

THE ETHICS OF NEGOTIATIONS
FOR TEXAS OIL AND GAS LAWYERS
ARE THERE ANY?

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By

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Rubin is an author of, co-author of, and contributing writer to more than a dozen legal books and over forty articles; his works are used in law schools and have been cited as authoritative by state and federal trial and appellate courts, including the U.S. First and Fifth Circuits. He has been honored as the Distinguished Alumnus by the LSU Law School and as the Distinguished Attorney of Louisiana by the Louisiana State Bar Foundation. His latest legal book, on Louisiana finance and real estate, is THE LOUISIANA LAW OF SECURITY DEVICES, A PRÉCIS (Carolina Academic Press), now in its second edition.

Rubin also is a novelist. At the American Library Association's annual meeting in San Francisco in 2015, his debut novel, a historical thriller entitled THE COTTONCREST CURSE, received the IndieFab Gold Award Winner as the best thriller/suspense novel published by a university or independent press. Publishers Weekly calls it a "gripping debut mystery," and 225 Magazine writes that it is "not just a thrilling murder mystery, but also a compelling look at life in south Louisiana during its most tumultuous decades." His second novel, a contemporary legal thriller entitled "CASHED OUT," was released nationally by Fiery Seas Publishing in August, 2017 and has won the Jack Eadon Award as the Best Contemporary Drama. The Providence Journal says: "*Cashed Out* features "a lawyer down and out enough to make John Grisham proud. He's culled from the likes of Michael Connelly by way of James Lee Burke. A gem of a tale." Both of Rubin's novels are available in your local bookstores, on the websites of Amazon and Barnes & Noble, and as eBooks in both Kindle and Nook formats.

THE ETHICS OF NEGOTIATIONS FOR TEXAS OIL AND GAS LAWYERS: ARE THERE ANY?²

BY: MICHAEL H. RUBIN³

1. THE TUGS AND PULLS

All lawyers engage in negotiations, whether they are litigators discussing a potential settlement or transactional lawyers doing deals. Not only are there regulations in the Rules of Professional Conduct, the practical problems are many. Professionalism issues arise, and there are a plethora of publications professing the palliative of professionalism as a panacea for the perils of practice.⁴

² Portions of this paper consist of excerpts from and adaptations of the author's prior publications, including:

"The Ethics Of Negotiations For Washington State Lawyers: Are There Any?, Washington State Bar Association's Real Property Probate and Trust Section Annual Meeting, Elum, Washington (June 2018); "Ethical Negotiations in Las Vegas," Nevada Bar Real Estate Section (Las Vegas, November, 2017); "The Ethics of Negotiations," International Conference of Shopping Centers, (San Antonio, September, 2017); "High Level Negotiations: Are There Any Limits," ABA Real Property Trusts and Estates Spring Symposia (Denver, April 2017); "The Ethics of Negotiations for Artists and Authors," Arts and the Media Inaugural Program (Baton Rouge, 2016); "The Ethics of Negotiations for Tax Practitioners" ABA Tax Section (New Orleans, 2013); "The Ethics of Negotiations for Washington Estate and Tax Planners," (Seattle, WA, Dec. 2012); "The Ethics of Texas Negotiations," Dallas Bar Association Energy Law Section, August 17, 2012; "The Ethics of Oil and Gas Negotiations," Center for American and International Law, Institute for Energy Law 63rd Annual Institute, February 16, 2012 (Houston, Texas); "The Ethical Utah Lawyer: What Are The Limits In Negotiation?," 21 Utah Bar Journal 15 (March/April, 2008); "The Intersection of Conflicts of Interest and Imputation of Knowledge," 22 ABA Probate and Property 53 (Nov. 08); "Ethics," The Construction Lawyer, Fall 2006; and "Labor Negotiations: Do Any Rules of Ethics or Professionalism Really Apply?" ALI-ABA Labor Seminar, Spring 2003, "The Ethical Negotiator: Ethical Dilemmas, Unhappy Clients, and Angry Third Parties," 26 The Construction Lawyer 12 (2006); "Breaching the Protective Privilege Wall: Expanding Notions of Real Estate Lawyers' Liability to Non-Clients," The ACREL Papers, Fall 2002 (ALI-ABA); "From Screens and Walls to Screams and Wails: A Selective Look at Screening Among The Various Ethics Rules and Cases and "A Consideration of Some Unanswered Questions," The ACREL Papers, Fall, 2001 (ALI-ABA); and "The Ethics of Negotiations: Are There Any?" 56 Louisiana Law Review 447 (1995).

