysis of Contract Drafting Choices*,

The dawn of the modern plain language movement has coincided with the increase in legal drafting instruction in law schools, and the game-changing attitudes of some modern drafting scholars concerning modernizing language choices have become more instructive to young lawyers.⁴

The plain language movement began with David Mellinkoff's *The Language of the Law* in 1963 and expanded in Richard Wydick's widely cited *Plain English for Lawyers* in 1979.⁵ These works formed the basis of a movement spanning more than fifty years⁶ and encompassing hundreds of books in the U.S. and abroad touting its many benefits.⁷ While the earliest applications of the movement focused on "consumer contracts" and other public documents,⁸ more recently, some scholars of drafting style have argued that its benefits extend to the context of sophisticated contracts.⁹

Specifically, Bryan Garner, in his widely influential book *Legal Writing in Plain English*, suggests applying the plain language movement to contracts to make their language accessible to "ordinary readers."¹⁰ Further, Kenneth Adams, author of the ABA's *Manual of Style for Contract Drafting*, suggests that drafters should "turn[] traditional contract prose into a specialized version of standard English."¹¹ These scholars go beyond the call for the removal of pure "lawyerisms"¹² and suggest revisions to some of the most deeply-rooted language used by contract drafters.¹³

65 SYRACUSE L. REV. 451, 455 (2015).

4. See AM. BAR ASS'N, SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA: 2002-2010 78 (Catherine L. Carpenter et al. eds., 2012) (noting that as of 2010, 122 law schools offered some course in the area of contract drafting, up from only 31 schools in 1992); see also KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING § 1.22 (ABA Bus. Law Section 3d ed. 2013) [hereinafter ADAMS, MANUAL OF STYLE]; BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH 109 (Univ. of Chi. Free Press 2d ed. 2012) (influential drafting style guides which emphasize a broad use of plain language in contract drafting).

5. See generally DAVID MELLINKOFF, THE LANGUAGE OF THE LAW (Little, Brown & Co. 1963); RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS (Carolina Academic Press 5th ed. 2005).

6. JOSEPH KIMBLE, WRITING FOR DOLLARS, WRITING TO PLEASE: THE CASE FOR PLAIN LANGUAGE IN BUSINESS, GOVERNMENT, AND LAW 11 (Carolina Academic Press 2012).

7. See generally *id.* at 47-102.

8. *Id.* at 54-59 (discussing New York's Plain English Law for consumer contracts passed in 1977).

9. See ADAMS, MANUAL OF STYLE, *supra* note 4 at xxix; GARNER, *supra* note 4, at 109-12.

10. GARNER, *supra* note 4, at 109.

11. ADAMS, MANUAL OF STYLE, *supra* note 4, at § 1.22.

12. GEORGE W. KUNEY, THE ELEMENTS OF CONTRACT DRAFTING: WITH QUESTIONS AND CLAUSES FOR CONSIDERATION 18, 47 (3d ed. 2011).

13. See ADAMS, MANUAL OF STYLE, *supra* note 4, §§ 1.7-1.30. Adams defines "legal terms of art" as "words and phrases that have a specialized doctrinal meaning" and suggests that such phrases be omitted from contracts. *Id.* §§ 1.6-1.7. He notes that drafters often rely on such "traditional contract language" because it "has been litigated or 'tested'" *Id.* at 1.30. However, Adams suggests that such

However, going beyond the removal of “pure gobbledygook” and meaningless jargon (such as “aforementioned” and “hereinafter”)¹⁴ to suggest a broader re-writing of traditional contract language extends beyond the initial policies of the plain language movement.¹⁵ It is correct that removing most archaic lawyerisms reduces ambiguity and increases readability of contracts.¹⁶ However, earlier proponents of clear drafting style understood that contracts embody a “[c]ommunication based on the language habits” of a particular speech community, and therefore require some “adherence to the existing conventions of language.”¹⁷

Particularly, Reed Dickerson suggested that adherence to traditional language is compelling in the context of transactional drafting because contracts constitute a communication whose “ultimate audience” goes beyond the parties, including “the courts and other agencies that may be called upon to enforce them.”¹⁸ While Garner is correct to note that “only a small fraction of 1%” of all contracts are ever litigated¹⁹, this statistic fails to recognize that the specter of litigation influences the behavior of drafters and parties to contracts in a pre-litigious setting.²⁰ The certainty of a consistent judicial application in a particular jurisdiction can have significant impact on the choice of terms and parties’ behavior in structuring a transaction.²¹

Dickerson’s theory concerning the consideration of the judicial reader is reflected by modern drafting scholars who have recognized that best practice in drafting “requires the drafter to think about the contract from the perspective of all persons that may later be called upon to interpret it,” including “the parties” as well as “judges, arbitrators, or other decision makers who may be called upon to resolve a dispute by construing the agreement in light of the language, context, and pertinent legal rules.”²²

justification for the retention of such language is a “lazy platitude.” *Id.* § 1.36.

14. REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* 3 (Little, Brown & Co. 3d ed. 1965).

15. See KIMBLE, *supra* note 6, at 47-48.

16. ADAMS, *MANUAL OF STYLE*, *supra* note 4, §§ 1.3-1.6.

17. DICKERSON, *supra* note 14, at 19.

18. *Id.* at 18-19.

19. GARNER, *supra* note 4, at 109.

20. See Johnson, *supra* note 3, at 484-87. For example, the existence of judicially tested language in a contract may negate extensive argument when disagreement arises in that an incipient controversy may dissipate quickly when one party can demonstrate a high likelihood of prevailing in its position regarding contract meaning. In more protracted disagreements, the degree of established meaning associated with the contract language at issue will frame and affect settlement negotiations.

21. *Id.*

22. James P. Nehf, *Writing Contracts in the Client’s Interest*, 51 S.C. L. REV. 153, 155 (1999). See also STARK, *DRAFTING CONTRACTS*, *supra* note 1, at 3 (recognizing that applicable law is directly

By suggesting untested constructions in place of traditional terms, Adams and Garner propose the use of experimental constructions in place of language consistently interpreted by decision makers. This choice carries risk avoided when using tested terms. Specifically, the concept of “learning externalities” proposed by Mitu Gulati and Robert Scott suggests that “standard, widely used”²³ terms are known, understood, and less likely to be “erroneous[ly] interpret[ed] by a court.”²⁴ This theory suggests that higher risk of misinterpretation and decreased efficiency may result by the use of alternative, untested language.

Further, modern critics of the plain language movement have noted that terms of art, and even the broader subset of “technical language” of the law remain incomprehensible to a lay audience, despite any rephrasing, because understanding such language requires “specialized knowledge of the legal context” in which the terms operate.²⁵ Further, any “translation of such expressions” is “insufficient to make them fully intelligible, because their incomprehensibility lies in the fact that they refer to a legal rule, practice, concept, or doctrine” lying outside their plain linguistic meaning.²⁶

Nevertheless, one policy suggested in support of removing tested constructions is a resistance to “the idea that if a court offers its interpretation of confusing contract language, we’re forevermore committed to using that confusing contract language to convey that meaning.”²⁷ Yet, not all tested terms are confusing, and in some instances, a court’s preferred construction of a term may be in the client’s best interest. In such circumstance, the ethics of advocacy dictate that a transactional attorney should use the tested term. These ethical obligations must be further explored to understand the ethical duties of the contract drafter in making language choices.

III. ETHICAL IMPLICATIONS OF DRAFTING

To better understand the weaknesses of the current ethical guidelines as applied to the modern transactional attorney engaged in complex language choices, one must examine: (A) the history of regulation of

relevant to drafting choices).

23. MITU GULATI & ROBERT E. SCOTT, *THE 3½ MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* 10-11 (Univ. of Chicago Press 2013).

24. *Id.* at 34.

25. Rabeea Assy, *Can the Law Speak Directly to its Subjects? The Limitation of Plain Language*, 38 J. OF L. & SOC. 376, 400 (2011).

26. *Id.*

27. Kenneth A. Adams, *‘Tested’ meet ‘Market’*, ADAMS ON CONTRACT DRAFTING (Oct. 13, 2014), <http://www.adamsdrafting.com/tested-meet-market/>.

transactional attorneys in the U.S. legal profession; (B) the absence of neutrality in modern drafting practice; (C) the evolving role of transactional attorneys as advocates in the U.S. legal system; and (D) the existing Model Rules that ethics scholars have argued apply to the behavior of transactional attorneys.

A. History of Professional Regulation of Transactional Attorneys

Little scholarship or commentary exists concerning the ethical duties of attorneys engaged in drafting contracts.²⁸ The paucity of regulation and discussion of the behavior of transactional attorneys can be traced to the fact that the predecessors to the current Model Rules²⁹, including: (i) the ABA Canons of Professional Ethics (the Canons);³⁰ and (ii) the ABA Code of Professional Responsibility (the Code),³¹ focused primarily on the behavior of litigating attorneys.

The Canons, published in 1908, “dealt almost exclusively with the dilemmas”³² of the litigator, and the Code, published in 1969, offered little improvement. Even the “aspirational” Ethical Considerations of the Code, meant to “suggest proper ethical behavior” served as “basically a guide to the litigating attorney” working in the adversarial context.³³

Scholars active at the time of the drafting of the Code recognized an ongoing “historical bias” toward regulating the role of the litigator more stringently than the role of the transactional attorney.³⁴ Even as early as 1976, ethics scholars noted this bias was “inappropriate” due to the evolving role of the mid-century transactional attorney as a counselor and advisor in preventive functions.³⁵

Nonetheless, the current Model Rules, originally drafted in 1983, a version of which have been adopted in 49 states and the District of Columbia,³⁶ are similarly premised on an adversarial, litigation-based

28. Gregory M. Duhl, *The Ethics of Contract Drafting*, 14 LEWIS & CLARK L. REV. 989, 990 (2010) [hereinafter, Duhl, *Ethics*]; see also, TINA STARK, TEACHER’S MANUAL, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 319 (Wolters Kluwer 2014).

29. MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 2012).

30. CANONS OF PROFESSIONAL ETHICS (1908).

31. MODEL CODE OF PROF’L CONDUCT (1969).

32. Louis M. Brown & Harold A. Brown, *What Counsel the Counselor? The Code of Professional Responsibility’s Ethical Considerations—A Preventive Law Analysis*, 10 VAL. U. L. REV. 453, 455 (1976).

