



2007

Representative Negotiator of Integrity

Frederick H. Zemans

Osgoode Hall Law School of York University, fzemans@osgoode.yorku.ca

Source Publication:

Theory and Practice of Representative Negotiation. Toronto, ON: Emond Montgomery, 2007.

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/scholarly_works

Recommended Citation

Zemans, Frederick H. "Representative Negotiator of Integrity." Hanycz, Colleen, Frederick H. Zemans, and Trevor C. W. Farrow, eds. Theory and Practice of Representative Negotiation. Toronto, ON: Emond Montgomery, 2007. p. 101-136. ISBN: 9781552392645

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

Representative Negotiators of Integrity

Frederick H. Zemans

“Negotiation is a moral and ethical process, worthy of deep philosophical, political, legal and human respect.”

Carrie Menkel-Meadow¹

The Ethical Representative Negotiator

There is virtually no negotiation—personal, professional, or in the workplace—where ethical and moral issues do not arise. This chapter explores whether there are or should be accepted ethical and moral expectations and standards for representative negotiators.

Kevin Gibson describes negotiation as a “value-based enterprise,” and argues that negotiation necessarily involves questioning the nature of our personal values. In each negotiation, negotiators must make conscious decisions about the process they will use and the posture they will adopt. These decisions reflect personal values with respect to moral issues such as fairness, rights, and justice.² We would argue that such decisions become even more complex in the context of representative negotiation.

CHAPTER OUTLINE

- The Ethical Representative Negotiator, 101
- Scenarios Involving Moral and Ethical Issues, 102
- Competing Impulses in Negotiation, 104
- The Protean Negotiator, 105
- A Look at Our Own Moral and Ethical Compass, 110
- Integrity in Negotiation, 113
- Can Answers Be Found in Codes of Conduct? 127
- After the Negotiation, 134
- Notes and Questions, 135
- Selected Further Reading, 136

1 C. Menkel-Meadow, “The Ethics of Compromise” in A.K. Schneider & C. Honeyman, eds., *The Negotiator’s Fieldbook* (Washington, DC: ABA Press, 2006) 155 at 156.

2 K. Gibson, “Ethics and Morality in Negotiation” in A.K. Schneider & C. Honeyman, eds., *The Negotiator’s Fieldbook* (Washington, DC: ABA Press, 2006) 175.

The terms *morality* and *ethics* are often used interchangeably in the discussion of integrity in negotiation. However, *morality* refers to personal values, learned at home, at school, and in religious, cultural, and social communities; these values pertain specifically to what Gibson describes as the “quality of being virtuous.”³ Moral conduct is behaviour that has “virtue”—conformity to the ideals of right human conduct based on principles of right and wrong.⁴ *Ethics* refers to “a set of moral principles: a theory or system of moral values ... moral issues or aspects (such as rightness) or a consciousness of moral importance.”⁵ Ethical conduct is behaviour that is honourable and reflects moral principles. In the context of the workplace or a profession, ethical conduct is generally referred to as “practical ethics” or “applied ethics.” A number of private and public sector organizations have developed codes of ethical conduct that set standards for dealing with matters such as sexual harassment, confidentiality, and fraud. These organizations include the provincial and national bar associations, provincial law societies, local real estate boards, municipalities, and major employers. We discuss codes of ethics and their role in answering moral and ethical dilemmas later in this chapter.

Scenarios Involving Moral and Ethical Issues

Consider the following scenarios. How would you address the moral and ethical issues they raise?

1. You are graduating from university and have decided to sell your five-year-old Vespa. (Your grandparents have offered you their car to allow you to explore Central America and to celebrate your graduation with honours in History.) You placed an ad on a local website and Leslie responds by email that she is interested. You listed the Vespa at \$5,500. Leslie comes to see and test drives the Vespa and offers you \$4,000 cash. You have been told that the Vespa is worth about \$2,500 on a trade-in and needs some work done on the brakes. You are inclined to accept Leslie’s offer and not mention the brakes, particularly since Leslie is moving out of the province to undertake graduate work.
Is this a proper commercial negotiation? Would it make any difference if Leslie is a good friend?
2. You are looking for a summer job in northern Canada, after second-year law school. You have always had an interest in working on Aboriginal law issues and are hoping that you might be able to get a position in either the public or private sector. You are concerned about some of your grades in first-year law school. You found the

3 *Ibid.*

4 *Webster’s II, New Riverside Dictionary*, s.v. “morality.”

5 *Merriam-Webster Online Dictionary*, s.v. “ethics.”

adjustment to law school very difficult and were particularly stressed out for personal reasons during the final Christmas exams of first year. (Christmas final exams in first year are being abolished at many Canadian law schools because some faculties believe that Christmas is too early for law students to receive grades that will appear on their transcripts.) You were disappointed to receive a C in Contracts and a B in Criminal Law, which were two of your favourite courses. One of your professors told you that she regretted that the law school grade profile did not provide for pluses, as she would have given you a B+ in Criminal Law, if such a grade was available. You have prepared a resumé to send out to lawyers and law departments in Yellowknife and have changed your Contracts grade to C+ and your Criminal Law grade to B+.

Is this an ethical or moral course of action? Can this change be excused as mere exaggeration? What are your concerns? Do you think the change in grades is changing a material fact? What are the potential legal and personal implications? Would you change the grades in this situation?

3. You are visiting Barcelona for the first time with your new significant other and he admires a beautiful old pocket watch and chain in the street market in the square in front of your hotel. The antique dealer is an elderly woman who tells you that she is the widow of the dealer who operated the stand since the Second World War. She insists that the watch and chain are valuable and that the weight of the gold makes them worth at least US\$500. You don't believe the watch is that valuable but desperately want to impress upon your new significant other that he is very important to you. You talk to the antique dealer for some time and she indicates that 20 percent is the most that she can take off the price. You walk away and look at other watches in the market but don't find anything that you like as much. You return and tell the dealer that US\$200 in cash is all that you are prepared to offer. Your special friend indicates that he is prepared to kick in another US\$100 to get the watch, but you decline and start shouting at the dealer that she is being highly unreasonable and unresponsive to young Canadians. The dealer doesn't understand all of your English but becomes very flushed and embarrassed with your behaviour in the public market and finally agrees to sell the watch and chain for US\$275.

Is your behaviour appropriate? Have you negotiated ethically? How did the vendor feel about you after the sale? Would such behaviour be appropriate in attempting to negotiate the return of a pair of shoes to a local Canadian shoe store, in face of their well-known no return policy?

These scenarios are hypothetical, but they present moral and ethical issues that we commonly encounter in both our personal and professional lives. Consider these problems and reflect on potential issues that you may confront in your own negotiations while representing a friend, a colleague, or a stranger. Do moral and ethical issues become more complex when you are a representative negotiator and not merely representing yourself? Do the terms or basis of your retainer or representation change how you would and should behave in a negotiation? Is there a moral or ethical standard of behaviour that can guide your actions? Do the facts, circumstances, or relationships determine your approach and analysis of these issues?

Competing Impulses in Negotiation

Ethics, morality, and integrity are critical aspects of all negotiations. We begin our discussion of these aspects by considering how they are influenced by four fundamental, distinct, and competing impulses in negotiation.

Peter Adler believes that the diverse approaches to negotiation devolve into four basic schools of thinking about how humans behave in the face of real or imagined conflict:⁶

One presupposes that all of us are fundamentally competitive. A second assumes we are, at core, cooperative. A third takes for granted that all of us will seek to do what is morally correct. A fourth assumes we are rational and pragmatic.

These four impulses—pursuing your own fair share, uniting with others to achieve a common end, insisting on doing what is right, and using logic and reason to solve practical problems—seem to have evolutionary roots that date back to our origins on the African savannah.

In most negotiations, we can find the presence of and dynamic interaction among the competitive, cooperative, moral, and pragmatic impulses (see figure 5.1).

Each impulse carries different assumptions about human nature and lends itself to a particular negotiation strategy. In many chapters in this book, we explore the relationship between competitive and cooperative negotiation strategies, and when these strategies are generally exercised or should be exercised by negotiators. We also discuss the influence of culture, power, and gender on our inclination to be more or less competitive and cooperative in representative negotiations.

In this chapter, we examine the relationship and tensions between moral and pragmatic impulses in negotiation as well as the relationship between an ethical negotiating philosophy and competitive and cooperative negotiation strategies. Are cooperative or competitive negotiators more likely to act ethically or pragmatically in negotiation? How can negotiators determine what is ethical or moral in the context of a particular negotiation? Many negotiations begin with one side or the other saying, “It’s the principle of it!” That principle may be legal, ethical, religious, cultural, or based on the negotiator’s personal moral code. What room does this position leave for negotiation?

The pragmatic impulse, which is situated directly across from the moral impulse in figure 5.1, is based on rational problem-solving. This impulse tends to underlie approaches to interest-based negotiation. According to Adler, a great deal of the literature on interest-based negotiation

assumes that people know and understand their needs, that interests can be rationally and dispassionately analyzed, and that elegant if not super-optimum solutions can be found. Fisher and Ury’s famous dictums of separating the people from the problem, focusing on interests, generating possibilities, and insisting on objective criteria are an attempt to create a rational, if not quasi-scientific critical inquiry process that leads to a more easily negotiated result.⁷

6 P.S. Adler, “Protean Negotiation” in A. Kupfer Schneider & C. Honeyman, eds., *The Negotiator’s Fieldbook* (Washington, DC: ABA Press, 2006) 17 at 18. The discussion in this section and the next is based on Adler.

7 *Ibid.* at 21.

However, Gerald Wetlaufer, among others, is skeptical about the integrative approach that Fisher and Ury developed in their book *Getting to Yes*:

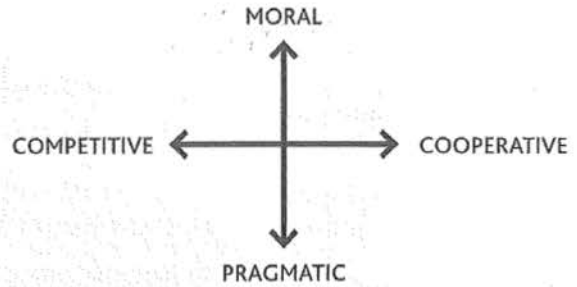
We have, in certain respects, allowed ourselves to be dazzled and seduced by the possibilities of integrative or 'win-win' bargaining. That, in turn, has led to a certain amount of overclaiming. The reason, I think, is that if we hold these possibilities in a certain light and squint our eyes just hard enough, they look for the entire world like the holy grail of negotiations. They seem to offer that which we have wanted most to find. What they seem to offer—though in the end it is only an illusion—is the long-sought proof that cooperation, honesty and good behavior will carry the day not because they are virtuous, not because they will benefit society as a whole, but because they are in everyone's individual and pecuniary self-interest. But however much we may want "honesty" to be "the best policy" in this strong sense, the discovery of integrative bargaining has not, at least, so far, provided that long-sought proof.⁸

Let us return to Adler's discussion of the four impulses in the negotiation paradigm. Just as a creative tension exists between the competitive and cooperative approaches, so too a polarity exists between the moral and pragmatic aspects of negotiation.⁹ We recommend an approach to negotiation that integrates competitive and cooperative negotiation strategies. As well, we urge wise negotiators to recognize that they must consider, utilize, and integrate an appropriate ethical and pragmatic approach in their negotiation planning and strategies. Next, we consider how negotiators can effectively integrate the tensions among the various negotiation impulses.

