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29. Mitchell Polinsky & Daniel Rubinfeld, *The Deterrent Effects of Settlements and Trials*, 8 INT'L REV.L. & ECON. 109 (1988).
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Chapter 16

ETHICAL CONSIDERATIONS IN LAWYER'S NEGOTIATIONS— THE PARADOX OF CANDOR

Truth poses particular problems for negotiators. While the conventional wisdom lauds truthfulness in negotiation, many bargaining strategies are premised upon selective disclosure, omission to state, puffing, and even outright misrepresentation of fact. All of this bargaining takes place in a process that is largely immune from external scrutiny. Given this context, there is a broad terrain in which negotiators may lie, omit to state, or mislead by conduct. As Professor Charles B. Craver recently put it:

On the one hand the negotiator must be fair and truthful: on the other hand he must mislead his opponent. Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not be misled.

The lawyer as negotiator faces unique issues regarding truth telling. Official rules governing the bargaining process and norms of professionalism are awash with ambiguity about the requirement of scrupulous adherence to veracity. For the past twenty-five years the profession has engaged in a debate over whether ethical rules governing negotiation behavior are desirable or even warranted. To some, promulgating formal rules might well disadvantage rule-abiding attorneys. They could be falsely lulled into acting on the assumption that their more competitive counterparts were behaving similarly, at a cost to their clients.

Further confounding the boundary of professional responsibility and negotiation ethics, there is a clear potential for conflict between the attorney's own values and the perceived duty of single-minded zealous advocacy on behalf of the client's interests. Some clients may want counsel to use bargaining tactics that support shading the truth. Even by insisting that their attorney not volunteer to provide any information not compelled by court order or by comprehensive discovery, clients may compel their lawyers to swim in ethically murky waters. For all these reasons it is difficult to make prescriptive statements about truth telling and lawyers.

Take, for example, the section headings of a provocative article by Gerald Wetlauffer as an initial taxonomy of the truth telling quandary:

I Didn't Lie;

I Lied, if You Insist on Calling it That, but it Was an Omission of a Kind that is Presumed to be Ethically Permissible;

I Lied But It Was Legal;

I Lied But it Was on an Ethically Permissible Subject;

I Lied But It Had Little or No Effect;

I Lied But It Was Justified by the Very Nature of the Negotiations;

I Lied But It Was Justified by the Nature of My Relationship to the Victim—The Adversary's and Competitor's Excuses;

I Lied But It Was Justified Under the Special Ethics of Lawyering;

I Lied But It Was Permissible Because of the Bad Conduct or the Incompetence of My Adversary; and

I Lied But It Was Justified by the Good Consequences It Produced.

This bewildering array of possible responses to whether lying is appropriate demonstrates the complexity of the issue for lawyers in negotiation. The readings in this chapter provoke us to consider whether the profession should attempt to police lying in legal negotiation.

The first two readings in this chapter, by Eleanor Holmes Norton and James White, set the stage for our analysis of the acceptability of deception in lawyer's negotiation. From these excerpts we can see the difficulties inherent in attempting to impose formal regulatory constraints on attorneys on what may be undetectable and sometimes arguably justifiable conduct.

The next series of readings outlines the history of these regulatory attempts. The Bar has a lengthy history of debating the wisdom of efforts to require truth in negotiation, whether precatory or binding. The Kutak Commission's proposal in the early 1980's, and several responses to it, provide provocative food for thought.

After some twenty years, the latest iteration of the Bar's formal effort to regulate ethics in negotiation flows from two streams. In 1997 the ABA authorized a fresh look at the Model Rules of Professional Conduct, the work of the Kutak Commission. It created the Ethics 2000 Commission. This project looked again at the question of candor in negotiation, but recommended only a revised comment to Rule 4.1. Douglas Yarn's short article summarizes the effect of the organized Bar's latest endeavor.

The second effort at a formal effort to deal with the paradox of candor in legal negotiation comes from the ABA's Section on Litigation. For several years in the late 1990s the Section adopted a number of guidelines that govern attorney behavior in pretrial discovery and in the courtroom. Then it turned to settlement negotiations. In mid-2002 the Section promulgated, and the ABA approved, a set of Ethical Guidelines for Settlement Negotiations. During this process Mercer University sponsored a symposium on the proposed Guidelines. Dean Patrick Emery Longan introduces a set of hypotheticals used at the symposium to frame questions about the effects of the

Guidelines on two issues of truthfulness—misleading statements and a duty to disclose.

Many observers find these recent official efforts anemic. As an alternative, James Alfini proposes a more robust Rule 4.1 for our consideration. Lawyers receive only modest guidance from Rule 4.1 in the informal context of settlement negotiation, but are much more constrained by Rule 3.3 when their conversation is directed “to the tribunal.” Alfini argues that the exponential growth in mediation requires that we rethink the assumption that the relaxed standard of Rule 4.1 is sufficient to guide lawyers in all their negotiations. As attorneys now practice their craft so frequently in informal proceedings, should they not be held to a standard of truthfulness higher than “*caveat lawyer?*” He drafts a new Rule 4.1 for our consideration that reflects the unique characteristics of these collaborative processes. It is a provocative proposal, and would change the professional obligation of the negotiating lawyer dramatically.

If not rules, what about norms? Are there situations in which people expect candor, even without a formal requirement of candor, when they bargain? First, Eleanor Holmes Norton presents four justifications for truth-telling in negotiation. She gives several examples to demonstrate the complexities of knowing when deception might be situationally acceptable. Next, David Lax and James Sebenius acknowledge that negotiators frequently use tactics designed in part to mislead their bargaining opposite as to their ultimate settlement point. The authors offer criteria that help determine when using these tactics is acceptable.

Steven Hartwell alerts us to the importance of the context in which a deception may be practiced. Each negotiation occurs in a context of assumptions about how the parties will be bargaining. For example, if I am negotiating with an insurance claims representative over the amount of a payment for damage to my automobile, I will expect us to be doing distributive bargaining rather than problem solving or interest-based negotiation. Hartwell suggests that deception practiced *within* a bargaining context is less potentially harmful than deception *about* a context.

These three readings are classics in the field, and are as perceptive now as when originally written. At that time, lawyers engaged in adversarial proceedings customarily negotiated in two domains in the shadow of pending litigation—either informally, in unstructured settings, or in the structured forum of judicial settlement conference. In those contexts, the traditional exhortation to zealous advocacy still dominated thinking about candor in legal negotiation. However, times have changed, as have the lawyer’s professional roles. Contemporary legal practice comprises a spectrum of negotiation tasks—from the focused zealous advocacy of criminal defense practice; through planning, problem solving and mediation advocacy; to the practice of those who maintain a collaborative law practice. Attorneys now negotiate in an array of settings, ranging from a casual conversation over coffee at Starbucks to a formal court-ordered-and-monitored mediation proceeding. The next two excerpts highlight how difficult a task it is to adopt a uniform professional norm governing truth-telling.

Two experienced trainers and mediators present contrasting views of what we can expect of lawyers who increasingly find themselves participating

in the full complement of alternative dispute resolution processes. Kimberly Kovach believes that the more consensual, problem solving context of some negotiations, especially those employing a third party mediator, require different behaviors and a distinct ethic from all participants, including counsel. These processes foster a problem solving strategy; but those who adopt one unilaterally may be vulnerable to exploitation by a competitive opposite. Kovach suggests managing this dilemma by holding lawyers to different ethical expectations when they practice in venues that nurture cooperation. She describes several "new ethical parameters," including an ethic of honesty, that she believes would provide a more incisive standard to govern professional behavior.

Jeffrey Krivis, by contrast, believes that "deception can best be described as the raw material which drives negotiation of litigated cases." For him and those sharing his perspective, deception is the mothers milk of settlement. From this perspective, the lamb may lie down with the lion, but doesn't get much sleep. Lawyers who adopt an ethic that does not take this reality into account may find themselves at a considerable strategic disadvantage.

Finally, the chapter closes with three provocative case studies of the consequences of truth telling issues in negotiation.

Readings

The Problem Highlighted

1. Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U.L.REV. 493, 506-08 (1989).
2. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM.BAR FOUND.RES.J. 926, 926-38.

The Bar's Attempts at Official Positions

3. Model Rules of Professional Conduct, Rule 4.1 and Comment (1983).
4. ABA Comm'n on Evaluation of Professional Standards (Kutak Commission), Model Rules of Professional Conduct (Proposed Final Draft, Jan. 30, 1980), Proposed Rule 4.2(a) & (b) and Comment.
5. Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U.L.REV. 493, 538 (1989).
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7. Gary Lowenthal, *Truthful Bargaining by Lawyers*, 2 GEO. J. OF LEGAL ETHICS 411, 423-27 (1988).
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If Not Rules, What About Norms?

12. Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U.L.REV. 493, 524-25, 535-36 (1989).
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14. Steven Hartwell, *Understanding and Dealing With Deception in Legal Negotiation*, 6 OHIO ST.J. ON DISP.RES. 171, 182-87 (1991).
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16. Jeffrey Krivis, *The Truth About Deception in Mediation*, 4 PEPPERDINE DISP. RESOL. L.J. 251-8 (2004).

Case Studies

17. Geoffrey Peters, *The Use of Lies in Negotiation*, 48 OHIO STATE L.J. 1, 8-13 (1987).
18. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM.B.FOUND.RES.J. 926, 931-35.
19. Rex Perschbacher, *Regulating Lawyers' Negotiations*, 27 ARIZ.L.REV. 75, 77-9, 137-38 (1985).

THE PROBLEM HIGHLIGHTED

ELEANOR HOLMES NORTON, *BARGAINING AND THE ETHIC OF PROCESS*

64 N.Y.U.L.Rev. 493, 506-08 (1989).

Negotiation is neither a profession (though professionals often engage in negotiation), nor a discrete activity with a defined mission. Rather, negotiation is a process that takes place in a multitude of contexts, extraordinary in their variety and range. However, negotiation is not simply another means of human discourse. Bargaining is a unique process in which the parties engage in stylized strategic behavior and use practices such as bluffing, puffing, and withholding information as a matter of course. Such behavior needs to be probed and understood in the context of the process within which it occurs.

The first step toward sorting out unacceptable or unlawful behavior and aligning negotiation practices with ethical aspiration is more explicit recognition of the connections among strategy, law, and ethics. This requires an understanding of the context in which ethical decisions are made, because no convincing bargaining ethic can be abstracted from the everyday realities of this ubiquitous process. Even behavior by negotiators that appears inappropriate, excessive, or contrary to stated rules or law is unlikely to be ques-

tioned or changed if this would entail the alteration of indispensable characteristics of the negotiation process itself.

There has been little evidence of or interest in coherent standards or express norms for appropriate behavior in negotiations. It is difficult to articulate limits for a process whose chief benefits include its flexibility and its freedom from rules. Negotiation raises questions of ethics, strategy, and law that are sometimes peculiarly embroidered together and difficult to unravel. What appears strategically sound during the course of bargaining may not be ethically or even legally appropriate. For example, a person with only a slight injury to the neck may choose to wear an unnecessary neck brace to the negotiation session where her injury will be considered. The action is strategic, because even without saying anything about her injury, the claimant creates the impression of a condition serious enough to warrant compensation. The action is unethical, and probably illegal, because it transmits the false impression that she has been seriously injured.

Such ethical problems arise as a natural consequence of the inherent incentives to capitalize on negotiation skill and the near absence of express limits on the uses of that skill. Yet, traditional controls, such as codes and regulations, clearly do not fit a free-form, privately policed, and pervasive market process.

* * *

Truthfulness connotes the authenticity of the information conveyed. Without truthfulness, human relations would be impossibly cumbersome, because nobody could be believed and the trust essential to the accomplishment of all tasks would be impossible. In much the same way, truthfulness is vital to negotiations, but there are additional reasons for its necessity in this context. First, the assumption of truthfulness underlies the choice of negotiation by the parties; the parties would be unlikely to choose negotiation without the belief that the process would result in an agreement that would be carried out according to its terms. Second, each party to a negotiation needs information that may be possessed by only one of them. Third, the validity of the agreement itself is premised on truthfulness; an agreement based on false information may be declared fraudulent and therefore unenforceable.

Yet, the concept of truthfulness in negotiation raises unique ethical questions because in most circumstances candor is not necessarily required. Ethical clarity is taxed in a process in which both truthfulness and deception have standing. The legal doctrine of misrepresentation requires that the facts under negotiation be true. However, puffing as to these facts is legal, and aspects of puffing have recently been recognized as a specific exception to an attorney's ethical responsibility to be truthful. Deception may include a wide range of practices, from withholding information that need not be shared to misrepresentation that can invalidate an agreement. Between these poles are many deceptive practices: for example, an offer of inaccurate information concerning settlement price or concerning whether one is prepared to sue rather than settle at the terms offered; and silence concerning an important piece of information. The legitimacy, even necessity, of at least some deception in many traditional modes of bargaining makes it difficult to apply ordinary ethical notions of truthfulness in a systematic fashion. The avail-

able evidence confirms the notion that truthfulness is a particular sort of ethical tension in negotiation.

JAMES J. WHITE, *MACHIAVELLI AND THE BAR: ETHICAL LIMITATIONS ON LYING IN NEGOTIATION*

1980 Am.Bar Found.Res.J. 926, 926-38.

The difficulty of proposing acceptable rules concerning truthfulness in negotiation is presented by several circumstances. First, negotiation is non-public behavior. If one negotiator lies to another, only by happenstance will the other discover the lie. If the settlement is concluded by negotiation, there will be no trial, no public testimony by conflicting witnesses, and thus no opportunity to examine the truthfulness of assertions made during the negotiation. Consequently, in negotiation, more than in other contexts, ethical norms can probably be violated with greater confidence that there will be no discovery and punishment. Whether one is likely to be caught for violating an ethical standard says nothing about the merit of the standard. However, if the low probability of punishment means that many lawyers will violate the standard, the standard becomes even more difficult for the honest lawyer to follow, for by doing so he may be forfeiting a significant advantage for his client to others who do not follow the rules.

The drafters appreciated, but perhaps not fully, a second difficulty in drafting ethical norms for negotiators. That is the almost galactic scope of disputes that are subject to resolution by negotiation. One who conceives of negotiation as an alternative to a lawsuit has only scratched the surface. Negotiation is also the process by which one deals with the opposing side in war, with terrorists, with labor or management in a labor agreement, with buyers and sellers of goods, services, and real estate, with lessors, with governmental agencies, and with one's clients, acquaintances, and family. By limiting his consideration to negotiations in which a lawyer is involved in his professional role, one eliminates some of the most difficult cases but is left with a rather large and irregular universe of disputes. Surely society would tolerate and indeed expect different forms of behavior on the one hand from one assigned to negotiate with terrorists and on the other from one who is negotiating with the citizens on behalf of a governmental agency. The difference between those two cases illustrates the less drastic distinctions that may be called for by differences between other negotiating situations. Performance that is standard in one negotiating arena may be gauche, conceivably unethical, in another. More than almost any other form of lawyer behavior, the process of negotiation is varied; it differs from place to place and from subject matter to subject matter. It calls, therefore, either for quite different rules in different contexts or for rules stated only at a very high level of generality.

A final complication in drafting rules about truthfulness arises out of the paradoxical nature of the negotiator's responsibility. On the one hand the negotiator must be fair and truthful; on the other he must mislead his opponent. Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical

difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled.

Some experienced negotiators will deny the accuracy of this assertion, but they will be wrong. I submit that a careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true positions. That is true of both the plaintiff and the defendant in a lawsuit. It is true of both labor and management in a collective bargaining agreement. It is true as well of both the buyer and the seller in a wide variety of sales transactions. To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation.

Of course there are limits on acceptable deceptive behavior in negotiation, but there is the paradox. How can one be "fair" but also mislead? Can we ask the negotiator to mislead, but fairly, like the soldier who must kill, but humanely?

* * *

Pious and generalized assertions that the negotiator must be "honest" or that the lawyer must use "candor" are not helpful. They are at too high a level of generality, and they fail to appreciate the fact that truth and truthful behavior at one time in one set of circumstances with one set of negotiators may be untruthful in another circumstance with other negotiators. There is no general principle waiting somewhere to be discovered as Judge Alvin B. Rubin seems to suggest in his article on lawyer's ethics. Rather, mostly we are doing what he says we are not doing, namely, hunting for the rules of the game as the game is played in that particular circumstance.