³ The author is licensed to practice law only in Louisiana. This paper, while it refers to and discusses laws of other states, reflects a civil law attorney's outsider's view of common-law statutes, rules and jurisprudence.

⁴ The reader will note a definite tilt towards alliteration in this paragraph. As Justice Cardozo noted, in discussing legal opinions (but using a concept applicable to all effective writing): "The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of the proverb and the maxim." P.H. Dunn, "How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis," 113 Yale L.J. 493 (2003), citing Benjamin N. Cardozo, Law and Literature and Other Essays and Addresses 9 (1931).

For just a few of the many essays and articles on professionalism, see:

Durham, "Promoting The Standards Of Professionalism And Civility," 19 Utah B.J. 8 (2006); McMahon, "Declining Professionalism In Court: A Comparative Look At The English Barrister," 19 Geo. J. Legal Ethics 845 (2006); Corn, "Lessons From The Law Of War: A New Perspective On The "Legal Warrior's" Code Of Professionalism," 47 S. Tex. L. Rev. 781 (2006); Kennedy, Lantin & York, 7"Professionalism: Dealing With Unprofessional Conduct In Bankruptcy," 36 U. Mem. L. Rev. 575 (2006); Schofield, "Practice & Professionalism Tips From A Mediator, Arbitrator and Appraiser," 1 Trial Advoc. Quarterly (2006); Gunnarsson, "Professionalism: Judges' Pet Peeves," 94 Ill. B.J. 20 (2006); Alvarado, "A Radical Proposal for Lifetime Professionalism," 37 St. Mary's L.J. 1053 (2006); Johnson, "Applying The Standards Of Professionalism And Civility To The Practice Of Criminal Law, 18 DEC Utah B.J. 28 (2005); Rhode, "Profits and Professionalism," 33 Fordham Urb. L.J. 49 (2005); Creamer, "Professionalism: The Next Level," 79 Tul. L. Rev. 1539 (2005); Ames, "Concerns about the Lack Of Professionalism: Root Causes Rather than Symptoms Must Be Addressed," 28 Am. J. Trial Advoc. 531 (2005); and Barton, "The ABA, The Rules, And Professionalism: The Mechanics of Self Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons," 83 N.C. L. Rev. 411(2005).

While Rules 3.3 and 4.1 deal with negotiations, representations, misrepresentations, puffing, bluffing and silence in and outside of court settings, some claim that the main source of authority is not in the Rules themselves but in the interstices between the “black letter” rules, the comments, and what the public expects from lawyers.

This paper is an overview of how the ABA Model Rules relate to the personal moral principles that might guide or restrict the options of attorneys during negotiations. It also contains a selective look at some of the ethics rules in other states.

2. **WHAT DO CLIENTS WANT IN NEGOTIATIONS AND WHAT CAN YOU GIVEN THEM? THE LAWYER AS THE ZEALOUS ADVOCATE.**

Every client wants a lawyer/negotiator who gets all the client desires, leaves nothing on the table, and gives away the minimum. The dominant model of a lawyer is one who is a “zealous advocate”⁵ of the client’s position: it is a term indicating that the client’s interest is paramount. As far back as 1820, Lord Brougham declared, in *2 Trial of Queen Caroline* 8, “An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction, which he may bring upon others.”⁶

“Zealous advocate” is a term that is often used by lawyers to describe their role; however, that term has not existed in the “black letter” rules since the ABA Model Rules superseded the Model Code of Professional Conduct in 1983.⁷ When the 1983 Model Rules (“MR”) were adopted, the term “zealous advocate” was deleted. In its place was a

⁵ The “zealous advocate” language was contained in Canon 7 of the Canons of Professional Ethics; it was not carried forward in the 1983 Model Rules of Professional Conduct or its subsequent versions.

⁶Quoted by Sharon Dolovich, “Ethical Lawyering and the Possibility of Integrity,” 70 *Fordham L.Rev.* 1629 (2002), in her citing of Deborah L. Rhode’s book, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION*, 2000 at 15.

⁷ The term “zealous” advocacy appeared in the EC 7-1 of the Model Code.

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