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# The Negotiator-as-Professional: Understanding the Competing Interests of a Representative Negotiator

Trevor C. W. Farrow<sup>1</sup>

## I. INTRODUCTION

This article is about lawyers as negotiators, and in particular, it is about identifying and understanding the influential and potentially competing interests that are – or at least should be – in the minds of lawyers (and potentially other third party representatives) during the overall negotiation process. As several commentators have recently and correctly pointed out, the "overwhelming preponderance" of what lawyers do "involves negotiating with others."<sup>2</sup> There is little doubt that the bulk of a solicitor's work involves representative negotiation, whether it is deal-making as a corporate lawyer, negotiating with suppliers or outside counsel as an in-house lawyer, working out a divorce settlement as a collaborative family lawyer, or crafting the provisions of a collective bargaining agreement as a labour lawyer. Equally important are the tools of negotiation in many aspects of a litigator's day, including negotiating the terms of a settlement, plea bargaining, working out the parameters of and approaches to an advocacy brief with a client, scheduling hearing dates with opposing counsel, or engaging in a court-annexed dispute resolution session. As Marc

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1. Assistant Professor, Osgoode Hall Law School, York University, [tfarrow@osgoode.yorku.ca](mailto:tfarrow@osgoode.yorku.ca). I first presented the ideas in this article in a guest lecture in Frederick H. Zemans' "Lawyer as Negotiator" course at Osgoode Hall Law School in Toronto on 25 October 2006. I am grateful to Allan C. Hutchinson, Frederick H. Zemans, D. Paul Emond, and Colleen M. Hanycz for comments on an early draft of this article, to Jonathan Finkelstein for research assistance, and to my students – through numerous research papers and in-class discussions – who have significantly influenced my thinking in this article.

2. CHARLES B. WIGGINS & L. RANDOLPH LOWRY, *NEGOTIATION AND SETTLEMENT ADVOCACY: A BOOK OF READINGS*, 497 (2d ed., 2005).

Galanter has commented, the work of litigators could more accurately be described as "litigotiation."<sup>3</sup> So what this article is dealing with – representative negotiation – is the bread and butter of what essentially most lawyers do most of the time.

While there continues to be an increasing amount of literature on the mechanics and strategies of negotiation,<sup>4</sup> the underlying interests that are typically at stake in representative negotiations from the perspective of representatives – particularly negotiations involving lawyers – have not been adequately studied.<sup>5</sup> And until all interests are identified and placed squarely on the table as active parts to the overall process, representative negotiation will be less than fully effective, ethical and satisfying as a process for all those involved, including clients, lawyers and the public.

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3. GEORGE W. ADAMS, *MEDIATING JUSTICE: LEGAL DISPUTE NEGOTIATIONS*, 112-13 (CCH, 2003) (citing Marc Galanter & M. Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 *STAN. L. REV.* 1338, 1342 (1994). *See also* MICHAEL P. SILVER, *MEDIATION AND NEGOTIATION: REPRESENTING YOUR CLIENTS*, v (Butterworths, 2001).

4. Perhaps the best-known and still leading example of this literature is ROGER FISHER, WILLIAM URY BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN*, (2d ed. 1991). For a recent example, *see* Colleen M. Hanycz, *Introduction to the Negotiation Process Model* in COLLEEN M. HANYCZ, FREDERICK H. ZEMANS, & TREVOR C. W. FARROW, *THE THEORY AND PRACTICE OF REPRESENTATIVE NEGOTIATION* (2008). For general collections, *see, e.g.*, MICHAEL L. MOFFITT & ROBERT C. BORDONE, *THE HANDBOOK OF DISPUTE RESOLUTION* (Jossey-Bass ed., 2005), MAX H. BAZEMAN, *NEGOTIATION, DECISION MAKING AND CONFLICT MANAGEMENT*, (Edward Elgar ed., 2005), JULIE MACFARLANE, *DISPUTE RESOLUTION: READINGS AND CASE STUDIES*, (2d ed., 2003) For further background materials, *see generally* Trevor C. W. Farrow, *Dispute Resolution and Legal Education: A Bibliography* 7 *CARDOZO J. CONFLICT RESOL.* 119 (2005); Trevor C. W. Farrow, *Dispute Resolution, Access to Civil Justice and Legal Education* 42 *ALTA L. REV.* 741 (2005); Trevor C. W. Farrow, *Review Essay, Thinking About Dispute Resolution*, 41 *ALTA L. REV.* 559 (2003).