The definition of truth is in part a function of the substance of the negotiation. Because of the policies that lie behind the securities and exchange laws and the demands that Congress has made that information be provided to those who buy and sell, one suspects that lawyers engaged in SEC work have a higher standard of truthfulness than do those whose agreements and negotiations will not affect public buying and selling of assets. Conversely, where the thing to be bought and sold is in fact a lawsuit in which two professional traders conclude the deal, truth means something else. Here truth and candor call for a smaller amount of disclosure, permit greater distortion, and allow the other professional to suffer from his own ignorance and sloth in a way that would not be acceptable in the SEC case. In his article Rubin recognizes that there are such different perceptions among members of the bar engaged in different kinds of practice, and he suggests that there should not be such differences. Why not? Why is it so clear that one's responsibility for truth ought not be a function of the policy, the consequences, and the skill and expectations of the opponent?

Apart from the kinds of differences in truthfulness and candor which arise from the subject matter of the negotiation, one suspects that there are other differences attributable to regional and ethnic differences among negotiators. Although I have only anecdotal data to support this idea, it seems plausible that one's expectation concerning truth and candor might be different in a small, homogeneous community from what it would be in a large, heterogeneous community of lawyers. For one thing, all of the lawyers in the

small and homogeneous community will share a common ethnic and environmental background. Each will have been subjected to the same kind of training about what kinds of lies are appropriate and what are not appropriate.

Moreover, the costs of conformity to ethical norms are less in a small community. Because the community is small, it will be easy to know those who do not conform to the standards and to protect oneself against that small number. Conversely, in the large and heterogeneous community, one will not have confidence either about the norms that have been learned by the opposing negotiator or about his conformance to those norms.

The differences that may result in perceptions about "truth and candor" often come to the surface in my negotiations seminar at the Michigan Law School, where there will be students from all parts of the country, from large and small cities, and from a variety of ethnic backgrounds. One such seminar involved a discussion between two students who had engaged in a mock negotiation that had been heated and had resulted in an unsatisfactory outcome for both. Each student had grown up in Manhattan; one was black, the other was Jewish. Their discussion in the seminar about their personal reactions to negotiation, about their experience as children and young adults in the art of negotiation, and about their personal reactions to it was illuminating. The Jewish student, one of the best in the class, was more at ease with the negotiation process, more comfortable with the ambiguity it produced, and more experienced as a negotiator. The black student, also a good student, reported that an extended negotiation without some event to relieve the tension caused him tremendous anxiety. He reported that his youthful negotiations were short and often concluded in explosive behavior. For example, if there were an argument about where two groups would play baseball (on my lot or yours), the typical negotiation would last a few minutes and, if it were not quickly resolved, would be concluded by a fight. At the conclusion of that fight the game would be played on the winner's lot. Although the anecdote does not show systematic ethical differences between the two students, it does reveal systematically different attitudes about the negotiation process as a whole, and there is no reason to believe that there are not similar and systematic differences about the appropriate level of candor and honesty among the various ethnic and regional subgroups in our society. That is not to say that one norm is correct, only that the rules of the game played by one group are not the same as the rules played by another.

THE BAR'S ATTEMPTS AT OFFICIAL POSITIONS

MODEL RULES OF PROFESSIONAL CONDUCT

American Bar Association.

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment

* * *

Misrepresentation

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

Statements of Fact

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by Client

Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

MODEL CODE COMPARISON:

Paragraph (a) is substantially similar to DR 7-102(A)(5), which stated that "[i]n his representation of a client, a lawyer shall not [k]nowingly make a false statement of law or fact."

With regard to paragraph (b), DR 7-102(A)(3) provided that a lawyer shall not "[c]onceal or knowingly fail to disclose that which he is required by law to reveal."

AMERICAN BAR ASSOCIATION COMM'N ON EVALUATION
OF PROFESSIONAL STANDARDS (KUTAK COMMISSION),
MODEL RULES OF PROFESSIONAL CONDUCT

(Proposed Final Draft, Jan. 30, 1980), Proposed Rule 4.2 and Comment.

4.2 FAIRNESS TO OTHER PARTICIPANTS

(a) IN CONDUCTING NEGOTIATIONS A LAWYER SHALL BE FAIR IN DEALING WITH OTHER PARTICIPANTS.

(b) A LAWYER SHALL NOT MAKE A KNOWING MISREPRESENTATION OF FACT OR LAW, OR FAIL TO DISCLOSE A MATERIAL FACT KNOWN TO THE LAWYER, EVEN IF ADVERSE, WHEN DISCLOSURE IS:

(1) REQUIRED BY LAW OR THE RULES OF PROFESSIONAL CONDUCT; OR

(2) NECESSARY TO CORRECT A MANIFEST MISAPPREHENSION OF FACT OR LAW RESULTING FROM A PREVIOUS REPRESENTATION.

SENTATION MADE BY THE LAWYER OR KNOWN BY THE LAWYER TO HAVE BEEN MADE BY THE CLIENT, EXCEPT THAT COUNSEL FOR AN ACCUSED IN A CRIMINAL CASE IS NOT REQUIRED TO MAKE SUCH A CORRECTION WHEN IT WOULD REQUIRE DISCLOSING A MISREPRESENTATION MADE BY THE ACCUSED.

(c) A LAWYER SHALL NOT:

(1) ENGAGE IN THE PRETENSE OF NEGOTIATING WITH NO SUBSTANTIAL PURPOSE OTHER THAN TO DELAY OR BURDEN ANOTHER PARTY;

(2) ILLEGALLY OBSTRUCT ANOTHER PARTY'S RIGHTFUL ACCESS TO INFORMATION RELEVANT TO THE MATTER IN NEGOTIATION;

(3) COMMUNICATE DIRECTLY WITH ANOTHER PARTY WHO THE LAWYER KNOWS IS REPRESENTED BY OTHER COUNSEL, EXCEPT WITH THE CONSENT OF THE PARTY'S COUNSEL OR AS AUTHORIZED BY LAW.

COMMENT:

Fairness

Fairness in negotiation implies that representations by or in behalf of one party to the other party be truthful. This requirement is reflected in contract law, particularly the rules relating to fraud and mistake. A lawyer involved in negotiations has an obligation to assure as far as practicable that the negotiations conform to the law's requirements in this regard.

Disclosure

Under the usually accepted conventions of negotiation, the parties have only limited duties of disclosure to each other. Generally, a party is not required to apprise another party of background facts or collateral opportunities for gain that may accrue as a result of a transaction between them. Facts that must be disclosed do not include estimates of price or value that a party places on the subject of a transaction, or a party's intentions as to an acceptable settlement of a claim, or the existence of an undisclosed principal except where nondisclosure would constitute fraud. A party is permitted to suggest advantages to an opposing party that may be insubstantial from an objective point of view. The precise contours of the legal duties concerning disclosure, representation, puffery, overreaching, and other aspects of honesty in negotiations cannot be concisely stated. They have changed over time and vary according to circumstances. They also can vary according to the parties' familiarity with transactions of the kind involved. Thus, the modern law of commercial transactions places duties of disclosure on sellers that go well beyond the classic rule of caveat emptor, and modern securities transactions often must conform to elaborate disclosure rules. It is a lawyer's responsibility to see that negotiations conducted by the lawyer conform to applicable legal standards, whatever they may be.

In negotiation as in litigation, a lawyer generally has no duty to inform an opposite party of relevant facts and circumstances. However, it is the lawyer's duty to be forthcoming when the lawyer or the client has misled

another party with respect to a matter of fact or law, for in such circumstances the failure to act is the equivalent of actively misleading the other party. A lawyer should not induce a belief that the lawyer is disinterested in a matter when in fact he or she represents a client.

Whether there should be a further burden of disclosure on a lawyer has long been a matter of some controversy. Canon 41 of the Canons of Ethics required, in general terms, that "when a lawyer discovers that some fraud or deception has been practiced he should endeavor to rectify it," if necessary by undertaking to "inform the injured person or his counsel." A more limited requirement was imposed by DR 7-102(B) of the ABA Model Code of Professional Responsibility. The competing considerations are clear but difficult to resolve. A lawyer could properly be regarded as having a professional responsibility to see that negotiations under his or her auspices are informed on all sides. However, to make a lawyer responsible for an opposing party's information about the matter in negotiation exposes the lawyer to charges of misfeasance that can be easily contrived, and exposes the transaction to additional risk of being legally avoided on the ground of mistake. The likelihood of these consequences is especially severe when the facts concerning the matter in negotiation are inherently uncertain or complex, or where there is substantial discrepancy between parties' access to information about the matter. Counsel for the accused in a criminal case is subject to constraint against disclosing during negotiations facts that might incriminate the client. See also Rule 1.7.

Tactics

Negotiation is ordinarily a voluntary process. The parties usually determine the agenda and procedure of negotiation, without the constraint of externally imposed rules or an external authority, such as a judge, to enforce them. The principal sanction supporting standards of decorum and fairness is that of breaking off negotiations, although in some situations, such as collective bargaining, there may also be legal sanctions to compel bargaining.

There are, however, limitations that should be observed by a lawyer in conducting negotiations. As an aspect of the duty to deal fairly with other parties, a lawyer should not engage in the pretense of negotiation when the client has no real intention of seeking agreement. In particular, it is dishonest to pretend to negotiate when the real purpose is to prevent the other party from pursuing an alternative course of action. More generally, a lawyer acting as negotiator should recognize that maintaining a fair and courteous tenor in negotiation can contribute to a satisfactory resolution. This is particularly true when the parties to the negotiation have a continuing relationship with each other, as in collective bargaining or in negotiations between divorcing parents concerning child custody. An agreement that is the product of open, forbearing, and fair-minded negotiation can be a demonstration by the lawyers of the conduct that the parties themselves should display toward each other.

ELEANOR HOLMES NORTON, *BARGAINING
AND THE ETHIC OF PROCESS*

64 N.Y.U.L.Rev. 493, 538 (1989).

The addition of the comment to the Model Rules is an important breakthrough because it is the first suggestion in the history of legal ethics that bargaining may require some adjustment in the application of the otherwise uniform requirement of truthfulness. However, the comment opens rather than settles the issue. This addition depends on a set of examples and does not purport to be a coherent principle. The stated rationale for the change—that deceptive information about price, value, settlement terms, and the existence of a principal are part of a widely accepted category—creates the impression of a self-evident and coherent group of exceptions to the requirement of truthfulness in bargaining. However, it is not clear what the category is. Price deception usually takes place in a bidding process; deception concerning a settlement point often is offered as a bluff; and the existence of a principal is deliberately withheld, although the comment does not indicate whether, upon inquiry, the principal's existence could be denied. These are significantly dissimilar forms of deception, and placing them in a category called "accepted conventions" does not make their kinship any clearer or make it possible to analogize to other examples. The withholding of the existence of a principal, in particular, is a misrepresentation of a material fact and should therefore be the model for few if any similar exceptions. Thus reliance on "accepted conventions" in a field where the conventions have not been systematically examined injects pragmatism into the Rules without justifying this standard or examining its consequences.

GEOFFREY C. HAZARD, JR., *THE LAWYER'S OBLIGATION
TO BE TRUSTWORTHY WHEN DEALING WITH
OPPOSING PARTIES*

33 So.Car.L.Rev. 181, 192-96 (1981).

The idea underlying the Kutak Commission's original proposal was not very complicated: the lawyer, as the instrument of a transaction, should be the guardian of its integrity. The proposal did not purport to hold lawyers strictly liable for the integrity of transactions or even burden them with a duty of reasonable care. Their only duty was to disclose facts of which an opposing party was obviously ignorant and which might affect the integrity of the transaction.

Much more fundamental objections were leveled at the proposal, particularly at the requirement that lawyers be "fair." Many members of the Commission and certainly the Reporter were surprised at the vehemence of the objections. "Vehemence" is the correct word, since much more heat than light was forthcoming in the reaction to the proposal. The Commission's surprise was compounded because the proposal seemed appropriate to the lawyer's role and appeared to reflect one interpretation of the lawyer's duty as established in the decisional law.

Although the explanation of the bar's aversion to the January 1980 proposal is complex, some concerns can be identified. First, many members

of the bar do not realize or are unwilling to accept the fact that the law at large applies to lawyers. Perhaps these members of the bar believe an immunity attaches to lawyers against the civil liabilities imposed by the law on other intermediaries such as real estate brokers or securities underwriters. More subtly, perhaps lawyers recognize that the law at large applies to them but do not wish to be accountable for that obligation in the context of professional discipline.

Still subtler concerns were involved. The fundamental difficulty appears to stem from the lack of a firm professional consensus regarding the standard of openness that should govern lawyers' dealings with others and the lack of settled and homogeneous standards of technique in the practice of law. This lack of consensus indicates that lawyers, at least nationally, do not share a common conception of fairness in the process of negotiation. The lack of this consensus means that lawyers lack the language to express norms of fairness in negotiation and the institutional means to give effect to these norms.

The underlying disagreement about standards of fairness is not difficult to understand. Lawyers' standards of fairness are necessarily derived from those of society as a whole, and subcultural variations are enormous. At one extreme lies the "rural God-fearing standard," so exacting and tedious that it often excludes the use of lawyers. At the other extreme stands "New York hardball," now played in most larger cities using the wall-to-wall indenture for a playing surface. Between these extremes are regional and local standards and further variations that depend on the business involved, the identity of the participants, and other circumstances. Against this kaleidoscopic background, it is difficult to specify a single standard that governs the parties and thus a correlative standard that should govern their legal representatives.

The second area of disagreement concerns professional technique. Lawyers differ widely in the technical sophistication they expect of themselves and of others with whom they deal. As a result, their expectations regarding their own or their opponents' knowledge in the context of a given transaction may vary widely. Among practitioners having a very high level of technique, it is expected that a lawyer has carefully investigated and compiled relevant information, is familiar with recent developments in applicable law, recognizes all tax implications of a transaction, and anticipates secondary transactions likely to be involved in the transaction at hand. At another level of technique, lawyers may use a standard form for a transaction and hope for a satisfactory result.

Professional transactions within any given level of technique proceed according to implicitly understood conventions that allay all but ordinary anxiety on the part of the lawyers. Professional transactions that combine diverse levels of technique pose much greater difficulties. Lawyers accustomed to less sophisticated techniques are understandably fearful that they will be outmatched or even hoodwinked, with the possibility of loss to their clients and humiliation or even worse for themselves.

Lawyers accustomed to more sophisticated techniques have a correlative but perhaps less apparent dilemma. First, signs of bumbling on the other side cannot necessarily be taken at face value; there is such a thing as country-slickering and it occurs even in the city. Second, sophisticated

lawyers are at risk precisely because of their technical sophistication. High-level technicians recognize aspects of transactions that lawyers of lesser sophistication may overlook. But what is to be done with that knowledge? If it is withheld, the transaction becomes vulnerable to rescission because of the lawyer's nondisclosure. The lawyer's professional competence, if not fully deployed for the benefit of the opposing party, thus becomes a potential infirmity for the transaction. Conversely, if the lawyer's competence is deployed for the benefit of the opposing party, where does the deployment properly stop, short of a takeover of the transaction and assumption of responsibility for the interests of both parties?

In the ebb and flow of practice, lawyers can and do adjust to these exigencies. The high level technicians deal with each other with circumspection but confidence. Lawyers in other strata of the professional community have their own conventions. When levels are crossed, the less sophisticated lawyer must decide whether to trust the opponent or to associate someone else, research into the night, or perhaps even abort the transaction. The more sophisticated lawyer must decide whether to risk later recriminations about the transaction if the bargain is too hard, whether to make particular disclosures to protect the deal but at the risk also of killing the deal, or whether to handle the transaction for both sides.

This range of possibilities is difficult to govern by regulation. A rule based on the premise that the legal profession is substantially homogeneous in technical sophistication would put the technically sophisticated lawyer in a hopeless dilemma when dealing with an unsophisticated opposing counsel. Such a lawyer could straightforwardly be a partisan of his own client unless it became evident that the other side was inadequately represented. But in that case, the superior technician would have to assist the other side to guard against the risk of a subsequent charge of nondisclosure or fraud. Yet until a transaction is well underway, a lawyer cannot know which course of action is required. At the same time, the lawyer who is unsophisticated or is simply acting according to his idea of the applicable conventions of openness would be in jeopardy of giving away his client's position. Thus, in a situation where the opposing lawyers differ substantially in technical sophistication, a rule requiring reciprocal disclosure could not yield genuine reciprocity.

On the other hand, it would be practically impossible to formulate a general rule that accounts for variations in technical sophistication. Consider the difficulties with the concept of specialization and with the definition of "specialization once the concept was accepted, or with the problem of "incompetence" among the trial bar. Could we imagine rules of disclosure that were based on a distinction between Type A Lawyers and Type B Lawyers? Anyone who is sanguine about overcoming these difficulties should try drafting the criteria by which to differentiate the technically sophisticated practitioner from the bar at large.

In light of these constraints, legal regulation of trustworthiness cannot go much further than to proscribe fraud. That is disquieting but not necessarily occasion for despair. It simply indicates limitations on improving the bar by legal regulation.