The Protean Negotiator

An "effective negotiator," says Robert Benjamin, "requires a thinking frame that is adaptive, dynamic, fluid, and shifting and a model of negotiation that can house a variety of negotiation rituals."¹⁰ Adler concurs and calls this type of negotiator a *Protean negotiator* after Proteus, the sea god who was able to change form at will. Protean negotiators should be

Figure 5.1 Competing Impulses



Source: P.S. Adler, "Protean Negotiation" in A. Kupfer Schneider & C. Honeyman, eds., *The Negotiator's Fieldbook* (Washington, DC: ABA Press, 2006) 17 at 19.

8 R. Fisher & W. Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, 2d ed. (New York: Penguin Books, 1991); see G.B. Wetlaufer, "The Limits of Integrative Bargaining" in Menkel-Meadow & M. Wheeler, eds., *What's Fair: Ethics for Negotiators* (San Francisco: Jossey-Bass, 2004) at 49.

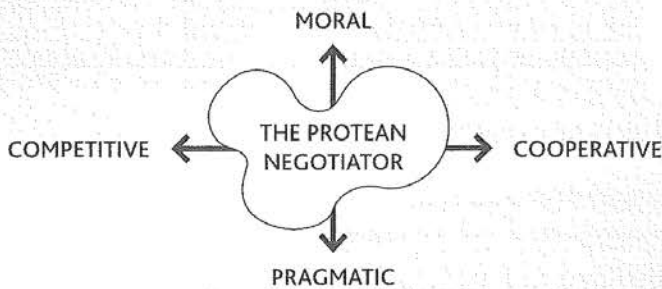
9 D.A. Lax & J.K. Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain* (New York: Free Press, 1986). Lax and Sebenius describe the tension between creating and claiming in their discussion of these issues.

10 R. Benjamin, *The Protean Sensibility: Recommending Approaches to Leadership and Negotiation* (2004) [unpublished].

able to read and change their strategy according to the context. They should be able to “dance the competitor’s jitterbug, the collaborator’s tango, the moralist’s waltz, and the pragmatist’s four step. One dance may be more comfortable than the others, and the dances can be sequenced, but they are all in the repertoire.”¹¹ Protean negotiators are creative and responsive to the negotiation situation, as well as the personalities, gender, culture, and values of those involved.¹²

We urge that the Protean become the Canadian negotiation dance of the 21st century. Negotiators and certainly representative negotiators must learn to effectively combine collaborative and competitive dances, always remembering the importance of morality. Ulti-

Figure 5.2 The Protean Negotiator



Source: P.S. Adler, “Protean Negotiation” in A. Kupfer Schneider & C. Honeyman, eds., *The Negotiator’s Fieldbook* (Washington, DC: ABA Press, 2006) 17 at 24.

ately, despite their remarkable routine, they and their new or old partners must conclude with an effective pragmatic foxtrot. We encourage negotiators to keep dancing and to develop their negotiation routines. They should respond to the music and the rhythm, and to the routines of their various partners—and be ethical, creative, and strategic.

Discussions of ethics for lawyers or other representative negotiators often confuse what is ethical (as determined by a particular corporate standard or according to a professional code of conduct) with what is prudent or wise. This is the choice between dancing the slow moralist’s waltz and the often faster pragmatist’s foxtrot.

Let’s look briefly at four approaches to ethical reasoning: *end-result ethics*, *duty ethics*, *social contract ethics*, and *personalistic ethics* (see figure 5.3). These approaches can help negotiators not only reflect on their own ethical approach to negotiations but also consider how their approach might be developed further. Which approach or approaches to ethical reasoning do you, as a representative negotiator, deem appropriate?

We encourage negotiators to reflect on their moral and ethical foundations, and, at the same time, to acknowledge their own attraction and commitment to a specific set of personal morals. (An analytical process for the resolution of moral problems appears in figure 5.4.)

Rather than attempt to determine what is moral or ethical based on ends, duties, or the social norms of the community, 20th-century philosopher Martin Buber and his followers assert that people should simply consult their own conscience. In *Ethics and Leadership: Putting Theory into Practice*, William Hitt develops an ethical problem that contrasts the philosophies based on ends, duties, and the social norms of a community with Buber’s personalistic, or conscience-based, approach to ethics:

11 Adler, *supra* note 6 at 24.

12 Adler, *supra* note 6 at 23.

Figure 5.3 Four Approaches to Ethical Reasoning

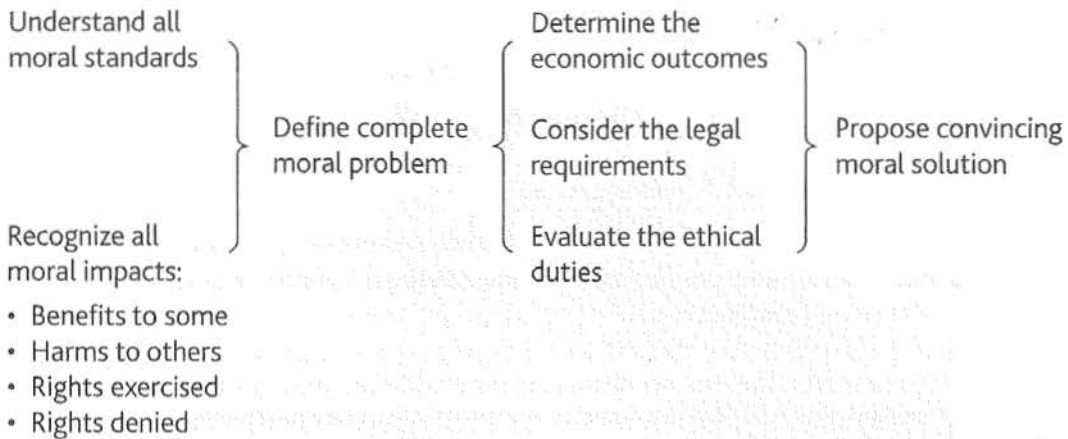
Ethical System	Definition	Major Proponent	Central Tenets	Major Concerns
End-result ethics	Rightness of an action is determined by considering consequences.	Jeremy Bentham (1748–1832) John Stuart Mill (1806–1873)	<ul style="list-style-type: none"> • One must consider all likely consequences. • Actions are more right if they promote more happiness, more wrong as they produce unhappiness. • Happiness is defined as the presence of pleasure and absence of pain. • Promotion of happiness is generally the ultimate aim. • Collective happiness of all concerned is the goal. 	<ul style="list-style-type: none"> • How does one define happiness, pleasure, or utility? • How does one measure happiness, pleasure, or utility? • How does one trade off between short-term vs. long-term happiness? • If actions create happiness for 90% of the world and misery for the other 10%, are they still ethical?
Duty ethics	Rightness of an action is determined by considering obligations to apply universal standards and principles.	Immanuel Kant (1724–1804)	<ul style="list-style-type: none"> • Human conduct should be guided by primary moral principles, or “oughts.” • Individuals should stand on their principles and restrain themselves by rules. • The ultimate good is a life of virtue (acting on principles) rather than pleasure. • We should not adjust moral law to fit our actions, but adjust our actions to fit moral law. 	<ul style="list-style-type: none"> • By what authority do we accept particular rules or the “goodness” of those rules? • What rule do we follow when rules conflict? • How do we adapt general rules to fit specific situations? • How do rules change as circumstances change? • What happens when good rules produce bad consequences? • Are there rules without any exceptions?

Continued on the next page.

Figure 5.3 Continued

Ethical System	Definition	Major Proponent	Central Tenets	Major Concerns
Social contract ethics	Rightness of an action is determined by the customs and norms of a community.	Jean-Jacques Rousseau (1712–1778)	<ul style="list-style-type: none"> • People must function in a social, community context to survive. • Communities become “moral bodies” for determining ground rules. • Duty and obligation bind the community and the individual to each other. • What is best for the common good determines the ultimate standard. • Laws are important, but morality determines the laws and standards for right and wrong. 	<ul style="list-style-type: none"> • How do we determine the general will? • What is meant by the “common good”? • What do we do with independent thinkers who challenge the morality of the existing social order (e.g., Jefferson, Gandhi, Martin Luther King)? • Can a state be corrupt and its people still be “moral” (e.g., Nazi Germany)?
Personalistic ethics	Rightness of an action is determined by one’s conscience.	Martin Buber (1878–1965)	<ul style="list-style-type: none"> • Locus of truth is found in human existence. • Conscience within each person calls them to fulfill their humanness and to decide between right and wrong. • Personal decision rules are the ultimate standards. • Pursuing a noble goal by ignoble means leads to an ignoble end. There are no absolute formulas for living. • One should follow one’s group but also stick up for what one individually believes. 	<ul style="list-style-type: none"> • How could we justify ethics other than by saying, “it felt like the right thing to do”? • How could we achieve a collective definition of what is ethical if individuals disagreed? • How could we achieve cohesiveness and consensus in a team that only fosters personal perspectives? • How could an organization assure some uniformity in ethics?

Source: Derived from W. Hitt, *Ethics and Leadership: Putting Theory into Practice* (Columbus, OH: Battelle Press, 1990).

Figure 5.4 Analytical Process for the Resolution of Moral Problems

Source: L.T. Homer, *The Ethics of Management*, 4th ed. (New York: McGraw-Hill/Irwin, 2003).

The setting is an outdoor hotel swimming pool on a warm July morning. At this particular time of day, there are only two persons present—a father who is fully clothed, sitting in a lounge chair beside the pool and reading the newspaper, and his five-year-old daughter, who is wading in the pool. While the father is engrossed in reading the sports page, he hears his daughter scream for help. She has waded into the deep end of the pool and is struggling to keep her head above water. At this moment, what is the right thing for the father to do? And what system of ethics will he use? If he chooses end-result ethics, he will compare the utilities associated with ruining his clothes, watch and billfold with those associated with saving his daughter's life. If he chooses rule ethics, he might first check to see if the hotel has posted any rules that prohibit a fully clothed person from entering the pool. And if he chooses social contract ethics, he might reflect on the social contract that he has with his family members. Obviously, he will choose none of these. He will jump into the pool immediately to rescue his daughter.¹³

Hitt argues that the motivation to action is clearly the father's conscience telling him, "Act now!" The nature of human existence provides us with opportunities to develop our own set of values—known as our conscience. Contemporary literature and movie scripts are filled with questions such as, how can this woman go to sleep at night, or how can this man look at himself in the mirror? Personalistic ethics posit that moral decisions and judgments must be made by individuals; they are not absolute. People must determine what is right and appropriate to do, individually; they should not impose their standards on others. Individual moral codes may be, but are not necessarily, informed by a belief in the moral imperatives of Judeo-Christian, Islamic, or other religious beliefs. We will discuss later the

13 W. Hitt, *Ethics and Leadership: Putting Theory into Practice* (Columbus, OH: Battelle Press, 1990) at 121-22. See discussion in R. Lewicki et al., *Negotiation*, 5th ed. (New York: McGraw-Hill Irwin, 2006) at 244-45.

extent to which codes of professional conduct effectively create and set out ethical standards that build on those of the great philosophers and whether these codes are helpful to representative negotiators confronting ethical issues.