33. *Id.* at 453.

34. *Id.* at 455.

35. *Id.* at 453-54.

36. STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 3 (Wolters Kluwer 2015).

system.³⁷ Modern drafting scholars have acknowledged that “with limited exceptions” there are no Model Rules directly on point concerning professional behavior by transactional attorneys.³⁸

The few Model Rules acknowledged as applying to the role of the transactional attorney provide limitations on making misrepresentations and assisting clients in undertaking fraudulent behavior.³⁹ Beyond these fraud-based proscriptions, the Model Rules provide little guidance to transactional attorneys in their daily tasks of translating clients’ cooperative business deals into workable and enforceable documents. Such work often goes on behind closed doors, rather than in the open forum of the courtroom, making discipline more difficult.⁴⁰ However, the informal nature of transactional practice should provide a strong incentive for a more readily applicable set of behavioral standards.

Consistent with the goal of attempting to regulate the behavior of attorneys during the drafting process, Gregory Duhl authored a recent and comprehensive examination of the ethics of contract drafting.⁴¹ Duhl’s analysis supports a thesis that the goal of ethical obligations imposed on drafters should be consistent with contract law and its purpose of promoting trust between contracting parties.⁴² However, this obligation exists in tension with the reality that in the sophisticated commercial context, each side to the transaction typically retains their own counsel, who draft and negotiate contract terms on their specific client’s behalf.⁴³

Complicating the issue of regulating ethics during the drafting process is the private nature of such non-litigation practice. Most often, errors and ethical lapses in drafting are only discovered and raised by a party seeking to “avoid an unfavorable contract” after its execution.⁴⁴ Additionally, the role of the drafter is often “unconstrained by” the types of “formal procedures” applicable to trial attorneys, making it “more difficult to state comprehensively the ethical considerations” of transactional practice.⁴⁵

This article proposes that ethical guidelines for contract drafters arise from a broader set of Model Rules than those most often identified by ethics and drafting scholars. Further, the applicable Model Rules

37. Duhl, *Ethics*, *supra* note 28, at 995.

38. STARK, *DRAFTING CONTRACTS*, *supra* note 1, at 455.

39. Duhl, *Ethics*, *supra* note 28, at 995.

40. STARK, *DRAFTING CONTRACTS*, *supra* note 1, at 456.

41. See generally Duhl, *Ethics*, *supra* note 28.

42. *Id.* at 994.

43. See Gregory M. Duhl, *Conscious Ambiguity: Slaying Cerberus in the Interpretation of Contractual Inconsistencies*, 71 U. PITT. L. REV 71, 112 (2009) [hereinafter Duhl, *Cerberus*].

44. Duhl, *Ethics*, *supra* note 28, at 992.

45. Brown & Brown, *supra* note 32, at 456.

should, whether through interpretive opinions by the ABA, revisions to the comments to the Model Rules, or otherwise, be designed as clear and enforceable at the time of the initial drafting and negotiation of a contract. Such an understanding and potential revision of the Model Rules encourages ethical behavior throughout the contract drafting process, particularly in light of the aforementioned calls for changes in contract language.

B. Role of the Modern Transactional Attorney: Not a Mere Scrivener

To understand legal ethics as applied to the modern practice of sophisticated contract drafting, those regulating the profession must come to understand the multifaceted role of today's sophisticated transactional attorney. While litigators and clients may view the art of drafting as mere "wordsmithing,"⁴⁶ and scholars of ethics tend to treat transactional attorneys as advisors rather than advocates, neither of these views provides a complete understanding of current sophisticated transactional practice.⁴⁷ Therefore, Duhl's notion of the promotion of trust as a basis for ethical obligations in transactional practice faces challenges grounded in misunderstandings of the modern transactional attorney's role.

Yet, Duhl's concept of trust creation has its merits. First, the aspirational goal of promoting trust between parties might serve as an appropriate basis for drafting ethics where opposing parties have been categorically unrepresented. An example is attorney preparation of form or adhesion contracts applying to consumers or individuals who will sign with little or no chance to review or negotiate the terms. In such circumstances, ethics scholars have warned that drafters should attempt to do away with the sense of "adversarial tradition" and draft fairly to promote trust.⁴⁸ However, this is not the usual scenario in complex transactional practice in the U.S., where each party typically retains its own counsel and terms are heavily negotiated between parties.

Additionally, Duhl's ideal of trust in drafting ethics could also apply in a legal system where the drafter of the contract acts as a neutral scrivener. For example, civil law countries employ notaries to draft transactional documents to reflect the "subjective will of *all parties*."⁴⁹

46. CHARLES M. FOX, *WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU* 35 (2d ed. 2008).

47. STARK, *DRAFTING CONTRACTS*, *supra* note 1, at 456-57 (noting that the drafter is not a "mere scrivener" but rather "adds value to the deal and advances the client's objective").

48. Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361, 370 (2002).

49. Celeste M. Hammond & Ilaria Landini, *The Global Subprime Crisis as Explained by the Contrast Between American Contracts Law and Civil Law Countries' Laws, Practices, and Expectations in Real Estate Transactions: How the Lack of Informed Consent and the Absence of the*

These neutral scriveners also counsel all parties in connection with the terms and consequences of the documents.⁵⁰ In this role, civil law notaries act objectively to promote trust in ways not undertaken (and not permitted) by U.S. transactional attorneys. In a notarial system, the ideal of trust promotion could also help to shape ethical guidelines.

However, in the drafting and negotiation of sophisticated contracts in the U.S., each side of the deal typically retains their own attorney, responsible for negotiating, reviewing, and drafting contract terms on their behalf.⁵¹ While it is possible in some circumstances for a U.S. attorney to be retained as a neutral scrivener of a document, this is an unusual scenario wherein the drafter must take extreme care to clearly define her role as representative of neither party individually.⁵² Doing so is fraught with potential conflicts of interest under the Model Rules, and therefore most often avoided by the prudent attorney.⁵³

Even in a friendly, cooperative transaction, there exists the possibility that the structure of an agreement or inclusion of a particular term will benefit one side or another. Proceeding with dual representation in the face of this specter of conflict is prohibited under Model Rule 1.7, which provides that “a lawyer shall not represent a client if . . . 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.”⁵⁴

Scholars of transactional law and ethics have recognized that the directly adverse conflicts prohibited under Model Rule 1.7 “can . . . arise in transactional matters.”⁵⁵ The revisions to the Model Rules in 2000 even expanded the commentary to Model Rule 1.7 to clarify that the rules “equate the representation of buyers or sellers in buy-sale transactions with the representation of plaintiffs or defendants in lawsuits.”⁵⁶

As such, the Model Rules implicitly recognize “the same amount of adversity,”⁵⁷ between attorneys representing opposing parties in buy-sell type transactions and those engaged in litigation. While it has been

Civil Law Notary in the United States Contributed to the Global Crisis in Subprime Mortgage Investments, 11 J. INT’L BUS. & L. 133, 161-62 (2012) (emphasis added).

50. *Id.*

51. See Duhl, *Cerberus*, *supra* note 43, at 112.

52. Robert L. Kehr, *Write It Up: An Attorney May Be Able to Act As A Scrivener by Putting A Deal into Writing As Long As the Attorney Does Not Represent Either Party*, L.A. LAW. (Sept. 2011), at 20.

53. MODEL RULES OF PROF’L CONDUCT r. 1.7 cmt. 7 (2012).

54. *Id.* r. 1.7(a)(2) (2012).

55. Carl A. Pierce, *Ethics 2000 and the Transactional Practitioner*, 3 TRANSACTIONS 7, 13 (2002).

56. *Id.*

57. *Id.*

noted that the Model Rules themselves “do not provide a clear answer about whether business advisors should be guided by zealous advocacy,” the practice of transactional lawyering clearly positions attorneys to advance client goals, which constitutes some level of advocacy.⁵⁸ Thus, the suggested modes of viewing drafters as neutral, trust-promoting advisors are insufficient, and the related attempts to provided ethical guidelines on this basis fall short.

C. Boundaries on the Transactional Attorney as Advocate

One weakness of the existing scholarship on drafting ethics is rooted in the traditional paradigm of the litigator as “advocate,” and the transactional attorney as “advisor.”⁵⁹ As demonstrated, there exists more overlap between these two realms than traditionally understood. At the root of this tension lies the “incomplete and often confusing messages found in professional conduct rules about the business advisor’s role.”⁶⁰ The role of the transactional attorney must be re-examined and reframed in order to determine the most advantageous set of ethical guidelines for the modern transactional attorney.

Modern scholars of drafting recognize that today’s transactional attorneys do not merely draft contracts, but also negotiate disputes, analyze precedent, evaluate business issues, and “add value to the deal” by “advance[ing] client objectives.”⁶¹ Even traditional ethics scholars who promoted the old-fashioned framing of the transactional attorney’s role as a pure advisor were forced to recognize that the attorney’s task in structuring a transaction “is to guide the client . . . to act in such a manner that the result will be *beneficial*.”⁶²

This shift in perception is reflected in modern scholarship concerning the best practices of transactional attorneys, which recognizes that client expectations are the “foremost” concern of the good drafter.⁶³ The question becomes how a transactional attorney should ideally strive to achieve this benefit for the client when the Model Rules fail to provide the same “comprehensive, consistent guidance” provided to litigators.⁶⁴

It is clear that the traditional construct of the “zealous advocate” often championed by the litigator does not provide a good fit for the role of

58. Paula Schaefer, *Harming Business Clients With Zealous Advocacy: Rethinking the Attorney Advisor’s Touchstone*, 38 FLA. ST. U. L. REV. 251, 256 (2011).

59. See Brown & Brown, *supra* note 32, at 453.

60. Schaefer, *supra* note 58, at 253.

61. STARK, DRAFTING CONTRACTS, *supra* note 1, at 3, 456-57.

62. Brown & Brown, *supra* note 32, at 460 (emphasis added).

63. Nehf, *supra* note 22, at 154.

64. Schaefer, *supra* note 58, at 275.

the modern transactional attorney.⁶⁵ Advocacy that is too zealous can lure the transactional attorney into acting more as the client's "instrument" in entering into potentially ill-advised, though technically legal, transactions.⁶⁶ Overzealous advocacy on behalf of a transactional client can begin to hedge toward fraud,⁶⁷ one of the main problems currently recognized by ethics scholars and regulated by the Model Rules in the transactional setting. This issue is further discussed in Part III.D. of this Article.

