

Chapter 1

Breaking with Tradition: Exercising Professional Judgment when Drafting Oil and Gas Documents

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§ 1.01. Professional Judgment and the Competent Lawyer.

Lawyers are paid to exercise professional judgment. From the first day of law school students begin learning how to evaluate facts and apply the law to effectively advise clients. This process has been described as “[p]erhaps the most fundamental legal skills”¹ It is the ability to apply law to facts and

¹ *Model Rules of Prof’l Conduct* R. 1.1 cmt. [2] (2014).

then determine “what kind of legal problems a situation may involve”² Legal drafting takes this process one step further. Once the legal problem is identified, the lawyer fashions language and document structure to *use* the law to achieve client goals. “Legal drafting” is listed in the *Model Rules of Professional Conduct* as one of the “important legal skills.”³ It is a major component of a competent lawyer: “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”⁴ Competence is an obligation, not an aspiration: “A lawyer *shall* provide competent representation to a client.”⁵ This chapter describes the process lawyers follow to ensure competent representation when drafting documents.

To provide competent representation, the lawyer must exercise professional judgment. Model Rule 2.1 directs: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”⁶ The focus for legal drafting is the obligation to “exercise independent professional judgment.” To date, the major focus under Rule 2.1 has been on the “independent” element and cases where the lawyer’s personal desires get in the way of representing his or her client. Sex with a client is the classic example where a lawyer’s “independent” judgment may be affected.⁷ The other category of cases is when a lawyer is disqualified from representing a client and pursues an appeal of the disqualification ruling — regardless of the client’s desires.⁸

From a drafting perspective, the focus is on the “professional judgment” part of the Rule 2.1 obligation. This chapter instructs on how lawyers

² *Id.*

³ *Id.*

⁴ *Model Rules of Prof’l Conduct* R. 1.1 (2014).

⁵ *Id.* (emphasis added).

⁶ *Model Rules of Prof’l Conduct* R. 2.1 (2014).

⁷ *See generally* Horiast v. Doctor’s Hospital of Operlousas, 255 F.3d 261, 267 n.6 (5th Cir. 2001) (discussing sexual relationship cases).

⁸ *E.g.*, *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 206-07 (1999) (lawyer’s personal interests in pursuing immediate appeal of disqualification ruling cannot interfere with client’s interests).

ensure they exercise “professional judgment” when drafting documents and structuring transactions. It also highlights the major impediments to the exercise of professional judgment: forms and industry practice. In this case, the “industry” includes the legal industry and the oil and gas industry.

§ 1.02. Forms and Industry Practice.

The future price of oil is 100 percent predictable because the price of oil never varies. Nobody with knowledge of the oil and gas industry would believe this statement. Nevertheless, members of the oil and gas industry, represented by some of the best legal minds in the world, routinely enter into oil and gas leases that are structured as though this statement were true. The very life of an oil and gas lease is largely dependent upon an external influence over which the lessee has no control: the market price of oil and gas. A major component of the lease habendum clause paying quantities equation is the market price of oil and gas.⁹ Oil and gas leases often become unprofitable when there is an extended decline in the price of oil or gas.¹⁰ Nevertheless, the industry persists in defining the duration of the oil and gas lease by its ability to produce in paying quantities. This is unwise and unnecessary, but it is also the universal industry practice, perpetuated largely by the use of oil and gas lease forms.¹¹

§ 1.03. Lawyer as Advisor.

Lawyers often undersell their services to clients. Although employed to provide service “X,” often that entry into the client’s business reveals a number of other potential issues that could benefit from a lawyer’s services.

⁹ See generally *T.W. Phillips Gas and Oil Co. v. Jedlicka*, 42 A.3d 261, 273-73 (Pa. 2012) (discussing factors to consider in determining whether a lease is satisfying the “paying quantities” requirement).

¹⁰ Camisha Simmons, “Falling Oil Prices May Cause Termination of Producing Oil and Gas Leases,” *Law.com* (Feb 9, 2015) (“As a consequence of the decline in oil prices, E&P companies may lose interests in oil and gas leases on property in which the companies are currently actively producing oil and/or gas.”).

¹¹ See David E. Pierce, “Incorporating a Century of Oil and Gas Jurisprudence into the “Modern” Oil and Gas Lease,” 33 *Washburn L. J.* 786, 806 (1994) (subsection a. titled: “Paying Quantities”: Chasing the Price of Oil & Gas).