A Look at Our Own Moral and Ethical Compass

In the short article that follows, Howard Raiffa considers social dilemmas and how we react to them.¹⁴ In another article, “Negotiation Analysis,”¹⁵ Raiffa discusses a similar scenario to the following dilemma.¹⁶

One miserably hot summer afternoon, you are driving from Toronto to Lake Muskoka on a holiday week-end. Traffic is crawling along a stretch of two-lane one way highway that usually presents no problem. Finally after an interminable delay, you discover the trouble: a mattress on the road; cars have to squeeze to one side to pass it. Should you stop your car and move the mattress? There will be at least some inconvenience to you and possibly a bit of danger involved if you stop. “Why should I be the fall guy? Let someone else be the good guy. Anyway, I’m already late, because of the delay for my appointment.”

What would you do? Would you stop and move the mattress? Do you think there would be a difference in response between genders? Between different cultural groups?

How much are we individually willing to sacrifice for the good of others when we get no immediate tangible reward other than the self-satisfaction of doing good? In “Ethical and Moral Issues,” Raiffa looks at the social dilemma of having to choose between acting nobly and selfishly. If you act nobly, you will help others at your expense; if you act selfishly, you will help yourself at the expense of others. Others have to make similar decisions. To highlight the tension between helping yourself and helping others, the social dilemma suggests that if all participants act nobly, all do well and society flourishes. But regardless of how others act, you can always do better for yourself, as measured in tangible rewards (profits), if you act selfishly—though doing so is at the expense of others. (The best tangible reward accrues to you in this game if you act selfishly and all others act nobly. But if everyone acts selfishly, all suffer greatly.) Think about how you would likely act in both the “game” scenarios.

14 These social dilemmas were developed by Thomas Schelling, a leading negotiation scholar.

15 This text was co-written with John Richardson and David Metcalfe.

16 H. Raiffa, with J. Richardson & D. Metcalfe, “Negotiation Analysis” in H. Raiffa, J. Richardson, & D. Metcalfe, *Negotiation Analysis: The Science and Art of Collaborative Decision Making* (Cambridge, MA: Belknap Press of Harvard University Press, 2002). The model for this scenario was developed by Thomas Schelling.

Howard Raiffa
"Ethical and Moral Issues"

in H. Raiffa, *The Art and Science of Negotiation* (Cambridge, MA: Belknap Press of Harvard University Press, 1982), footnotes omitted

It's often said that dishonesty in the short run is poor policy because a tarnished reputation hurts in the long run. The moral question is: Should you be open and honest in the short run because it is right to act that way, even though it might hurt you in the long run?

The hundreds of responses I have obtained to a questionnaire on ethical values are instructive. The distributions of the responses from students of business administration, government, and law are reasonable. But the students do not overwhelmingly say, "That sort of behavior may be borderline in my opinion for others, but is unacceptable to me." Most say, "If I were in that situation, I also probably would act in that borderline way"; and a few say, "I think that that behavior is unethical, but I probably would do the same." That's disturbing to me.

One student defended herself—even though the questionnaires were anonymous—by stating that most businesspeople in their ordinary activities are not subjected to those moral dilemmas. ...

Let's abstract and simplify by looking at a simple laboratory exercise concerning an ethical choice. Imagine that you have to choose whether to act nobly or selfishly. If you act nobly, you will be helping others at your own expense; if you act selfishly, you will be helping yourself at others' expense. Similarly, those others have similar choices. In order to highlight the tension between helping yourself and helping others, let's specify that if all participants act nobly, all do well and the society flourishes; but regardless of how others act, you can always do better for yourself, as measured in tangible rewards (say, profits), if you act selfishly—but at the expense of others. Leaving morality aside for the moment, the best tangible reward accrues to you in this asocial game if you act selfishly and all others act nobly. But if all behave that way, all suffer greatly.

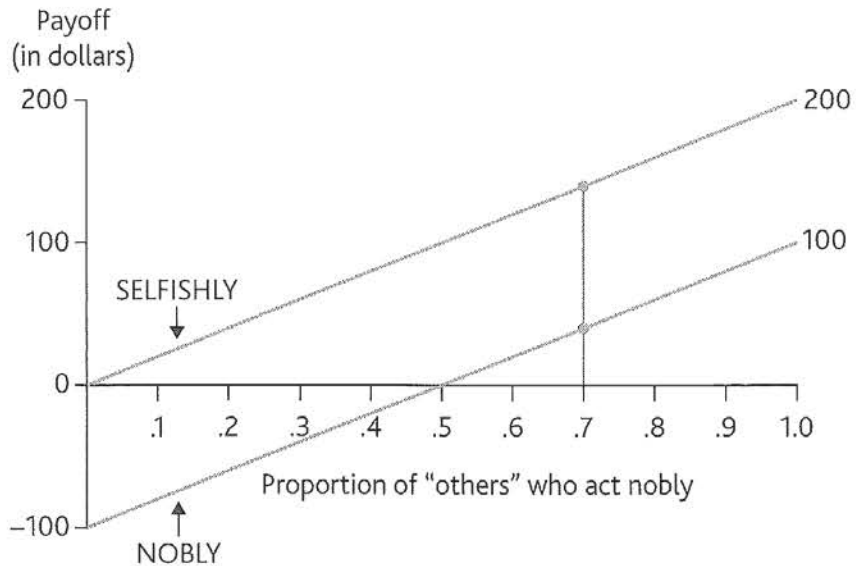
To be more concrete, suppose that you are one player in a group of 101, so that there are 100 "others." You have two choices: act nobly or act selfishly. Your payoff depends on your choice and on the proportion of the "others" who choose to act nobly (see figure 1). If, for example, 0.7 of the others act nobly, your payoff is \$40 when you act nobly and \$140 when you act selfishly. Notice that regardless of what the others do, if you were to switch from noble to selfish behavior, you would receive \$100 more; but because of your switch, each of the others would be penalized by \$2 and the total penalty to others would be \$200—more than what you personally gain. The harm you cause to others, however, is shared: you impose a small harm on each of many.

If the others can see that you are acting selfishly, then acting unselfishly may be your prudent action from a cold, calculating, long-term-benefit point of view. Your good reputation may be a proxy for future tangible rewards. But what if the others (because of the rules of the game) cannot see how you, in particular, behave? Suppose that all anyone learns is how many of the others chose the selfish opinion?

I learned about this game from Thomas Schelling, who dubbed it the "N-Person Prisoner's Dilemma Game," a direct generalization of that famous two-person game. In the literature, these games are called "social dilemmas" or "social traps," and are sometimes

discussed under the heading of “the problem of the commons” or “the free-rider problem.” Whenever anyone uses “the commons,” there is a little less for everyone else. The “commons” could be a town green, common grazing land, a common river, the ocean, or the atmosphere. Overpopulating our common planet is a prime manifestation of this problem. Whenever we enjoy a public benefit without paying our due share, we are a “free rider.” One variation of the free-rider problem is the noble-volunteer problem: Will a hero please step forward—and risk his or her life for the good of the many?

Figure 1 Payoffs for the Social Dilemma Game



Source: H. Raiffa, “Ethical and Moral Issues” in H. Raiffa, *The Art and Science of Negotiation* (Cambridge, MA: Belknap Press of Harvard University Press, 1982) 15 at 16.

Subjects were asked to play this social dilemma game not for monetary payoffs, but as if there would be monetary payoffs. There might, therefore, be some distortion in the results—probably not much, but in any case the experimental results are not comforting. Roughly 85 percent of the subjects acted non-cooperatively—acted to protect their own interests. Most subjects believed that only a small minority of the others would choose the cooperative (noble) act, and they saw no reason why they should be penalized; so they chose not to act cooperatively. They felt that it was not their behavior that was wrong, but the situation they were participating in. Unfortunately, many real-world games have these characteristics. A few subjects acted cooperatively because they were simply confused; but others—the really noble ones—knew exactly what was going on and chose to sacrifice their own tangible rewards for the good of the others, even though the others did not know who was acting for their benefit. If the rules of the game were changed to make “goodness” more visible, then more subjects would opt for the noble action—some, perhaps, for long-range selfish reasons. This suggests a positive action program: we should try to identify asocial games (social dilemmas) and modify the rules, if possible (which is easier said than done).

Now let's suppose that you are in a position to influence the one hundred others to act nobly by publicly appealing to their consciences. Do you need to influence all to follow your lead? No. You will get a higher monetary return for yourself by converting fifty selfish souls to the noble cause than by joining the ranks of the selfish. But balancing tangible and intangible rewards, you might still prefer to act nobly if you could get, say, forty conversions; with fewer conversions, you might be sacrificing too much. Suppose that you are wildly successful: seventy-five others join your coalition. Say that seventeen of these would have acted nobly anyway; three are despicable poseurs who join the nobles but who will defect secretly; and fifty-five have actually been swayed by your moral pleadings. Now you not only have benefited financially, but you feel morally righteous as well. Unfortunately, your actions have also made it more profitable for the remaining twenty-five who have not joined your coalition. Each conversion adds \$2 to the payoff of each of the others, including the selfish holdouts—they've been helped by your successful proselytizing. This may really bother some of the converted ones; it's unfair, they may argue, that the selfish, undeserving ones should profit from the noble actions of the majority. (A real-world analogue is the case where most of the nations of the world might agree not to catch blue whales, and because of this pact, it becomes easier for one noncooperating whaling country to find its prey.) Some of your converts may be so bothered to see that the undeserving are doing better than themselves that they may decide to defect. They may argue that the coalition is not working, when in absolute terms it may be working for them; but it may not be working in comparative terms. It rankles them that they are helping someone who is taking advantage of their noble behavior. So a few defect, and as a result, the coalition can easily come apart.

Integrity in Negotiation

According to Roger Fisher, "Most ethical problems facing lawyers in a negotiation stem from a conflict of interest between the lawyer's obligation to the client (presumably to get the best deal) and two of the lawyer's other interests: behaving honourably toward others involved in the negotiation and self-interest in preserving reputation and self-esteem."¹⁷

It is often asserted that a lawyer or other representative negotiator is obliged to bluff and deceive those on the other side to the extent that it is ethically possible to do so. James White writes, "In one sense the negotiator's role is at least passively to mislead his opponent ... while at the same time to engage in ethical behaviour." And, "Anyone who would maximize his potential as a negotiator must occasionally do things that would cause others to classify him as a 'trickster,' whether he so classifies himself or not."¹⁸

Here we discuss the principal ethical issues confronting a representative negotiator and specifically the dilemma between behaving honourably and the expectation that a third-party representative, and particularly a lawyer, should be zealously asserting the claims or

17 R. Fisher, "A Code of Negotiation Practices for Lawyers" (1985) 1:2 *Negotiation Journal* 105. This article is excerpted below on pages 130-34.