5. For useful starting points, *see generally* Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 *MD. L. REV.* 1 (1992); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 *COLUM. L. REV.* 509 (1994); Donald G. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 *UCLA L. REV.* 811 (1987); Carrie Menkel-Meadow, *Lawyer Negotiations: Theories and Realities – What We Learn From Mediation* 56 *MOD. L. REV.* 361 (1993); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving* 31 *UCLA L. REV.* 754 (1984). For some recent collections, *see generally* WIGGINS & LOWRY, *supra* note 2, HANYCZ, ZEMANS & FARROW, *supra* note 4; CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (LexisNexis ed. 2005). *See also* LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 52-70 (West Publishing 1987); WAYNE P. BRAZEL, *EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES* (Prentice-Hall 1988); XAVIER M. FRASCOGNA, JR. & H. LEE HETHERINGTON, *NEGOTIATION STRATEGIES FOR LAWYERS* (Prentice-Hall 1984); ROBERT A. WENKE, *THE ART OF NEGOTIATION FOR LAWYERS* (Richter Publications 1985). *See also* KENNETH ARROW, *BARRIERS TO CONFLICT RESOLUTION* PT. IV (Norton 1995).

## II. TRADITIONAL VISIONS OF THE REPRESENTATIVE NEGOTIATOR

The basic role of the lawyer is to do something on behalf of someone else, typically the client. In the context of representative negotiations, what is typically being sought is a negotiated deal or settlement that is to the benefit of the client, not the representative lawyer. Most commentators contemplate this role of the representative as one of "agent" on behalf of his or her "principal,"<sup>6</sup> or alternatively as a "surrogate,"<sup>7</sup> "affiliate,"<sup>8</sup> or bargaining "representative" on behalf of his or her "constituents."<sup>9</sup> Although each has a slightly different (more or less expansive) meaning of the relationship, for my purpose the common defining characteristic of all of these descriptions is that, at the end of the day, the deal is about the client's interests, not those of the lawyer. And notwithstanding modern negotiation models that promote cooperative, interest-based approaches,<sup>10</sup> this vision of the representative negotiator is still largely influenced by and located in notions of the lawyer as the client's "zealous advocate".<sup>11</sup> The problem, even under these models, is that – as a practical matter – there is much more at play in the representative negotiator's mind than just what the client cares about.<sup>12</sup>

6. See, e.g., ROBERT H. MNOOKIN & LAWRENCE E. SUSSKIND, *NEGOTIATING ON BEHALF OF OTHERS: ADVICE TO LAWYERS, BUSINESS EXECUTIVES, SPORTS AGENTS, DIPLOMATS, POLITICIANS, AND EVERYBODY ELSE passim* (Sage Publications 1999). See also WIGGINS & LOWRY, *supra* note 2, at 497; Jeffrey Z. Rubin & Frank E. A. Sander, *When Should We Use Agents? Direct vs. Representative Negotiation* 4 NEGOT. J. 395 (1988), in WIGGINS & LOWRY, *supra* note 2, at 501; Jayne Seminare Docherty & Marcia Caton Campbell, *Teaching Negotiators to Analyze Conflict Structure and Anticipate the Consequences of Principle-Agent Relationships* 87 MARQ. L. REV. 655 (2004), in WIGGINS & LOWRY, *supra* note 2, at 508.

7. See, e.g., WIGGINS & LOWRY, *supra* note 2, at 516.

8. See, e.g., Gifford, *supra* note 5, at 837 (citing Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking* HARV. L. REV. 637, 660 (1976)),

9. See, e.g., DEAN G. PRUITT, *NEGOTIATION BEHAVIOR* 41 (Academic Press, 1981) [*Negotiation Behavior*], in WIGGINS & LOWRY, *supra* note 2, at 499. See also Docherty & Campbell, *supra* note 6; DAVID J. CORRY, *NEGOTIATION: THE ART OF MUTUAL GAINS BARGAINING* 90 (Canada Law Book, 2000).