The ideal role of the transactional attorney is to draft a document that will provide the greatest benefit to a specific client while attempting to fairly reflect the terms of the deal agreed upon by the parties.⁶⁸ In this way, a transactional attorney can still "add value to the deal" from a client's perspective while avoiding "crossing the line" into re-cutting the deal or committing fraud.⁶⁹ The value the attorney adds for the client can include persuading opposing parties to act in favorable ways during the term of the contract as well as setting the client up for success in advance of a potential dispute.

As such, the "best approach" to contract drafting is "one that is deal-preserving and with the judge in mind."⁷⁰ This recognition of client benefit is not wholly inconsistent with the idea of contract drafting as a fair and cooperative enterprise. Contract drafting experts have noted that a "contract can be both pro-client and pro-relationship at the same time."⁷¹ A contract that withstands the interpretation of a court and aligns party interests "will ultimately be in [the] client's best interest."⁷²

When viewing a contract as a document that exists to persuade parties to act in favorable ways and gives rise to favorable interpretations, it becomes clear that drafting terms in a contract on behalf of a client constitutes a form of advocacy. Scholars of rhetoric and advocacy have noted that agreement with a proposed conclusion "rests upon the ability of one proponent to persuade another, or to persuade an authoritative decision maker, to read a document or to understand a situation in a

65. *Id.* at 281-82.

66. *Id.* at 260.

67. *Id.* at 277-78.

68. See STARK, DRAFTING CONTRACTS, *supra* note 1, at 456-57 (drafting expert Stark explains the drafter's role as requiring "facilitat[ion] through drafting . . . [of] an agreement between the parties. But this role does not render the drafter a mere scrivener. By working with a client to flesh out the business deal, a drafter *adds value to the deal and advances the client's objective*. A drafter may not, however, recut the parties' business deal by adding or changing provisions to which the parties have not agreed. Doing so steps over the line" (emphasis added)).

69. *Id.*

70. Scott J. Burnham et al., *Transactional Skills Training: Contract Drafting—Beyond the Basics*, 2009 TRANSACTIONS: TENN. J. BUS. L. 253, 268 (2009).

71. *Id.* at 269.

72. *Id.*

certain way.”⁷³ This mode of persuasion is most certainly undertaken by a sophisticated drafter preparing a contract on behalf of a client.

Thus, contract drafters’ attempts to control the actions of opposing parties and interpretations of a judge constitute advocacy. As such, these actions become part of the adversarial system that the Model Rules attempt to regulate. However, the Model Rules, as currently interpreted and enforced, do not provide guidance to transactional attorneys engaged in the role of advocate. Many checks placed on the advocacy of attorneys under the Model Rules are inherent in “the watching” function of the courts.⁷⁴ Yet, “no one is watching” when a transactional attorney is at work.⁷⁵

Recognizing contract drafting as the work of two or more advocates, it is simply insufficient to rely on the limited guidance of the Model Rules currently identified in scholarship as applying to transactional practitioners and hope that “attorneys . . . police each other.”⁷⁶ There are only a handful of Model Rules and related comments commonly identified to constrain drafters’ conduct. These limitations primarily are focused on the commission of fraud. A deeper discussion of the Model Rules, as currently interpreted, and identification of opportunities within the existing Model Rules to shape the behavior of contract drafters as advocates must be undertaken.

D. Enforcement Against Transactional Attorneys Under the Current Model Rules

In his recent examination of the ethics of contract drafting, Gregory Duhl argued that the most evident violations of the Model Rules by contract drafters occur where the drafter engages in fraudulent or “fraudulent-type” behavior.⁷⁷ These behaviors are regulated under Model Rules 1.2(d), 4.1(a) and (b) and 8.4.⁷⁸ Yet, these rules “place only limited restrictions on a lawyer’s conduct in drafting contracts.”⁷⁹

Specifically, 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.” Rule 4.1 states that

[i]n the course of representing a client a lawyer shall not

73. Linda L. Berger, *Studying and Teaching “Law as Rhetoric”: A Place to Stand*, 16 J. LEGAL WRITING: J. LEGAL WRITING INST. 3, 11 (2010).

74. Schaefer, *supra* note 58, at 262.

75. *Id.*

76. Duhl, *Ethics, supra* note 28, at 1011.

77. *Id.* at 996.

78. *Id.* at 994.

79. *Id.* at 995.

knowingly . . . fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.” Finally, Rule 8.4 says “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”⁸⁰

Based on these rules, Duhl hypothesizes three types of fraudulent or near-fraudulent drafting that could result in ethical violations: (a) knowingly drafting false representations and warranties; (b) committing fraud, conscious ambiguity, or transcription error; and (c) knowingly drafting invalid or “iffy” provisions.⁸¹

These violations envision a spectrum of behavior in the realm of fraud and deception, but not including reckless or negligent behavior. Drafting expert Tina Stark agrees that whether a drafter’s behavior “cross[es] the line” into the realm of the unethical is judged on a spectrum.⁸² Stark notes the emphasis on fraud in the current Model Rules, and posits a theory of “intersectionality” where client behavior falls on a spectrum ranging from legal and not fraudulent, to criminal and fraudulent.⁸³ A lawyer’s actions in assisting the client move in tandem from ethical to unethical in relation to the client’s place on the spectrum, with some gray area at the midpoint of the scale.⁸⁴

Yet, according to Duhl, the Model Rules do provide some concrete guidance as to where certain types of drafter behavior will fall on such an ethical scale. Specifically, Model Rule 1.0 defines the term “fraud” for purposes of discipline to require “a purpose to deceive.”⁸⁵ Duhl suggests that some form of scienter by the attorney must be present for the fraud-based Model Rules he identifies (1.2(d), 4.1(a), (b), 8.4) to be violated.⁸⁶ Additionally, no reliance or injury need occur,⁸⁷ as the Model Rules themselves do not require such.⁸⁸ According to Duhl, the inquiry into violation of the Model Rules on the basis of fraud turns on the existence of intent to deceive by the attorney, rather than the outcome or injury.

80. *Id.* at 996 (quoting MODEL RULES OF PROF’L CONDUCT r. 1.7(d), 4.1(b), 8.4(c)).

81. Duhl, *Ethics*, *supra* note 28, at 994.

82. STARK, DRAFTING CONTRACTS, *supra* note 1, at 458.

83. *Id.*

84. *Id.*

85. Duhl, *Ethics*, *supra* note 28, at 996 (quoting MODEL RULES OF PROF’L CONDUCT r. 1.0).

86. *Id.*

87. *See contra* RESTATEMENT (THIRD) OF TORTS § 9 (AM LAW INST., Tentative Draft No. 2, 2014) (defining a party liable for fraud as “one who fraudulently makes a material misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to act or refrain from acting, is subject to liability for economic loss caused by the other’s justifiable reliance on the misrepresentation”).

88. Duhl, *Ethics*, *supra* note 28, at 996.

Duhl notes that one of the clearest behaviors that could land an attorney in disciplinary hot water is knowingly incorporating misrepresentations of material facts, such as misstatements of company financial information, into a contract.⁸⁹ If the contract is executed, the attorney has assisted a fraud in violation of Rule 1.2(d), and even if the contract stalls, the inclusion by the attorney of the terms in a draft contract could constitute an indirect “representation that the statements are true” in violation of Rules 4.1(a) and 8.4.⁹⁰

Duhl notes additional drafting behaviors on the clearly-fraudulent end of the spectrum, including attorneys’ failure disclose scrivener’s errors made by opposing parties, and concealment or failure to point out alterations to a document.⁹¹ Duhl’s examination of the “more subtle form[s]”⁹² of potential drafting fraud are of more interest and paint a closer picture to the question at hand, dealing with the use of innovative and untested plain language in contract drafting.

In his analysis of drafting behavior that runs afoul of the Model Rules as currently interpreted, Duhl notes two types of behavior that fall into the gray area between clearly fraudulent and clearly permissible. The first being the use of “conscious ambiguity,” which Duhl defines as an attorney’s knowing use of “a clause in an agreement with two contradictory meanings” or to which “the parties attach different meanings.”⁹³ Duhl notes that such behavior “at its extreme” could be considered “‘dishonest’ and violate Rule 8.4.”⁹⁴

Next, Duhl delves into the biggest gray area, the inclusion of “iffy” or potentially “invalid” terms.⁹⁵ The types of terms Duhl highlights include “impermissible” clauses that “mislead parties”—especially consumers—as to their rights.⁹⁶ He determines that the inclusion of such clauses could rise to the level of fraud in violation of Model Rule 1.2(d), but only where the clause is known to be invalid and likely to mislead—rather than merely “iffy.”⁹⁷

While “iffy” or unenforceable clauses pose a slightly different consideration from the re-drafting of traditional clauses into modern language, the ethical implications are similar. In the case of an untested

89. *Id.* at 998.

90. *Id.* at 998.

91. *Id.* at 1002-05.

92. *Id.* at 1009.

93. Duhl, *Ethics*, *supra* note 28, at 1009.

94. *Id.* at 1011.

95. *Id.* at 1012.

96. *Id.* at 1013 (discussing the example of draft-release waivers limiting liability to minors for injuries incurred in a bicycle race, where the waivers are known to be invalid if challenged on the basis of the riders’ age).

97. *Id.*

construction of a traditional term, a lawyer is less sure of the potential judicial interpretation of a clause. Therefore, using such a clause brings more potential risk than the use of a tested clause. It follows that Duhl's recognition of the heightened burden of knowledge about the clause's potential enforceability applies in both circumstances.

By analogizing the drafting of "iffy" clauses to the redrafting of tested terms into untested modern language, it becomes clear that the Model Rules require a measure of research-based knowledge as to the meaning and enforceability of untested contract terms before they are included in a contract. This Article continues by positing that this knowledge requirement invokes the drafting attorney's ethical obligations of competence, allocation of authority, diligence, and communication.