18 J.J. White, "The Pros and Cons of Getting to Yes" (1984) 34 *J. Legal Educ.* 115 at 118-19.

concerns of her clients. How far should a representative go on behalf of an unethical and deceptive client? At what point are the representative's actions in asserting claims on behalf of a client immoral and potentially illegal? Richard Shell confronts these issues, and he proposes that although negotiators should "aim high" in their ethical conduct, a minimum of ethical standards are required in any negotiation (see the excerpt from Shell's "Bargaining with the Devil Without Losing Your Soul: Ethics in Negotiation," on pages 116–27). Though Shell discusses these issues in the American context, he maintains that the basic principles of fairness and prudence in bargaining conduct are global.¹⁹

Three Schools of Bargaining Ethics

In order to help negotiators aim high with respect to ethics in negotiation, Shell goes beyond minimum ethical standards to focus on common schools of bargaining ethics. Shell does not suggest that a single approach to ethics in negotiating is clearly superior (whether morally or pragmatically) to the others. Rather, he outlines three schools of bargaining ethics, allowing negotiators to decide which approach best defines their approach to ethical practice: (1) the "It's a game" Poker School, (2) the "Do the right thing even if it hurts" Idealist School, and (3) the "What goes around, comes around" Pragmatist School.²⁰

The "It's a game" Poker School, originally conceptualized by Albert Carr,²¹ was discussed and analyzed in a seminal article by James White. Carr claims "the ethics of business are game ethics, different from the ethics of religion."²² Thus, business ethics are distinguished from personal morality or ethics in which "the golden rule" would normally apply. Advocates of this approach claim that, in the context of commercial negotiations, deception and bluffing are exonerated because experienced negotiators expect such strategies as part of the "rules" of negotiating and consequentially place no reliance in them. People who adhere to the Poker School readily admit that bargaining and poker are not exactly the same. However, they point out, deception is essential to play effectively in both arenas. White writes:

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. ... 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 position. ... To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation.²³

19 G.R. Shell, "Bargaining with the Devil Without Losing Your Soul: Ethics in Negotiation" in C. Menkel-Meadow & M. Wheeler, eds., *What's Fair: Ethics for Negotiators* (San Francisco: Jossey-Bass, 2004) 57. This article is reproduced below.

20 *Ibid.* at 65.

21 A.Z. Carr, "Is Business Bluffing Ethical?" (1968) 46 *Harvard Business Review* 143; A.Z. Carr, *Business as a Game* (New York: New American Library, 1968).

22 Carr, "Is Business Bluffing Ethical?" *ibid.* at 143.

23 J.J. White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation" (1980) *American Bar Foundation Resolution Journal* 926 at 928.

Skilled players, in both poker and bargaining, are likely to exhibit a robust and realistic distrust of the other negotiator(s). This school nevertheless recognizes that both “games” have strict rules. (In poker, for instance, hiding cards is not permitted.) Proponents of the Poker School approach do not believe that members should be precluded from playing because outsiders disagree with the School’s central assumptions. Idealists and pragmatists disagree with the Poker School approach, arguing that there are *no* strict rules in negotiation. Though “the game” depends on the presumption that the rules are known by all negotiators, laws and codes of conduct vary in different circumstances and communities and may not be known by the novice or visiting negotiator.

David Lax and James Sebenius address the ethical issue of power (without challenging the game metaphor) by asking, “are the ‘rules’ known and accepted by all sides?” Further, they ask, “how can any ‘rules’ of the game meet the mutual ‘awareness and acceptance of the rules’ test?”²⁴ They suggest that all parties must not only understand the rules of the game but also be equally free to enter and leave the situation.²⁵ The question is not just a matter of the ethics of honesty in negotiation, but the ethics of power exercised in negotiation relationships.

The “Do the right thing even if it hurts” Idealist School, derived from Kant and the concept of duty ethics, holds that behaviour that is considered unethical in daily life must also be unethical in the commercial and business context. The Idealist School of negotiation ethics says, “bargaining is an aspect of social life, not a special activity with its own set of rules. The same ethics that apply in the home should carry directly into the realm of negotiation.”²⁶ If it is wrong to lie or mislead in a social context, it is wrong to do so in a negotiation. Idealists argue that lying in a negotiation is a selfish act designed to achieve personal gain, and, therefore, unethical. Idealists generally prefer to be candid, even if it means surrendering some strategic advantage. Idealists do not rule out deceptions altogether; “harmless” ones are permissible. A major shortcoming of this position is that idealists may be open to exploitation by canny parties. “Idealists think that the members of the Poker School are predatory and selfish. For its part, the Poker School thinks that idealists are naïve and even a little silly.”²⁷ Shell, himself, expresses a personal preference for the Idealist approach, proposing that negotiators should at least aim for this standard, even if they occasionally fall short of it in their personal or professional life.

The “What goes around, comes around” Pragmatist School recognizes the game aspects of the Poker School approach but eschews the idea of “necessary” deceptions. Lying is wrong not because it is unethical but because it is impractical. Erosion of trust will lead to long-term losses that more than offset short-term gains. Shell’s analysis is perhaps weakest here; he identifies the main difference between the pragmatists and the idealists as the fact that the former will lie a bit more often than the latter.

24 D.A. Lax & J.K. Sebenius, “Three Ethical Issues in Negotiation” (1986) 2:4 *Negotiation Journal* 363.

25 *Ibid.* at 365, citing S. Bok, *Lying: Moral Choices in Public and Private Life* (New York: Pantheon Books, 1978).

26 Shell, *supra* note 19 at 67.

27 *Ibid.*

Shell provides examples of how each of these schools would respond during a negotiation to a buyer's direct question: "Do you have another offer?" in the section titled "The Ethical Schools in Action," toward the end of the excerpt that follows.

Minimum Ethical Standards

Shell asserts in his article below that negotiators are not bound by a general "good faith" duty in the negotiation of commercial contracts. Thus, he suggests, the best bright-line standard for judging whether a negotiation has been conducted ethically is the law of fraud. Shell explains how the elements of fraud analysis can help evaluate ethical conduct. According to the six key elements of fraud analysis, "[a] bargaining move is fraudulent when a speaker makes a (1) knowing (2) misrepresentation of a (3) material (4) fact (5) on which the victim reasonably relies (6) causing damages."²⁸

G. Richard Shell

"Bargaining with the Devil Without
Losing Your Soul: Ethics in Negotiation"

in C. Menkel-Meadow & M. Wheeler, eds., *What's Fair: Ethics
for Negotiators* (San Francisco: Jossey-Bass, 2004) 57

Ethics Come First, Not Last

Your attitudes about ethical conduct are preliminary to every bargaining move you make. Your ethics are a vital part of your identity as a person, and, try as you may, you will never be able to successfully separate the way you act in negotiations from the person you are in other parts of your life. That is "you" at the bargaining table as well as "you" in the mirror every morning.

Your personal beliefs about ethics also come with a price tag. The stricter your ethical standards, the higher the cost you must be willing to pay to uphold them in any given transaction. The lower your ethical standards, the higher the price may be in terms of your reputation. And the lower the standards of those with whom you deal, the more time, energy, and prudence are required to defend yourself and your interests.

I'll give you my bias on this subject right up front: I think you should aim high where ethics are concerned. Personal integrity is one of the four most important effectiveness factors for the skilled negotiator. Negotiators who value "personal integrity" can be counted on to negotiate consistently, using a thoughtful set of personal values that they could, if necessary, explain to others. This definition puts the burden on you as an individual—not me as judge—to construct your own ethical framework. I learned long ago that the best way to teach others about values is to raise tough questions, give people tools to think about them, then get out of the way.

28 *Ibid.* at 58.

Reasonable people will differ on ethical questions, but you will have personal integrity in my estimation if you can pass my “explain and defend” test after making a considered, ethical choice. After we have examined some ways of thinking about your own duties, we will look at how you can defend yourself when others use ethically questionable tactics against you.

The Minimum Standard: Obey the Law

Regardless of how you feel about ethics, everyone has a duty to obey the laws that regulate the negotiation process. Of course, bargaining laws differ between countries and cultures, but the normative concerns underlying these different legal regimes share important characteristics. I will look briefly at the American approach to the legal regulations of deception as an example of the way law works in negotiations, but basic principles of fairness and prudence in the bargaining conduct are global, not national.

American law disclaims any general duty of “good faith” in the negotiation of commercial agreements. As an American judge once wrote, “In a business transaction both sides presumably try to get the best deal. . . . The proper recourse [for outrageous conduct] is to walk away from the bargaining table, not sue for ‘bad faith’ in negotiations.” This general rule assumes, however, that no one has committed fraud. As we shall see, the law of fraud reaches deep into the complexities of negotiation behavior.

There are six major elements of a fraud case. A bargaining move is fraudulent when a speaker makes a (1) knowing (2) misrepresentation of a (3) material (4) fact (5) on which the victim reasonably relies (6) causing damages.

A car dealer commits fraud when he resets a car odometer and sells one of his company cars as if it were brand new. The dealer knows the car is not new; he misrepresents its condition to the buyer; the condition of the car is a fact rather than a mere opinion, and it is a fact that is important (“material”) to the transaction; the buyer is acting reasonably in relying on the mileage as recorded on the odometer when she buys the car; and damages result. Similarly, a person selling her business commits fraud when she lies about the number and kind of debts owed by the business.

Lies about important facts that go to the core of a deal are not unknown in business negotiations. But most negotiators don’t need a lawyer or an ethicist to tell them that such misrepresentations ought to be avoided. These are cases of fraud, pure and simple. People who try to cheat you are crooks.

More interesting questions about lying arise on the margins of the law of fraud. What if the dealer says you had better buy the car today because he has another buyer ready to snatch the car away tomorrow? That may be a statement of fact, but is it material? It looks like Sifford’s little lie about his catalogue price. [Earlier in the chapter, the author relates a story in which the late Darrell Sifford, a Philadelphia newspaper columnist, is able to get a remarkable deal on a globe by lying to the store clerk, saying that he had seen the same globe in a catalogue for a lower price.] Assuming Sifford is innocent of legal fraud in the globe case, should we hold a professional car dealer to a different legal standard? Is the car dealer’s lie about the other buyer fraudulent or just a form of creative motivation?

Suppose the seller does not state a fact but instead gives an artfully phrased opinion? Perhaps the person selling her business says that a large account debt “could probably be renegotiated” after you buy the firm. Could this opinion be deemed so misleading as to be fraudulent if the seller knows for a fact that the creditor would never consider renegotiation?

Let's look briefly at each element in the law of fraud and test where the legal limits lie. Surprisingly, though we would all prefer to see clear black and white rules outlining our legal duties, staying on the right side of the law often requires a prudent respect for the many gray areas that inevitably color an activity as widespread and multifaceted as negotiation. Knowing what the law is helps you stay within its boundaries, but this knowledge does not eliminate the need for a strong sense of right and wrong.

Element 1: Knowing

To commit fraud, a negotiator must have a particular state of mind with respect to the fact he or she misrepresents. The misstatement must be made "knowingly." One way of getting around fraud, therefore, might be for the speaker to avoid direct contact with information that would lead to a "knowing" state of mind.

For example, a company president might suspect that his company is in poor financial health, but he does not yet "know" it because he has not seen the latest quarterly reports. When his advisers ask to set up a meeting to discuss these reports, he tells them to hold off. He is about to go into negotiation with an important supplier and would like to be able to say, honestly, that so far as he knows the company is paying its bills. Does this get him off the hook? Perhaps. But many courts have stretched the definition of "knowing" to include statements that are, like the executive's in this case, made with a conscious and reckless disregard for their truth.

Nor is reckless disregard for truth the limit of the law. Victims of misstatements that were made negligently or even innocently may obtain relief in certain circumstances. These kinds of misstatements are not deemed fraudulent, however. Rather, they are a way of recognizing that a deal was based on a mistake.

Element 2: Misrepresentation

In general, the law requires a negotiator to make a positive misstatement before a statement is judged fraudulent. A basic legal rule for commercial negotiators is, "Be silent and be safe."

