

Mercer University School of Law
Professionalism Orientation
August 14, 2020

STUDENT HANDOUT

Introduction and overview

On Friday, August 14, you all will be participating via Zoom in the law school's professionalism orientation. Law schools in Georgia have held these orientations for more than twenty-five years. Georgia is a leader nationwide in the promotion of professionalism among lawyers.

The orientation will begin with a talk by lawyer Kevin Hicks. Afterwards, you will break up into smaller groups and discuss the problem below with experienced lawyers and judges. It is imperative that you prepare for this session carefully and that you participate actively in the discussions.

In the spring semester, you will take a three-credit course on professionalism and professional identity. We will revisit this problem near the end of that course.

You will receive the appropriate Zoom invitations for both sessions.

Assignment

Start by reading the following script and imagining yourselves in the shoes of the two lawyers, Donna and Adam. Then read the particular instructions after the script.

Scene Summary*

A senior lawyer, Donna, and an associate, Adam, meet together to go over a draft of a contract that they have just received from Amanda, the lawyer on the other side of the deal. Donna and Adam represent Sam Jenkins, a successful businessman. Sam is undertaking a new business, the manufacture and sale of baseball bats made from bamboo. Sam recognizes that the demand for wood bats is about to grow as a result of safety concerns about metal bats. He also believes that making bats from bamboo will make them more durable (a common complaint about traditional bats made from ash or maple is how easily they break) and will have the added appeal of being more eco-friendly. Bamboo grows much more quickly than ash or maple trees. With Donna's help, Sam has been negotiating a contract with his brothers, Jim and Bob, who run an import-export business. The contract calls for Jim and Bob to supply Sam with all the bamboo that Sam requires for his new venture for the next five years at a set price.

In the negotiation of the contract, one sticking point has been the desire of Jim and Bob to have an "escape clause." Under the "escape clause," Jim and Bob would be excused from their obligation to fulfill Sam's requirements for bamboo in the event of "political unrest" in the country of origin. Unbeknownst to Sam, his brothers intend to obtain the bamboo primarily from Ethiopia. The price of Ethiopian bamboo is low, but Jim and Bob fear that unrest could disrupt the supply or drive their costs up. Through their lawyer Amanda, Jim and Bob have insisted on this clause. Sam eventually concedes the point. Donna and Adam are now reviewing what purports to be a final version of the contract (ready for Sam's signature), which has just arrived from Amanda's office. They realize that Amanda omitted the clause that had been vigorously negotiated and reluctantly agreed to. Donna and Adam discuss how to respond to this "scrivener's error." In particular, they discuss the following options: (1) conferring with their client about what to do; (2) telling Amanda, the lawyer for the opposing party, about the mistake without discussing it with their client first; and (3) advising the client to sign the contract without advising the client or the other lawyer about the mistake.

[Scene opens with Donna and Adam looking over the draft contract in a conference room.]

Adam: [Flipping through pages, appearing confused] Donna, where is the escape clause supposed to be? I can't seem to find it in the section on delivery obligations, which is where I thought Amanda was going to put it.

Donna: That's where it should be. [looking at her version of the agreement]. Are you sure it's not there?

Adam: Definitely not there. She must have stuck it in here somewhere. Let me search the document quickly and see where she put it. [turns to laptop and

* Professor Patrick Longan wrote this script with Professor Karen Sneddon and with Professor Sue Chesler of Arizona State College of Law.

uses the “find” feature to search for words in the draft agreement...waits several seconds...tries another term...waits several seconds.] You’re not going to believe this, but I think she left it out.

Donna: You’ve got to be kidding me. After all the fuss she made about getting that into the contract, she leaves it out? What kind of an idiot are we dealing with?

Adam: It’s not here. I don’t know what to tell you. I searched terms from the language we agreed to – “escape” “political unrest” “relieved of obligation” – none of it comes up. She left it out. Now what?

Donna: I have no idea. This is a new one on me. ... I’ll tell you though, Sam never liked this idea of an escape clause to begin with. He told me “the whole point of a contract like this is to put the pressure on them to meet my needs, so I can concentrate on manufacturing and marketing.” He’d be pretty happy to sign an agreement without that clause in it. Remind me: what’s the default rule if we leave the escape clause out of it?

Adam: The default rule is that Jim and Bob can escape their obligation if political stability in their source country was a basic assumption of the contract and their obligation to supply the goods at the agreed price becomes “impracticable” because of political unrest in that country. I’m not sure a court would find that to be so – you can get bamboo from lots of different countries – and I think that since Jim and Bob have contemplated this problem, a court would not be so willing to let them off the hook. Sam really gave up a lot when he agreed to this clause.

Donna: Wow. Amanda has really messed it up this time. ... I’ll tell you, I’m tempted to just say nothing, let the brothers sign the deal, and let the chips fall where they may. It only becomes an issue if some kind of turmoil really does disrupt the supply. Sam will be in a much stronger position with Jim and Bob without that clause in there.

Adam: True enough, but don’t you feel a little bad about Amanda? I mean, if we get to that point, it seems to me that her clients aren’t going to be very happy. They could sue Amanda for malpractice, or they could sue Sam to reform the agreement on the basis of mistake and make Amanda pay for bringing that case. What a nightmare. There but for the grace of proofreading go I...