GARY LOWENTHAL, *TRUTHFUL
BARGAINING BY LAWYERS*

2 Geo.J. of Legal Ethics 411, 423-27 (1988).

MISREPRESENTING SETTLEMENT AUTHORITY AND MAKING FALSE DEMANDS

One form of misrepresentation deserves separate discussion because it raises unique and difficult problems in defining the appropriate contours of ethical behavior. Some negotiators, believing that they are conforming to accepted bargaining conventions, make untruthful statements concerning their settlement authority or the legitimacy of their bargaining demands. For example, assume that the plaintiff in a damage action has indicated to his attorney that he will accept a settlement of \$50,000, but feels he is entitled to \$75,000 and requests his lawyer to negotiate for a sum that is as close to that figure as possible. The defense lawyer informs plaintiff's counsel that the defendant is prepared to offer \$53,000 if the plaintiff will settle the claim for that amount, and then asks: "Will your client accept a \$53,000 offer?" Knowing that an affirmative response will end the plaintiff's chances for a settlement closer to \$75,000, the lawyer's reply is: "No."

A similar problem occurs when a negotiator makes a bargaining demand solely for purposes of leverage. Assume that a dispute between two neighbors, Smith and Jones, concerns debris from Jones' tree falling in Smith's backyard swimming pool. Smith alleges that broken limbs and leaves from the tree have ruined his pool skimmer and threaten to damage the pool's plaster surface and surrounding deck. The neighbors have been feuding about the tree for years and substantial animosity exists between them. Smith informs his lawyer that he has no desire for remuneration; he would gladly forego any damages for the skimmer if Jones would remove the tree. Smith's lawyer suspects (correctly) that Jones might be amenable to removing the tree because it drops debris into Jones' yard also. Like most people, however, Jones does not want to give up "something for nothing." Therefore, Smith's lawyer presses for damages in addition to the tree's removal, as a bargaining chip to be given up later to allow Jones to save face. To make the bargaining chip seem realistic, the lawyer asserts that Smith intends to sue Jones for the damages Smith has suffered, even though the lawyer knows that Smith has no such intent.

Both illustrations depict a lawyer-negotiator deliberately misrepresenting a fact to induce another party to enter into an agreement that meets the needs of the negotiator's client. In each case the misrepresented fact relates to the negotiation process itself, rather than to a circumstance or event surrounding the underlying dispute or transaction. In the first illustration, the lawyer lies about his settlement authority; in the second, the lawyer makes a claim that he has no intention of pursuing. Are practitioners who make such false statements about the bargaining process acting unethically?

Lawyers' views of the propriety of these untruths vary remarkably. Some would condone the statements in the two illustrations, either because they are "tactics" rather than lies, or because a lawyer is sometimes "duty bound" to lie on behalf of a client. Others—most notably Roger Fisher and Judge Alvin Rubin—reason that a lie is a lie and an ethics code that permits

such deception in negotiation is "risky for clients, bad for lawyers, and bad for society." James White would treat the two hypotheticals differently. Agreeing with Fisher and Rubin in the first case, White sees the misrepresentation of settlement authority as a "lie," and believes it is unethical. However, he concludes that the false negotiation demand is acceptable behavior because its use is "standard" for experienced bargainers in some contexts.

Considering the bar's propensity to adopt negotiation ethics rules that permit deception by lawyers, it is not surprising that the *Model Rules* take the position of their Reporter, Geoffrey Hazard. Hazard believes that although it is "desirable" for lawyers to be truthful in negotiation, "conventions governing social intercourse" give lawyers license to make false statements concerning bargaining demands and settlement authority. The Comment to Rule 4.1 similarly concludes that statements regarding "a party's intentions as to an acceptable settlement of a claim" ordinarily are not statements of material fact, and thus may be misrepresented, according to "generally accepted" conventions of negotiation. Presumably the thoughts of leading commentators like Fisher, Rubin and—in part—White are outside Professor Hazard's notion of "generally accepted" wisdom. The *Model Rules* adopt the hard-line position that when negotiators make assertions about their settlement authority or the legitimacy of demands they are making, they do not vouch for the truthfulness of their assertions, regardless of how sincere they may seem. If a gullible person on the other side of the table believes a negotiator's false statement about a bargaining position, the fault lies with the person who is ignorant of the rules, and not with the one who intentionally misleads.

How or why the bar concludes that a negotiation morality that rewards dishonesty is "generally accepted" is never stated. The conclusion is certainly not based on existing empirical evidence. Indeed, James White, normally an advocate of hard-nosed, competitive bargaining, opines that: "Some might say that the rules of the game provide for [misrepresenting the limit of one's authority to settle], but I suspect that many lawyers would say that such lies are out of bounds and not part of the rules of the game." My own experience as a long-time observer of the negotiation process is that, at least in the first of my illustrations, most lawyer-negotiators will avoid answering the question without resorting to a lie. Moreover, regardless of empirical verification, an ethics code should not condone conduct merely because it is "generally accepted." Ethics rules should be principles of desirable conduct that are morally binding on the conscience of a professional.

There appear to be at least two alternatives that make more sense than the bar's approach to lying about the bargaining process. First would be to make clear in the comment to Rule 4.1 that there is no exception to the prohibition against knowingly misrepresenting facts when the facts in question refer to such matters as a negotiator's settlement authority or the legitimacy of a bargaining demand. Requiring honesty in negotiators' factual assertions does not mean that negotiators must make full disclosure of their room to make concessions. Instead, it means that when a lawyer-negotiator does assert that a client will not accept a particular settlement offer or that a client is committed to a certain course of action, the lawyer's words should be truthful.

This approach to ethics does not put the honest lawyer at a disadvantage in a zero sum negotiation; one can be a principled negotiator and still be firm. For example, when the lawyer negotiating on behalf of the damage claimant is asked if he has authority to accept a \$53,000 settlement, he might respond resolutely that the question itself is inappropriate. The lawyer could also explain why \$53,000 is an undesirable or inadequate figure or argue why the plaintiff believes that the claim is worth \$75,000, rather than \$53,000. Another response that sidesteps the inquiry is an assertion that the parties need to discuss the merits of the case more thoroughly before discussing specific amounts. Without lying, a lawyer can still press for a settlement that is favorable to the client.

A second alternative to the bar's approach would be to adopt a rule to the effect that whether it is unethical to make an untruthful statement about one's settlement authority or the legitimacy of a claim depends on the circumstances in which the statement is made. Factors that would have a bearing on the propriety of such statements might include the type of negotiation involved, prevailing practices in the locale and—most important—the opposing party's understanding of those practices. Untruthful posturing would be permissible only where both parties are aware that a negotiator's statements regarding the acceptability or legitimacy of settlement terms may be false. Under such an approach, the burden of knowing the other party's assumptions concerning the rules on truthfulness in negotiation should rest on the shoulders of a party who chooses to make untruthful statements. Although an ethics rule of this nature would condone untruthful statements in certain contexts, it would protect the innocent victims of a lawyer's lying, unlike the standard adopted by the bar.

COMMENT, ROBERT GORDON, *PRIVATE SETTLEMENT
AS ALTERNATIVE ADJUDICATION: A RATIONALE
FOR NEGOTIATION ETHICS*

18 J. of Law Reform 503, 530-36 (1985).

FAIRNESS TO OTHER PARTICIPANTS

In conducting settlement negotiations,

(A) A lawyer shall at all times act in good faith and with the primary objective of resolving the dispute without court proceedings;

(B) A lawyer shall not

(1) Knowingly make any statement that contains a misrepresentation of material fact or law or that omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) Knowingly fail to

(a) Disclose to opposing counsel such material facts or law as may be necessary to correct manifest misapprehensions thereof; or, alternatively,

(b) Give reasonable indication to opposing counsel of the possible inaccuracy of a given material fact or law upon which opposing counsel appears to rely. Such indication may take the

form of statements of unwillingness to discuss a particular matter raised by opposing counsel.

Comment

This Rule is designed to promote basic truthfulness in private settlement negotiations. Its precise objective is to make a lawyer's duty of truthfulness in the negotiation setting coextensive with his duty of candor toward a tribunal. Accordingly, the following interpretive guidelines are suggested.

1. *Good Faith*—The good faith commanded by subsection (A) requires that a lawyer in negotiation conduct himself in such a way as will maximize the potential for reaching a fair and expeditious settlement. This includes, but is not limited to, a duty to reciprocate the candor of opposing counsel with like candor, but in no instance with less truthfulness than that prescribed in subsection (B), and a duty to use information obtained in the course of the negotiation in a way constructive to fair settlement.

* * *

3. *Statements of fact*—The Rule is intended to apply to statements of law or fact, and does not reach statements of conjecture, theory, or opinion. No duty of truthfulness extends to expressions of this kind.

Example 4—Lawyer (L) and Opposing Counsel (OC) are negotiating a claim of medical malpractice. L states to OC, "I'm convinced your clients were negligent in the performance of their surgery on my client." In fact, L has conferred with an expert witness, both concluding that the operation was probably conducted with due care. Because the statement refers to the personal belief of L, rather than to any material fact, the misrepresentation does not violate the Rule.

4. *Duty to disclose or give reasonable indication of inaccuracy*—Subsection (B)(2) gives the lawyer an option when faced during negotiation with an adversary laboring under a manifest misapprehension of material fact or law. He may either: (a) disclose such information as is necessary to disabuse the adversary of his misconception, or (b) give some reasonable indication of the possible inaccuracy of material information upon which opposing counsel appears to rely.

Example 5—Lawyer (L) represents a prominent golf pro (G) who suffered a disabling back injury when he slipped on a ball negligently left in a dark clubhouse corridor. Although the newspapers reported G's injury as permanent, G has spent the past month abroad receiving medical treatment with positive results. He now works out, practices daily, and doctors have given assurances that he will be back on the playing circuit within a year. G informs L of these developments prior to the commencement of settlement talks. During negotiation, however, it is clear that Opposing Counsel (OC) still believes that the damage to G's back is irreversible. He states, "What has happened to your client is a terrible thing, and we want to do right by him. Suffering as he is now, his career gone forever, we want to do all we can to ease the pain."

In this situation, subsection (B)(2) of the Rule gives L an option. Since G's physical condition is a matter of material fact, and OC's misapprehension as to the true status of this condition is manifest, L must either: (a) tell OC

about the treatment G has been receiving and the likelihood of his being able to return to the pro circuit; or (b) give OC such reasonable indication as to put him on notice of the possible inaccuracy of his perception of G's health. Although L need not inform OC of the exact prognosis for G's recovery, he may not permit OC's misperception of this critical fact to go completely unchecked. His second option, therefore, would be to make some statement to indicate nonassent to the misapprehended fact. He may say, for example: "I'm not willing to discuss either the extent of my client's suffering or his future career prospects." Or, he might say, "If you want to depose my client or his doctors to find out the extent of the injuries, you may. We're only here to discuss settlement."

Statements such as these satisfy the dictates of subsection (B)(2)(b), as they put OC on notice that information upon which he appears to rely may be inaccurate. Although such statements amount to at least partial disclosure, it is important that a lawyer be able to keep some cards close to the chest without violating his duty of truthful negotiation behavior. No rule of negotiation ethics should oblige a lawyer to submit to cross-examination by his adversary. Yet neither should rules of professional conduct permit one attorney to profit unfairly from the manifest misapprehensions of opposing counsel. Subsection (B)(2)(b) strikes a compromise. The notice it ensures prevents a settlement from being negotiated on the basis of misinformation. Yet the form this notice takes allows a lawyer to remain in the negotiation without giving up facts he would rather force his adversary to discover independently. Given that candor toward opposing counsel will be reciprocated with like candor, the wisdom of making statements like the foregoing is questionable. But the Rule takes account of the varying tactical predilections of legal negotiators, and allows lawyers to conduct truthful settlement without having to research for their adversaries. Such a compromise affords lawyers a certain amount of strategic freedom when negotiating, yet at the same time safeguards the integrity of information that will ultimately produce settlement.

DOUGLAS H. YARN, *LAWYER ETHICS IN ADR AND
THE RECOMMENDATIONS OF ETHICS 2000 TO
REVISE THE MODEL RULES OF PROFESSIONAL
CONDUCT: CONSIDERATIONS FOR ADOPTION
AND STATE APPLICATION*

54 Ark. L. Rev. 207-70 (2002).

BACKGROUND

For much of the 20th Century, the American Bar Association ("ABA") has promulgated a "model" regime of professional legal standards for state bars to adopt. Drawing on the prior work of pioneer legal ethicists Sharswood and Hoffman and the first codified set of ethical provisions, the ABA promulgated the Canons of Professional Ethics ("Canons") in 1908. The Canons were primarily aspirational in nature, speaking in terms of what an attorney should do rather than must do.

As the profession grew and evolved, the need for an ethical code that would provide a basis for discipline became apparent. In 1964, the ABA House

of Delegates created the Special Committee on Evaluation of Ethical Standards ("Special Committee") to recommend changes to the Canons. Instead, the Special Committee drafted an entirely new set of ethical provisions, adopted in 1969 by the ABA as the Model Code of Professional Responsibility ("Model Code"). The Model Code embodied two separate parts, Ethical Considerations, which were largely aspirational guidelines, and Disciplinary Rules, which served as a minimum set of behavioral standards, a violation of which would subject the lawyer to discipline. As an improvement on the Canons, it particularly emphasized guidelines for the lawyer in the role of the advocate.

Although most states quickly adopted the Model Code, there were significant concerns which soon led to the formation of another study commission, known as the Kutak Commission, which produced the Model Rules of Professional Conduct ("Model Rules"), adopted by the ABA in 1983 and by most states soon thereafter. The Model Rules are a dramatic shift from the hortatory "fraternal norms issuing from an autonomous professional society" to a "body of judicially enforced regulations." For some, the Model Rules represented a much needed step toward a realistic, functional ethical regime that matched the modern reality of legal practice.

But the modern reality of legal practice is in constant flux. By 1997, the ABA decided it was time to create yet another commission, the Commission on Evaluation of the Rules of Professional Conduct, the "Ethics 2000 Commission," to study and recommend revisions to the Model Rules. Although some of the Model Rules's problems can be traced to dissonance between the original texts of the actual Rules and their accompanying guidelines or Comments, other problems had arisen in the intervening years. Growing disparities in state variations among the thirty-nine states that had adopted the Model Rules caused a uniformity problem. This was exacerbated by the thirty amendments made between 1983 and 1997 by the ABA. In addition, changes in technology and the dynamics of law practice created pressures to revise the Model Rules accordingly.

* * *

COMMISSION RECOMMENDATION: RULE 4.1—TRUTHFULNESS TO OTHERS

The Commission recommended inserting the word "ordinarily" in comment 2 of Rule 4.1 so that it would read in pertinent part:

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements **ordinarily** are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud....

This minor revision provides small comfort to those in the ADR community who have called for a higher level of truthfulness to the other side by attorneys in mediation. They argue that a higher level of truthfulness is

congruent with the concept of mediation as a less adversarial, problem-solving process in which more open discussion leads to better solutions. Although the Commission apparently excluded mediation from the more stringent requirements of candor under its proposed Rule 3.3, the possibility remained that the Commission might recommend a higher standard of truthfulness in negotiation and, by extension, mediation by revising Model Rule 4.1. Currently, that rule provides that:

In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

What constitutes a "statement of material fact," however, is significantly reined in by comment 2, which creates a broad exception for "puffing" and positional bargaining deception in negotiation.

During the drafting of the current Model Rules, authorities were divided on the appropriate standards for attorney behavior, and they continue to press for various interpretations and revisions. One of the more persuasive arguments is that Rule 4.1 provides little guidance on truthfulness as it is, thereby leaving mediators, as well as ADR attorneys, unrestrained in their use of deception. Another argument is that the permissiveness of Rule 4.1 provides an inadequate "ethics infrastructure to support the settlement culture" that has become predominant since the Model Rules were drafted. Under this argument, Model Rule 4.1 was drafted at a time when only informal negotiations were contemplated. In today's legal environment, settlement negotiations are likely to take place in the more structured and complex settings . . . within the ambit of the court, thus raising the level of truthfulness required in the direction of Rule 3.3's absolute candor.

Ultimately, the Commission's spare response simply indicates that in extraordinary situations estimates of price or value and statements of intentions regarding the acceptability of a settlement can constitute misrepresentations. It appears to have decided not to accept the notion that attorneys should be held to higher standards of truthfulness in negotiation. Alternatively, it decided that it was impossible to realistically clarify truthfulness under the rule. As a practical matter, the level of truthfulness that should be required of attorneys in mediation remains unsettled within the ADR community and such a virtually unenforceable requirement would be hortatory at best.