As a practical matter, of course, silence is difficult to maintain if one's bargaining opponent is an astute questioner. In the face of inconvenient questions, negotiators are often forced to resort to verbal feints and dodges such as, "I don't know about that" or, when pressed, "This is not a subject I am at liberty to discuss." When you choose to lie in response to a pointed question probing the strength of your bargaining position, you immediately raise the risk of legal liability. As we shall see below, however, some lies are not material, and the other party may be charged with a duty to discount the truth of what you tell them.

Surprisingly, there are circumstances when it may be fraudulent to keep your peace about an issue even if the other side does not ask about it. When does a negotiator have a duty to voluntarily disclose matters that may hurt his bargaining position? American law imposes affirmative disclosure duties in the following four circumstances:

1. *When the negotiator makes a partial disclosure that is or becomes misleading in light of all the facts.* If you say your company is profitable, you may be under a duty to disclose whether you used questionable accounting techniques to arrive at that statement. You should also update your prior statement if you show a loss in the next quarter and negotiations are continuing.

2. *When the parties stand in a fiduciary relationship to each other.* In negotiation actions between trustees and beneficiaries, partners in a partnership, shareholders in a small corporation, or members of a family business, parties may have a duty of complete candor and cannot rely on the “be silent and be safe” approach.
3. *When the nondisclosing party has vital information about the transaction not accessible to the other side.* A recent case applying this exception held that an employer owed a duty of disclosure to a prospective employee to disclose contingency plans for shutting down the project for which the employee was hired. In general, sellers have a greater duty to disclose hidden defects about their property than buyers do to disclose “hidden treasure” that may be buried there. Thus, a home seller must disclose termite infestation in her home, but an oil company need not voluntarily disclose that there is oil on a farmer’s land when negotiating to purchase it. This is a slippery exception; the best test is one of conscience and fairness.
4. *When special codified disclosure duties [exist], such as those regarding contracts of insurance or public offerings of securities.* Legislatures sometimes impose special disclosure duties for particular kinds of transactions. In the United States, for example, many states now require home sellers to disclose all known problems with their houses.

If none of these four exceptions applies, neither side is likely to be found liable for fraud based on nondisclosure. Each party can remain silent, passively letting the other proceed under its own assumptions.

Element 3: Material

Many people lie or deliberately mislead others about something during negotiations. Often they seek to deceive by making initial demands that far exceed their true needs or desires. Sometimes they lie about their bottom line. Perhaps, like Sifford, they embellish their story about why they are entitled to a particular price or concession.

Of course, initial demands and bottom lines may not be “facts” in the ordinary sense of the word. One may have only a vague idea of what one really wants or is willing to pay for something. Hence, a statement that an asking price is “too high” may not be a misrepresentation as much as a statement of opinion or preference.

Suppose, however, that an art gallery owner has been given authority by an artist to sell one of the artist’s paintings for any price greater than \$10,000. Is it fraud for the gallery owner, as part of a negotiation with a collector, to say, “I can’t take less than \$12,000”? In fact, she does have authority to sell the painting for anything above \$10,000, so there has been a knowing misrepresentation of fact. Suppose the buyer says, “My budget for this purpose is \$9,000,” when she is really willing to spend \$11,000? Same thing. The legal question in both cases is whether these facts are “material.”

They are not. In fact, lies about demands and bottom-line prices are so prevalent in the bargaining that many professional negotiators do not consider such misstatements to be lies, preferring the term “bluffs.”

Why? Such statements allow the parties to assert the legitimacy of their preferences and set the boundaries of the bargaining range without incurring a risk of loss. Misleading statements about bottom-line prices and demands also enable parties to test the limits of the other side’s commitment to their expressed preferences.

The American legal profession has gone so far as to enshrine this practice approvingly in its Model Rules of Professional Conduct. These rules provide that “estimates of price or value placed on the subject of a transaction and a party’s intention as to an acceptable settlement of a claim” are not “material” facts for the purposes of the ethical rule prohibiting lawyers from making false statements to a third person.

There are thus no legal problems with lying about how much you might be willing to pay or which of several issues in a negotiation you value more highly. Demands and bottom lines are not, as a matter of law, “material” to a deal.

As one moves from bluffs about how much one wants to spend or charge toward more assertive, specific lies about why one price or another is required, the fraud meter goes up. One common way to back up a price demand, for example, is Sifford’s “I can get it cheaper elsewhere” argument, used by consumers the world over. Negotiators often lie about their available alternatives. Is this fraudulent?

When a shopper lies to a storekeeper that she can get an item cheaper across town, the statement is not “material.” After all, the seller presumably knows (or should know) at least as much about the value of what he is selling as the buyer does. If the seller wants to sell it for less than the asking price, who knows better than the seller what the right price is?

But suppose we switch roles. Suppose the seller lies about having another offer that the buyer has to beat? For example, take the following older, but still important legal case from Massachusetts.

A commercial landlord bought a building and negotiated a new lease with a toy shop tenant when the tenant’s lease expired. The proprietor of the toy shop bargained hard and refused to pay the landlord’s demand for a \$10,000 increase in rent. The landlord then told the shop owner that he had another tenant willing to pay the \$10,000 amount and threatened the current tenant with immediate eviction if he did not promptly agree to the new rate. The tenant paid but learned later that the threat had been a bluff; there had been no other tenant. The tenant successfully sued for fraud.

In another case, ... a real estate agent was held liable for fraud, including punitive damages, when she pressured a buyer into closing on a home with a story that a rival buyer (the contractor who built the house) was willing to pay the asking price and would do so later that same day.

What makes these lies different in a legal sense from the “I can’t take less than \$12,000” statement by the art gallery owner or the “I can get it cheaper elsewhere” comment by a shopper? I think the difference has to do with the fact that the victims in these cases were “little people”—small business and customers—who were being pressured unfairly by professionals. The made-up offers were “material” facts from the buyers’ point of view. They were specific, factual, coupled with ultimatums, and impossible to investigate.

But I do not think a court would have reached the same result if both parties had been consumers or both sophisticated professionals. Nor would I expect to see results like this outside a wealthy, consumer-oriented country such as the United States. Still, it is worth noting that such cases exist. They counsel a degree of prudence on the part of professional sellers or buyers when dealing with the public.

Element 4: Fact

On the surface, it appears that only misstatements of objective facts are occasions for legal sanctions. Businessmen seeking to walk close to the legal line are therefore careful to

couch their sales talk in negotiation as opinions, predictions, and statements of intention, not statements of fact. Moreover, a good deal of exaggeration or puffing about product attributes and likely performance is viewed as a normal aspect of the selling process. Buyers and sellers cannot take everything said to them at face value.

The surface of the law can be misleading, however. Courts have found occasion to punish statements of intention and opinion as fraudulent when faced with particularly egregious cases. The touchstone of the law of fraud is not whether the statement at issue was one of pure fact but rather whether the statement succeeded in concealing a set of facts the negotiator preferred to keep out of sight.

Suppose you are borrowing money from a bank and tell the bank as part of your application that you plan to spend the loan on new capital equipment. In fact, you are really going to pay off an old debt. Fraud? Possibly.

In the memorable words of a famous English judge, "The state of a man's mind is as much a fact as the state of his digestion." Lies regarding intention even have a special name in the law: promissory fraud. The key element in a promissory fraud case is proof that the speaker knew he could not live up to his promise *at the time the promise was made*. In other words, he made the promise with his fingers crossed behind his back. If you are the victim, you must also show that the other side's intention going into the deal went to its very heart—that is, that the statement of the intention was "material."

What about statements of opinion? Self-serving statements about the value of your goods or the qualifications of your product or company are the standard (legal) fare of the negotiating table. However, when negotiators offer statements of opinion that are flatly contradicted by facts known to them about the subject of the transaction, they may be liable for fraud. In one New York case, for example, the seller of a machine shop business opined to a prospective buyer that the buyer would have "no trouble" securing work from his largest customer. In fact, the seller was in debt to his customer, intended to pay off this debt from the proceeds of the sale to the buyer, and had virtually no work there due to his reputation for poor workmanship. The buyer successfully proved that the sale had been induced by the seller's fraudulent statement of opinion and collected damages.

What seems to matter in these cases is unfairness. If a statement of intention or opinion so conceals the true nature of the negotiation proposal that a bargaining opponent cannot accurately assess an appropriate range of values or risks on which to base the price, then it may be fraudulent.

Element 5: Reliance

Negotiators who lie sometimes defend themselves by saying, in effect, "Only a fool could have believed what I said. The other party had no business relying on me to tell him the truth—he should have investigated for himself."

As we saw in our discussion of lies about other offers, this defense works pretty well when both sides are on roughly the same footing. But when one side has a decided advantage, as does a professional buyer or seller against a consumer or small business, American courts are more sympathetic to the idea that the victim reasonably relied on the lie.

In addition, courts are sympathetic to those who, in good faith, rely on others to treat them fairly in the negotiation process and who have that trust violated by more powerful firms trying to steal their trade secrets and other information. There have been a number of cases, for example, allowing recoveries to independent inventors and others who disclosed

trade secrets in the course of negotiations to sell their discoveries. The prospective buyers in these cases are typically big companies that attempted to use the negotiation process as a way of getting something for nothing. The prudent negotiator, however, always secures an express confidentiality agreement if secret information or business plans must be disclosed in the course of the information exchange process.

One trick that manipulative negotiators use to avoid liability after they have misstated important facts or improperly motivated a transaction is to write the true terms and conditions into the final written agreement. If the victim signs off on the deal without reading this contract, he will have a hard time claiming reasonable reliance on the earlier misstatements in a fraud case later on.

For example, suppose you negotiate the sale of your company's principal asset, an electronic medical device, to a big medical products firm. During the negotiations, the company assures you that it will aggressively market the device so you can earn royalties. The contract, however, specifically assigns it the legal right to shelve your product if it wishes. After the sale, it decides to stop marketing your product and you later learn the company never really intended to sell it; it was just trying to get your product off the market because it competed with several of its own.

In a case like this, a court held that the plaintiffs were stuck with the terms of the final written contract. The lesson here is clear: *Read* contracts carefully before you sign them, and question assurances that contract language changing the nature of the deal is just a technicality or was required by the lawyers.

Element 6: Causation and Damages

You cannot make a legal claim for fraud if you have no damages caused by the fraudulent statement or omission. People sometimes get confused about this. The other negotiator lies in some outrageous and unethical way, so they assume the liar's conduct is illegal. It may be, but only if that conduct leads directly to some quantifiable economic loss for the victim of the fraud. If there is no such loss, the right move is to walk away from the deal (if you can), not sue.

Beyond the Law: A Look at Ethics

As you may have noticed, the legal rules that govern bargaining are suffused with a number of ethical norms. For example, professionals with a big bargaining advantage are sometimes held to a higher standard when negotiating with amateurs and consumers than they are when they approach others as equals. Parties that stand in special relationships to each other, such as trustees or partners, have heightened legal disclosure duties. Lies protecting important factual information about the subject of the transaction are treated differently from lies about such things as your alternatives or your bottom line. Silence is unacceptable if an important fact is inaccessible to the other side unless you speak up.

I want to challenge you to identify what *your* beliefs are. To help you decide how you feel about ethics, I will briefly describe the three most common approaches to bargaining ethics I have heard expressed in conversations with literally hundreds of students and executives. See which shoe fits—or take a bit from each approach and construct your own.

As we explore this territory, remember that nearly everyone is sincerely convinced that they are acting ethically most of the time, whereas they often think others are acting either

naively or unethically, depending on their ethical perspective and the situation. Thus, a word of warning is in order. Your ethics are mainly your own business. They will help you increase your level of confidence and comfort at the bargaining table. But do not expect others to share your ethics in every detail. Prudence pays ...

