

Legal professionals involved in contract drafting and negotiation encounter various ethical issues that necessitate a principled response.

Ethical Issues in Contract Drafting and Negotiation

Key ethical challenges that can arise include:

- **Unequal Bargaining Power and Sophistication**
 - Negotiating against an unrepresented or less sophisticated party presents a subtle ethical dilemma for transactional lawyers, as specific guidance on this is often not explicitly addressed in professional conduct canons that are more focused on litigation.
- **Misrepresentation, Fraud, and Non-Disclosure**
 - There is a clear ethical obligation **never to assist a client in illegal or fraudulent conduct**. This means a drafter cannot knowingly include false statements in a representation or draft a contract to facilitate an unlawful purpose.
 - A significant issue is the potential for **non-disclosure or providing incomplete or misleading information** by a counterparty, which requires due diligence from the legal professional.
 - A particularly problematic practice is "**creative ambiguity**," where ambiguous provisions are deliberately included to allow a client to invoke a hidden, alternative meaning after signing. This is seen as antithetical to a successful contract relationship and may violate lawyer ethics rules.
- **Implied Duty of Good Faith**
 - Contracts generally imply a **duty of good faith and fair dealing** in their performance and enforcement. An ethical issue arises when parties attempt to circumvent this implied duty through vague or overreaching language, such as granting "sole and absolute discretion," potentially allowing a party to act arbitrarily or capriciously.

How Legal Professionals Should Respond

Legal professionals should adhere to fundamental principles of competence, loyalty to the client, and integrity towards the legal system and other parties.

- **Uphold Professional Competence and Clarity:**
 - **Provide competent representation** by possessing a deep understanding of relevant laws, client's business, and the commercial context of the deal. Avoiding drafting in unfamiliar areas without adequate preparation is crucial.
 - Ensure **legal compliance and enforceability** of all contract terms.
- **Act in the Client's Best Interests (Client-Centric Approach):**
 - Offer **candid and direct advice** to the client, even if it is difficult to hear, ensuring they fully understand the risks and obligations they are undertaking.

- Systematically analyze every contract provision through the lens of **money, risk, control, standards, and endgame** to shape a deal that is not only legally sound but also commercially advantageous and protective of the client's interests.
- Always aim for a contract that mutually satisfies and meets the goals and objectives of both parties, recognizing that a "bad agreement can be worse than no agreement at all".
- **Maintain Ethical Conduct in Negotiations:**
 - Engage in negotiations with **fairness and courtesy** towards other advocates, refraining from personal attacks, misrepresentations, and deceptive tactics.
 - Prioritize **clear and honest communication** to foster mutual understanding and achieve mutually beneficial outcomes.
 - Practice **active listening** to truly understand the other party's perspectives and interests, which builds trust and facilitates effective problem-solving.
 - Address issues and concerns **early and openly** in the negotiation process to prevent them from escalating into major problems.
 - Maintain a **calm and professional tone** during disagreements, focusing on underlying interests rather than rigid positions, and proactively proposing solutions.
- **Uphold the Rule of Law and Integrity:**
 - **Never facilitate illegal or fraudulent conduct** by a client, and refuse to draft contracts that include false statements or serve an unlawful purpose.
 - Consciously avoid using "creative ambiguity" to trick or mislead the other party. If a provision is unclear, clarify it, as a court may preclude a party from arguing a meaning different from what the other side understood if they were aware of that understanding.
 - Address the **implied duty of good faith** directly in contracts, especially when granting discretion. Instead of relying on ambiguous phrases, draft explicit language that clarifies the scope of discretion and acknowledges good faith expectations, as attempts to circumvent this duty can lead to disputes.
 - Challenge the "myth of tested language" and advocate for using **clear, standard English** over archaic or confusing terms, as clarity is the best defense against future disputes.
 - Consider implementing and adhering to **organizational style guides** to promote consistency and clarity across all drafted contracts, enhancing overall quality and reducing the likelihood of disputes. When sending drafts, proactively inform the counterparty that the document adheres to modern drafting guidelines, framing it as a standard for clarity and efficiency.