

# **TRUST, BUT VERIFY: The Importance Of Ethical Contract Practices In Challenging Times**

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Sarah Thomas Pagels – Laffey, Leitner & Goode LLC  
John W. Halpin – Laffey, Leitner & Goode LLC  
Jordan Corning – Epic Systems Corporation

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# Contracts The Old Way

“A lawyer shall act with reasonable diligence and promptness in representing a client.”

SCR 20.1.3



# Contracts In 2020



It's a brave new world. Does SCR 20.1.3 on diligence still apply?

# The Pandemic Effect



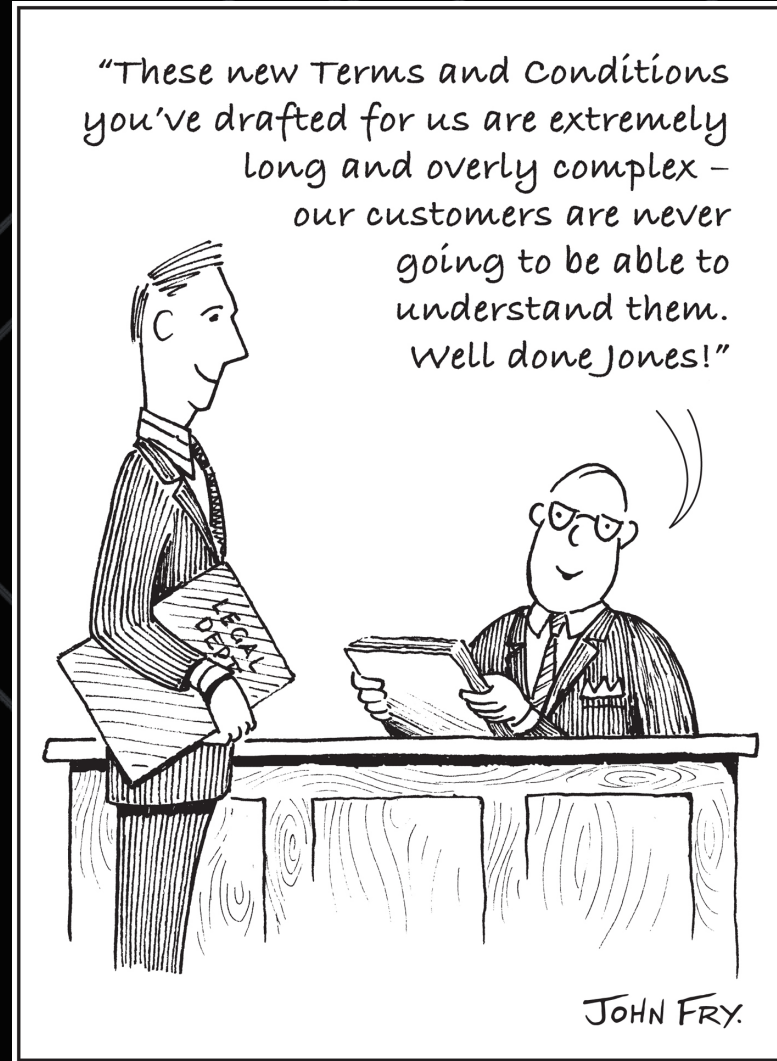
- Supply-chain disruption.
- Governmental orders.
- Bankruptcies, foreclosures & the death of longstanding relationships.
- Insurance coverage?
- Indemnity agreements.
- Ethics rules still apply!

# Securing Favorable Terms



# Standard (But Important) Terms

- Conditional performance
- Dealing with delay
- Acts of God / force majeure
- Limiting exposure
- Termination rights
- Choice of law



# Ethics Always Apply



# Maintain Confidences

“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosure that are impliedly authorized in order to carry out the representation.”