IV. APPLYING THE MODEL RULES TO MODERN DRAFTING STYLE

Due to the focus on fraudulent drafting, ethics scholars overlook the potential applicability of other core ethical rules to the practice of transactional drafting. Specifically, Model Rules 1.1, 1.2, 1.3, and 1.4, concerning competence, allocation of authority, diligence, and communication respectively, are not frequently or deeply discussed in connection with the ethical duties of attorneys drafting contracts.⁹⁸ However, each of the aforementioned rules applies when one views transactional attorneys as advocates engaged in persuasive word choices advancing client interests. The Model Rules themselves recognize that all attorneys, even transactional attorneys, carry the role of advocate, by requiring all attorneys to "act with competence, commitment and dedication to the interest of the client . . . upon the client's behalf."⁹⁹

The Model Rules discussed below put in place important safeguards on lawyers' behavior as advocates, and certainly apply to attorneys making non-traditional language choices in contracts. These advocacy-oriented rules require the lawyer to be fully informed of the relevant precedent, to undertake the work necessary to be assured that unique phrasing of clauses does not disadvantage the client, and to keep the client informed of and involved in the decisions the lawyer makes concerning word choices.

The potential impact of each of these Model Rules on the behavior of attorneys using non-traditional terms will be discussed. The analysis will begin with the competence and diligence rules, and then analyze the allocation of authority and communication rules in tandem.

98. See generally MODEL RULES OF PROF'L CONDUCT r. 1.1, 1.2, 1.4, 1.4 (2012).

99. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 6.

A. Model Rule 1.1—Competence

The competence duty under the Model Rules requires that “[a] lawyer shall provide competent representation to a client,” which entails “the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”¹⁰⁰ Broadly speaking, this duty imposes upon attorneys “an ethical obligation to write well.”¹⁰¹ Simply being “exposed to contract drafting” either in law school or in practice does not prepare an attorney to competently draft.¹⁰²

Expertise in drafting, as in any legal discipline, can be obtained through “necessary study,” as provided in the comments to Model Rule 1.1.¹⁰³ However, competence in drafting requires not only a “thorough grounding in contract law” but also a more nuanced understanding of how the law “is to be applied on behalf of the client.”¹⁰⁴ A core competency in contract drafting requires adequate satisfaction of the “client’s wishes by the provisions of the document.”¹⁰⁵ In this way, the competence duty necessitates client advocacy, in conjunction with the requirement that the document be appropriately drafted and enforceable.

Further, the transactional attorney, like any other lawyer, “should be careful in performing legal work.”¹⁰⁶ Specifically, it long has been noted that the duties of an attorney structuring a transaction require “an examination of legal and extra-legal indicators, the most well-recognized of which is how a court will respond to a given factual situation.”¹⁰⁷ The drafter must consider whether “a court will rule unfavorably if certain facts occur.”¹⁰⁸ To make these determinations, a transactional lawyer must attain a strong “background in the legal rules governing contract interpretation” as well as “a routine for keeping current on relevant statutory mandates and case law.”¹⁰⁹

This level of competence requires knowledge of the typical interpretation of tested terms and recognition that non-traditional word choices may give rise to unpredictable applications by a court in a variety of factual scenarios. Therefore, in fulfilling her ethical

100. MODEL RULES OF PROF’L CONDUCT r. 1.1.

101. Brian M. Kubicki, *The Practice of Writing*, 52 RES GESTAE 252, 252 (2008).

102. Lisa L. Dahm, *Practical Tips for Drafting Contracts and Avoiding Ethical Issues*, 46 TEX. J. BUS. L. 89, 89 (2014).

103. MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 2.

104. Dahm, *supra* note 102, at 93.

105. MELISSA H. WERESH, *LEGAL WRITING: ETHICAL AND PROFESSIONAL CONSIDERATIONS* 196 (2d ed. LexisNexis 2009).

106. Michael L. Shakman et al., *There but for the Grace of God Go I: A Look at the Modern Transactional Legal Malpractice Case*, 18 CBA REC. 32, 35 (2004).

107. Brown & Brown, *supra* note 32, at 461.

108. *Id.* at 461.

109. Nehf, *supra* note 22, at 156.

obligations, the drafter must recognize her duty as an advocate of the client and consider whether the use of a non-traditional term helps or harms the client if the contract falls into dispute.

In a rare, early discussion of the competence duty as it relates to the role of the transactional attorney, an article by ethics scholars Louis M. Brown and Harold A. Brown noted that competence is best served in the transactional context by considering the “damage which could be done to the [transactional] client by incompetence.”¹¹⁰ Therefore, competence in the transactional context requires not merely knowledge of the applicable law, but also applying a lawyer’s legal knowledge to the particular needs of a particular client.¹¹¹

The transactional lawyer’s “aspirations of competence” should include attaining “the knowledge and skill to grasp the client’s goals, to reframe them if necessary, to initiate the discussion of alternative courses of conduct and, along with the client, to be creative regarding the uses of the law.”¹¹² This early framing of the duty by the Brown article implicitly requires that the transactional attorney use the law in the way most beneficial to achieving such client goals.

A more recent article provides another framework for applying the competence rule to transactional attorneys. Christina Kunz posits that transactional attorneys drafting contracts have a heightened competence duty when it comes to potentially invalid clauses.¹¹³ She notes that Comment 2 to Model Rule 1.1 mentions “some important legal skills, such as the analysis of precedent . . . and legal drafting, [that] are required in all legal problems.”¹¹⁴ Such problems include drafting contract terms and require the analysis of precedent concerning the potential interpretation the term. Kunz focuses on substantively “iffy” clauses, but the uncertainty of judicial interpretation associated with untested variations of traditional terms is analogical.

This duty to research and inform is particularly high where, as Kunz notes, the particular clause has been “criticized” in another jurisdiction.¹¹⁵ In such a case, Kunz suggests that “[t]he lawyer should seriously consider urging the client to consider practicalities,” such as effects on the “parties’ relationship, performance on both sides, public perceptions, other contracts with the same language and other

110. Brown & Brown, *supra* note 32, at 467-68.

111. *Id.* at 468.

112. *Id.* at 476.

113. Christina L. Kunz, *The Ethics of Invalid and “Iffy” Contract Clauses*, 40 LOYOLA L.A. L. REV. 487, 503 (2006).

114. *Id.* at 503 (quoting MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 2) (internal quotations omitted).

115. *Id.* at 503-04.

concurrent negotiations.”¹¹⁶

The same considerations ring true for a lawyer’s decision to rephrase a clause with a settled meaning into terms that have a less predictable method of interpretation in the courts. The lawyer must consider and advise the client of potential risks concerning the way other parties will view the clause, whether other contracts exist which use the more modern language in lieu of the traditional phrases, whether those contracts have been litigated, and the view of the jurisdiction in which the contract will be enforced.

Further, the duty to be informed about the view of the jurisdiction in which the contract will be enforced is critically important to drafting a contract that provides benefit to the client, a recognized goal of the transactional attorney.¹¹⁷ Since contracts are essentially authorless documents, it has been recognized in literary scholarship that contracts “enlist the attendant authority of the law.”¹¹⁸ Thus, courts’ interpretations of the meaning of contract language become a critically important mode by which a drafter can set boundaries around meaning, and therefore control potential outcomes for a client.¹¹⁹

It is settled that liability for legal malpractice may not arise in circumstances where the law is unsettled as to whether to include certain terms in a document. However, this does not negate the fact that “[l]egal uncertainty can manifest in the preparation of documents if the precise language and content have not been judicially construed.”¹²⁰ This uncertainty affects the decision whether the competent lawyer should rephrase a tested term into a modern, untested variation.

While attorneys are not “required to predict infallibly how a court will interpret documents that they have drafted,”¹²¹ the competence duty requires “the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”¹²² This baseline level of knowledge includes knowledge about the preferred phrasing of terms, or at the very least, current, applicable judicial interpretations of terms selected.

The requirement of deeply researching and understanding the impact of rephrasing terms as an element of competency is heightened in the

116. *Id.* at 504.

117. Brown & Brown, *supra* note 32, at 460-61.

118. Tal Kastner, *What is a Contract?: The Absent Author of the Written Contract and the Function of Certain Conventions of Drafting and Construction* 6 (Princeton Univ., Working Paper No. 814068, 2005), <http://ssrn.com/abstract=814068>.

119. *Id.* at 6-7.

120. 2 RONALD E. MALLIN, WITH ALLISON MARTIN RHODES, *LEGAL MALPRACTICE* §19:14 (2016).

121. *See id.*

122. MODEL RULES OF PROF’L CONDUCT r. 1.1.

context of contract drafting, because “each word or provision in a contract may be subjected to greater scrutiny and challenge by opposing counsel whereas the meanings of words or phrases in a brief or pleading are rarely the primary target or focus of even the most zealous advocate.”¹²³

And yet, even in litigation documents, such as complaints, where word choices are of less import, the competent attorney is exhorted to rely on “legal precedent” and perform “sufficient research and analysis” to be assured that the document adequately advances a client’s claim.¹²⁴ It has been considered a failure of competence to advance “novel claims and new interpretations of law” in a complaint insufficiently supported by precedent.¹²⁵ Similarly, the competent transactional lawyer should not use untested terms in a contract without a deep, thoroughly researched consideration of the consequences on enforceability, parties’ behaviors, and potential judicial interpretations.

B. Model Rule 1.3—Diligence

The diligence duty under the Model Rules requires that “[a] lawyer . . . act with reasonable diligence and promptness in representing a client,”¹²⁶ including “tak[ing] whatever lawful and ethical measures are required to vindicate a client’s cause.”¹²⁷ In fulfilling this duty, the lawyer must act “with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf,” yet the “lawyer is not bound . . . to press for every advantage that may be realized for a client.”¹²⁸

Further, because the diligence duty requires “promptness,”¹²⁹ the “modifying [of] a previously drafted contract,” which would likely include tested terms of art, “require[s] significantly less time than drafting a contract from scratch.”¹³⁰ Such widely-available contracts and terms not only aid the attorney in meeting the promptness requirement, but may also assist in furthering the interests of the client, as traditionally-composed contracts are often “generally accepted within

123. Dahm, *supra* note 102, at 91.

124. WERESH, *supra* note 105, at 111.

125. *Id.* (discussing *In re Richards*, 986 P.2d 1117 (N.M. 1999), where an attorney was disciplined for violating the New Mexico equivalent of Model Rule 1.1 based on drafting a complaint for a counterclaim premised upon a novel interpretation of federal “common law lien” theory that the court determined to lack good faith).