DUTIES NOT ADDRESSED BY THE COMMISSION

Ultimately, the Commission took a very conservative approach to the ethical problems of ADR attorneys. By recommending only these few, mostly precatory standards, the Commission did little to promote ADR or change attorney behavior. Considering this restraint, it is not surprising that the Commission did not address such aspirational and difficult to enforce norms such as a duty of civility, a duty of good faith participation, or a general duty to promote ADR.

PATRICK EMERY LONGAN, *ETHICS IN SETTLEMENT
NEGOTIATIONS: FOREWORD*

52 Mercer L. Rev. 807, 807-16 (2001).

I. INTRODUCTION

On March 9 and 10, 2001, Mercer University's Walter F. George School of Law and its Mercer Center for Legal Ethics and Professionalism held a Symposium on ethical issues in settlement negotiations. Funding for the Symposium came from a consent order, signed by United States District Judge Hugh Lawson, in which the DuPont Corporation settled claims of litigation misconduct in exchange for a payment of \$11 million. Each of the four accredited law schools in Georgia received \$2.5 million to endow a faculty chair in ethics and professionalism, and the other \$1 million was set aside to endow an annual Symposium on issues of ethics and professionalism. The Symposium will rotate among Mercer University, the University of Georgia, Emory University, and Georgia State University. The Mercer Symposium was the first to be held pursuant to the court's order. The Symposium examined a draft set of Ethical Guidelines for Settlement Negotiations being drafted by a task force of the American Bar Association Section of Litigation. In recent years, the ABA Litigation Section has promulgated similar guidelines for litigation conduct, civil discovery, and trial procedures. The success of those projects led the ABA Litigation Section to undertake the negotiation project. The task force began studying the issues and drafting the guidelines in the Spring and Summer of 2000. The ABA Litigation Section agreed that the Mercer Symposium would provide a type of "public hearing" for the guidelines in their draft form, as they stood in March 2001. [*The Guidelines were published by the Section in final form in August 2002. They "should not be construed as representing the policy of the American Bar Association." The ABA, however, "recommends [them] as a resource...."*]

* * *

II. LIMITS ON MISLEADING CONDUCT

At the Symposium, the first panel dealt with two issues of truthfulness: misleading statements and the duty to disclose. Model Rule of Professional Conduct 4.1 covers these topics:

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

There are two issues lurking within and behind this rule. First, as to misrepresentations, comment two to Rule 4.1 contains a special qualification for statements in the context of settlement negotiations. It exempts from the requirements of Rule 4.1(a) certain statements that "under generally accepted conventions in negotiation" are not taken as statements of fact, such as the acceptability of a particular amount in settlement. In other words, there is room in negotiations for puffing and bluffing because those practices are what

everyone involved expects. Second, the last phrase of Rule 4.1(b) appears to prohibit disclosure, even to prevent fraud, if Rule 1.6 would prohibit the disclosure. Rule 1.6 forbids disclosure of "information related to the representation of a client," absent client consent and with some very limited exceptions. The exception, therefore, threatens to swallow the rule about disclosure.

Another relevant Model Rule is Rule 1.16(b), which permits a lawyer to withdraw from representation if the client "persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." For example, a client who lies to his or her lawyer and has the lawyer unwittingly repeat the lie to an opposing party may forbid the lawyer to reveal the falsity of the representation already made. The result might be fraud, perpetrated by the client through the lawyer. The attorney ethically may withdraw from the representation under these circumstances.

Part 4.1 of the draft Guidelines reiterates the duties that arise under Rule 4.1 and adds a section that points out the lawyer's duty to withdraw if the lawyer discovers that the client will use the lawyer's services to perpetrate a crime of fraud. Guideline 4.3.7 is also relevant:

4.1.1. False Statements of Material Fact. In the course of negotiating or concluding a settlement, a lawyer may not knowingly make a false statement of material fact (or law) to a third person.

4.1.2. Silence, Omission, and the Duty to Disclose Material Facts. In the course of negotiating or concluding a settlement, a lawyer must disclose a material fact to a third person when doing so is necessary to avoid assisting a criminal or fraudulent act by a client, unless such disclosure is prohibited by the ethical duty of confidentiality.

4.1.3. Withdrawal in Situations Involving Misrepresentations of Material Fact. If a lawyer discovers that a client will use the lawyer's services or work product to materially further a course of criminal or fraudulent conduct, the lawyer must withdraw from representing the client and may disaffirm any opinion, document or other affirmation. If a lawyer discovers that a client has used a lawyer's services in the past to perpetuate a fraud, now ceased, the lawyer may, but is not required to, withdraw, but disaffirming his/her prior opinion and work product is not permitted.

4.3.7. Exploiting Opponent's Mistake. In the settlement context, a lawyer should not attempt knowingly to obtain benefit or advantage for himself or herself or his or her client as a result of an opponent's mistake which has been induced by the lawyer or which is obviously unintentional. Further, a lawyer may have an affirmative duty to disclose information in settlement negotiations if he or she knows that the other side is operating on the basis of a mistaken impression of material fact.

Other than Guideline 4.3.7, [*which was not promulgated as written here*] the relevant Guidelines track the requirements of the Model Rules and provide some commentary and background in the Reporter's Notes. Guideline 4.3.7 takes other views of the purpose of the Guidelines. It attempts both to synthesize the lawyer's obligations from a variety of sources and to describe a "best practices" standard that may go beyond what is legally required.

A. The Limits of Representations

The first panel dealt with these and other issues in the context of three hypotheticals. The first concerned a case in which the plaintiff sought lost profits and the lawyer was trying to decide what he or she could say about the lost profits in negotiation in a variety of factual situations:

You represent the plaintiff in a breach of contract action. You are seeking lost profits. What can you say in negotiations about the lost profits if:

- (a) Your expert has come to no conclusion about their cause.
- (b) Your expert has told you the breach did not cause the lost profits.
- (c) Your expert has given you a range between \$2,000,000 and \$5,000,000 for the lost profits.
- (d) Your expert says the maximum lost profit is \$2,000,000.
- (e) You do not have an expert; your client says the loss was \$5,000,000.

It is common in negotiation for each side to emphasize the strength and persuasiveness of its evidence. On the other hand, each side in discovery has the opportunity to explore the other side's evidence. In this scenario, each side would be entitled to a report and a deposition of the other's testifying expert. Any statement about the expert would be a statement of fact. Because of the importance of expert testimony to this case, any statement of this sort would be material. The lawyer must be careful to tell only the truth to avoid violating Rule 4.1. Good lawyers, however, will test the assertions in discovery, consistent with the now-famous Russian proverb, "Trust, but verify."

Beyond the rules of ethics, however, it is proper to ask what the best strategy is for a lawyer in this negotiation. Here, any statement about the expert's conclusions probably will be the subject of discovery. If the statement is found to be false, the lawyer who made it will lose some credibility. That loss, which will likely survive the conclusion of this particular case and affect negotiations with the other lawyer in future cases, will cause these future negotiations to be more strained, more lengthy, and probably less fruitful. To the extent that the lawyer gains a reputation for untruthfulness as a result of statements about the expert, the lawyer may be impeding all his or her future negotiations. In other words, this hypothetical involves a happy situation in which it is both the right strategy and the smart strategy to tell the truth.

In a continuation of that same hypothetical, the panel discussed questions of representations about settlement authority and statements of fact that are literally true but, in context, potentially misleading:

In this breach of contract action, can you:

- (a) tell opposing counsel that you will not settle for less than \$3.5 million when you have authority to settle for \$2 million?
- (b) tell opposing counsel that five major buyers stopped buying from your client after the breach, knowing that they stopped buying for other reasons?

As discussed, comment 2 to Model Rule 1.4 defines statements about settlement authority not to be material. Technically, therefore, the lawyer should feel free to lie about his or her authority. Another strategy, however,

and one that may be more effective in the long run, is simply to deflect any questions of authority with statements such as, "You know neither one of us can discuss our authority—let's talk about a fair settlement of this case." The reason a deflection may be more effective in the long run is the same reason exaggerations about the expert's conclusions may cause long term harm. You may be ethically permitted to lie about your authority, but if you do it, and the other lawyer catches you at it, he or she will not trust you again.

The misleading statement about the lost customers raises a persistent and subtle issue for lawyers about the use of language. The statement is literally true. These customers have left, and they did so at a time after the defendant's breach. The only reason the statement is made, however, is in the hope that the defendant will make the leap and conclude that the customers left because of the breach or, at least, that the plaintiff will attempt to prove that they did. The statement is, therefore, an intentionally misleading, sly use of language. It is reminiscent of former President Clinton's response to a question before the grand jury about his deposition testimony: "It depends on what the meaning of is is." The lawyer who engages in this type of deception is more clever, perhaps, than a straightforward liar, but the lawyer is no less worthy of condemnation. Once again, however, we can rely on the power of reputation to deter lawyers (at least those who care about their reputations) from engaging in these tactics. Word gets around.

B. Disclosure of Factual Errors

The second hypothetical concerned a duty to disclose facts when the other lawyer has made a settlement offer containing obvious mistakes:

You represent the husband in a divorce action. You receive from opposing counsel a proposed property settlement with the following errors: (1) a transcription error that undervalues an asset; (2) an arithmetical error that undervalues an asset; (3) a valuation by purchase price of an asset when market value is much higher. All the errors work to your client's advantage. What, if anything, should you do about them?

To the extent that the first two errors are "scrivener's errors" (the other lawyer missed a typographical error or failed to add the numbers correctly), the lawyer has the duty to correct the mistakes. The third problem may raise more difficult issues because the error may come from opposing counsel's conscious but erroneous judgment about what valuation is best for his or her client. Can the lawyer in the hypothetical take advantage of his or her adversary's error in judgment?

The question is a species of a fundamental, recurring question in an adversarial system. The lawyer owes a primary duty of loyalty to the client. In most respects, the lawyer is not expected to be his or her brother's keeper. One answer to the particular ethical question presented is to say that it is not the interesting or important question. The client is not perpetrating a fraud or a crime by taking advantage of a bad lawyer on the other side. There is no duty to disclose under Rule 4.1.

Abiding by the rules of ethics, however, is necessary but not always sufficient for good lawyering. Ethically, the lawyer need not correct every misstep of opposing counsel. But sometimes correcting the mistake would be the wise thing to do. For example, if the mistakes involved in the proposal

were fundamental mistakes, ones that under the law of contract the opposing party would provide grounds later to void the transaction, then the lawyer may best serve his or her client by alerting opposing counsel to the mistakes now. If the parties to the transaction will have a continuing relationship, such as shared responsibility for minor children, the best strategy might be to correct the mistakes and buy some trust, which may be sorely needed later. Here, as in many situations, ethics tells you the options available, but the lawyer must still exercise good judgment among the options.

C. Disclosure of Legal Errors

The final hypothetical for the first panel highlighted the fact that Model Rule 4.1 forbids a lawyer from making a material misrepresentation about the law. The hypothetical does so in the context of an interaction with a young lawyer who is operating under a mistake about the state of the law:

You represent the defendant in a personal injury case. In negotiation with plaintiff's counsel (a young, relatively inexperienced lawyer), it becomes clear to you that this lawyer believes his or her client's potential recovery is limited by a tort reform statute. You know that this statute has been found unconstitutional by the state supreme court. May you, and should you, correct opposing counsel's mistake about the law?

Most practicing lawyers would not think twice about taking advantage of this younger lawyer. Again, the client is not perpetrating a fraud or a crime, and the client might be very happy to save some money because his or her adversary's lawyer is clueless. No rule of legal ethics requires the lawyer to be the opposing party's lawyer also. No rule requires that lawyers settle cases only on "fair" terms.

Again, however, the strictly ethical inquiry cannot end the discussion. For example, lawyers might find that taking advantage of the mistake in particular circumstances, such as a horrific injury to a young child, would be morally wrong although ethically permissible. The lawyer is free to counsel the client about nonlegal matters, such as the morality of leaving the injured child unable to obtain the life-long care the child needs. The lawyer is even free to seek to withdraw if assisting in a settlement under these circumstances would be repugnant to the lawyer. Here, as in the prior examples, the best lawyers consider all the circumstances and determine first whether the rules of ethics require a particular course of action and, if they do not, what under all the circumstances is the wisest choice.

JAMES J. ALFINI, SETTLEMENT ETHICS AND LAWYERING IN ADR PROCEEDINGS: A PROPOSAL TO REVISE RULE 4.1

19 N. Ill. U.L. Rev. 255-72 (1999).

ETHICAL CONSTRAINTS IN ADR SETTINGS

Given [the] range of real and potential behaviors exhibited by lawyers in ADR settings, there is a compelling need to articulate the ethical constraints on lawyers when they represent clients in ADR settings. The twin problems of gamesmanship and misrepresentation are particularly troubling. Unfortunately, the ABA Model Rules of Professional Conduct provide little guidance to the

lawyer engaged in settlement activities in ADR. What is worse, the one rule that is most instructive provides guidance that, standing alone, is inimical to the proper functioning of the litigation process.

Rule 4.1 of the Model Rules has the high-minded title: "Truthfulness in Statements to Others." The rule states, in part: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person."

This is a wonderfully straightforward and clear statement that appears to set a high standard of conduct for a practicing lawyer. On the face of it, it seems to say that a lawyer should not lie. However, when we look to the commentary to this rule we find in the second paragraph the following:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

So when it comes to negotiations, the rule prohibits only "material" lies. It thus opens the door to what some refer to as "puffery," and others as lying, in negotiations. One commentator has concluded that the ABA has "unambiguously embraced 'New York hardball' as the official standard of practice."

The commission that was responsible for drafting the rules, generally referred to as the Kutak Commission, had originally proposed a truthfulness rule, without all the conditional language, entitled "Fairness to Other Participants." However, the Commission was convinced that such a sweeping rule would be untenable for the practicing lawyer. In perhaps the most influential article arguing for an amended rule that would permit "puffery" in negotiation, Professor James White of the University of Michigan Law school stated:

Pious and generalized assertions that the negotiator must be 'honest' or that the lawyer must use 'candor' are not helpful. They are at too high a level of generality and they fail to appreciate the fact that truth and truthful behavior at one time in one set of circumstances with one set of negotiators may be untruthful in another circumstance with other negotiators.

Professor White won the day. The rule opens the door to lying in negotiations; and, since the adoption of the Model Rules almost two decades ago, numerous commentators have written on this topic arguing variously that we need a continuing discourse on the ethics of lying in negotiation because our discourse is, as one commentator put it, "uncritical, self-justificatory and largely unpersuasive." This commentator states: "... lying is not the province of a few 'unethical lawyers' who operate on the margins of the profession. It is a permanent feature of advocacy and thus of almost the entire province of law." Others have argued that we need an alternative model for negotiation that emphasizes truth seeking, or that we need a negotiation rule that articulates the various "conventions" in negotiations. Alternatively, this latter commentator goes so far as to accept lawyer deceit as a negotiation

norm and suggests that we might consider a "caveat lawyer" rule (recognize that lying is an inherent part of the negotiation process and just accept the fact that anything goes). These commentaries leave one with a strong sense of unease over this ethics low-water mark.

With the increased use of ADR by the courts, the application of Rule 4.1 has become more problematic. Should Rule 4.1 be seen to extend beyond the negotiation setting to apply to lawyering activities in ADR proceedings? Or, should Rule 3.3, which is entitled "Candor Toward the Tribunal," apply? Similar to Rule 4.1, Rule 3.3 states that, "[a] lawyer shall not knowingly make a false statement of material fact or law to a tribunal." Unlike Rule 4.1, Rule 3.3 does not have the same kind of qualifying language in the commentary to the rule. Therefore, the lawyer's obligation of candor to a judge or a court is much higher than the lawyer's obligation of truthfulness in negotiation. Indeed, the Rule 3.3 obligation has been referred to as a "requirement of absolute truthfulness."

While ADR proceedings would appear to fall into a gap between the formal proceedings contemplated by Rule 3.3 and the informal settings contemplated by Rule 4.1, as written, it would seem that Rule 4.1 would apply. Because Rule 3.3 applies only to proceedings before a "tribunal," and given the relative informality of ADR proceedings, it would appear that Rule 3.3 would be inapplicable to even the most formal ADR proceedings. Although the term "tribunal" is not defined in the "Terminology" section of the ABA Model Rules, it is used in the sense of an adjudicative proceeding: "... the context in which the term is used in the Rules makes it clear that 'tribunal' refers to a trial-type proceeding in which witnesses are questioned, evidence is presented, the parties and their counsel participate fully, and the decision is rendered by a fact-finder." Even the more formal ADR proceedings such as court-annexed arbitration and summary jury trial do not meet these criteria. For example, the parties are generally discouraged from using witnesses in both. Certainly, mediation would not qualify as a tribunal under even the most relaxed criteria.