10. See, e.g., FISHER, URY, & PATTON, *supra* note 4, and see generally MACFARLANE, *supra* note 4.

11. For a useful discussion of this role, see ADAMS, *supra* note 3 at 136-47.

12. As Fisher and Ury argue, "Whether it is his employer, his client, his employees, his colleagues, his family, or his wife, every negotiator has a constituency to whose interests he is sensitive. To understand that negotiator's interests means to understand the variety of somewhat differing interests that he needs to take into account." FISHER, URY, & PATTON, *supra* note 4, at 48. I am grateful to Colleen M. Hanycz for drawing this passage to my attention.

To address this deficiency, several discussions of lawyers (or others) as representative negotiators have expanded this principal-agent vision somewhat by suggesting that the role of a representative negotiator is defined not by one but by two interests: the interests of the client and the interests that are at stake vis-à-vis the bargaining opposite. For example, Wiggins and Lowry comment that: "As representative negotiators, attorneys always have two negotiations occurring simultaneously: One with their bargaining opposite and one with their own client."<sup>13</sup> Further, as Rubin and Sander question: "What if the agent . . . care[s] about his future relationship with the other agent, and wants to be remembered as a fair and scrupulous bargainer? How should this conflict get resolved . . . ?"<sup>14</sup>

The position occupied by typical representative negotiators under these sorts of two-interest models is said to be a "boundary-role position," in which representatives, as Dean Pruitt comments, "can be thought of as intermediaries whose job is to reconcile the interests of their own and the opposing organization. They must represent the interests of their constituents to the opposing representative *and* represent the views of the opposing representative to their constituents."<sup>15</sup>

These somewhat expanded treatments of the relevant interests at stake in representative negotiations – beyond those of simply the representative's clients – help better to understand the process of representative negotiation and what actions are and should be taken by representatives on behalf of their clients in any given context. However, the problem with these somewhat expanded models is that they still do not paint the full picture of what is typically going on inside the representative negotiator's mind, and as such, provide an impoverished view of his or her role, both in terms of its responsibilities and its potential opportunities.

### III. NEGOTIATOR-AS-PROFESSIONAL

To address these deficiencies, I advance an alternative, expansive model of the representative negotiator that I call the "negotiator-as-professional" model. It is a model that sees the role of the representative negotiator as being defined not simply by the client's interests or by the two interests that are identified by the boundary-role position models,<sup>16</sup> but rather by at least

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13. WIGGINS & LOWRY, *supra* note 2, at 498 (commenting on arguments presented in Rubin & Sander's "When Should We Use Agents?", *supra* note 6). *See also id.* at 497.

14. Rubin & Sander, *supra* note 6, at 505 (cited to WIGGINS & LOWRY, *supra* note 2, emphasis omitted).

15. PRUITT, *supra* note 9, at 500 (cited to WIGGINS & LOWRY, *supra* note 2).

16. *See, e.g., supra* note 15 and accompanying text.

four sets of interests: client interests, a broad understanding of the representative's self-interests (that may include, but are not limited to, interests vis-à-vis the representative negotiator's bargaining opposite), ethical interests, and the public's interests.

### A. *Client Interests*

#### 1. Interests of the Representative's Client

In any lawyering model, the representative's client maintains one of, and typically the primary set of interests in the relationship. This is the defining characteristic of the lawyer-client relationship in the adversary system.<sup>17</sup> In the context of negotiation, as Rubin and Sander point out, lawyer representatives bring to the table a particular "expertise" and a "tactical flexibility" to be used to the benefit of the client.<sup>18</sup> Further, according to Pruitt, the "essence of the representative effect" under the boundary-role position in negotiation "is trying to please one's constituent"<sup>19</sup> (a task that is obviously directly dependant on the client's interests). Therefore, as Pruitt further argues:

[i]t follows that bargainers who are representatives will usually be less conciliatory than those who are negotiating on their own behalf' and, subject to contrary instructions from the client, "representatives tend to view their constituents as desiring a tough, nonconciliatory approach to bargaining of the kind that is produced by a win/lose orientation."<sup>20</sup>

Here we see ourselves largely back to the "zealous advocate" tendency that foregrounds the interests of the client typically to the exclusion of essentially everything else.