126. MODEL RULES OF PROF’L CONDUCT r. 1.3.

127. *Id.* r. 1.0 cmt. 1.

128. *Id.* r. 1.3 cmt. 1.

129. *Id.* r. 1.3.

130. Dahm, *supra*, note 102, at 97.

the industry” in which the client operates.¹³¹

Of course, the competence duty requires that such standard forms be fully understood, researched, and reviewed, so as not be used “blindly.”¹³² As noted, “[g]ood drafting takes care, practice, sound judgment, and a lot of effort.”¹³³ Nonetheless, the “precedent-based drafting approach’ . . . makes sense”¹³⁴ in many circumstances, particularly where clients are fee-sensitive, operate in a highly standardized industry, or the lawyer has developed the forms based on research and practice experience.

As has been noted by drafting scholars, “the lawyer owes a duty to the client to keep . . . legal fees on a diet,” a goal which can be achieved through drafting a contract which “rais[es] few issues.”¹³⁵ The higher risk and added research burdens arising under the competence duty when using untested language would undoubtedly increase fees. Therefore, particularly with regard to fee-sensitive clients, use of non-traditional language and the attendant increase in related research fees may constitute an unethical disservice.

In all cases, the lawyer has a duty to communicate with the client at the outset of the relationship concerning the client’s expectations regarding fees,¹³⁶ as well as the client’s tolerance for increased costs based on non-traditional language changes.¹³⁷ Discussion of these issues comprises the basis of the allocation of authority between the attorney and client, as well as the communication duty of the attorney, which will be discussed below.

C. Model Rules 1.2 and 1.4—Allocation of Authority & Communication

Model Rule 1.2 provides that “a lawyer shall abide by a client’s decisions concerning the objectives of the representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”¹³⁸ The comments to Model Rule 1.2 make clear that decisions concerning “the purpose” of the representation are allocated to the client, while the decisions of the lawyer are entitled to deference concerning the “means to be used to accomplish [client] objectives, particularly with respect to technical, legal and tactical

131. *Id.*

132. *Id.*

133. Nehf, *supra*, note 22, at 155.

134. Dahm, *supra*, note 102, at 96-97.

135. Peter Siviglia, *Designs for Courses on Drafting Contracts*, 12 SCRIBES J. LEGAL WRITING 89, 97 (2009).

136. MODEL RULES OF PROF’L CONDUCT R. 1.5(b).

137. *Id.* r. 1.2 cmt. 2.

138. *Id.* r. 1.2(a).

matters.”¹³⁹

This allocation of authority regarding the “means” of the representation, however, is subject to communication with the client, as emphasized in the text of and comments to Model Rule 1.2(a).¹⁴⁰ Specifically, Comment 1 to Model Rule 1.2 invokes the communication requirement under Model Rule 1.4(a)(2) concerning the means utilized by the lawyer to achieve the client’s objective. To properly follow this rule, a lawyer must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”¹⁴¹ The duties under Model Rules 1.2 and 1.4 are therefore inextricably linked when dealing with choices made by a transactional attorney in drafting documents on a client’s behalf.

Specifically, it has been recognized by scholars of drafting ethics that “[i]n drafting documents on behalf of a client, the lawyer clearly has an obligation to explain the contents of those documents to the client so that the client understands the legal ramifications of executing the documents.”¹⁴² Further, even where the “underlying conduct of the attorney is appropriate” there exists a requirement to advise the client about the consequences of a proposed construction of a contract.¹⁴³

Thus, the research and recognition of potential uncertainty associated with the use of untested terms required under the competence duty trigger an enhanced duty to inform the client under Model Rule 1.4(a)(2). This requirement enhances the historical view of the heightened requirements of Model Rule 1.4 in the transactional setting.¹⁴⁴ In the context of a transactional representation, the client is the lawyer’s “*raison d’etre*”¹⁴⁵ and therefore the “amount of communication” required to ensure the lawyer is fulfilling the client’s goal “may be much greater” than in litigation practice.¹⁴⁶

Christina Kunz in her article on drafting ethics under the UCC notes that “[i]n many situations, a candid dialogue between lawyer and client will resolve the ethical tension” associated with the selection of “iffy”

139. *Id.* r. 1.2 cmt. 2.

140. *Id.* r. 1.2 cmt. 1.

141. MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(2).

142. WERESH, *supra* note 105, at 199.

143. *Id.* (discussing *Winston v. Brogan*, 844 F. Supp. 753 (S.D. Fla. 1994)). In *Winston*, attorneys transferred estate assets to a marital trust in a novel attempt to avoid tax liability, and had the beneficiary sign a verification of such transfer that was not fully explained. *Winston*, 844 F. Supp. at 753-55. This deprived the beneficiary of outright distribution of the assets as originally provided in decedent’s will. *Id.* at 755. The court found the attorneys liable by taking particular note of their failure to advise the beneficiary. *Id.*

144. *Brown & Brown*, *supra*, note 32, at 467.

145. *Id.*

146. *Id.* at 460.

clauses.¹⁴⁷ She notes the need for balance between the rights of opposing parties and the requirement for zealous representation as motivating the lawyer's decisions regarding how to draft clauses in these circumstances.¹⁴⁸

Thus, in deciding whether to incorporate a non-traditional construction of a tested term, a transactional attorney has the duty to consult and communicate with the client regarding the potential outcomes and uncertainty associated with such choice. This duty has not been clearly delineated with regard to the transactional practitioner. However, as the interpretation of an untested term certainly could impact the outcome and enforcement of a contract by a judge, this decision inherently is connected to the "objectives" or outcomes of the representation.¹⁴⁹

Model Rule 1.2 allocates decisions concerning the outcome of representation to the client. Model Rule 1.2 requires careful explanation by the attorney before such rephrasing occurs. Additionally, the lawyer should defer to the client concerning associated potential increases in fees.¹⁵⁰ Practically speaking, the Model Rules require the attorney to explain and confirm with the client the decision to cast aside traditional terms of art in a contract that has well-documented, consistent judicial interpretations. This is particularly true where tested interpretations effectively achieve the client's objective at a lower cost.

Further, a failure of the attorney to gain an understanding of the nature of the client's "business objectives" could also lead to an inability to meet the requirements of Model Rule 1.2.¹⁵¹ This is especially true where the client operates in a particular industry. Typically, industries will operate and communicate using specialized "customs and jargon," the understanding of which may be essential to achieving the client's goals.¹⁵²

In such cases, redrafting of tested terms, even where helpful to clarify or brevity, may undercut the client's position vis-à-vis contracting parties in a heavily regulated industry. Model Rules 1.2 and 1.4, properly viewed, require consultation with the client concerning the potential impact on client objectives in these circumstances. As a result, revision of traditional terms into alternative language may lead to frustration of client goals, potentially resulting in ethical violations.

This discussion ebbs into the practical considerations of how a

147. Kunz, *supra* note 113, at 510.

148. *Id.*

149. MODEL RULES OF PROF'L CONDUCT r. 1.2(a).

150. *Id.* at cmt. 2.

151. Dahm, *supra* note 102, at 94.

152. *Id.*

transactional attorney can meet their ethical duties when faced with the call for a broader use of plain language. In order to better understand the problems posed by language choices, and the ethical implications of the behavior of drafters in making these choices, one must turn to case studies of attorneys in practice.

V. CASE STUDIES: DRAFTERS & LANGUAGE CHOICE

In order to demonstrate the problem faced by drafters when seeking to modernize traditional language, one must analyze specific suggestions made by plain language drafting commentators and apply the holdings of recent case law dealing with such language choices. The below examples constitute only a handful of recent instances of courts' interpretations of traditional contract language to the detriment of contract parties.¹⁵³ Further, in order to illustrate the duty to communicate the impact of these changes to clients, one also must review malpractice decisions concerning languages choices.

A. *The Problem of Shall vs. Will*

One of the most pioneering recent suggestions for the modernization of contract language comes from Bryan Garner, who instructs drafters to “[d]elete every *shall*.”¹⁵⁴ Garner correctly notes that *shall* very often is misused by drafters.¹⁵⁵ The term *shall* is “supposed to mean ‘has a duty to,’” but it often is distorted by drafters who pair it with “neither” or “nothing,” to alter its meaning.¹⁵⁶

Despite the efforts of other drafting experts to reform and standardize the use of *shall* (by instructing drafters to limit their use of the term only to statements of obligation),¹⁵⁷ Garner is still safe to surmise that based on its rampant misuse, the term “*shall* is a mess.”¹⁵⁸ Garner notes that a *shall-less* style in transactional drafting is preferable and suggests the

153. See also *VFC Partners 26, LLC v. Cadlerocks Centennial Drive, LLC*, 735 F.3d 25, 31-32 (1st Cir. 2013) (holding that failure to use the “typical language parties often use to introduce a list of non-exclusive examples, such as ‘shall include but not be limited to’ . . . weigh[ed] against reading the . . . sentence as a list of non-exclusive examples”).

154. GARNER, *supra* note 4, at 125.

155. *Id.*

156. *Id.* For example, compare the correct, obligatory usage “The Purchaser shall pay \$5,000,000” with the permissive usage “Neither party shall assign this Agreement without prior written consent.”

157. See Kenneth A. Adams, *Banishing Shall from Business Contracts: Throwing the Baby Out With the Bathwater*, 24 AUSTL. CORP. LAW. 12 (Sept. 2014), <http://www.adamsdrafting.com/wp-content/uploads/2014/09/Banishing-Will-from-Business-Contracts-ACLA.pdf>; STARK, DRAFTING CONTRACTS, *supra* note 1, at 151-52.

158. GARNER, *supra* note 4, at 126.

use of the term “will” to indicate obligation.¹⁵⁹

While Garner and the other critics of shall have a valid point,¹⁶⁰ that the misuse of the term is endemic, the ethical drafter must consider in each circumstance whether the *appropriate* use of the term might be more likely to achieve a client’s goals. In order to fulfill the duties of competence and diligence, a lawyer must be informed as to whether controlling law in the jurisdiction in which the contract will be enforced has criticized the use of “will” as an alternative.