The Ethical Schools in Action

As a test of ethical thinking, let's take a simple example. Assume you are negotiating to sell a commercial building, and the other party asks you whether you have another offer. In fact, you do not have any such offers. What would the three schools recommend you do?

A Poker School adherent might suggest a lie. Both parties are sophisticated business-people in this deal, so a lie about alternatives is probably legally "immaterial." But a member of the Poker School would want to know the answers to two questions before making his move.

First, could the lie be easily found out? If so, it would be a bad play because it wouldn't work and might put the other side on guard with respect to other lies he might want to tell. Second, is a lie about alternatives the best way to leverage the buyer into making a bid? Perhaps a lie about something else—a deadline, for example—might be a better choice.

Assuming the lie is undetectable and will work, how might the conversation sound?

Buyer: Do you have another offer?

Poker School Seller: Yes. A Saudi Arabian firm presented us with an offer for \$_____ this morning, and we have only forty-eight hours to get back to it with an answer. Confidentiality forbids us from showing you the Saudi offer, but rest assured that it is real. What would you like to do?

How would an idealist handle this situation? There are several idealist responses, but none would involve a lie. One response would be the following:

Buyer: Do you have another offer?

Idealist Seller 1: An interesting question—and one I refuse to answer.

Of course, that refusal speaks volumes to the buyer. Another approach would be to adopt a policy on "other buyer" questions:

Buyer: Do you have another offer?

Idealist Seller 2: An interesting question, and one I receive quite often. Let me answer you this way. The property's value to you is something for you to decide based on your needs and your own sense of the market. However, I treat all offers with the greatest confidence. I will not discuss any offer you make to me with another buyer, and I would not discuss any offer I received from someone else with you. Will you be bidding?

Of course, this will work for an idealist only if he or she really and truly has such a policy—a costly one when there is another attractive offer he or she would like to reveal.

A final idealist approach would be to offer an honest, straightforward answer. An idealist cannot lie or deliberately mislead, but he is allowed to put the best face he can on the situation that is consistent with the plain truth:

Buyer: Do you have another offer?

Idealist Seller 3: To be honest, we have no offers at this time. However, we are hopeful that we will receive others soon. It might be in your interest to bid now and take the property before competition drives the price up.

How about the pragmatists? They would suggest using somewhat more sophisticated, perhaps deceptive blocking techniques. These techniques would protect their leverage in ways that were consistent with maintaining work relationships. Once again, assume that the buyer has asked the “other offer” question and there are no other offers. Here are five ways a pragmatist might suggest you block this question to avoid an out-and-out factual lie about other offers while minimizing the damage to your leverage. Some of these blocking techniques would work for idealists too:

- *Declare the question out of bounds:* “Company policy forbids any discussion of other offers in a situation like this.” Note that, if untrue, this is a lie, but it is one that carries less risk to your reputation because it is hard to confirm. If there really is such a company policy, an idealist could also use this move to block the question.
- *Answer a different question:* “We will not be keeping the property on the market much longer because the market is moving and our plans are changing.” Again, if untrue, this statement is a mere lie about a rationale that troubles pragmatists less than idealists.
- *Dodge the question:* “The more important question is whether we are going to get an offer from you—and when.”
- *Ask a question of your own:* “What alternatives are you examining at this time?”
- *Change the subject:* “We are late for our next meeting already. Are you bidding today or not?”

Blocking techniques of this sort serve a utilitarian purpose. They preserve some leverage (though not as much as the Poker School) while reducing the risk of acquiring a reputation for deception. Relationships and reputations matter. If there is even a remote chance of a lie coming back to haunt you in a future negotiation with either the person you lie to or someone he may interact with, the pragmatists argue that you should not do it.

So—which school do you belong to? Or do you belong to the school of your own, such as “pragmatic idealism”? To repeat, my advice is to aim high. The pressure of real bargaining often makes ethical compromisers of us all. When you fall below the standard of the Poker School, you are at serious risk of legal and even criminal liability.

Bargaining with the Devil: The Art of Self-Defense

Regardless of which school of bargaining ethics you adopt, you are going to face unscrupulous tactics from others on occasion. Even members of the Poker School sometimes face

off against crooks. Are there any reliable means of self-defense to protect yourself and minimize the dangers? This section will give you some pointers on how to engage in effective self-defense against unethical tactics at the bargaining table.

Maintain Your Own Standards—Don't Sink to Theirs

It is tempting to engage in tit for tat when the other side uses unethical tactics. We get angry. We lose perspective and start down the unethical path ourselves.

Avoid this trap. First, no matter what school of bargaining ethics you adhere to, you need to keep your record clean both to maintain your self-respect and to avoid gaining a reputation for slippery dealing. Second, as soon as you begin acting unethically, you lose the right to protest other people's conduct. Their behavior may give you a legitimate claim to extract concessions, or it may form the basis for a legal case. Once you join them in the gutter, you forfeit your moral and legal advantage.

Table 1 is a tool to keep yourself out of trouble with deception. You'll have to decide for yourself whether the advice passes muster under your personal ethical standards. So far as I know, all of the alternatives are legal, so Poker School adherents who find themselves in a tight spot in which a lie will not work should feel free to use them. Pragmatists usually prefer to avoid lies if relationships matter, so these will be helpful to them too. Idealists can use any of these that involve telling the truth in a way that does not mislead or deflecting a question with an obvious, transparent blocking maneuver.

Remember, there is no commandment in negotiation that says, "Thou shalt answer every question that is asked." And as an aspiring idealist, I have found it useful to follow this rule: *Whenever you are tempted to lie about something, stop, think for a moment, and then find something—anything—to tell the truth about.* If the other side asks you about your alternatives or your bottom line, deflect that question and then tell the truth about your goals, expectations, and interests.

A Rogue's Gallery of Tactics

As my final offering on this topic, here is a list of the more common manipulative tactics you will encounter at the bargaining table:

- Decide which school of bargaining ethics you belong to.
- Determine whether you can use your relationships to offset the dangers of unethical conduct by others involved in the transaction.
- Probe, probe, probe. Do not take what you hear at face value.
- Pause. Remember that you do not have to answer every question.
- Do not lie. Instead, find a way to use the truth to your advantage.

We have seen some of these before, but I will summarize them again for ease of reference. Note that only some of them involve overt deception.

I do not label these unethical because most of them are well within the boundaries of the Poker School, and some can work even for pragmatists when there is no relationship problem in view.

Table 1 Alternatives to Lying

Instead of Lying About	Try This
Bottom line	Blocking maneuvers. Ask about their bottom line. Say, "It's not your business." Say, "I'm not free to disclose that." Tell the truth about your goal. Focus on your problems or needs.
Lack of authority	Obtain only limited authority in the first place. Require ratification by your group.
Availability of alternatives	Initiate efforts to improve alternatives. Stress opportunities and uncertainties. Be satisfied with the status quo.
Commitment to positions	Commit to general goals. Commit to standards. Commit to addressing the other side's interests.
Phony issues	Inject new issues with real value or make a true wish list.
Threats	Use cooling-off periods. Suggest third-party help. Discuss use of a formula.
Intentions	Make only promises you can and will keep.
Facts	Focus on uncertainty regarding the facts. Use language carefully. Express your opinion.

Summary

Ethical dilemmas are at the center of many bargaining encounters. There is no escaping the fact that deception is part of negotiation. And there is no escaping the importance people place on personal integrity in their dealings with others at the bargaining table. One ethical slip, and your credibility is lost, not just for one but for many deals. Effective negotiations take the issue of personal integrity very seriously. Ineffective negotiators do not.

How do you balance these two contradictory factors? I have presented three frameworks for thinking about ethical issues: the Poker School, the Idealist School, and the Pragmatist School. I personally think you are better off sticking to the truth as much as possible. I sometimes lose leverage as the price of this scruple, but I gain a greater measure of ease and self-respect as compensation.

Where you come out on bargaining ethics, of course, is a matter for you to decide. My only injunction to you is this: negotiators who value personal integrity can be counted on to behave consistently, using a thoughtful set of personal values that they could, if necessary, explain and defend to others.

Can Answers Be Found in Codes of Conduct?

What about the nature of the ethical relationship between a lawyer and client or another representative negotiator and his client? Do codes of conduct help answer the moral and ethical dilemmas that have been discussed in this chapter? The Canadian Bar Association's *Code of Professional Conduct* calls upon lawyers to undertake duties with "integrity,"²⁹ "honest[y] and candour,"³⁰ and to observe a "standard of conduct that reflects credit on the legal profession and the administration of justice generally and inspires the confidence and trust of both clients and the community."³¹ Is this "standard of conduct" set by the Canadian Bar Association helpful in determining how a lawyer should behave in the situations discussed in this chapter? Should we set our standards solely on the basis of "complying"? Julian Webb writes:

Virtue also conveys, more generally, a commitment to fairness, and an idea of 'wholeness' that we have become perhaps less accustomed to apply to people than things. Yet it is 'wholeness' that ... is critical, particularly as a counterbalance to the morally deadening consequences of too close an adhesion to a narrowly defined role morality. There is no virtue in blind adherence to a role or a rule. By 'wholeness' I am thus trying to convey a sense of being true to oneself, not as a metaphysical being, but as an embodied self in constant interaction with others.³²

In 2002, lawyers in the American Bar Association (ABA) engaged in a debate pertaining to a proposed "duty of fair dealing"³³ in settlement negotiations and an existing duty not to make "false statements of material fact or law."³⁴ The latter, however, does not include "statements of opinion or those that merely reflect the speaker's state of mind."³⁵ As ABA Model Rule 4.1, comment 2, states:

29 Canadian Bar Association, *Code of Professional Conduct* (Ottawa: Canadian Bar Association, 2006) c. I.

30 *Ibid.* c. II (Advising Clients)

31 *Ibid.* c. XVI (Avoiding Questionable Conduct, Commentary 10).

32 J. Webb, "Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education" (1998) 25 *Journal of Law and Society* 134-50 at 143.

33 American Bar Association, Section on Litigation, *Ethical Guidelines for Settlement Negotiations* (Chicago: American Bar Association, 2002) s. 2.3.

34 *Ibid.*, s. 4.1.1.

35 *Ibid.*

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 ordinarily in this category ...³⁶

Commenting on negotiations of counsel in mediation, the ABA Ethics Committee concluded that "statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation 'puffing,' ordinarily are not considered 'false statements of material fact' within the meaning of the Model Rules."³⁷

Dispute resolution scholar Kimberlee Kovach denounces the opinion of the ABA Ethics Committee, saying that it allows deceit "under the characterization of 'puffery' in negotiation," and also allows "attorneys to make misrepresentations to the mediator as well as one another." Kovach finds this particularly troubling, given the ABA's endorsement of a mediator's duty to "promote honesty and candor between and among all participants."³⁸ Her response focuses on the ethical and moral tensions between the moral imperative "do not lie" and commonly accepted practices of deception within the field of representative negotiation.

According to Robert Piercey, some moral philosophers derive ethics from deeper moral norms that must trump more contingently situated ethics.³⁹ Thus, "do not lie" trumps any suggestion of any type of deception in negotiation, including puffery or misleading about one's client's bottom line. Others claim the contrary—that morality is derived from localized and particularized ethical discourse. For the ABA, puffery and misleading about the bottom line are seen as ethically acceptable, since both are customarily part of the rules of the negotiation game that all players should know.

