Taking unfair advantage of drafting errors

You receive for signature from another solicitor a final version of a contract from which an important clause previously agreed upon has been omitted. The omission of the clause is inadvertent; but its omission is advantageous to your client.

Do you face an ethical dilemma? What would be your response? Do you have your client sign the contract as delivered to you? Do you seek instructions from your client to bring the inadvertent omission to the attention of the other solicitor? Do you contact the other solicitor to correct the error without recourse to your client?

Rule 30 of the Australian Solicitor Conduct Rules (ASCR) helps us in resolving this ethical conundrum. The Rule states:

> A solicitor must not take unfair advantage of the obvious error of another solicitor or other person, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact.

Where the omission is inadvertent then there is an ethical responsibility upon us to disclose to the other solicitor the error they have made. Where the "final" version of a contract contains a drafter's error, it would be unconscionable for us to permit our client to take an unfair advantage from the mistake. This is reinforced by our fundamental ethical duties. Firstly, to act in the best interests of our client (Rule 4.1.1 – our client avoids the potential costs of a rectification action); secondly, to be honest in all our dealings in the course of legal practice (Rule 4.1.2) and thirdly, we are to avoid actions which may compromise our integrity (Rule 4.1.4). It is also arguable that if we permitted our client to sign the contract as delivered we could also be in breach of Rule 34.1.3 by using a tactic that could be said to have frustrated another person (because the client had no right to sign a document that did not reflect the parties agreement). In the recent decision of Philip McMurdo J in *Equititrust Limited v Willaire Pty Ltd* [2012] QSC 206 a solicitor's behaviour in not drawing to the attention of another solicitor the insertion of an amendment to an agreed settled draft was characterised as unconscionable. Also note that the solicitor criticised for the conduct had previously represented to representatives of the other party that the mortgage had been executed by the client and was to be returned.

Our duty to fearlessly represent our client is not unlimited. The client does not have the right in this situation to take unfair advantage of the obvious error to obtain a benefit which has no supportable foundation in law of fact. Indeed, for us to suggest to a client that this is an opportunity to take the benefit of the clerical omission would be not only unconscionable but a violation of our fundamental duties. It would be unprofessional to permit exploitation of the drafting error. Judge Trager, a Federal Court Circuit Judge in the United States has decried "gotcha" tactics employed by some lawyers as contributing to the low regard the profession is held by members of the public: *Morning Star Packing Co LP v Crown Cork & Seal Co (USA) Inc.* 303 Fed Appx 399. This was a case where an obvious error in drafting, omitted a party to the agreement and a party was put to the expense of seeking rectification.

If confronted by this dilemma we should inform our client of the inadvertent omission and urge our client to provide instructions to us to permit us to reveal to the other solicitor the mistake. We are permitted only to follow "lawful, proper and competent instructions" (Rule 8.1). We need to counsel our client as to the potential consequences of attempting to take unfair advantage of the inadvertent omission (the potential for indemnity costs in a rectification action and possibly engaging in misleading or deceptive conduct). A client who refuses to provide instructions to

permit correction of the obvious error should be informed that we cannot be a party to that behaviour and will need to withdraw from representation (we can terminate the engagement for just cause and on reasonable notice – Rule 13.1.3).

Do we need the client's instructions to inform the other solicitor of the drafting error? Rule 9 provides that any information which is confidential to a client and acquired by us during the client's engagement must not be disclosed unless permitted by the rule. Rule 9.2.1 permits us to disclose confidential client information if "the client expressly or impliedly authorises disclosure". The American Bar Association in *Informal Opinion 86-1518* (ABA Committee on Ethics and Professional Responsibility, Informal Op.86-1518 (1986)) has ruled:

> When the lawyer for A has received for signature from the lawyer for B the final transcription of a contract from which an important provision previously agreed upon has been inadvertently omitted by the lawyer for B, the lawyer for A, unintentionally advantaged, should contact the lawyer for B to correct the error and need not consult A about the error.

Informal Opinion 86-1518 expressed the view that the duty of confidentiality did not preclude disclosure because the lawyer was impliedly authorised to make disclosure of information that "facilitates a satisfactory conclusion" (see Nathan M Crystal *"The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations"* 87 Ky LJ 1055 at 1089). The reasoning in *Informal Opinion 86- 1518* was also supported by reference to a rule that have no equivalent rule in the *ASCR.* Rule 4.1 of the ABA Model Rules of Professional Conduct, at the date the Informal Opinion was released, provided that a lawyer had an obligation to fulfil" reasonable client expectations". It was said that a contract based on an obvious drafting error is not part of the client's reasonable expectation. Another reason advanced for implicit authority to disclose is that there is no informed decision for the client to make; the decision on the contract has already been made by the client. Mann J in *Tamlura NV v CMS Cameron McKenna* [2009] EWHC 320 (Ch) at [168] (*Tamlura*) suggests that there may be circumstances where an implicit authorisation to disclose could arise, in that a responsible solicitor gets on with the job of implementing client instructions. His Honour said:

> He had his instructions, and on this point they had been clear for some time. They had been reinforced the day before. The responsible solicitor gets on with his job of implementing his client's instructions, particularly bearing in mind the time pressures involved. He is not obliged to take advantage of an apparent mistake on the part of the other side, and on the facts of this case was not obliged to contact Mr Christie and Mr Vlotman to see if they wished to do so either. Had he gone along with Mrs Mares' drafting, knowing that it might have been a mistake, it could have involved his client in a rectification action in the future (potentially based on an allegation of sharp practice), it could have involved re-drafting the circular, and it might even have involved the circular being tricky and misleading to other shareholders. If they had sought to exploit the situation and been caught out, it might even have imperilled the transaction….But there are additional matters which demonstrate why they were not negligent in failing to go back to the client to invite him to consider taking advantage of an apparent mistake in an allotment transaction in relation to the shares in a publicly listed company. The position might have been otherwise if there had been some doubt as to whether DLA were really proposing some change in the commercial aspects, but that is not the case in this matter, and Mr Cakebread accepted that it was unlikely that this was a new proposal coming out of the blue. It was an apparent mistake, which Mr Page and Mr Aspery were entitled to correct in the fulfilment of their instructions, and that is what they did.

Not all circumstances will suggest an implicit authority to disclose. *Tamlura* had a number of factors which pointed to such an implied authority: firstly, the instructions the solicitors held had been clear for some time; secondly, there were time constraints which required quick action; and thirdly, the drafted document, if it stood as is, could be seen as tricky and misleading to third parties.

Notwithstanding this view as to implicit authorisation, the better course would be to have a conversation with the client as to the risks of non-disclosure and to obtain express authorisation. If the client provides us with the instruction to inform the other solicitor of the drafting error the dilemma disappears. If our client refuses to give us authorisation to disclose we cannot become a party to the securing of a benefit to our client which has no supportable foundation in law or fact. We must then terminate the client engagement for just cause and provide the client with reasonable notice (Rule 13.1.3). If we withdraw should we disclose the drafting error to the other solicitor? Our duty of confidence binds us even after the engagement has been terminated. Unless there exists an exception to the duty or we are permitted by the rules to disclose then we are bound to retain the confidences of the client acquired during the client's engagement.

In summary, we cannot permit a client to take advantage of an inadvertent drafting error of the other solicitor. This is consistent with the purpose of contract law, that the agreement reflects the parties' actual agreement. It is reinforced by Rule 30 and our fundamental duties.

Stafford Shepherd
Senior Ethics Solicitor
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