For example, a recent case out of the Supreme Court of Texas refused to find an obligation where the term “will” was used.¹⁶¹ In the *Lubbock* opinion, the court interpreted the terms of a lease between the Lubbock County Water Control and Improvement District (the Water District) and Church & Akin, L.L.C. (the Company).¹⁶²

The Water District had leased property to the Company, on which the Company operated a marina, gasoline station, and convenience store.¹⁶³ The lease provided, in pertinent part, that “[t]he marina *will* issue catering tickets that *will* be redeemed at the gate for admittance to the lake. These tickets *will* be redeemed by the marina at the price of \$1.00 each. They *will* only be available to persons coming into the marina.”¹⁶⁴

Counsel for the Company argued this provision obligated the Company to regulate access to the marina, thus providing a service to the Water District for purposes of obtaining a waiver of the Water District’s sovereign immunity.¹⁶⁵ The court disagreed, based in part on a finding that the language did not “constitute an agreement by [the Company] to provide a service” to the Water District.¹⁶⁶ Specifically, the court noted that the provision created no “implied duty” on the part of the Company to issue the tickets.¹⁶⁷ Rather, the court found that the provision stood for the proposition that the Company “intended to” issue the tickets.¹⁶⁸

159. *Id.* See also BRYAN A. GARNER, GARNER’S DICTIONARY OF LEGAL USAGE 953–54 (3d ed. 2011).

160. See generally Joseph Kimble, *The Many Misuses of “Shall”*, 3 SCRIBES J. LEGAL WRITING 61 (1992).

161. *Lubbock Cty. Water Control v. Church & Akin, L.L.C.*, 442 S.W.3d 297 (Tex. 2014); see also D.C. Toedt, *Drafting Tip: Define “will” as meaning “must”*, ON CONTRACTS (July 4, 2014), <http://www.oncontracts.com/drafting-tip-define-will-as-meaning-must/>.

162. *Lubbock Cty.*, 442 S.W.3d at 299.

163. *Id.*

164. *Id.* at 305 (emphasis added).

165. *Id.*

166. *Id.* at 306.

167. *Lubbock Cty.*, 442 S.W.3d at 307.

168. *Id.* This reading is consistent with drafting expert Tina Stark’s criticisms of the use of the term “will” to indicate obligation, noting that it functions as a statement of intended future performance, rather than the immediate creation of a duty. STARK, DRAFTING CONTRACTS, *supra* note 1, at 151-52.

The court's majority opinion was met with a vigorous dissent, agreeing with the Company's position that the disputed term created an obligation sufficient to fall under the statutory waiver of immunity applied to contracts for provision of services to a government entity. The dissent argued that "[i]n this context, 'will,' although it has many possible meanings depending on context, here indicates a mandatory requirement."¹⁶⁹

Nonetheless, this opinion creates a strong uncertainty as to whether Garner's preferred method of obligating parties to act is enforceable in a Texas court. Based on the ethical duties discussed in Part IV, it is clear that a competent, diligent attorney practicing in Texas would do well to research this issue, and if the attorney intended to use the term "will," as suggested by Garner, advise the client of the associated risks of enforcement.¹⁷⁰ These risks also exist with other proposed modernizations, as discussed below.

B. The Problem of Claims "Arising Out of or Relating to" a Contract

The phrase "arising out of or relating to" is a consistently used component of many contracts' dispute resolution provisions.¹⁷¹ Traditionally, contract drafters who desire a broad arbitration provision provide that mandatory arbitration applies to disputes "arising out of or relating to" the particular contract,¹⁷² and those who desire a more narrow construction use the phrase "arising under" the contract.¹⁷³ The addition of the phrase "relating to" is typically interpreted to broaden the arbitration provision to apply not only to contract disputes, but also to other disputes such as tort claims between the parties to the contract.¹⁷⁴

169. *Lubbock Cty.*, 442 S.W.3d at 311 (Willett, J., dissenting).

170. Garner's suggestion for removing "shall" and replacing it with alternate terms also has met resistance in the rulemaking context. The 2007 amendments to the Federal Rules of Civil Procedure removed "shall" in Rule 56 and replaced it with "should." Steven S. Gensler, *Must, Should, Shall*, 43 AKRON L. REV. 1139, 1140 (2010). The use of "shall" was reinstated by amendments to Rule 56 effective on December 1, 2010. See generally 11-56 STEVEN S. GENSLER & JEFFREY W. STEMPEL, MOORE'S FEDERAL PRACTICE (3d ed. 2012). The reversion to "shall" was based in part on comments "arguing that the style translation had been a mistake." Gensler, *supra*, at 1.

171. ADAMS, MANUAL OF STYLE, *supra* note 4, at § 13.18.

172. See, e.g., *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 398 (1967); *Mehler v. Terminix International Co.*, 205 F.3d 44 (2d Cir. 2000); *Drews Distributing Inc. v. Silicon Gaming, Inc.*, 245 F.3d 347 (4th Cir. 2001); *Fyrnetics Ltd., v. Quantum Group, Inc.*, 293 F.3d 1023 (7th Cir. 2002).

173. See, e.g., *In the Matter of Kinoshita & Co.*, 287 F.2d 951, 952-953 (2d Cir. 1961); *Pennzoil Exploration and Production Co. v. Ramco Energy Limited*, 139 F.3d 1061, 1076 (5th Cir. 1998); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 720 (9th Cir. 1999).

174. TINA L. STARK, NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE 186 (ALM Publishing 2003) [hereinafter STARK, BOILERPLATE]; see also *PSI Energy Inc. v. AMAX, Inc.*, 644 N.E.2d 96, 97-100 (Ind. 1994) (indicating that an agreement to arbitrate claims "arising out of or

Plain-language drafting proponent Kenneth Adams expresses concerns related to the use of the traditional language as the method to set the scope of the coverage of dispute resolution provisions. Specifically, Adams notes that:

It would indeed be a good idea to state precisely the types of claims that are to be submitted to arbitration. But instead of precision, *arising out of or relating to* uses two vague standards that offer little predictability as to what falls within the scope of the provision. In particular, invoking the broader *relating to* standard could result in a party's being unpleasantly surprised by the consequences of something unexpectedly falling within the scope of the provision.¹⁷⁵

As an alternative, Adams suggests focusing on “the transaction contemplated by the contract.”¹⁷⁶ For example, with regard to a confidentiality provision, Adams suggests using the phrase “*any disputes arising out of this agreement or the Recipient's handling, disclosure, or use of any Confidential Information.*”¹⁷⁷ According to Adams, this approach would permit parties to bring a “broad but predictable set of claims within the scope of a provision.”¹⁷⁸

However, Adams' approach fails to take into account the consistently broad judicial interpretations of arbitration clauses, however phrased, particularly in the federal courts.¹⁷⁹ In fact, the issue of unpredictable judicial interpretation is not necessarily solved by the use of a more transaction-focused arbitration provision. In a recent case, the Court of Appeals of Georgia ordered arbitration based on a broad interpretation of a very specific, transaction-oriented clause.¹⁸⁰

In *Kormanik*, Chris and Mary Kormanik sued DBGS, LLC d/b/a DirectBuy of Greenville (DirectBuy) for negligent misrepresentation based on shoddy work by a contractor recommended to them by DirectBuy.¹⁸¹ The Kormanik's membership agreement with DirectBuy provided:

relating to” a coal supply contract made the arbitration clause “all encompassing”); *Abrey Partners V, L.P. v. F & W Acquisition, LLC*, 891 A.2d 1032, 1055 (Del. Ch. 2006) (noting that the phrase “to have arisen out of or to have resulted from . . . bespeaks of breadth” in the choice of law context, extending over fraud claims in addition to contract claims).

175. ADAMS, *MANUAL OF STYLE*, *supra* note 4, at §§ 13.23-24.

176. *Id.* § 13.26

177. *Id.* § 13.28.

178. *Id.* § 13.26.

179. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)).

180. *DBGS, LLC v. Kormanik*, 775 S.E.2d 283, 285 (Ga. Ct. App. 2015).

181. *Id.*

[DirectBuy] staff and . . . [o]wners stand ready to help you resolve *any problem you may encounter with your Membership or with any order you place through DirectBuy*, but if we are not able to achieve a satisfactory resolution for you, you and we agree to avoid the needless delays, expenses, and uncertainties of court proceedings by submitting all such unresolved disputes exclusively to private, expedited, and confidential arbitration.¹⁸²

DirectBuy sought to arbitrate the Kormaniks' claim regarding the recommended contractor pursuant to the foregoing provision, but the trial court denied DirectBuy's motion to compel arbitration "on the ground that the Kormaniks' claim for negligent misrepresentation concerning the contractor recommendation did not involve their DirectBuy membership or . . . a problem with their order."¹⁸³ However, the Court of Appeals of Georgia reversed, noting Georgia's "clear public policy in favor of arbitration."¹⁸⁴

The use of the phrase "any problem you may encounter with your Membership or with any order" comes closer to Adams' suggestion that arbitration provisions focus on the "transaction contemplated by the contract" (in this case, the Kormaniks' membership in a company selling home furnishings and fixtures).¹⁸⁵ However, the court in *Kormanik* imposed a far broader reading of the provision than either party could have predicted, compelling arbitration on a claim relating to an outside contractor recommendation.¹⁸⁶

The court took guidance from the broad interpretation of arbitration clauses in federal cases, noting that Georgia's arbitration code "closely tracks" federal arbitration law.¹⁸⁷ The court found that "[a]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."¹⁸⁸ The court looked to the "factual allegations in the complaint" rather than the "legal causes of action" to determine that the negligent misrepresentation claim fell under the seemingly narrow arbitration clause.¹⁸⁹

Thus, the parties to the contract in *Kormanik*, should they have desired to keep their arbitration clause more narrow, would have been

182. *Id.* at 284-85 (emphasis added).

183. *Id.* at 285.

184. *Id.*

185. ADAMS, MANUAL OF STYLE, *supra* note 4, at §§ 13.26-28.

186. *Kormanik*, 775 S.E.2d at 285.