Webb believes that social virtues, expressed in such terms as friendship, care, beneficence, sympathy, and solidarity, are more important than the minimal standards set by the legal profession and should assist us in exploring the nature and limits of social and professional responsibility.⁴⁰

36 *Ibid.*

37 American Bar Association Standing Committee on Ethics and Professional Responsibility, *Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation*, Formal Opinion 06-439 (Chicago: American Bar Association, 2006), online: BNA <<http://www.bna.com/bnabooks/ababna/annual/2006/42.pdf>>.

38 K. Kovach, "Ethics Opinion a Step Back in Time, Complicates Responsibility of Mediators" (2006), online: American Bar Association Committee on Ethics <<http://www.abanet.org/dch/committee.cfm?com=DR018000>> citing Standard VI, 4 of the Model Standards of Conduct for Mediators approved by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution in August 2005, which can be found at <<http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf>>.

39 R. Piercey, "Not Choosing Between Morality and Ethics" (2001) 32 *The Philosophical Forum* 53 at 54.

40 Webb, *supra* note 32 at 144.

Julie Macfarlane argues that the ethical dilemmas mediators encounter are much too multi-dimensional to be summarized in a generic code such as the Canadian Bar Association—Ontario ADR Section Model Code of Conduct for Mediators.⁴¹ She also suggests that these types of codes are too general to be useful and that practitioners must develop “internal norms,” rather than rely on external ones. “The current approach—largely limited to the development of voluntary codes of conduct for mediators—consistently underestimates and oversimplifies the complexities of what it means to mediate ethically.”⁴² Macfarlane argues that “codes of conduct . . . are neither conceptually nor structurally able to address the complex and unique moral dilemmas of practice,” and that the “norms and practices for a case must be generated from the actual interaction between the parties and the mediator.”⁴³

Mediation is negotiation with impartial and neutral third-party facilitators. Does Macfarlane’s concern about the utility of codes of conduct for mediators extend to codes of conduct for third-party negotiators? Who should write such codes—the legal profession, unions, the real estate industry, or experts on professional or business ethics? Are codes of conduct helpful in negotiations? Are they used? And whom do the codes protect—the public or the negotiator, the individual mediator or the mediation’s professional work group? How effectively are codes enforced? In the last 100 years we have seen the proliferation of codes of professional conduct. Accountants, lawyers, and brokers are all subject to mandatory ethics courses that attempt to raise the “ethical consciousness” in business and the professions. Many of these codes are after-the-fact attempts to convince the public, shareholders, and regulators that corporations and their representatives are taking their monopolies seriously and monitoring and policing their professional ethics.

In 2000, Wilkinson, Walker, and Mercer conducted a study focusing on whether lawyers in Ontario consulted their code of professional conduct, and specifically whether the Professional Conduct Handbook (“the Handbook”) was considered a useful tool. The authors reported that “the Handbook actually inhibited the ethical deliberations of those lawyers who referred to it for assistance in solving their specific problems.”⁴⁴ They concluded that “the net effect of these results is that the lawyers who did not consult the Handbook arguably behaved more ethically more often than those who did refer to the Handbook.”⁴⁵ On the basis of their findings, the authors observed that ethical rules can actually serve to impede moral development. If lawyers can simply turn to a specific rule when facing an ethical

41 Canadian Bar Association—Ontario ADR Section Model Code of Conduct for Mediators, online: Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/codeofconduct.asp>>. The code was drafted for lawyer and non-lawyer mediators and has been adopted as the code of mediator conduct for the Mandatory Mediation Program in the Ontario Superior Court in Ottawa, Toronto, and Windsor. Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194 R.24.1 Mandatory Mediation.

42 J. Macfarlane, “Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model” (2002) 40 Osgoode Hall L.J. 49 at 51.

43 *Ibid.*

44 M.A. Wilkinson, C. Walker & P. Mercer, “Do Codes of Ethics Actually Shape Legal Practice?” (2000) 45 McGill L.J. 645 at 647.

45 *Ibid.* at 680.

dilemma, “they will be dissuaded from rational deliberation and from accepting personal responsibility for their actions.”⁴⁶

As we have discussed, representative negotiators, and lawyers specifically, are often torn between an obligation to achieve a successful outcome for their client and a desire to negotiate with integrity. In “A Code of Negotiation Practices for Lawyers” below, Fisher outlines a solution to this ethical and moral dilemma. The code Fisher presents was drafted by lawyers and negotiation experts for the Harvard Negotiation Project.⁴⁷ Do you think that the code is helpful for negotiators? Is the code a useful guide for non-lawyers who are representative negotiators? Do you find the “model of just behavior” section of the code (see page 132) helpful in dealing with the issues discussed in this chapter? Does the code that Fisher and others developed address some of the competing interests of representative negotiators that we discussed in chapter 2?

Roger Fisher
 “A Code of Negotiation Practices for Lawyers”
 (1985) 1:2 Negotiation Journal 105-10

Most ethical problems facing lawyers in a negotiation stem from a conflict of interest between the lawyer’s obligation to the client (presumably to get the best deal) and two of the lawyer’s other interests: behaving honorably toward others involved in the negotiation and self-interest in preserving reputation and self-esteem.

It is often asserted that a lawyer is obliged to bluff and deceive those on the other side to the extent that it is ethically possible to do so. Professor James White of Michigan has written, “In one sense the negotiator’s role is at least passively to mislead his opponent ... while at the same time to engage in ethical behavior.” And, “Anyone who would maximize his potential as a negotiator must occasionally do things that would cause others to classify him as a ‘trickster,’ whether he so classifies himself or not” (White, 1984, pp. 118-119).

It may be possible to limit these ethical problems by conducting a preliminary negotiation between lawyer and client, clarifying the basis on which the lawyer is conducting the negotiation. The following two drafts are intended to stimulate discussion of this possibility. The first is in the form of a memorandum that a lawyer might give to a new client, and the second an attached draft code of negotiating behavior.

Memorandum to a New Client: How I Propose to Negotiate

Attached to this memorandum is a Code of Negotiation Practices for Lawyers. It has been prepared by lawyers and other professional experts in the negotiation process and is based on a draft first produced by the Harvard Negotiation Project at Harvard Law School.

I would like to obtain your approval for my accepting this code as providing the general guidelines for any negotiations I may conduct on your behalf. I would also like you to know that I will follow these guidelines in any negotiations that you and I may have with each other, for example over the question of fees. Finally, I commend the code to you because I think it provides useful guidance on

⁴⁶ *Ibid.* at 650.

⁴⁷ Fisher, *supra* note 17.

how you, yourself, might wish to conduct negotiations with others, even though you are not a lawyer.

The reason I would like your approval of my following this code in my negotiations as your lawyer is to avoid any future misunderstanding. In addition, I would like to put to rest the canard that because I am a lawyer, I have a "professional" duty to you as my client to engage in sharp or deceptive practices on your behalf—practices that I would not use on my own behalf and ones that might damage my credibility or my reputation for integrity. Let me explain.

The Code of Professional Responsibility approved by the American Bar Association provides that a lawyer should advance a client's interest zealously. The Code of Professional Responsibility does little to clarify this standard, and the Bar Association has failed to adopt proposed changes that would more explicitly permit a lawyer to balance the duty to be a partisan on behalf of a client with the duty to adhere to ethical standards of candor and honesty.

The result is that in the absence of client approval to do otherwise, it can be (and has been) argued that a lawyer should conceal information, bluff, and otherwise mislead people on behalf of a client even (1) where the lawyer would be unwilling for ethical reasons to do so on his or her own behalf; and (2) where the lawyer's best judgment is that to do so is contrary to the public interest, contrary to wise negotiation practices, and damaging to the very reputation for integrity that may have caused the client to retain the lawyer.

It is no doubt possible that in a given case a lawyer may obtain a short-term gain for a client by bluffing, threatening, actively misrepresenting the extent of the lawyer's authority, what the client is willing to do, or other facts, or by engaging in browbeating or other psychological pressure tactics. Yet many lawyers and academic experts believe that a practice of trying to settle differences by such tactics is risky for clients, bad for lawyers, and bad for society.

I believe that it is not a sound practice to negotiate in a way that rewards deception, stubbornness, dirty tricks, and taking risks. I think it wiser for our clients, ourselves, and our society to deal with differences in a way that optimizes the chance of reaching a fair outcome efficiently and amicably; that rewards those who are better prepared, more skillful and efficient, and who have the better case as measured by objective standards of fairness; and that makes each successive negotiation likely to be even better. (This does not mean that a negotiator should disclose everything or make unjustified concessions.)

The attached code is intended to accomplish those goals.

I hope you will read it and approve my trying to adhere to it. I will be happy to discuss it with you now and at any time during negotiations. Some of the ideas underlying the Code are discussed in the book *Getting to Yes: Negotiating Agreement Without Giving In* by Roger Fisher and William Ury (Houghton Mifflin, 1981). If you would like, I would be happy to provide you with a copy.

A Code of Negotiation Practices for Lawyers

I. Roles

1. Professional. You and those with whom you negotiate are members of an international profession of problem solvers. Do not look upon those on the other side as enemies but rather as partners with whom cooperation is essential and greatly in the interest of your client. You are colleagues in the difficult task of reconciling, as well as possible, interests that are sometimes shared but often conflict.
2. Advocate. You are also an advocate for your client's interests. You have a fiduciary obligation to look after the needs and concerns of your client, to make sure that they are taken into account, and to act in ways that will tend to ensure that they are well satisfied. It is not enough to seek a fair result. Among results that fall within the range of fairness, you should press with diligence and skill toward that result that best satisfies your client's interests consistent with being fair and socially acceptable.

3. Counselor. Clients, motivated by anger or short-term considerations, sometimes act, and may ask you to act, in ways that are contrary to their own best interests. Another of your roles is to help your clients take long-term considerations properly into account, come to understand their enlightened self-interest, and to pursue it.
4. Mediator. Furthermore, a negotiator often has to serve as a mediator between a client and those on the other side. Two lawyers, negotiating with each other, sometimes best function as comediators, trying to bring their clients together.
5. Model of just behavior. Finally, as a lawyer and negotiator, you should behave toward those with whom you negotiate in ways that incorporate the highest moral standards of civilization. Your conduct should be such that you regard it as a praiseworthy model for others to emulate and such that, if it became known, it would reflect credit on you and the bar. You should feel no obligation to be less candid for a client than you would be for yourself, and should not behave in ways that would justifiably damage your reputation for integrity.

II. Goals

As a negotiator, your goal is a good outcome. Such an outcome appears to depend on at least seven elements:

1. Alternatives. The outcome should be better for your client than the best available alternative that could be reached without negotiating.
2. Interests. Your client's interests should be well satisfied. The interests of other parties and the community should be sufficiently satisfied to make the outcome acceptable to them and durable.
3. Options. Among the many possible outcomes, an agreement should be the best possible—or as near to it as can reasonably be developed without incurring undue transaction costs. Possible joint gains and mutually advantageous tradeoffs should be diligently sought, explored, and put to use. The result should be an elegant solution with no waste. This means that it could not be significantly better for your client without being significantly worse for others.
4. Legitimacy. The outcome should be reasonably fair to all as measured by objective criteria such as law, precedent, community practice, and expert opinion. No one should feel "taken."
5. Communication. If negotiations are to reach a wise outcome without waste of time or other resources, there must be effective communication among the parties. Communication should not halt when one or more of the parties wants to express disagreement. Even when a given negotiation fails to produce satisfactory results, communication lines should remain open.
6. Commitments. Pledges as to what you will or won't do should be made not at the outset of a negotiation but after differences of perception, interest, and values are fully appreciated. Commitments should be mutually understood and carefully crafted to be realistic and easy to implement.
7. Relationship. Both the way each negotiation is conducted and its outcome should be such that in future negotiations, it will be easier rather than harder for the parties to reach equally good or better outcomes.