Donna: [*curtly*] What happens to Amanda is not my problem. If it was someone I liked and trusted, maybe I would feel different, but she has been a pain at every step of this process. Serves her right.

Adam: Shouldn't it matter that, really, we already agreed to this clause? Is it right to take advantage of another lawyer's mistake like this?

Donna: *[dismissively]* I take advantage of other lawyer's mistakes every day. If they don't know the law, I don't educate them. If they don't insist on a provision that I would insist on in their shoes, I don't do their job for them.

Adam: I get that, really I do. But if the shoe were on the other foot, what would you want Amanda to do?

Donna: *[conceding]*...I'd want her to tell me about my mistake so that I could fix it. And if she didn't tell me about it, I'd put her on my list of lawyers never to trust again and tell anyone who would listen not to trust her.

Adam: So ... shouldn't we just tell her and get the contract put together the way our clients have already agreed to put it together?

Donna: Maybe...but it just doesn't feel right to do something that can only hurt our client.

Adam: Anyway, don't you think a court later on would reform the deal to conform to what the parties really agreed to? I mean – we would have to testify that yes that was the deal and yes we knew there was a mistake and yes we had our client sign it anyway. Sounds like a classic case of mistake.

Donna: Maybe, but Jim and Bob would be behind the eight ball if push came to shove. The contract without the escape clause would give us leverage at first, even if we eventually – after years of litigation and lots of attorney's fees – we would lose on mistake and reformation. It's still in Sam's interest not to tell. Although I suppose if you're right about the law, he could be liable for fees if he fought it. But of course he could always bluff in negotiations, try to get some concessions, and then give up without litigation if the bluff didn't work.

Adam: At the very least, don't you think we should tell Sam about this? He might not want to take the chance, and after all the other parties are his brothers. He's been pretty hard-nosed in these negotiations, and I don't blame him for that, but still – I don't think he would want to do this to his brothers.

Donna: You'd be surprised. Sam can be hard-headed, and he almost killed the deal entirely because of this so-called escape clause. But I am tempted to call him and tell him about it – if for no other reason than just to cover myself regardless of what happens with this.

Adam: What if he tells us not to tell Amanda? Then what?

Donna: I suppose we'd have to do what he says. Leave Amanda hung out to dry.

Adam: Is there some ethical obligation for us to do one thing or another? Should we get some help with that?

Donna: I really don't see an ethical issue here. We didn't do anything wrong – Amanda did. No, I think this is just one of those situations where we're going to have to use some judgment and decide what to do. We can talk to Sam, or we can tell Amanda without talking to Sam first. I honestly don't know which is best. I feel like I should talk to my client, but I do feel some sympathy for Amanda.

Adam: Well, what are we going to do? [Fade out as the lawyers ponder that question.]

Instructions and Assumptions

As a lawyer, sometimes your actions will be dictated by the law or by rules of professional conduct. In one sense, those are the easy problems: you have no choice.

Professionalism comes into play when you do have choices among permissible courses of action. This is such a problem. Because you are just beginning your legal training, we give you the following assumptions about the law as it applies to this problem:

1. There is no rule of legal ethics that requires you to tell Sam about the error.
2. There is no rule of legal ethics that prevents you from revealing the error to Amanda (unless you tell Sam first and he forbids it). You are free to inform Amanda of the mistake and have it corrected without telling Sam.
3. There is no rule of ethics that prevents you from telling Sam about the mistake.
4. If Sam chooses to sign the contract without the escape clause, he will not be engaging in fraud, and therefore you will not be assisting in fraud (something as a lawyer you may not do).
5. If the brothers later sue about the mistake, they will ask the court to “reform” the contract to include the escape clause. Under the law of contracts, they probably can win that case, but it would take a very long time and cost quite a bit in attorney’s fees to achieve that result.
6. If you choose to tell Sam about the mistake first, and he says he wants to sign the contract as is, you have at most two choices. You must hand him the pen or, if Sam is doing something that you find “repugnant” or something with which you have a fundamental disagreement, you may withdraw as his lawyer. You no longer would have the option of telling Amanda about the mistake.

Your choices

Donna and Adam identify two possible courses of action. You must decide between them.

Option #1: You alert Amanda to the mistake without first talking to Sam.

If you choose this option, be ready to explain why. Be reflective – what is it that is motivating you to go in this direction? Be ready to convince your classmates who chose the other option why yours is better.

If you choose Option #1, also decide whether you are going to tell Sam after the fact that you alerted Amanda to the mistake. Be prepared to articulate why or why not.

Option #2: You talk to Sam before alerting Amanda to the mistake.

If you choose Option #2, be ready to convince your classmates who chose the other option why yours is better. Also be ready to describe what kind of conversation you plan to have with Sam. Are you going to give him a “heads-up” that you are going to call Amanda and alert her to the mistake? Or are you going to counsel him about what decision he should make? What would be the content of this counseling? If you advise him to let you tell Amanda and he says no, are you prepared to withdraw as his counsel?

Conclusion

At the end of the discussion, there should be time to discuss the problems with your group leaders “out of role.” You will have the opportunity to comment and ask questions about the exercise.