A PROPOSAL TO REVISE RULE 4.1

Thus, lawyering activities in ADR proceedings would appear to be governed by the permissive Rule 4.1 (rather than the absolute truthfulness Rule 3.3), which provides an inadequate ethics infrastructure to support the settlement culture that has developed over the past twenty years. Rather than circumscribing the gamesmanship and misrepresentation that can and does take place in ADR proceedings, the language in the commentary to Rule 4.1 may actually encourage deceptive practices. Moreover, the rule does not take account of the enhanced role for the client in ADR proceedings.

The proposed revision of Rule 4.1 set forth below recognizes that settlement discussions are now likely to take place in more structured and complex settings than the informal negotiations contemplated by the present Rule 4.1. Thus, the language in the commentary attempting to distinguish between "material" facts and other kinds of facts, opening the door to lying in ADR settings, has been struck. In addition, a new Rule 4.1(b) prohibits a lawyer from assisting his or her client "in reaching a settlement agreement that is based on reliance upon a false statement of fact made by the lawyer's client."

Finally, a paragraph has been added to the commentary that recognizes the increased use of dispute resolution alternatives and cautions the lawyer to be truthful and to inform his or her client of the dictates of this rule.

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of [~~>~~ material ~~<~~] fact or law to a third person; or

(b) assist the client in reaching a settlement agreement that is based on reliance upon a false statement of fact made by the lawyer's client; or

[~~>~~ (~~b~~) ~~<~~] fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

[~~>~~ Statements of Fact ~~<~~]

~~[>[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. <]~~

Alternative Dispute Resolution

[2] A lawyer's duty of truthfulness applies beyond formal tribunals (see Rule 3.3) to less formal settings. The obligation to be truthful is particularly essential with the increased use by courts of dispute resolution alternatives such as mediation, arbitration, mini-trial, and summary jury trial to effect settlement. When representing a client in these less formal settings, the lawyer may often encounter situations where both the lawyer and his or her client participate freely in open and frank discussions unconstrained by rules of evidence or procedure. The lawyer should therefore inform the client of the lawyer's duty to be truthful and the lawyer's inability to assist the client in reaching a settlement agreement that is procured in whole or in part as a result of a false statement of material fact or law made by the client.

Fraud by Client

[3] Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

Changes in Rule 4.1 along these lines are particularly important in light of the fact that ADR proceedings, especially mediation, are intended to encourage active client participation and involve third party neutrals. ADR settings are therefore likely to involve more complex interactions and communications than the traditional lawyer-to-lawyer negotiations contemplated by the current rule, making them fertile ground for lawyer gamesmanship and misrepresentation. Under these circumstances, it is imperative that we have a rule that sets a clear, unambiguous standard of truthfulness.

CONCLUSION

There is a critical need to create an ethics infrastructure to support the settlement culture that has developed over the past two decades. In a broadening variety of dispute resolution settings, lawyers and their clients have only the language of ABA Model Rule 4.1 to guide their behavior. The current Rule 4.1 is ambiguous at best, and at worst, would appear to countenance gamesmanship and misrepresentation by lawyers in ADR proceedings. The rule should be re-drafted to hold lawyers to a higher standard of conduct in settlement discussions. The twenty-first century lawyer will be spending much of her time communicating with third parties in a wide variety of dispute resolution fora. It is imperative that the rules governing a lawyer's behavior in these contexts establish standards of professional conduct that will maintain the integrity of our civil justice system and assist in restoring public confidence in the legal profession.

IF NOT RULES, WHAT ABOUT NORMS?

ELEANOR HOLMES NORTON, *BARGAINING
AND THE ETHIC OF PROCESS*

64 N.Y.U.L.Rev. 493, 524-25; 535-36 (1989).

[After a detailed exploration of four prominent justifications for professional rules on truth-telling, Professor Norton summarizes:]

These four approaches, in part because of an insufficient focus on the operational features of the bargaining process, do not adequately satisfy the demands of a workable aspirational ethic for bargaining. Each, however, offers relevant insights. Universalism insists that negotiators not allow the special responsibilities of partisan advocacy to distort their ethical obligations. Without diminishing the importance of universalist aspirations, however, long and instructive experience with legal ethics cautions that there are limits to the usefulness of universal ethical rules in a specialized process. The need to accommodate individualist notions of partisan protection inherent in our legal system has produced a special lawyer's ethic. Similar partisan considerations are at work in bargaining.

Traditionalism most closely approximates the instinctive partisanship of classical competitive negotiations. In legal matters, traditionalism stresses

both the right of the individual to partisan loyalty from an attorney and the importance of the adversarial system in obtaining justice. No such overriding values characterize generic negotiations. What remains, therefore, is partisanship, a virtually instinctive characteristic that needs no reinforcement in negotiation ethics. The legal system, in which the partisan posture has been submitted to detailed analysis, teaches that partisanship brings ethical pressure. Unexposed to public monitoring, traditionalism would intensify the private struggle that the unpoliced bargaining process already encourages.

Relativism is useful in the search for an appropriate negotiation ethic because it directs attention to the actual purposes such an ethic would serve. Probing the function of a given aspect of legal practice is useful to the search for a feasible bargaining ethic. However, relativism that goes no further than the classic division between advocates and nonadvocates obscures the possibility that in negotiations, the two may harbor as many similarities as differences.

Pragmatism offers experience rather than theory as the basis for a bargaining ethic. However, the absence of systematic data revealing existing bargaining ethics seriously impedes this approach. If experience with bargaining ethics could be satisfactorily documented, pragmatism might point toward an ethic that is sensible, coherent, and practical. Even then, however, pragmatism would not ameliorate unethical practice if it rested on the lowest common denominator of ethical experience. In any case, pragmatism raises unprecedented methodological difficulties in determining how, and even whether, to credit existing experience as a legitimate basis for a bargaining ethic.

* * *

The assumptions of the functionalist model [*which Norton develops*] may be summarized as follows:

1. Bargaining is indispensable to the functioning of society.
2. The fundamental purpose of bargaining is to achieve a valid agreement.
3. Practices that threaten the validity of an agreement violate the fundamental purpose of the process.
4. Bargaining is an adversarial market process in which willing opponents use partisan strategic dealings (bargaining techniques) to arrive at accurate information and to obtain fair treatment.

These assumptions underlie the use of the internal resources of the process to achieve truthfulness and fairness in bargaining. The result is a minimal but functional ethic. This ethic is best understood through an explanation of its operation to induce truthfulness and fairness and through an analysis of appropriate illustrations.

Truthfulness is important in negotiations because it encourages trust between opponents and thus facilitates agreement. However, adherence to the ethical standard of truthfulness in bargaining does not require a negotiator to abandon the assumptions of the process. Parties to a negotiation may use bargaining techniques, including strategic dealings, in order to arrive at

accurate information concerning factual matters and the true intentions of an opponent, as well as to limit information offered to an opponent.

False information is not usually recognizable as a bargaining technique and therefore closes off the opportunity for an opponent to arrive at accurate information through the use of his own bargaining techniques. Thus, giving false information in a negotiation violates the assumption that bargaining techniques will elicit accurate information. False information also undermines the basic purpose of the bargaining process, to achieve a valid agreement. However, false information necessary for a mode of bargaining to occur is an exception because of the assumption that bargaining is necessary to the functioning of society. Generally, though, information that is necessary for bargaining to occur is also recognizable as a bargaining technique. Such false information does not threaten the validity of an agreement because it may be uncovered during the course of bargaining through the use of bargaining techniques so as to facilitate the eventual discovery of more accurate information. Thus, deceptive offers and counteroffers, as well as settlement point deception may be considered either bargaining techniques that invite counter-techniques or false information that is necessary for a form of bargaining to occur. The withholding of the name of a principal, however, cannot be uncovered readily through the use of bargaining techniques and therefore can be justified only as necessary for bargaining to occur. Often deceptive exchanges are not misrepresentations as the term is commonly understood because the true asking price or the settlement point may become clear to the parties only as a result of the process of bargaining itself.

Several examples may be helpful to show how the assumptions apply to truthfulness. Avoiding a direct answer is a bargaining technique when it limits information to an opponent without undermining the validity of an agreement. Failing to volunteer information is a bargaining technique when it limits information to an opponent unless, for example, silence about the particular facts undermines the validity of the agreement. Other examples of bargaining techniques are puffing concerning the quality of goods and bluffing concerning calling off negotiations. The process assumes that negotiators will use partisan strategic dealings to arrive at truthful information, and that the statements made will not keep opponents from using bargaining techniques to arrive at truthful information. Such deceptive information is not inconsistent with the assumptions of the process. When it is offered in such a way as to allow strategic responses that can arrive at more accurate information, it is necessary for bargaining to occur.

DAVID A. LAX AND JAMES K. SEBENIUS, *THREE*
ETHICAL ISSUES IN NEGOTIATION

2 *Negot.J.* 363-70 (1986).

The agent for a small grain seller reported the following telephone conversation, concerning a disagreement over grain contracted to be sold to General Mills:

We're General Mills; and if you don't deliver this grain to us, why we'll have a battery of lawyers in there tomorrow morning to visit you, and then we are going to the North Dakota Public Service [Commission];

we're going to the Minneapolis Grain Exchange and we're going to the people in Montana and there will be no more Muschler Grain Company. We're going to take your license.

Tactics mainly intended to permit one party claim value at another's expense inescapably raise hard ethical issues. How should one evaluate moves that stake out positions, threaten another with walkout or worse, misrepresent values or beliefs, hold another person's wants hostage to claim value at that person's expense, or offer an "elegant" solution of undeniable joint benefit but constructed so that one side will get the lion's share?

* * *

The essence of much bargaining involves changing another's perceptions of where in fact one would settle. Several kinds of tactics can lead to impressions that are at variance with the truth about one's actual position: persuasive rationales, commitments, references to other no-agreement alternatives, calculated patterns of concessions, failures to correct misperceptions, and the like. These tactics are tempting for obvious reasons: one side may claim value by causing the other to misperceive the range of potentially acceptable agreements. And both sides are generally in this same boat.

Such misrepresentations about each side's real interests and the set of possible bargaining outcomes should be distinguished from misrepresentations about certain aspects of the substance of the negotiation (e.g., whether the car has known difficulties that will require repair, whether the firm being acquired has important undiscussed liabilities, and so on). This latter category of tactics, which we might dub "malign persuasion," more frequently fails tests of ethical appropriateness. Consider two such tests.

ARE THE "RULES" KNOWN AND ACCEPTED BY ALL SIDES?

Some people take the symmetry of the bargaining situation to ease the difficulty of ethical choice. The British statesman, Henry Taylor, is reported to have said that "falsehood ceases to be falsehood when it is understood on all sides that the truth is not expected to be spoken." In other words, if these tactics are mutually accepted as within the "rules of the game," there is no problem. A good analogy can be found in a game of poker: Bluffing is expected and thus permissible, while drawing a gun or kicking over the table are not. Yet often, the line is harder to draw.

For instance, a foreigner in Hong Kong may be aware that at least some tailors bargain routinely, but still be unsure whether a particular one—who insists he has fixed prices—is "just bargaining." Yet that tailor may reap considerable advantage if in fact he bargains but is persuasive that he does not. It is often self-servingly easy for the deceiver to assume that others know and accept the rules. And a worse problem is posed if many situations are often not even recognized as negotiation, when in fact they exhibit its essential characteristics (interdependence, some perceived conflict, opportunistic potential, the possibility of explicit or tacit agreement on joint action). When, as is often the case in organizational life, such less acknowledged negotiation occurs, then how can any "rules" of the game meet the mutual "awareness and acceptance of the rules" test?

CAN THE SITUATION BE FREELY ENTERED AND LEFT?

Ethicist Sissela Bok (1978) adds another criterion: For lying to be appropriate, not only must the rules be well-understood, but the participants must be able freely to enter *and* leave the situation. Thus to the extent that mutually expected, ritual flattery or a work of fiction involve "lying," there is little problem. To make an analogy between deception and violence: though a boxing match, which can involve rough moves, meets this criterion, a duel, from which exit may be impossible, does not.

Yet this standard may be too high. Bargaining situations—formal and informal, tacit and explicit—are far more widespread than many people realize. In fact, a good case can be made that bargaining pervades life inside and outside of organizations, making continual free entry and exit impractical. So if bargaining will go on and people will necessarily be involved in it, something else is required.

OTHER HELPFUL QUESTIONS

When it is unclear whether a particular tactic is ethically appropriate, we find that a number of other questions—beyond whether others know and accept it or may leave—can illuminate the choice. Consider several such questions:

Self-image. Peter Drucker (1981) asks a basic question: When you look at yourself in the mirror the next morning, will you like the person you see? And there are many such useful queries about self image, which are intended to clarify the appropriateness of the choice itself and not to ask about the possible consequences (firing, ostracism, etc.) to you of different parties being aware of your actions: Would you be comfortable if your co-workers, colleagues, and friends were aware that you had used a particular tactic? Your spouse, children, or parents? If it came out on the front page of the *New York Times* or the *Wall Street Journal*? If it became known in ten years? Twenty? In the history books?

Reciprocity. Does it accord with the Golden Rule? How would you feel if someone did it to you? To a younger colleague? A respected mentor? A member of your family? (Of course, saying that you would mind very much if it were done to another need not imply that the tactic is unethical; that person may not be in your situation or have your experience—but figuring out the reason you would be bothered can give a clue to the ethics of the choice.)

Advising Others. Would you be comfortable advising another to use this tactic? Instructing your agent to use it? How about if such advice became known?

Designing the System. Imagine that you were completely outside the setting in which the tactic might be used, but that you were responsible for designing the situation itself: the number of people present, their stakes, the conventions governing their encounters, the range of permissible actions, and so on. The wrinkle is that you would be assigned a role in that setting, *but* you would not know in advance the identity of the person whose role you would assume. Would you build in the possibility for the kind of tactics you are now trying to evaluate? A simpler version of this test is to ask how you

would rule on this tactic if you were an arbitrator, or perhaps an elder, in a small society.

Social Result. What if everybody bargained this way? Would the resulting society be desirable? These questions may not have obvious answers. For example, hard, individual competition may seem dehumanizing. Yet many argue that, precisely because competition is encouraged, standards of living rise in free-market societies and some forms of excellence flourish.

Alternative Tactics. Are there alternative tactics available that have fewer ethical ambiguities or costs? Can the whole issue be avoided by following a different tack, even at a small cost elsewhere?

Taking a Broader View. In agonizing over a tactic—for instance, whether to shade values—it is often worth stepping back to take a broader perspective.

First, there is a powerful tendency for people to focus on conflict, see a “zero sum” world, and primarily aim to enlarge their individual shares. Such an emphasis on “claiming” is common yet it can stunt creativity and often cause significant joint gains to go unrealized. In such cases, does the real problem lie in the ethical judgment call about a tactic intended to claim value, or is it a disproportionate focus on claiming itself? If it is the latter, the more fruitful question may be how to make the other face of negotiation—moves jointly to “create value”—more salient.

Second, does the type of situation itself generate powerful tendencies toward the questionable tactics involved? Is it an industry in which “favors” to public officials are an “expected” means for winning good contracts? If so, evaluating the acceptability of a given move may be less important than deciding (1) whether to leave the situation that inherently poses such choices, or (2) which actions could alter, even slightly, the prevalence of the questionable practices.

* * *

CONCLUSION

The overall choice of how to negotiate, whether to emphasize moves that create value or claim it, has implications beyond single encounters. The dynamic that leads individual bargainers to poor agreements, impasses, and conflict spirals also has a larger social counterpart. Without choices that keep creative actions from being driven out, this larger social game tends toward an equilibrium in which everyone claims, engages constantly in behavior that distorts information, and worse.

Most people are willing to sacrifice something to avoid such outcomes, and to improve the way people relate to each other in negotiation and beyond. The wider echos of ethical choices made in negotiation can be forces for positive change. Each person must decide if individual risks are worth general improvement, even if such improvement seems small, uncertain, and not likely to be visible. Yet a widespread choice to disregard ethics in negotiation would mark a long step down the road to a more cynical, Hobbesian world.

STEVEN HARTWELL, *UNDERSTANDING AND DEALING
WITH DECEPTION IN LEGAL NEGOTIATION*

6 Ohio St.J. on Disp.Res. 171, 182-87 (1991).

A. ENVIRONMENTAL CUES TO CONTEXT

Ordinarily, the environment itself cues people to the appropriate context for decoding information. When I hear a trilled "r" accompanied by bodily gestures characteristic of latin culture, I know to "decode" the sounds I hear as Spanish. When I enter a theater, environmental cues such as the stage and the seating tell me that the action to follow is "theater." The words "once upon a time" cue a child that what follows is merely a story. We can, of course, make mistakes about context. The language I hear may be Portuguese, not Spanish. Modern theater sometimes plays with context, having actors step out of the theater audience so that the theater context does not tell us for sure whether they are actors or not. Although becoming socialized within a culture entails the ability to quickly and accurately identify social contexts, we all occasionally misidentify contexts even within cultures we know very well. Most all of us have experienced the jitters while attending an unfamiliar social occasion because we fear we will misunderstand or be misunderstood.