This model is further articulated in the negotiation context by Robert Cochran, who argues that not only should representatives tend to "please" the client, they should also afford a significant amount of deference to the

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17. For an historic treatment of the adversary system – and the lawyer's role in that system – that remains very helpful today, see Lon L. Fuller, *The Adversary System* in Harold J. Berman, *TALKS ON AMERICAN LAW*, 32 (New York: Vintage Books, 1961).

18. Rubin & Sander, *supra* note 6, at 502-03. See also ADAMS, *supra* note 3, at 136-47.

19. PRUITT, *supra* note 9, at 501.

20. *Id.* Because of this tendency, Pruitt argues in favour of representatives being fully informed of their clients' actual – rather than perceived – interests when approaching negotiations. See *id.* See also the findings of David A. Lax and James K. Sebenius, "Negotiating Through an Agent" 35 J. OF CONF. RESOL. 474 (1991).

client's choices in all aspects of the lawyering process.<sup>21</sup> When looking at the question of "what choices the client should make," Cochran answers by advocating that "courts [should] require lawyers to allow clients to make those choices which a reasonable person, in what the lawyer knows or should know to be the position of the client, would want to make."<sup>22</sup> Here again we see a strong preference for the client's interest as the keystone to the relationship.

So any model of the role of lawyer-as-negotiator must find a central position for the client's interests. However, the problem with models that focus essentially exclusively on the client's interests is that they are not accurate or honest in their description of what is in reality actually at play in the minds of representative negotiators, nor do they account for the fact that representative negotiators do not, and often should not, necessarily align their interests with those of their clients (or forgo their or other interests) in the spirit of zealous advocacy.<sup>23</sup> I can say with first-hand experience – as a litigator and negotiator turned academic – that as a conceptual matter, there are more interests at play than only those of the client. And as a practical matter, privileging the interests of the client does not always sit well with representative negotiators.

An example from a recent negotiation class illustrates these concerns. In an animated debrief portion of an in-class mock negotiation that I recently conducted involving the intellectual property rights to artistic materials of the negotiating parties, a student of mine, after reflecting on the difficulty of maintaining a negotiation relationship with the other side as well as maintaining any sense of personal integrity vis-à-vis a very difficult position she was being asked to advance on behalf of her client, stated in sheer frustration: "we started from a ridiculous position: our client simply wanted too much. Her position was [expletive] crazy." The student's frustration resulted in a significant discussion about the role of the lawyer generally, and the lawyer-as-negotiator in particular. The easy response to her concerns was that she was her client's agent, and she could either conduct the negotiation or get off the file.<sup>24</sup> However, that model – the simple agency model of lawyering that essentially backgrounds all other interests in favour of strong client autonomy – did not sit at all well with her.

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21. See WIGGINS & LOWRY, *supra* note 2 (citing Robert F. Cochran, *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990)).

22. WIGGINS & LOWRY, *supra* note 2 (quoting Cochran, *supra* note 21).

23. See Jeswald W. Salacuse, *Law and Power in Agency Relationships* in MNOOKIN, *supra* note 6 at 157 (discussing the diverging interests of principals and agents generally).

24. See *infra* note 65 (discussing the issue of withdrawal).

Advancing instructions that in her view were "ridiculous" and "crazy" did not leave my student with either a good feeling about the specific case or about her general role as a representative negotiator. For her, notwithstanding her role as a lawyer-negotiator, there was clearly more at stake.

Overly client-centric visions of the role of representative negotiator, like the model advanced by Cochran, do not help with this frustration, which belies interests at play other than those of the client. So the question then becomes: Do we need to live with that frustration? Is the zealous advocate view of the world the right (or only) one, particularly in light of concerns that leave the representative feeling frustrated, inadequate and perhaps hamstrung regarding potential alternative approaches and solutions? Because there are clearly interests other than those of the client that need to be recognized, the answer to this question, must be no. Before getting to some objections to this position,<sup>25</sup> and further, to a set of interests involving the various potential self-interests of the representative negotiator that were at stake in my student's role-play example, I briefly (below) identify another set of client interests: those of the opposing client.

## 2. Other Client's Interests

Because this article deals with the mindset of the representative negotiator (and not specifically the mindset of principal parties), I do not spend much time here on the interests of the other side. Thinking about the interests of negotiation principals – by identifying, maximizing and/or minimizing mutual interests, creating space for mutual gains, value creating and value claiming, etc. – is an important subject that is discussed elsewhere.<sup>26</sup> However, it is obviously important – when thinking about the competing interests at stake in the mind of the representative lawyer – to make sure that the other side's interests, in addition to interests vis-à-vis the bargaining opposite<sup>27</sup> – are on the table.