III. Some Good Practices

There is no one best way to negotiate—a way that is applicable to every issue, context, and negotiating partner. In many situations, whether haggling in a bazaar or negotiating a new union contract, customs and expectations may be so fixed that any benefit that might occur from negotiating in a different way would be outweighed by the transaction costs of trying to do so. Nevertheless, the general rules of thumb and seven-element framework for analysis that follow may help even the most seasoned negotiator to continue to learn from experience and to improve the tools at his or her disposal.

A. General Guidelines

1. **Authority.** You and your client should establish the extent of your authority in terms that are as clear as circumstances permit. This includes the scope of the subject over which you will be negotiating and your authority to discuss questions, develop recommendations, make procedural commitments, and make final commitments on behalf of a client. If a client approves your use of this Code, you have authority to discuss any issue raised by the other side; to seek to develop a proposal that you and the other negotiators can conscientiously recommend; and, if in your judgment the circumstances so warrant, to commit your client to those terms. In almost all circumstances, however, even though you have such extensive authority, you will find it wise to obtain your client's approval of the terms of an agreement before it is finally accepted. Likewise, it is also prudent to let those with whom you are negotiating know at an early stage that that is your intention.
2. **Commitment.** As negotiations proceed there is often considerable uncertainty as to the degree of the parties' commitment to points on which agreement seems to have been reached. Matters drafted and tentatively accepted cannot be reopened without some cost. Accordingly, it is useful to remind your fellow negotiators from time to time of your understanding of the present status of points on the table. (For example: "My understanding is that we are now, without any commitment from either side, seeking to develop the terms of a possible agreement—terms that we both think might be acceptable." Or: "Our acceptance of this point is on the premise that we are able to reach agreement on all the other points in a package; if other points are not resolved to our mutual satisfaction either party is free to reopen this point.")
3. **Two judges.** Two negotiators are like two judges in that no decision will be reached unless they agree. A lawyer's skill in dealing with a judge is thus highly relevant to the way in which he or she should treat a fellow negotiator. (A negotiation is less like a quarrel and more like an appellate argument; less "You idiot!..." and more "Your honor...") If an argument has too little merit or is too extremely partisan in your favor to be advanced before a judge, then you should not advance such an argument in the context of a negotiation. Nor should you be less honest or candid than you would be in court with a judge. And, no matter how predisposed you may be, you should be as open to reasoned argument as you would want a judge to be.

B. In Pursuit of a Good Outcome

1. **Develop a best self-help alternative.** You should compare all proposed terms with your client's best alternative to a negotiated agreement. This means that you should understand the best that your client can do through unilateral action, self-restraint, agreement with some other party, or litigation. In a dispute, one standard with which to compare any proposed settlement is the expected value to your client of the litigation option. You should make a thoughtful and realistic assessment of the possible outcomes of litigation, including the human and financial costs, the uncertainty of result, and the damage to relationships that is often involved. You should not let any personal interest in trying a case, vindicating a position, enhancing a reputation, or earning substantial fees bias your judgment.
2. **Clarify interests.** You should come to understand fully the interests of your client, not simply the stated wants, but the underlying needs, concerns, fears and hopes. Do your best to make sure that the other side appreciates them. Make sure that you fully appreciate the other side's interests. One element of being well prepared is to be able to present the other side's point of view more persuasively than they can—and to explain convincingly why you still differ.
3. **Generate options.** Create a wide range of options that you believe are reasonably fair and take account of the legitimate interests of all parties. Encourage joint inventing by the parties, without commitment, of possible ways to reconcile the differing interests involved. To aid the process of inventing possibilities, postpone the process of evaluating and deciding among them.

4. Maximize legitimacy. Develop your knowledge of the law, precedents, expert opinion, and other potential objective standards of fairness applicable to the matter under negotiation. Discover and arm yourself with fair standards that effectively protect your client's interests. Do extensive research on standards previously advanced or accepted by those on the other side. Persuasively present the case for criteria that are both fair and take full account of the interests of your client. Be open to persuasion, but be an effective advocate for those standards that are most favorable to your client's interests to the extent that legitimate arguments can be found for them. In a negotiation, as in a courtroom, discussing what is fair does not mean giving in to the other side's demands.
5. Communicate effectively. Listen. The more you know about the other side's thinking, the greater chance you have of being able to persuade them. Unless you know what is on their minds, you are shooting in the dark. Acknowledging good points is one way of encouraging good communication.
6. Commit carefully. Commitments should generally be made at the end of the negotiation, not at the beginning. To reduce the risk of having either side lock itself into a fixed position before it fully understands the problem, consider the desirability of preparatory discussions at which both sides take no position and advance no proposals. Both sides clarify interests and perceptions, generate options, and suggest possible standards for determining a fair outcome.

When you do make an offer, remain willing to examine any proposed change that (1) would make the proposal better for both sides; (2) would make it substantially better for either side without significantly damaging the interests of the other; or (3) would in your eyes make the proposed agreement objectively fairer. Likewise, you should be prepared and open to considering any counteroffer that meets the same standards.

7. Build relationships. Throughout a negotiation, you have two crucial relationships—with the other side and with your client. In addition, you must continue to live with yourself. A good relationship is built and maintained by adhering to some basic values:

Be honest. Your obligation to your client never requires you to be dishonest. You must, of course, keep some matters confidential. Full disclosure is not expected or required.

Keep promises. Honor commitments. The easiest way to keep all promises is to make very few. If circumstances are going to make it impossible or unreasonable to keep a commitment, be the first to let people know.

Consult. Nothing is more basic to a good working relationship than advance communication. A rule of thumb is ACBD: Always Consult Before Deciding on matters that will significantly affect others.

Be open. A policy of listening, learning, taking advice, and being flexible builds the kind of relationship that encourages joint problem solving.

After the Negotiation

We encourage negotiators to reflect upon and learn from their ethical and moral behaviour in negotiations. Engage in self-reflection and periodically seek feedback from the other parties to the negotiation to learn about how you are perceived and whether you are considered effective and ethical. Barry Stuart, former chief judge of the Territorial Court of Yukon and an advocate of using the Aboriginal tradition of peacemaking circles in restorative justice efforts, suggests that negotiators reflect upon the following after a negotiation:⁴⁸

48 B.D. Stuart, *Peacemaking Circles: Principles for Introduction and Design of Peacemaking Circles* (LL.M. Thesis, Osgoode Hall Law School, 1999) [unpublished].

	What I Want to Feel About Myself While Driving Home	What I Want the Other Parties to Feel About Me While Driving Home
Honesty	"I want to feel I have been honest."	"That they have felt I have been honest."
Respect	"It is important for me to respect others, to respect their interest, their views."	"That they respect and understood me."
Listening	"If I don't listen, I won't be showing respect, but I really want to be sure I listen to hear what they say."	"That they feel I did hear them, and they know that."
Fair	"Whatever happens, fairness is important. I don't want to leave with something that is not fair for them or for me."	"That they believe I tried to be, and was, fair."
Trust	"This may be hard, but I really want to leave feeling I trusted them—you know, really trusted them."	"That they could trust me and believed that I didn't deceive them or didn't want to deceive them."
Practical	"What we do has to make sense, moves us along. My input has to help move things along to a conclusion."	"I want to be seen as working towards a result, being interested not just in winning, but interested in solving problems. I want them to think I am realistic."

Notes and Questions

1. You have recently graduated from a leading Canadian law school and are articling for a boutique litigation firm in Victoria. The senior partner asks you to meet with a long-standing corporate client who has a minor family law matter. (The firm doesn't usually handle domestic cases, but is taking on this matter as a favour to the ongoing client.) The client is in the midst of negotiating a domestic contract with his much younger companion and does not want the companion to know about his substantial off-shore assets. Basically, he wants his new companion to have a half-interest in the condo they live in and in his favourite antique sailboat, but not have any claim on his other assets in Canada and the Cayman Islands. The client has asked you to attend the negotiation meeting with his significant other and not reveal any of his assets other than his sailboat, car, condo, and the various furnishings, paintings, and antiques in the condo. Just before the negotiation, the client calls and says that his significant other would like an affidavit setting out all of his assets. He asks you to draw up the affidavit for him to swear en route to the meeting with his companion, who will be unrepresented at the negotiation.

Do you have any problems with going ahead and preparing for this negotiation? Which assets would you list in the affidavit? What ethical issues arise from this scenario and how would you deal with them? Would you discuss your concerns with other colleagues? With the senior partner of your firm? Would you consult a code of conduct in the time available for you to reflect on this negotiation?

Selected Further Reading

- J.R. Cohen, "The Ethics of Respect in Negotiation" (2002) 18 *Negotiation Journal* 115.
- P.C. Crampton & J.G. Dees, "Promoting Honesty in Negotiation: An Exercise in Practical Ethics" (1993) 3 *Business Ethics Quarterly* 359.
- R.A. Friedman & D.L. Shapiro, "Deception and Mutual Gains Bargaining: Are They Mutually Exclusive?" (1995) 11 *Negotiation Journal* 243.
- K. Gibson, "Ethics and Morality in Negotiation" in A.K. Schneider & C. Honeyman, eds., *The Negotiator's Fieldbook* (Washington, DC: ABA Press, 2006) 175.
- D.A. Lax & J.K. Sebenius, "Three Ethical Issues in Negotiation" (1986) 2 *Negotiation Journal* 363.
- R.J. Lewicki & R.J. Robinson, "Ethical and Unethical Bargaining Tactics: An Empirical Study" (1998) 17 *Journal of Business Ethics* 665.
- C. Menkel-Meadow, "Ethics, Morality and Professional Responsibility in Negotiation" in P. Bernard & B. Garth, eds., *Dispute Resolution Ethics: A Comprehensive Guide* (Washington, DC: ABA Press 2002).
- R. Mnookin & L. Susskind, *Negotiating on Behalf of Others: Advice to Lawyers, Business Executive, Sports Agents, Diplomats, Politicians and Everybody Else* (Thousand Oaks, CA: Sage Publications, 1999).
- E.H. Norton, "Bargaining and the Ethics of Process" (1989) 64 *N.Y.U.L. Rev.* 494.
- S.R. Peppet, "Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining" (2002) 7 *Harv. Negot. L. Rev.* 83.
- C. Provis, "Ethics, Deception and Labor Negotiations" (2000) 28 *Journal of Business Ethics* 145.
- N.A. Welsh, "Perceptions of Fairness" in A.K. Schneider & C. Honeyman, eds., *The Negotiator's Fieldbook* (Washington, DC: ABA Press, 2006) 165.
- G. Wetlaufer, "The Ethics of Lying in Negotiation" (1990) 75 *Iowa L. Rev.* 1219.
- J.J. White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation" (1980) 4 *American Bar Foundation Research Journal* 926.

PART V

Perspectives, Lenses, and Issues Pertaining to Legal Negotiation