Context can clarify an otherwise ambiguous conversation. Consider, for example, over-hearing this simple statement: "John shot two bucks." The first necessary contextual decision is that the language is English and that the sentence should be understood according to the rules of the English language. Without any other contextual markers, the sentence might mean that John shot a gun and struck two deer or that John gambled away two dollars. Context would ordinarily be provided by our knowledge of John (he is a renowned hunter), the speaker (she is only interested in gambling), the general subject matter of the conversation (they have been talking all morning about hunting) or perhaps the location (they are at a casino). In the same manner, negotiation styles or contexts serve as contextual markers that help us identify the probability that certain statements are intended as deceptive.

B. NEGOTIATION CONTEXTS

"Negotiation" is the name of a context and, as well, the name of a set of contexts. When two opposing attorneys meet on the courthouse steps just before trial, the environment cues them that what they say in the next few minutes should be interpreted as within the context "negotiation." Only a naive attorney would interpret the greetings, inquiries about parking problems, and other such topics as merely conversation within the context of polite social intercourse. Negotiation, however, is a complex context containing within it several different contexts. The meaning of certain words or gestures in one of these contexts may differ from their meaning in another context. The context of a "courthouse steps" negotiation differs from the collegial "office" context of negotiating among one's peers within a law firm or law school faculty. The contextual interpretation of "deception" in one such context may differ from the contextual interpretation in another. Environmental cues and the language employed guide us in the appropriate interpretation of deceptive language and conduct. In order to understand better how

these deceptions are interpreted, we need to review briefly the three major contexts that constitute most negotiations.

Professor Donald Gifford has recently offered a comprehensive typology of negotiation contexts. His typology identifies three explicit contexts: competition, cooperation and integration (often called "collaboration"). The first context, competition, is marked by high demands, limited disclosure of information, threats, apparent commitments to positions, and deception. Asserted opening demands, bottom lines, constraints on authority to bargain, the identity of one's principal, and the seriousness of threats should all be taken as potentially deceptive. For example, a statement by one negotiator that "One million dollars is the least we will accept to settle this case" should, given a competitive context, be interpreted as a high demand and a probable deception. The opponent would undoubtedly err if he were to interpret this statement as a candid offer.

The characteristic pattern that identifies the second context, cooperation, is the pattern of alternating and sequential concessions directed toward a compromise. Each party typically opens with offers that are less than what they expect at a final settlement. Given the above statement in a cooperative context, the opponent should interpret it as a signal inviting a counter-offer with the expectation that the opponent will then make a lesser demand. The speaker does not intend to deceive as he might in a competitive context, but intends that the statement encourage a sequence of concessions in which he himself intends continued participation. Plea bargaining between experienced prosecutors and defense counsel typically follows a cooperative context.

With the third context, integration, the negotiators engage in problem solving to satisfy their common interests. Given the "one million dollar" statement, the opponent should interpret it as candid, and designed to help both negotiators resolve their common problem. The two negotiators may have, for example, two million dollars to resolve a certain problem. The speaker does not intend to deceive or to induce a counter-offer. Integration differs from cooperation in several respects. Cooperation typically presumes a zero-sum situation in which your gain is my loss. The pattern of sequential concessions is intended to reach a fair division of a fixed pie. Integration typically presumes a non-zero sum situation, that is, a situation in which the pie can be made larger or in which the parties can abandon the original pie and, by working together, construct a new and tastier pie.

C. DECEPTION OF CONTEXT

A major thesis of this paper is that the kind of deception that threatens a negotiation is a deception *about* a context and not a deception *within* a context. As long as each negotiator accurately identifies the negotiation strategy (that is, the negotiation context) of the other, and appropriately anticipates the kind of candidness and deception which that negotiation context entails, deception will not derail the negotiation. If, for example, both negotiators knowingly employ a competitive context, then each will interpret the other's statements as presumptively deceptive. A negotiator who understands the negotiation context as competitive cannot rationally walk out of a competitive negotiation in a rage over a deception. Similarly, if both negoti-

ators knowingly engage in a integratively-contexted negotiation, neither should ever intentionally deceive the other because it is not in their own self-interests to do so. However, negotiations are complex events and negotiators sometimes misread the context of a negotiation and consequently misinterpret the language of their opponents. At other times, negotiators act irrationally by refusing to recognize a patently obvious context, a type of negotiation pathology....

1. *Why We React More Strongly to Deception of Context*

Good reasons compel negotiators to react more strongly to deception about a context than to deception within a context. Deception about context is potentially much more harmful than deception within a context. To be deceived about a context is to misinterpret every piece of information within that context. Consider the feeling of discovering that a person whom we thought to be a friend (that is, a person within a "friend context") has, from the very beginning, been a false friend. This sudden realization means that we have misunderstood everything this person has said to us. We have been deceived not once but numerous times. We may feel painfully humiliated. The difference between deception within a context and deception about a context is the difference between merely falling short and betrayal, between Peter and Judas.

2. *Embarrassment and Shame*

We intuitively express the difference between deception within a context and deception about a context with the social concepts of embarrassment and shame. Embarrassment is always context dependent. What is embarrassing in one context (belching in the faculty dining room, a deception in an integrative negotiation context) may not be embarrassing somewhere else (belching at home in front of one's long suffering family, a deception in a competitive negotiation context). Embarrassment is a negotiator's typical reaction to being caught in an inadvertent deception within a context that does not permit deception, such as a deception within an integrative context. Someone is embarrassed because he has not acted consistently with the context he wishes to project. The deceiver's embarrassment (flushed face, stammering) signals his opponent that he did not mean to deceive (that is, that he momentarily and inadvertently slipped from his role as an integrative negotiator). Sometimes negotiators are embarrassed when they discover they have been deceived because the deception indicates that they have not been the astute, sophisticated negotiators they thought themselves to be.

3. *Shame*

In contrast to embarrassment, shame typically entails intentional deception about a context. Shame is not being the person one claims to be in some fundamental way. Shame entails the violation of some general principle of civil conduct. To be a false friend and betray another is shameful.

KIMBERLY K. KOVACH, *LAWYER ETHICS MUST
KEEP PACE WITH PRACTICE: PLURALITY IN
LAWYERING DEMANDS DIVERSE AND
INNOVATIVE ETHICAL STANDARDS*

39 Idaho L. Rev. 399, 418-29 (2003).

The ethical rules that currently govern lawyers were created with the underlying premise of an adversary system. However, such a system, focused on competition and winning at all costs, provides only one context for a lawyer's work. While allegedly the encouragement of adversarial approaches and competition works to achieve justice through the determination of truth, difficulties arise when such attitudes and behavior are carried over into non-adversarial practices. Although some skills, knowledge, and conduct transfer across practices, others do not. For instance, one difficulty in problem solving and collaborative approaches is that current rules permit conduct that may be viewed as deceitful and contentious. This behavior is frequently considered appropriate in the name of zealous representation or typical in legal negotiations. When utilized in the non-adversarial contexts, for example mediation, the conduct can be detrimental to the process.

Although there has been recognition of the existence and evolution of less or non-adversarial practices in the code, current rules fail to address lawyer conduct in those practices in any effective manner. Ironically, such deficiencies have recently been recognized by the Litigation Section of the American Bar Association. In noting a paucity of standards in negotiation work, the section (through a specially appointed committee) has formulated Ethical Guidelines for Settlement Negotiations.

New approaches to representation need fresh and different ethical guidelines and rules. Substantial difficulties are likely in the transition from competition to collaboration, particularly if made subsequent to experience in a law practice where adversary tendencies are rewarded and reinforced. There have been calls for change in law practice generally, both broad reforms as well as lesser but nonetheless valuable calls for civility in practice, which are to be applauded. I focus, however, on those lawyers who have already made some commitment to a different type of representation, recognizing that the adversary system is not for everyone and every situation, problem, or concern.

Changes from the current ethical guidelines and rules are necessary if lawyers are to be suitable, capable, and competent representatives in the myriad of roles in which they find themselves, including collaborative, problem solving, and non-adversarial activities. The underlying principles of these processes are founded upon the direct and truthful exchange of communication. Adversarial conduct is quite often contrary to those qualities, attitudes, and behaviors. The mind-set necessary for problem solving is "fundamentally incompatible with the mind-set [of] effective trial advocate[s]." Yet, without an alternative or proper guidance as an impetus for change, lawyers will likely continue to engage in the same conduct that is familiar to them.

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Assuming that the argument for new and distinct ethical rules for lawyers who represent clients in less or non-adversarial work has been made,

the next step is to determine the specific elements of such practice parameters. A variety of characteristics, rules, and guidelines may constitute such a code, and the following is not intended to be a model for drafting a code. Rather, by this overview, I hope to provide a method to encourage continued thought and deliberation regarding necessary features and elements of such guidelines.

A. ETHIC OF CARE

One standard that might be included in a code of ethics for lawyers representing clients in non-adversarial contexts is that of an ethic of care. Others have called for a general care standard for all lawyer conduct, as well as proposing a specific ethic of care in lawyering. The care ethic or morality provides a rather broad perspective for the individual lawyer's conduct. An "ethic of care" has been defined by contrasting it with an "ethic of justice or rights." Rather than a justice focus on the relative rights and duties of individuals, the care ethic places emphasis on the connections between people. Such an approach often includes a "relational ethic."

Broadly viewed, a care ethic may be regarded as a foundation of moral and philosophical thought. Another way to consider an ethic of care is the movement away from self-interest to "other interest," and an ongoing realization and acknowledgment of "human interdependence."

In the context of legal representation, an ethic of care may encompass a responsibility to take specific steps to minimize harm to parties. An ethic of care has been defined as behavior which extends "care and compassion to vulnerable individuals and groups who have been harmed or are in harm's way." Additionally, such a care ethic has been used as a backdrop to consider "critical questions about the law and its impact on vulnerable groups and individuals."

The ethic of care has also been recognized as a moral foundation of mediation, and it has been specifically considered in the context of representation in mediation. One theme examined by Riskin in his early work discussing mediation and lawyers was the capability of care and people interconnection as a foundation of mediation, which is a primary reason why mediation necessitates a different philosophical map for lawyers. Another view proposes a new ethic for those lawyers who represent parties in mediation which would involve a different conception of human nature. This view of people is not one where they are separate, disconnected individuals; rather they are viewed, and view themselves, as possessing intrinsic connections.

The ethic of care has been discussed primarily in terms of the lawyer and the relationship and interaction with her client. While such a care ethic is certainly applicable in all types of representational roles, the care in terms of non-adversarial representation should extend to the other parties and their lawyers. Such a care ethic is at the basis of collaborative work. One example of collaborative lawyering is listening in an empathic way. By doing so, areas that allow for mutually beneficial results may be revealed. This process of finding complementary interests is an essential factor for parties planning to continue to do business together.

Demonstrating an ethic of care involves integrating care considerations and empathy into one's work. Although an ethic of care may also encompass a

"Golden Rule" of communication, it may be more beneficial to set out communication as a separate ethic.

B. HONESTY

Honesty is often considered a virtue. Yet, the legal profession is widely seen as lacking in honesty. Public perception is that the lawyer's task in many situations is to distort the truth. Problems have even been known to arise between a lawyer and his own client. The commentary to Model Rule 4.1 provides an excellent example of the permissible boundaries of a lawyer's deception. Several years ago, many called for a rule requiring truthfulness; however, others were persuasive contending that some "puffing" is part of negotiation and should not be prohibited. The inability of enforcement was another concern. Consequently, the current model rule, through its commentary, appears to allow a wide range of deception. And despite requests, Ethics 2000 declined to make changes.

Requests for an ethic of honesty for lawyers have been made generally, as well as in the specific context of negotiation and mediation. The truthful disclosure of relevant information has been recognized as vital to the realization of mutually-acceptable settlements, commonly the end result of a mediation or negotiation. Although honesty or truthfulness may sometimes be considered an element of good faith or another ethic such as altruism, there may be good reason to isolate this aspect of conduct, particularly in light of the implicit endorsement of deceit provided by Rule 4.1.

In fashioning a specific rule for truthfulness, one consideration may be the suggestion of a broad generalization, such as the application of a "Golden Rule of Candor." Another option is to establish a bright line or explicit rule regarding what information must be disclosed and what cannot be concealed. Specificity may be necessary to change the current "conventions in negotiation," which explicitly permit puffery and fail to draw any instructive lines that provide boundaries that may not be crossed.

An ethic of honesty would require that lawyers who represent clients in problem solving activities be truthful with one another. As such, each could then rely on the other's contentions, disclose interests and priorities, and efficiently find alternatives to jointly maximize gains. This would also serve a secondary purpose—setting aside contracts on the basis of fraud would likely be eliminated. Such an ethic would also obligate lawyers not to permit clients to lie or mislead. While objections to such a truthfulness standard have been articulated, particularly regarding difficulty of enforcement, such is the case in most ethics debates. The complexity of the issue, however, should not be the determining factor in considering rule creation.

C. A GOOD FAITH STANDARD

Despite the frequent use of the term, the concept of *good faith* is not a uniform one. Instead, it conveys a number of different ideas to different people. This lack of clarity has been problematic in attempting to establish a standard of good faith in a variety of contexts. Nonetheless, the term is used with increasing frequency in discussions of legal representation, negotiation, and mediation, as well as in general dealings. Specificity in definition, at least initially, will be necessary in order to provide useful and beneficial guidance.

In some instances, standards of good faith participation in ADR, mediation, and negotiation have been advocated. Transactional practice has also seen a call for good faith, specifically in negotiations. A detailed discussion, including both the advantages and disadvantages to such an approach, may be found elsewhere. While good faith is included here as an ethical standard, courts have also considered good faith in the context of a lawyer's conduct in specific situations, including statutory mandates for mediation.

Good faith in negotiation, mediation, and problem solving involves a number of behaviors, which I have delineated elsewhere. The presence (or absence) of good faith may be realized from the "totality of the circumstances" of a willingness on the part of the participants to be open to another perspective. This does not mean that the parties must agree with each other, only that an attempt is made to listen and understand other viewpoints presented. At the very least, parties should not summarily reject, without consideration, what the other side has to say. A good faith standard may also necessitate or overlap with several other ethical principles, such as empathy, care, honesty, and communication.

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D. COMMUNICATION

Communication is essential to negotiation, mediation, and problem solving. Communication is essential for all human interaction. Consequently, communication is another important factor to consider for inclusion in ethical guidelines for the lawyer representative. This ethical element of communication should be distinguished from current requirements that lawyers communicate with clients about the matters in which they are involved. Certainly such communication is imperative in the lawyer-client relationship; and while it is included as an ethical requirement, it is done so without a real focus on the process, or methods and manners of communicating. In this context, then, a communication ethic might examine the "process" of communicating.

Demonstrating communication skills through active participation, sincere listening and questioning, and exhibiting empathy are important in all types of representation. Such focus has been emphasized in clinical law teaching. In non-adversarial roles, this becomes even more critical and extends beyond the communication between the lawyer and client to that which takes place across and around the table. Skillful communication improves the ability of the parties, with their lawyers, to determine areas of mutual interest, which may produce integrative potential for problem solving. Discovering interests is often a key to achieving mutually-agreeable resolutions or outcomes, whether in a dispute resolution or transactional context. Listening is often a primary element of resolution. Individuals involved in conflict quite often desire that someone listen to their concerns. Problem solving can be quite effective if the other parties at the table, including the lawyers, listen to one another. This may also result in increased opportunities for creative solutions, especially those including non-monetary matters such as acknowledgments and apologies. Specifically, this ethic would emphasize listening in order to understand the other's thoughts, feelings, and desires.

An ethic involving the process of communicating recognizes that the basis for all human relationships is communication itself. Such an ethic may

require additional teaching and training in communication skills and methods. Innovative ethical standards may also embrace an empathy ethic which intersects with communication. For example, empathic listening is often considered part of the communication process. In order to illuminate empathy, however, there may be wisdom in advocating the enactment of a separate ethic of empathy.

E. EMPATHY

The notion of empathy in practice, as well as its role in legal education, has been documented. Empathy involves the ability to recognize, relate to, or understand the emotions and experiences of another person, often leading to feelings of sympathy and compassion.