187. *Id.*

188. *Id.*

189. *Id.*

better served by including the traditional narrowing phrase “arising under” (which was absent from the arbitration clause in question).¹⁹⁰ Instead, the use of non-traditional, transaction-focused language, led to an unpredictable judicial result.

The court’s broad interpretation of the language in *Kormanik* demonstrates the potentially unpredictable results of an arbitration clause, even one that follows Adams’ advice to focus on the transaction rather than traditional scope-defining terms.¹⁹¹ The *Kormanik* case makes clear that even a very detailed, non-traditional construction can still lead to an unpredictable result based on the policies of the jurisdiction in which the language is interpreted.

Based on this precedent and the associated risk of broad interpretation, the competent and diligent drafter should research precedent of the jurisdiction in which the contract is likely to be enforced to determine how broadly an arbitration agreement will be construed and advise the client with regard to the risks associated with any proposed construction of the term.¹⁹² Even a seemingly narrow construction of a clause term might lead to more unpredictable results than a traditional term, depending on judicial interpretation.

C. Malpractice and Informing the Client

The foregoing cases provide examples of outcomes of non-traditional drafting resulting in injury to a client’s position. These cases highlight the need for competence and diligence in researching and understanding the laws of the jurisdiction in which a drafter works in order to make informed language choices. However, neither case discusses the duties of the drafter during the contract formation phase in communicating with clients concerning potential language changes.

Cases concerning violations of Model Rule 1.4 dealing with communication in the transactional context are scarce. Therefore, one must turn to legal malpractice cases to find examples of the level of communication required between lawyer and client when considering language changes in contracts during the negotiation and drafting phases. Malpractice cases have imposed a requirement for attorneys to explain operative language choices to clients, even sophisticated clients, if those language changes can have potential consequences of

190. See *supra* note 171 and accompanying text.

191. ADAMS, MANUAL OF STYLE, *supra* note 4, at § 13.26.

192. See STARK, BOILERPLATE, *supra* note 174, at 185 (noting that “[s]tate courts have interpreted arbitration provisions both narrowly and broadly. Practitioners should be sure to check the cases in their states”).

interpretation.¹⁹³

In a relevant case before the Supreme Court of New York, Appellate Division, the law firm of Mandel, Resnik & Kaiser (Mandel) was retained to represent E.I. Electronics, Inc. (EIE) in a transaction whereby EIE “was to be acquired, in whole or in part,” by General Electric (GE).¹⁹⁴ The court laid out the stages of the proposed transaction:

The acquisition was structured in three stages: (1) an initial purchase [by GE] of a 35% interest [in EIE], (2) a call option exercisable by GE enabling it to purchase an additional 14% interest and (3) a put option exercisable by [EIE] requiring GE to purchase the remaining interest in [EIE].¹⁹⁵

An original version of the agreement drafted by the Mandel firm provided that EIE’s put option (forcing GE to buy the remaining shares in EIE), was exercisable at any time after GE’s call option period expired.¹⁹⁶ The final, signed version, however, included a change made by the Mandel firm, in response to negotiations with GE’s attorneys, that made the exercise of the put option conditional on the call option having been exercised.¹⁹⁷ In essence, the final version, as drafted by the Mandel firm, made EIE’s ability to exercise the lucrative put option contingent upon GE’s exercising its call option first.¹⁹⁸

Erran Kagan, the principal of EIE, a sophisticated businessman and licensed attorney, later disputed the changes to the agreement and refused to pay Mandel’s attorney’s fees.¹⁹⁹ Mandel sued EIE for unpaid fees, and EIE counterclaimed for legal malpractice. In the counterclaim, EIE alleged that the Mandel firm, in negotiating and drafting the terms of the put option, permitted changes to the provision not sufficiently explained to Erran Kagan.²⁰⁰ EIE and Kagan claimed that the effect of the changes robbed them of their ability to exercise their desired put option.²⁰¹

In denying the Mandel firm’s motion for summary judgment on the

193. See *Mandel, Resnik & Kaiser, P.C. v. E.I. Elecs., Inc.*, 839 N.Y.S.2d 68 (N.Y. App. Div. 2007).

194. *Id.* at 70.

195. *Id.* In the basic sense, a “call option” is defined as “the right to require another to sell” and a “put option” as “the right to require another to buy.” *Option*, BLACK’S LAW DICTIONARY (10th ed. 2014).

196. Corrected Decision/Order at 2-3, *Mandel, Resnik & Kaiser, P.C. v. E.I. Elecs., Inc.*, 839 N.Y.S.2d 68 (N.Y. App. Div. 2007) (No. 123360/01), 2006 WL 5110555.

197. *Mandel*, 839 N.Y.S.2d at 70.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

malpractice claim and remanding for further fact-finding, the court's primary concern was that the Mandel firm had "failed to apprise [Kagan] concerning the effect of the amendment to its put option."²⁰² Mandel made "no assertion that the change was discussed with Erran Kagan or that its significance was explained."²⁰³ The court downplayed the importance of Kagan's sophistication, noting that a question of fact remained regarding the "extent of the reliance" by Kagan on Mandel's advice, and the extent to which Kagan "understood the word 'closing'" as included in the document.²⁰⁴

While the *Mandel* decision was a malpractice case rather than an ethics opinion, the court's analysis is instructive with regard to the competence, diligence, allocation of authority, and communication duties of an attorney under the Model Rules as discussed in Part IV of this Article. One of the required elements of a malpractice action in New York, where the *Mandel* case was litigated, requires the plaintiff to prove that the defendant attorney "failed to exercise the degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community."²⁰⁵

This malpractice standard closely tracks the requirement in Model Rule 1.1 that requires a competent attorney to use "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."²⁰⁶ Further, in certain jurisdictions, violations of Model Rule 1.1 can serve as evidence of malpractice liability, supporting the close link between the standards asserted under the Model Rule and the common law of attorney malpractice.²⁰⁷

Thus, the *Mandel* case stands for the proposition that the competent lawyer must fully explain the significance of operative language changes to a client, even in the context of sophisticated transactional practice. Comparable to the language change in the put option drafted in the *Mandel* case, one might envision a situation where changing a traditional term to more modern language might similarly impact the interpretation and enforcement of a contract, such as occurred in the *Lubbock* case.²⁰⁸

Mandel makes clear that in order to fulfill the duty of care, a reasonableness duty analogical to the competence duty in the Model

202. *Mandel*, 839 N.Y.S.2d at 70.

203. *Id.* at 71.

204. *Id.*

205. Corrected Decision/Order at 6, *Mandel, Resnik & Kaiser, P.C. v. E.I. Elecs., Inc.*, 839 N.Y.S.2d 68 (N.Y. App. Div. 2007) (No. 123360/01), 2006 WL 5110555.

206. MODEL RULES OF PROF'L CONDUCT r. 1.1.

207. *See, e.g.*, *Mainor v. Nault*, 101 P.3d 308, 320 (Nev. 2004).

208. *See Johnson, supra* note 3, at 469-76.

Rules, enhanced communication with the client is required before changes are made to legally significant terms of the contract. This duty applies to transactional attorneys working to obtain maximum benefit for their clients. Therefore, ways in which the Model Rules and enforcement of ethical standards can be enhanced to make this duty clear and evenly enforced amongst transactional practitioners must be considered.

This analysis will now turn to consider recommendations as to how Model Rules 1.1, 1.2, 1.3 and 1.4 can be applied to drafting attorneys in practice to provide clearer guidelines for modern transactional practice. One can look at underlying fiduciary duties, existing ABA Opinions, and the comments to the Model Rules as opportunities to improve drafter ethics on the front-end and add efficiency and fairness to the drafting process.

VI. RECOMMENDATIONS

Based on the foregoing case studies, it is clear that the ABA and local bar associations are “contribut[ing] to the problem” facing transactional attorneys by failing to articulate viable guidelines for attorneys’ language choices in drafting.²⁰⁹ Attorneys who grapple with whether and how to incorporate changes suggested by contract drafting commentators, or even by opposing counsel, have little guidance as to their ethical duties under the Model Rules.

Those who make and enforce these rules must begin to understand the multi-faceted role of the contract drafter and broaden the applicability of the rules identified by this Article in Part IV, in order to provide better guidance to transactional attorneys in making operative language choices. Below, this Article identifies several options for reimagining the Model Rules to better guide the transactional attorney as she chooses the language to advance her client’s interests.

These options include viewing the transactional attorney’s duty as a fiduciary duty, using existing ABA Opinions to shape how non-traditional language choices are treated, and providing transactional-focused comments to Model Rules 1.1, 1.2, 1.3, and 1.4. Each of these recommendations will be discussed below.

A. Fiduciary Duty as a Touchstone

One method of expanding the applicability of the Model Rules to transactional practitioners, as suggested by ethics scholar Paula

209. Schaefer, *supra* note 58, at 253.

Schaefer, is to shift the touchstone of the legal profession away from viewing the lawyer's role as a zealous advocate and toward a view of the lawyer as a fiduciary.²¹⁰ This shift helps expand the currently existing proscriptions on advocacy to capture the role of the modern transactional attorney, not merely the litigator. This focus on fiduciary behavior would require the lawyer to "act as a competent, diligent attorney" and also to "put the client's interests first."²¹¹

The fiduciary-based approach "tells the lawyer to focus on the client's interests" when emphasizing the client's understanding of risks but leaves room for other ethical rules to "define when other interests may or must prevail,"²¹² In this way, the use of the fiduciary duty as a touchstone also advances Gregory Duhl's concept of trust between parties.²¹³ A fiduciary acting as a client advocate need not place the client's interests above all others in all circumstances, as is often believed to be required under the "zealous advocacy" touchstone disputed by Schaefer.²¹⁴

Schaefer's approach permits for Duhl's desired cooperative, deal-focused approach to transactional lawyering²¹⁵ while placing client needs first whenever permissible. In doing so, the fiduciary approach requires the drafter to inform the client whenever language changes may have an impact on the client's desired position or outcome, particularly if the language change could result in uncertainties concerning liability or enforceability.²¹⁶

This counseling is required under the fiduciary duty framework because the "[f]iduciary duty requires a lawyer to ask whether a competent, loyal lawyer would encourage a course of conduct likely to create legal liability for the client."²¹⁷ This same logic suggests that the loyal and competent lawyer should advise the client of potential increases in risk associated with non-traditional phrasing of contract terms.