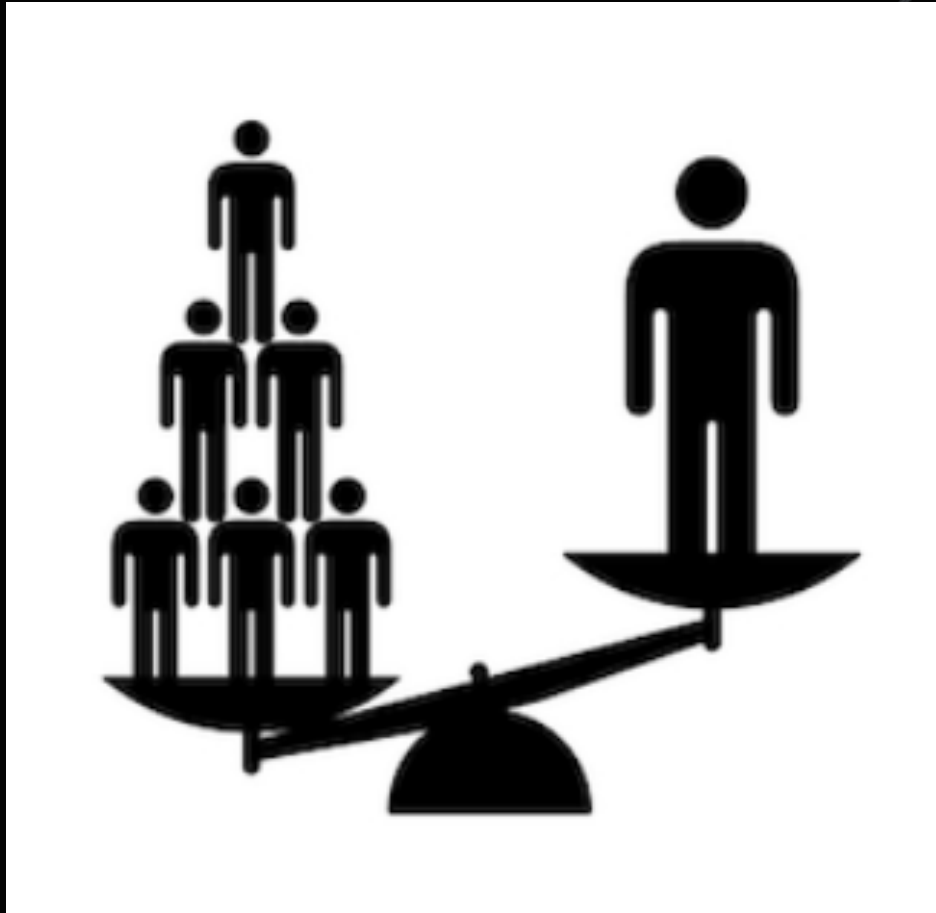
SCR 20.1.6

- A number of exceptions exist for fraud, court orders, etc.
- No exception for pandemics or pressure from opposing parties.





# Remember Who Your Client Is ...



“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”

SCR 20.1.13

- Organizational interests first
- Director/Officer vs. Employees & Members
- But must still comply with confidentiality obligations under SCR 20.1.6

# Play Fair

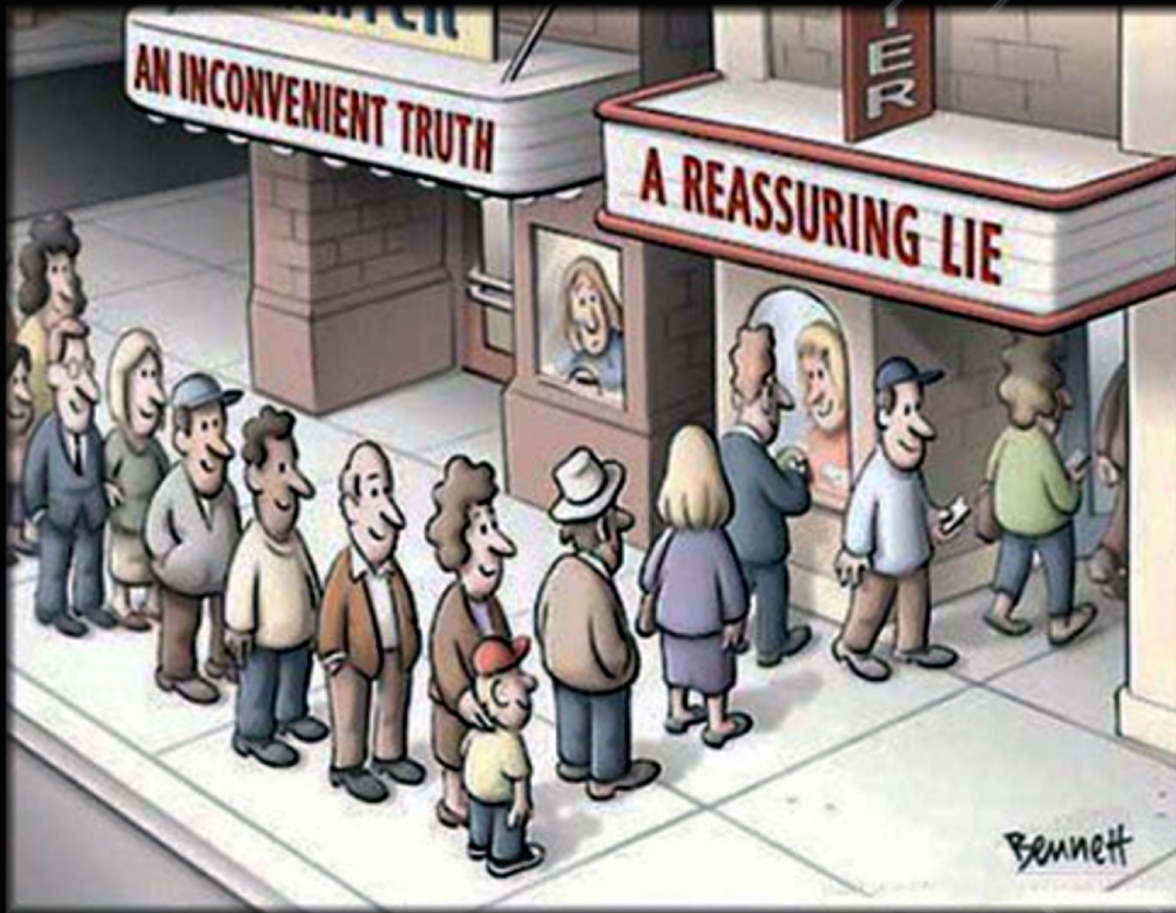
A lawyer shall not:

- knowingly advance a claim or defense that is unwarranted under existing law, unless there is a good faith basis to challenge;
- knowingly advance a factual position that is unwarranted unless non-frivolous; or
- take action that merely serves to harass or injure another.

SCR 20.3.1



# Tell the Truth



- Lawyers owe an **ongoing** duty to candor and must tell the truth. Lawyers cannot knowingly make false statements of law or fact or fail to correct them.
- Duty extends to:
  - The Court -- SCR 20.3.3
  - Opposing Party and Counsel-- SCR 20.3.4
  - Statements to Others -- SCR 20.4.1

# Good Faith & Fair Dealing in Wisconsin

- Ethical and fair negotiation necessarily requires good faith and fair dealing.
- Under Wisconsin law, a contract requires that each party act in good faith towards the other party and deal fairly with that party when performing, enforcing, or carrying out the expressed terms of the contract.
- Must determine the purpose of the agreement; that is, the benefits the parties expected at the time the agreement was made.
- Neither party shall do that which would have the effect of injuring or destroying the rights or ability of the other party to receive the benefits of the contract.
- *See also* Restatement (2d) Contracts, UCC, Consumer Protection Statutes.

# Context Matters

- Goal is to determine intent and prevent interference.
- Duty generally does not apply to negotiations.
- Choice of law may make a difference.
- Respective bargaining power of the parties is important.
- Courts like the certainty of contracts and want to encourage cooperation.
- Courts and adversaries respect those that advocate within ethical boundaries.

# Timing Matters

**POLL**: How often do you review and/or update your contracts?

- A. Annually.
- B. Before renewal.
- C. Only if there's an issue (a/k/a if it ain't broke, don't fix it).
- D. Right. I've been meaning to get to that...



## **Don't forget:**

- Ethics Rules always require competence, diligence, communication, and confidentiality; and
- Good faith and fair dealing is implied in every contract!

# PRESENTERS

**Laffey, Leitner & Goode LLC**  
325 E. Chicago St., Suite 200  
Milwaukee, Wisconsin 53202  
414.312.7003 | 414.755.7089 (f)

Sarah Thomas Pagels  
[stpagels@llgmke.com](mailto:stpagels@llgmke.com)

John W. Halpin  
[jhalpin@llgmke.com](mailto:jhalpin@llgmke.com)

**Epic Systems Corporation**  
1979 Milky Way, Verona, WI 53593  
608.271.9000 | 608.271.7237 (f)

Jordan Corning

[jcorning@epic.com](mailto:jcorning@epic.com)

The Epic logo is displayed in a bold, italicized, pink font. The letters are thick and slanted to the right, with a slight shadow effect. The 'E' is particularly prominent, with a long horizontal bar that extends to the right.