Arguments have been made that one can understand a situation, though he may not have the feelings himself. As such, an ethic of empathy may encompass "the ability to imagine the experiences of others and to participate in their sufferings." At the same time, however, one must remain aware of his differences from the other party, as in many cases a sense of false empathy may be conveyed that may threaten the parties' relationship.

Although some critics have argued against empathy having any role in the legal process, it can have a positive and powerful effect on client representation. Empathy is an important component in most types of representation as evidenced by the discussions in clinical settings. The previous reflections on empathy in lawyering have centered mostly on the empathy that a lawyer may demonstrate for his client, or, in some instances, for witnesses. For example, a lawyer may exhibit empathy to a client who is underprivileged, in an attempt to better understand her situation. In the case of non-adversarial representation, or in those instances where the parties and the lawyers are working together collaboratively in an attempt to problem solve, this empathy should not be limited to one's client, but rather extended to all participants. Only in this way can everyone involved obtain a better understanding of not only the situation, but can do so from each person's individual perception and view.

While an ethic of empathy may not guarantee specific conduct, it may lead to increased awareness and practice of such skills and behaviors. As part of an empathy ethic, it is also important to acknowledge feelings and emotions generally; particularly their role in the various processes in which the lawyer may engage. Research continues to reveal that emotions have an immense impact on a variety of lawyering tasks. For example, mood and emotion can influence the outcome of a negotiation; and more generally, emotions can have great impact on the decision-making of lawyers, as well as their clients.

Emotions also frequently impact the relational dynamics, not just the lawyer and client interactions, but all parties to the transaction or problem-solving process. Because of such influence, it seems logical that lawyers be obligated to be aware and consider the impact of emotion, including but not limited to empathy when engaged in representation. Others have recognized a need for an emotional range in lawyers, noting that it is often absent. This element could likely be a subpart of the care ethic, although a separate ethic of emotional recognition would place more emphasis on the importance of this ability. The skill to recognize human emotions may be included in a number

of ethical considerations, but a distinct consideration will likely highlight such conduct.

F. ALTRUISM

There may be merit in examining a separate ethic of altruism as well. This is similar to the ethic of care, as one's focus is on another. Putting empathy into action is one way in which altruism is illustrated. Application of a "Golden Rule" for lawyering may also emerge in the concept of the altruism ethic. Altruism in this sense is not only to engage in pro bono work or representation of indigent individuals, but also to feel a sense of service and dedication and commitment to the profession. In some ways, to be altruistic with regard to others also assists in forming and regaining the service or helping profession aspect that law practice was formerly considered.

G. TRUST AND RESPECT

Trust and respect are additional ethical considerations which would have a positive impact and influence upon the work of the lawyer in a variety of settings. Often, a lack of trust is the result of the use of Rambo and over-zealous type tactics. This then contributed to a less than collaborative response and a competitive and argumentative approach to the situation is put into action, in a spiral that rarely ends. Yet, when engaged in non-adversarial approaches, it is vital to the process that the parties work with one another in a trusting and confident manner.

Trust often serves as the basis for relationships, both personal and professional. Disputes and difficulties often arise, at least in part, due to a lack of trust or mistrust. Placing focus on building trust, or in some instances repairing it, can assist a great deal in moving the parties in a constructive direction in a problem solving process. There have been studies examining a variety of types of trust, and how they are built and repaired. While detail on the subject is beyond the scope of this article, suffice it to say that a requirement or ethic of trust would involve more than merely a comment about trustworthiness. A deeper understanding of the nuances of trust leads to a more constructive approach to such a condition.

Respect for others is virtuous and integral to good working relationships. While respect or respectful conduct can be viewed as part of other ethical guidelines, it is beneficial to single out this quality. Respect can reside in one's internal feelings, perhaps the purest form of respect. Alternatively, respect can be derivative of one's external actions. Although it is true that the inner feelings of respect cannot be demanded or prescribed while the actions can, another view examines respect as one combined of feelings and reason. As such, it may, in fact be possible to guide lawyers toward a more respectful conduct, particularly when engaged in non-adversarial representation.

H. OTHERS

Additional ethical standards that might need to be considered include an ethic of cooperation or collaboration. Although this may be deemed integral to other ethical precepts such as good faith and care, at least as we initiate discussions and proposals, it may be helpful to delineate such components in detail. An ethic of cooperation or collaboration may require communication

and understanding—but not necessarily agreement—of the other's point of view.

Although implied in terms of the mediation and problem-solving processes as well as collaborative lawyering, a more detailed and explicit aspect of such approaches would also assist in the necessary changes to approach.

JEFFREY KRIVIS, *THE TRUTH ABOUT DECEPTION IN MEDIATION*

4 Pepperdine Disp. Resol. L.J. 251-8 (2004).

Deception can best be described as the raw material which drives negotiation of litigated cases. It allows barriers to be overcome and concessions to occur. It can mean anything from mild exaggeration to lying and outright fraud. The spectrum of possibilities appears below:

- Honesty
- Exaggeration
- White Lies
- Partial Disclosure
- Silence as to Other Party's Mistake
- False Excuses
- Fraud

Deception is part of the human condition and it would be a mistake to dismiss it as improper, particularly when resolving litigated disputes. The exception of course would be outright fraud, which is by necessity illegal and unethical in all contexts. While candor and honesty are preferred when parties are concerned about ongoing relationships, it is unrealistic to expect litigators to be candid when the goal is to get as much as they can for their client.

In other contexts, white lies and exaggerations have actually become a part of our social framework and are not only considered acceptable in certain situations but are expected when they result in righting a human wrong, maintaining fairness or avoiding harm. For example, the government uses spies and undercover agents, which is a form of deception, yet it is morally acceptable because it is necessary to stop crime, catch criminals and protect the country. Politicians often exaggerate or make promises that they can't keep, yet they will be reelected for the next term. Parents tell very tall tales to their children about the tooth fairy, Santa Claus, the Easter bunny and other childhood fantasies because our society does not see this form of deception as destructive. When a family pet dies, parents often give their children fabricated explanations to protect them from having to deal with the difficult challenges of death.

Most people are guilty of some form of deception every day. How often do we turn down a dinner invitation and give a false excuse? Or answer "fine" when a co-worker asks, "how are you doing?" when in fact we are having a tough day. How about telling someone that an outfit looks good when it doesn't or offering thanks for a gift that you really don't want? These are all considered acceptable forms of deception. Our culture reinforces the idea that

telling a white lie is better than hurting someone's feelings, if it results in a positive outcome or makes the situation less difficult. Deception is tolerated in negotiations because there, too, it can be used constructively and productively to develop concessions that lead to agreement.

DECEPTION EXISTS AS PART OF THE COMPETITIVE MARKET

One of the central reasons why the occasional white lie is tolerated is that competition in our society promotes an atmosphere of freedom of choice and enables buyers and sellers to define the limits of acceptability. The foundation upon which this environment exists is the age old principle that the "buyer should beware." Competition will reward those individuals who seek to get the best deal often at the expense of the other party. In trying to get the best deal for a client, some forms of deception are tolerated within the marketplace of ideas, as long as individuals are not being fraudulent. There is no law against stretching the spectrum of deception in order to get a good deal.

An individual who utilizes competitive strategies is often believed to be using "shrewd business tactics" or referred to as a "good businessman." A car buyer shopping at the dealership hardly expects the salesman to be straightforward about his true selling price of a new vehicle. The buyer and the seller engage in a series of maneuvers designed to benefit the one who exploits the weakness in the other. It is not surprising that the dealer will inflate the sticker price and the seller will underestimate his willingness or ability to pay. Both parties maneuver closer to each other in a series of moves in order to meet somewhere in the middle. Whoever is the best negotiator will be rewarded with a larger piece of the remaining prize. As long as the negotiation moves are not fraudulent, deceptive techniques tend to be the engine that drives the motor of litigated negotiations. Our culture has established civil liabilities and criminal punishment for those who cross the limits of acceptability, but where the laws are silent, parties have a license to engage in these competitive strategies.

LAWYERS USE DECEPTION TO GET THE MOST FOR THEIR CLIENT

The litigated case is much like a game of cards. It is not necessary to have the best hand to win but simply to be a better player of the game. Technique and skill are often more important than a great hand. A good card player can improve his winnings if the other player overestimates his hand. Similarly, a negotiation can be more profitable to an attorney if the other party overestimates his case. One who tricks his opponent is sometimes able to capture more value for his client as part of the bargaining process, provided the trick is not a material misrepresentation. Of course, the risk of misleading an opponent is both shame to the lawyer's reputation, and possibly an ethical violation.

DECEPTIVE TECHNIQUES USED BY ATTORNEYS IN NEGOTIATION

Within the typical negotiation process there are various forms of deception that attorneys have come to rely on. Some examples include: concealing the willingness to settle and/or the bottom line, making inflated demands, exaggerating strengths and weaknesses, concealing client intentions, claiming a lack of authority, and failing to volunteer relevant facts.

1. Concealing the willingness to settle/bottom line

The most common technique for an experienced negotiator is to conceal the bottom line as long as possible. By keeping the other party in the dark about the bottom line price, a negotiator maintains an element of doubt and uncertainty in the mind of the opponent. An attorney may state that his client will not accept less than one number, yet be perfectly happy leaving with significantly less at the end of the day. By positioning himself at a certain high price level, he is engaging the other side in a competitive match of numbers.

2. Making inflated demands

In this scenario, the negotiation often starts with both parties giving inflated demands which are implicitly understood to change over the course of the negotiation. Concessions are usually calculated prior to the negotiation, designed to reach a settlement price at which they are comfortable. If a party is seeking a \$50,000 settlement they may only offer \$20,000 at the opening because they know the opposition is demanding \$100,000. By conducting a negotiation involving a series of concessions they can hope to reach their \$50,000 limit by strategically moving their numbers in correlation to their opponents. Both parties rise and fall never really knowing the other side's true number.

3. Exaggerating strengths and weaknesses

By making a case appear stronger, a negotiator puts pressure on the other side to make another concession. If one party overestimates the strengths of the opponent's case then they are more likely to accept less or offer more. An inaccurate assessment of the other party's strengths will lead to more cooperative behavior and larger concessions. The exaggeration technique is successful when used primarily on issues of speculation and opinion of value which are often unknown. Lawyers typically understand that exaggeration at some level will exist on any case because it is based in large part on the perceptions of the parties.

4. Concealing client intentions

When a party is uncertain what is important to the other side, it can be difficult to place a value on the case. Many times the clients place a higher value on certain non-monetary items, and reaching this important goal is the primary concern. When a party hides the importance of a goal, the other side does not know its true value. Concealing the client's true intentions is a game of hide and seek, where each side is attempting to find out what is most important to the other. At some point the client's intentions must be revealed in order to test the probability of acceptance by the other side.

5. Claiming a lack of authority

A useful technique often found within litigated negotiations is the claim that the negotiator lacks full settlement authority. The attorney may state that she is still analyzing the case before the client is able to move past a specific number. The negotiator claims that anything more than the "authorized" number requires approval from higher-ups. This technique is used to force the opponent to lose confidence in himself so that he or she will settle

for less than they otherwise would. It is used to improve bargaining position without having to make another concession. Some attorneys have been clever enough to tell their clients not to give them authority to accept a specific amount until the negotiation is nearing its end.

6. *Failing to volunteer relevant facts*

The professional rules of ethics require parties to disclose certain information to the other side but when the parties are not required to disclose relevant facts, many attorneys will not give up information they are not required to reveal. If a party has a right to withhold certain information most will not disclose it to the other party. While this is not being fully honest, it is generally not considered unacceptable.

CASE STUDIES

GEOFFREY M. PETERS, *THE USE OF LIES IN NEGOTIATION*

48 Ohio St.L.J. 1, 8-13 (1987).

DISTINGUISHING LYING FROM OTHER DECEPTIONS

A Bargain for Frances, is a children's book about negotiation. The story concerns two children, Frances and Thelma. Frances is characterized as being trusting, naive, and virtuous. Thelma is a con artist. Frances goes to Thelma's house, where the two play with Thelma's plastic tea set with red flowers on it. Frances tells Thelma that she has saved \$2.17 towards the purchase of a china tea set with blue flowers. Thelma convinces Frances to buy her plastic tea set with red flowers for a price of \$2.17. She uses the following tactics:

1. Thelma argues that plastic tea sets are better than china tea sets even though Thelma secretly prefers china tea sets.

2. Thelma tells Frances that she does not believe china tea sets are available anymore, while Thelma knows that there is one for sale in the nearby candy store for \$2.07.

3. When Frances expresses interest in buying Thelma's tea set, Thelma says she does not want to sell it. The reader is left with the impression that Thelma secretly did want to sell it, even as she was telling Frances the contrary.

Upon returning home with the plastic tea set, Frances soon learns how Thelma has tricked her. Frances sets out to return the favor, but she does not sink to Thelma's level to do so. Thelma has used lies to trick Frances. Frances decides to trick Thelma back by using other forms of deception.

At this point Frances becomes very clever. She puts a penny in the plastic sugar bowl. She calls Thelma and points out to her that the "no backsies" clause in their sales agreement covers any contents as well as the set itself. She suggests to Thelma that there is something in the sugar bowl. Thelma concludes that what is presently in the sugar bowl was left there by her (Thelma). Frances has been able to create this impression without ever actually saying anything that is untrue in the absolute, objective, scientific

sense. Thelma continues lying. She claims that she left a ring in the bowl. Frances says it is not a ring. Then Thelma lies that she left some birthday money in the bowl. Frances admits that there is money in the bowl, but she does not have to tell Thelma how much. She does not respond to Thelma's guesses of \$2.00 and then \$5.00. Under the rules of no backsies, the only way Thelma can get back whatever was in the sugar bowl when she sold it to Frances is to buy the set back. She no longer has Frances' \$2.17, having spent \$2.07 of it on the china set with blue pictures. Frances agrees to take the china set plus ten cents for returning the plastic set to Thelma.

The reader is left with the sense that Frances has taught Thelma a lesson while maintaining her own virtue. She has not lied to Thelma. She has simply allowed Thelma to be misled by her own greed and deviousness. It is revenge at its sweetest. The bully has punched herself in the nose. Frances does not consider either kind of trickery to be "nice," but there is an unmistakable sense that Frances' trickery was within ethical bounds whereas Thelma's was not.

Legal literature dealing with negotiation makes the same distinction. Because lawyers function in a world structured by judges and legislatures, we should not be surprised to find rules designed to govern lawyers in their negotiations, and accompanying text regarding the special difficulty of using rules to regulate negotiation. But they are general and ill-defined enough to permit a very wide range of interpretations regarding appropriate negotiating behavior. Statutes require that certain negotiations be conducted in an open and candid manner. The American Law Institute's *Restatement of the Law* contains sanctions against dishonest negotiating, but it does not specify what is to be considered "dishonest." The *Model Rules of Professional Conduct* prohibit lawyers from lying in negotiations. Rule 4.1(a) provides that a lawyer, in the course of representing a client, cannot "[m]ake a false statement of material fact or law to a third person."

Scholarly and instructional writing in the area rarely addresses the distinction directly, although it is often implicit in their writings. Although I find the idea of definitions dangerous, I will offer working definitions of "lying" and "deception" here to facilitate the recognition of the distinction in writings about negotiation. A "lie" is a false statement made by one who knows its falsity and with the intent to deceive another as to the truth. A "deception" is any other method of concealing the truth, including silence.

Kronman analyzes the famous case of *Laidlaw v. Organ* in his analysis of the law of fraud. According to Kronman, the case involved Organ's sale of tobacco to Laidlaw. The War of 1812 had driven the price of tobacco down. At the time of the formation of the contract to sell, Organ knew that the war had just ended and that Laidlaw did not know. As soon as the news of the war's ending got out, the price of tobacco rose dramatically. Before entering into the contract to sell, Laidlaw had "asked if there was any news which was calculated to enhance the price or value of the article about to be purchased." Kronman then distinguishes between two possible responses, each of which would have succeeded in protecting his ability to exploit his knowledge that the war had ended. Organ could have answered that he had no such knowledge—a lie, or he could have somehow cleverly avoided answering in such a way that the suspicions of Laidlaw would not have been aroused—a

deception. Kronman notes that the path of clever avoidance would be sanctioned by the law, while the path of direct denial would have been disapproved of as a fraud.

Wenke says,

It is common for a party to alter a position that earlier has been represented as nonnegotiable. This practice is considered to be *bluffing* rather than *lying*.

It is important to note, as Wenke does, that what distinguishes puffing from lying is that the statement is not expected to be believed in what might be considered a "literal" sense. For example, the rug salesman at Bok's Eastern bazaar does not lie when he says the rug is a priceless heirloom that you would be lucky to buy at the asking price. The reason is that the salesman does not expect you to believe the literal meaning of the statement. He expects that his statement will make you believe that the salesman probably is unwilling to reduce his price much. The statement would not be a lie, even if the salesman is, in fact, willing to come down dramatically. Yet the statement is meant, like all puffing, to deceive.