Therefore, incorporating the fiduciary approach into the traditional reading of the Model Rules would strengthen the competence, diligence, allocation of authority, and communication requirements as set forth by this Article when a transactional attorney seeks to make changes to traditional language. One challenge with this approach, as noted by

210. *See id.* at 286-99.

211. *Id.* at 283.

212. *Id.* at 287.

213. *See supra* notes 42 through 50 and accompanying text.

214. Schaefer, *supra* note 58, at 287-88.

215. *See supra* notes 42 through 50 and accompanying text.

216. *See Schaefer, supra* note 58, at 287-88.

217. *Id.* at 287.

Schaefer, is with the mechanics of incorporating the fiduciary touchstone into the existing Model Rules.²¹⁸

Schaefer suggests including references to the existence of the fiduciary duty in the Preamble to the Model Rules, setting the duty as a “gap filler” for behavior when the Model Rules otherwise leave decisions unclear.²¹⁹ This approach would work particularly well with regard to the currently-drafted rules which lack clear guidance for the transactional practitioner, as it would permit for the same analogical application of the litigation-oriented rules that transactional practitioners are accustomed to, while providing a baseline and ideal for the specific behavior adopted.

Another potential challenge to the fiduciary approach is the fear it constitutes a more nebulous standard than the existing “zealous advocacy” standard, and that a fiduciary requirement would “expand attorney liability” or discipline, “even when the attorney acted only negligently.”²²⁰ However, if this requirement to behave as a fiduciary is incorporated into the Model Rules as currently drafted, this risk could be avoided by retaining the definitions in the Model Rules that require scienter on the part of the attorney for fraud-based violations, as discussed in Part III.D of this Article.

Thus, adopting the fiduciary duty as an underlying touchstone to the Model Rules would assist transactional attorneys who face thorny dilemmas concerning language choice issues in sophisticated transactional practice. This new touchstone would encourage attorneys to place client interests above competing interests of style or readability, and require explanation to clients of changes to operative contract terms.

B. Use of Existing ABA Opinions as Guidelines

Another option for reshaping the way contract drafting skills are governed under the Model Rules would be to review and apply the reasoning of existing ABA Opinions on similar topics, in order to provide guidance concerning the expectations for drafter behavior. ABA Formal Opinions have spoken generally about the ideal behavior of transactional attorneys in their practice while drafting documents,²²¹ and these general guidelines could translate into more specific instructions for transactional attorneys seeking to fulfill their duties of

218. *Id.* at 289-91.

219. *Id.* at 291-92.

220. *Id.* at 289-90.

221. See ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 335 (1974) (discussing adequate preparation for writing opinions as the basis for transactions involving sales of unregistered securities).

competence, diligence, allocation of authority, and communication.

In a particularly helpful opinion from 1974, which was issued in response to changes in attorney duties under the Securities Act of 1933, the ABA attempted to set guidelines for the behavior of transactional attorneys engaging in a novel practice, that of issuing required opinions on the legality of sales of unregistered securities.²²² While a slightly different scenario from the lawyer seeking to utilize untested language in a contract, this opinion stands as one of the few discussions by the ABA of the duties of the transactional attorney more generally.

The opinion requires, in connection with the drafting of these securities opinions, that the attorney “competently and carefully consider . . . [relevant] facts” and in some circumstances to “review[] such appropriate documents as are available” in connection with the transaction.²²³ Additionally, the opinion advises the attorney to “make adequate preparation including inquiry into the relevant facts.”²²⁴

The opinion notes that “[w]hile the responsibility of the lawyer is to his client, he must not be oblivious of the extent to which others may be affected if he is derelict in fulfilling” his responsibility of competent drafting.²²⁵ The best transactional attorney, according to this analysis, goes beyond the mandatory requirements of the applicable conduct rules, and considers underlying ethical obligations. Being written in 1974, this opinion cites the Ethical Considerations of the Code as examples of encouraged behavior.²²⁶

While the Code and the Ethical Considerations were predecessors to the current Model Rules, these suggestions for the behavior of the transactional attorney have distinct modern applicability. Similar to the ideal of the fiduciary duty suggested by Schaefer, the approach of requiring inquiry into client and transaction facts and underlying documents, and the balance between client desires and the interests of others, are guidelines by which every transactional practitioner should abide.

Specifically, in connection with the modernization of traditional contract language, the requirements of this ABA Formal Opinion require inquiry into the position of the client within the transaction and the underlying interpretations of terms in the relevant jurisdiction. To achieve this goal, the Model Rules could include language in the Preamble generally highlighting the underlying duties of transactional attorneys to be fully familiar with the facts of the specific transaction

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *See supra* part III.A.

and applicable law concerning the language employed to best achieve client goals.

Such language in the Preamble would assist in the interpretation and enforcement of the Model Rules in scenarios involving drafting disputes, or even begin to reshape the behavior of transactional attorneys on the front end, reminding them to abide by these duties as they engage with their clients to draft documents that best achieve client goals.

Particularly, this language would heighten transactional attorneys' duty of competence by requiring enhanced familiarity with the position of the client within the transaction and the jurisdiction's views on the enforcement of key terms. It would also require diligence in the level of research required into both facts and law, and relevant communication with, and deference to, the client in understanding and approving choices of terms.

In this way, an incorporation of the reasoning of this ABA Formal Opinion into the Preamble of the Model Rules would help to provide a touchstone more applicable to the behavior of the transactional lawyer as advocate. While the current Preamble simply identifies the attorney advocate as "zealous," highlighting the more nuanced requirements of advocacy from the transactional perspective would provide needed depth to the interpretation of the Model Rules highlighted in Part IV of this Article as applicable to transactional lawyers.

C. Enhanced Comments to the Model Rules

An additional method of clarifying the applicability of the referenced Model Rules to transactional practice would be the inclusion or editing of specific comments to each of the Model Rules discussed in Part IV of this Article. Suggestions for edits to the comments of each Model Rule will be discussed.

With regard to Model Rule 1.1, the competence duty, it would be fairly easy to enhance existing commentary to make clear that the competence duty of a transactional attorney is only fulfilled when she becomes fully apprised of the factual position of her client and the view of the jurisdiction in which the contract will be enforced concerning the enforcement of particular terms. This requires both legal research and essential client-counseling skills.

Specifically, to enhance the applicability of the competence rule to transactional language choices, the discussion in Comment 2 to Model Rule 1.1 of "important legal skills" should be expanded.²²⁷ The general statement that important legal skills include "the analysis of precedent,

227. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 2.

the evaluation of evidence and legal drafting” must be expanded to address legal drafting as its own discipline with its own concerns.²²⁸

A specific comment highlighting a requirement for knowledge of the client’s needs, goals, industry, and risk tolerance, as well as the relevant precedent of the applicable jurisdiction concerning operative provisions of the contract being drafted would provide transactional lawyers a much clearer framework for making competent decisions concerning the phrasing of contract terms.

Further, with regard to the diligence duty under Model Rule 1.3, Comment 3 concerning timeliness could be expanded to recognize that the use of forms and tested terms can have benefits when representing a fee-sensitive client. The Comment should provide that an attorney must use such forms competently, with knowledge of the meaning and potential interpretations of each of the operative terms included in the form. This addition to the Comment would be in keeping with the requirement in Comment 2 to Model Rule 1.3 that a lawyer’s workload be controlled such that all matters be handled with competence.²²⁹

Concerning the allocation of authority under Model Rule 1.2 and communication under Model Rule 1.4, Comments 1 and 2 to Model Rule 1.2 should be edited to more specifically define the authority of the attorney in the transactional setting. These Comments should clarify that determining the “means”²³⁰ of the representation from a transactional perspective includes consideration of the level of risk associated with the use of an untested contract term.

The attorney would thus retain discretion to make operative language choices as part of the means of the representation, but pursuant Comment 1 to Model Rule 1.2, the lawyer “shall consult” with the client concerning these means.²³¹ Therefore, defining the means to include a consideration of the level of risk would encourage additional communication and discussion between the lawyer and client concerning the potential impact of changes to traditional language in contracts. This enhancement of the communication duty would also increase trust and efficiency in the attorney-client relationship in the transactional setting.

VII. CONCLUSION

The modern transactional practitioner makes dozens of decisions concerning contract language each day. Each of these decisions has the

228. *Id.*

229. *Id.* r. 1.3 cmt. 2.

230. *Id.* r. 1.2 cmts. 1, 2.

231. *Id.* See also *id.* r. 1.4(a)(2).

potential to significantly impact the success of a client's transaction. While the benefits of the plain language movement in contract drafting are many, including improved clarity, reduced ambiguity, and reduction of the distance between the client and the contract text, significant risks are associated with jettisoning all traditional, tested, legally-significant terms in lieu of phrasing more friendly to lay readers.

The existence of these risks, namely the potential for unforeseen opposing party behavior and judicial interpretation, implicate the ethical obligations of the transactional attorney. In order to fulfill the core ethical duties of competence, diligence, allocation of authority, and communication, a transactional attorney must carefully consider changes to terms of art, perform appropriate research into the position of her client in the transaction and the preferences of the courts in the applicable jurisdiction, consider the level of risk associated with the new language, and thoroughly communicate with her client concerning this risk.

The ethical practitioner must also balance the time and cost associated with the effective use of non-traditional terms against the wishes and direction of the client. Many clients, particularly in today's fee-sensitive legal market, may not be willing to incur the additional costs required for a transactional attorney to be assured of the enforceability, effectiveness, and potential interpretation of a novel clause. As such, a traditional term, even if perhaps less modern and stylish, may be the appropriate drafting choice.

In order to highlight these duties and provide appropriate guidance, the Model Rules must be modernized to reflect the multi-faceted and legally significant role of the transactional attorney as an advocate and partisan dealmaker. The Model Rules' comments must be revised and expanded to provide clear guidance to the many practitioners who undertake these important, high-value, client centric representations each day. The historical bias viewing only the litigator as an advocate is a function of a truncated view of the transactional attorney's role, and must evolve.