I think Raiffa and Sperber can be interpreted similarly. Raiffa says:

A common ploy is to exaggerate the importance of what one is giving up and to minimize the importance of what one gets in return. Such posturing is part of the game. In most cultures these self-serving negotiating stances are expected, as long as they are kept in decent bounds. Most people would not call this "lying," just as they would choose not to label as "lying" the exaggerations that are made in the adversarial confrontations of a courtroom. I call such exaggerations "strategic misrepresentations."

Sperber says:

Most negotiators use tactics which to outsiders could be considered lying and therefore dishonest. The criteria for judging an action is not what some third party believes but what is actually meant or perceived by the parties conducting the negotiations. If the other side understands the representation is merely an exaggeration and not a representation, then it is a perfectly acceptable tactic [whose effectiveness nonetheless depends on its ability to deceive] to be utilized. If in fact the other side accepts the proposal because of its belief in what is being said, then it is a misrepresentation of a material fact, it is unethical, and the result is an unenforceable agreement.

Fisher and Ury evidence their disapproval of lying by including such statements in their list of "dirty tricks." Fisher and Ury use "deliberate deception" where I would use "lie." This can be seen from the language following immediately after the heading "Deliberate deception," which reads,

Perhaps the most common form of dirty trick is misrepresentation about facts, authority, or intentions. . . . The oldest form of negotiating trickery is to knowingly make some false statement: "The car was driven only 5,000 miles by a little old lady from Pasadena who never went over 35 miles per hour."

Fisher and Ury list two other examples of deceptions, each of which involve lies. They refer to the "dirty trick" of "announc[ing] that they [the dirty tricksters] must take it [a purported agreement] to someone else for approval," and to the "dirty trick" of falsely asserting one's intention to comply with an agreement. Having disapproved of these lies, Fisher and Ury approve of other methods of deception in their approval of intentional concealment of the truth. "Good faith negotiation does not require total disclosure."

Dudley addresses the problem faced by a negotiator with a weak position. The simplest and most effective way to conceal that weakness would be to lie about it, claiming a strong position. Instead he suggests concealing the weakness "under extra details and the affect of style. . . . This style deflects the specific inquiry as well as it aids the inflation of your meager strengths."

All of this is meant to show that although the rules of negotiations among lawyers are not elaborately set out in a single governing statute, it is possible to discern conventions of a less formal nature that govern nonetheless. Among these conventions, which have something in common with rules of etiquette and good manners, is one that forbids the telling of lies while it approves the use of other deceptive tactics aimed at concealing the truth.

JAMES J. WHITE, *MACHIAVELLI AND THE BAR: ETHICAL LIMITATIONS ON LYING IN NEGOTIATION*

1980 Am.Bar Found.Res.J. 926, 931-35.

FIVE CASES

Easiest is the question that arises when one misrepresents his true opinion about the meaning of a case or a statute. Presumably such a misrepresentation is accepted lawyer behavior both in and out of court and is not intended to be precluded by the requirement that the lawyer be "truthful." In writing his briefs, arguing his case, and attempting to persuade the opposing party in negotiation, it is the lawyer's right and probably his responsibility to argue for plausible interpretations of cases and statutes which favor his client's interest, even in circumstances where privately he has advised his client that those are not his true interpretations of the cases and statutes.

A second form of distortion that the Comments [to proposed Model Rule 4.2] plainly envision as permissible is distortion concerning the value of one's case or of the other subject matter involved in the negotiation. Thus the Comments make explicit reference to "puffery." Presumably they are attempting to draw the same line that one draws in commercial law between express warranties and "mere puffing" under section 2-313 of the Uniform Commercial Code. While this line is not easy to draw, it generally means that the seller of a product has the right to make general statements concerning the value of his product without having the law treat those statements as warranties and without having liability if they turn out to be inaccurate estimates of the value. As the statements descend toward greater and greater particularity, as the ignorance of the person receiving the statements increases, the courts are likely to find them to be not puffing but express warranties. By the same token a lawyer could make assertions about his case or about the subject matter of his negotiation in general terms, and if those proved to be

inaccurate, they would not be a violation of the ethical standards. Presumably such statements are not violations of the ethical standards even when they conflict with the lawyer's dispassionate analysis of the value of his case.

A third case is related to puffing but different from it. This is the use of the so-called false demand. It is a standard negotiating technique in collective bargaining negotiation and in some other multiple-issue negotiations for one side to include a series of demands about which it cares little or not at all. The purpose of including these demands is to increase one's supply of negotiating currency. One hopes to convince the other party that one or more of these false demands is important and thus successfully to trade it for some significant concession. The assertion of and argument for a false demand involves the same kind of distortion that is involved in puffing or in arguing the merits of cases or statutes that are not really controlling. The proponent of a false demand implicitly or explicitly states his interest in the demand and his estimation of it. Such behavior is untruthful in the broadest sense; yet at least in collective bargaining negotiation its use is a standard part of the process and is not thought to be inappropriate by any experienced bargainer.

Two final examples may be more troublesome. The first involves the response of a lawyer to a question from the other side. Assume that the defendant has instructed his lawyer to accept any settlement offer under \$100,000. Having received that instruction, how does the defendant's lawyer respond to the plaintiff's question, "I think \$90,000 will settle this case. Will your client give \$90,000?" Do you see the dilemma that question poses for the defense lawyer? It calls for information that would not have to be disclosed. A truthful answer to it concludes the negotiation and dashes any possibility of negotiating a lower settlement even in circumstances in which the plaintiff might be willing to accept half of \$90,000. Even a moment's hesitation in response to the question may be a nonverbal communication to a clever plaintiff's lawyer that the defendant has given such authority. Yet a negative response is a lie.

It is no answer that a clever lawyer will answer all such questions about authority by refusing to answer them, nor is it an answer that some lawyers will be clever enough to tell their clients not to grant them authority to accept a given sum until the final stages in negotiation. Most of us are not that careful or that clever. Few will routinely refuse to answer such questions in cases in which the client has granted a much lower limit than that discussed by the other party, for in that case an honest answer about the absence of authority is a quick and effective method of changing the opponent's settling point, and it is one that few of us will forego when our authority is far below that requested by the other party. Thus despite the fact that a clever negotiator can avoid having to lie or to reveal his settling point, many lawyers, perhaps most, will sometime be forced by such a question either to lie or to reveal that they have been granted such authority by saying so or by their silence in response to a direct question. Is it fair to lie in such a case?

Before one examines the possible justifications for a lie in that circumstance, consider a final example recently suggested to me by a lawyer in practice. There the lawyer represented three persons who had been charged with shoplifting. Having satisfied himself that there was no significant

conflict of interest, the defense lawyer told the prosecutor that two of the three would plead guilty only if the case was dismissed against the third. Previously those two had told the defense counsel that they would plead guilty irrespective of what the third did, and the third had said that he wished to go to trial unless the charges were dropped. Thus the defense lawyer lied to the prosecutor by stating that the two would plead only if the third were allowed to go free. Can the lie be justified in this case?

How does one distinguish the cases where truthfulness is not required and those where it is required? Why do the first three cases seem easy? I suggest they are easy cases because the rules of the game are explicit and well developed in those areas. Everyone expects a lawyer to distort the value of his own case, of his own facts and arguments, and to depreciate those of his opponent. No one is surprised by that, and the system accepts and expects that behavior. To a lesser extent the same is true of the false demand procedure in labor-management negotiations where the ploy is sufficiently widely used to be explicitly identified in the literature. A layman might say that this behavior falls within the ambit of "exaggeration," a form of behavior that while not necessarily respected is not regarded as morally reprehensible in our society.

The last two cases are more difficult. In one the lawyer lies about his authority; in the other he lies about the intention of his clients. It would be more difficult to justify the lies in those cases by arguing that the rules of the game explicitly permit that sort of behavior. Some might say that the rules of the game provide for such distortion, but I suspect that many lawyers would say that such lies are out of bounds and are not part of the rules of the game. Can the lie about authority be justified on the ground that the question itself was improper? Put another way, if I have a right to keep certain information to myself, and if any behavior but a lie will reveal that information to the other side, am I justified in lying? I think not. Particularly in the case in which there are other avenues open to the respondent, should we not ask him to take those avenues? That is, the careful negotiator here can turn aside all such questions and by doing so avoid any inference from his failure to answer such questions.

What makes the last case a close one? Conceivably it is the idea that one accused by the state is entitled to greater leeway in making his case. Possibly one can argue that there is no injury to the state when such a person, particularly an innocent person, goes free. Is it conceivable that the act can be justified on the ground that it is part of the game in this context, that prosecutors as well as defense lawyers routinely misstate what they, their witnesses, and their clients can and will do? None of these arguments seems persuasive. Justice is not served by freeing a guilty person. The system does not necessarily achieve better results by trading two guilty pleas for a dismissal. Perhaps its justification has its roots in the same idea that formerly held that a misrepresentation of one's state of mind was not actionable for it was not a misrepresentation of fact.

In a sense rules governing these cases may simply arise from a recognition by the law of its limited power to shape human behavior. By tolerating exaggeration and puffing in the sales transaction, by refusing to make misstatement of one's intention actionable, the law may simply have recog-

nized the bounds of its control over human behavior. Having said that, one is still left with the question, Are the lies permissible in the last two cases? My general conclusion is that they are not, but I am not nearly as comfortable with that conclusion as I am with the conclusion about the first three cases.

Taken together, the five foregoing cases show me that we do not and cannot intend that a negotiator be "truthful" in the broadest sense of that term. At the minimum we allow him some deviation from truthfulness in asserting his true opinion about cases, statutes, or the value of the subject of the negotiation in other respects. In addition some of us are likely to allow him to lie in response to certain questions that are regarded as out of bounds, and possibly to lie in circumstances where his interest is great and the injury seems small. It would be unfortunate, therefore, for the rule that requires "fairness" to be interpreted to require that a negotiator be truthful in every respect and in all of his dealings. It should be read to allow at least those kinds of untruthfulness that are implicitly and explicitly recognized as acceptable in his forum, a forum defined both by the subject matter and by the participants.

REX R. PERSCHBACHER, *REGULATING LAWYERS' NEGOTIATIONS*

27 Ariz.L.Rev. 75, 77-9, 137-38 (1985).

Although there is no lawyers' code of negotiation ethics, there are rules regulating how negotiations may be conducted and how negotiators must conduct themselves with their clients and their adversaries. Two examples illustrate the problem of the possible gulf between technically effective and ethically proper negotiation conduct. The lawyer representing a defendant in a civil case has been instructed by her client to accept any settlement offer under \$100,000. The plaintiff's lawyer tells her, "I think \$90,000 will settle this case. Will your client give \$90,000?" The defendant's lawyer is in a bind. If she answers truthfully she forecloses further negotiation and the possibility of a much lower settlement. If she lies about what her client will do, she may well benefit her client. But is it proper for the lawyer to lie?

Consider further the case of a lawyer representing the proposed buyer of a financially distressed business. After initially showing an interest in accepting the seller's asking price of \$90 million, the lawyer and his client, knowing there are no other likely buyers, agree on a strategy of delay in reaching final agreement in order to take advantage of the seller's deteriorating business prospects. As a result, the seller eventually accepts the buyer's offer of \$45 million. As a bargaining technique the strategy is successful; the buyer has obtained the business at half the original asking price. But in doing so the lawyer may have breached a duty of fairness owed to others in negotiations to bargain in good faith.

These cases are difficult because the lawyers' roles as client advocate and ethical practitioner appear inconsistent and lead to different results. But they are difficult only on the assumption that the law does not resolve the conflict of roles. A factor is missing from these cases, one usually as important to the lawyer as knowing what technique will be most effective and what the rules of professional ethics will allow. That factor is the law—the

legal effects of each of the choices involved. The choices may not be any easier, but would not the litigation lawyer want to know whether misrepresenting her client's instructions to the plaintiff may, if discovered, make the resulting agreement voidable or expose her or her client to an action for fraud? Would she not want to know whether, by making the misrepresentation, she risked a suit by her own client for failing to follow instructions, or whether she may be liable for malpractice if no settlement results and the case must be tried?

Similar issues arise for the buyer's lawyer. Will the agreement finally reached be enforceable, or can it be avoided by the seller on the ground of duress? Does the lawyer, alone and with the buyer, risk liability to the seller for the economic harm that is suffered? Is the lawyer liable for malpractice if the agreement is avoided or if the buyer is found liable to the seller?

The examples pose basic questions regarding a lawyer's responsibility for the conduct of negotiations—the kinds of questions a “law of lawyers’ negotiations” should answer. The examples also disclose the basic relationships such a law must address: (1) negotiators’ relations with their clients, and (2) negotiators’ relations with adversaries and other third parties.

* * *

When lawyers act as negotiators for their clients they are themselves subject to the commands of the law. To determine what the law requires, a lawyer-negotiator needs to consider two sets of obligations—those owed to the client, and those owed to other parties to the negotiation. In dealing with clients, the rules of contract, torts, and agency law regulate and restrict lawyers’ freedom to act independently and require close consultation with clients. Lawyers must act within their authority and obey reasonable instructions from their clients, who possess final decisionmaking responsibility over the objectives of the representation. Lawyers must provide clients with all material information to make those decisions, keep them informed of the progress of the negotiations, and act competently and diligently in pursuing clients’ interests.

Thus the lawyers in the two cases mentioned at the beginning of this Article must act according to their clients’ instructions and overall objectives. If settlement for \$100,000 (or less) is possible in the civil case, the lawyer must settle; if the client buyer in the business sale hypothetical wants negotiations prolonged, the lawyer must follow that instruction unless he determines it is unreasonable or unethical. The lawyer’s professional obligation gives him a privilege to refuse to obey improper directions and instead withdraw as counsel. Apart from any specific instructions, lawyers are free to conduct the negotiations using reasonable judgment so long as they act for the benefit of their clients. The civil defendant’s lawyer in the opening hypothetical should convey the significant information just learned from the plaintiff’s lawyer—that the plaintiff is willing to settle for \$90,000 (or less)—to her client if it is reasonable to do so. The facts suggest the plaintiff’s lawyer wants an immediate answer. Hence, bargaining for a better settlement is a reasonable method of proceeding so long as the defendant’s lawyer does not jeopardize the acceptable settlement already offered. Acting within these

limits satisfies these lawyers' obligations to their clients under the circumstances.

* * *

Under these standards, the litigation lawyer and business lawyer discussed above are each at risk in dealing with their adversaries. Respectively, the hypotheticals raise serious legal issues of negotiator misrepresentation and coercive bargaining practices in negotiations. This Article points out that the hypotheticals raise the equally troublesome issue of lawyers' misrepresentations in negotiations. With the limited facts available, there is no sure answer to the question whether this conduct may expose the lawyers to liability for damages to the other parties. However, in the hypothetical civil case it is clear that if the defendant's lawyer misrepresents her client's intention—"No, my client won't give \$90,000"—the lawyer has made a fraudulent misrepresentation by which she hopes to obtain a settlement more favorable to her client. If she does do better than \$90,000, in part because of the misrepresentation, whether it makes the settlement voidable or not in turn depends upon whether plaintiff's reliance was justified.

* * *

In the hypothetical sale of business case, there is a strong possibility that the application of economic pressure and delay for the purpose of enhancing that pressure will make the agreement voidable for duress. On the other hand, there is no real likelihood that the lawyer faces monetary exposure to the third party for his conduct.

It is more difficult to gauge lawyers' potential liability to their clients for their actions. In the hypothetical civil litigation case, if the defendant's lawyer is candid with her opponent, the client could possibly show the lawyer was acting unreasonably in not seeking a more favorable settlement and that a more favorable settlement was possible using adversarial bargaining. In the sale of business example, if the buyer's lawyer chooses the pressure strategy and it taints the agreement, he faces a potential malpractice claim. The argument would be that a reasonably skillful lawyer should know the limits of coercive bargaining (the law of duress) and apply enough pressure to be effective, but not enough to endanger the agreement. In both cases the lawyers' difficulties are easily avoided by consulting the clients in advance and discussing possible strategies in the negotiations. As is often the case, lawyers' real problem with their clients is lack of communication, not incompetence.

Becoming familiar with the legal regulation of negotiation will not solve many of the dilemmas lawyers encounter there. What it does do, however, is to give lawyers their most valuable tool—the law—to take into account while calculating the consequences of their conduct for their clients, other parties, and, most importantly, for themselves. Lawyer-negotiators need to be as rigorous, as thorough, and as dispassionate in examining the legal consequences of their alternative courses of action as they are in assessing the legal consequences of the client's choices.