The typical lawyer-client relationship militates against any responsibility of the lawyer for the interests of the other side. Further, zealous advocacy models expressly reject such concerns. And my point here is not at all to say that the lawyer negotiator is now responsible for the other

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25. See, e.g., *infra* Part IV.

26. See, e.g., *supra* note 4.

27. Discussed *infra* in Part III.B.1.



side's interests, particularly when she is also represented. However, to the extent that alternative negotiation models are considered – for example strong cooperative models that actively include the other side's interests in the spirit of maintaining future relationships and mutual gains<sup>28</sup> or hybrid models that contemplate the balance of value creation and value claiming<sup>29</sup> – consideration for the other side's interests must at least be considered and discussed with the representative's client. And in any event, regardless of which negotiation model one follows, modern ethical codes are increasingly mandating consideration of the other side in the context of truth-telling and fair play.<sup>30</sup>

### *B. Representative Negotiator's Self-Interests*

Separate from client interests, there are a number of potential sets of self-interests at play for the representative in the negotiation process. When thinking about these interests, it seems to me that there are two questions that need to be addressed: What kind of negotiator is the representative (hard, soft, principled, etc.)? And what pecuniary and other self-interests are at stake? While the representative's ethical interests could also be considered here, they are instead treated in a separate part of this article.<sup>31</sup>

#### 1. Representative Negotiation Style

On the first question, negotiators must decide if they have the interest and skill to proceed with one or more negotiation styles,<sup>32</sup> and if so, whether negotiation style is a topic open for discussion with his or her client. Some negotiators are of the view that they are unable to wear different negotiation "faces." Again turning to examples from my teaching, several students have recently indicated to me – in the context of role-plays that require experimentation with different negotiation styles – that they feel very uncomfortable putting on a face or playing a role (the competitive negotiator, the cooperative negotiator, the bad cop, the tough guy, etc.) and

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28. See FISHER, URY, & PATTON, *supra* note 4.

29. See, e.g., HANYCZ, *supra* note 4; See also David A. Lax & James K. Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Mutual Gain* (Free Press, 1986).

30. See *infra* in Part III.C.2.

31. See *infra* Part III.C.

32. For a discussion of different negotiation styles, see G. R. Williams, *Style and Effectiveness in Negotiation*, in NEGOTIATION: STRATEGIES FOR MUTUAL GAIN (Lavinia Hall ed., 1993) 151, 156. See, e.g., ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 51-55 (2000); CHERYL PICARD ET AL., THE ART AND SCIENCE OF MEDIATION 69-75 (2004).

that, in their view, their skills are maximized when they present themselves as an authentic and principled representative in all cases. Drawing on personal practical experiences as a litigator and settlement counsel, these concerns resonate not only in the classroom but also amongst practicing representatives.

These threshold concerns are typically and ultimately dealt with on a calculus of competence and context. To the extent that the lawyer representative and the client think that the lawyer's chosen approach renders them competent for the negotiation, then all is well: proceeding on the basis of the lawyer's preferred style, as discussed with the client, is the chosen course of instruction. To the extent that is not the case, codes of conduct typically require the lawyer to get off the case and recommend another representative. Further, in line with scholars who argue that some contexts – typically including one-off personal injury cases – often lend themselves better to one negotiating style over another (competitive negotiation for example),<sup>33</sup> it may be that the context of a certain case determines the required level of competency with a given style. Again, choices will be made at this threshold stage regarding the approach and the continued retainer.

If the representative is competent to proceed with one or more of a variety of different styles, the issue then becomes one of ownership. Who gets to choose with which style to proceed: the representative or the client? Here we see the potential of an obvious conflict. As Rubin and Sander discuss, there is often a potential conflict with a client's instruction (for example to achieve the best possible outcome in a one-off negotiation through the use of a competitive approach) and the interest of a representative negotiator (who would prefer, for example, to retain a relationship with the negotiator's bargaining opposite by using a cooperative approach).<sup>34</sup> Similarly, Gifford and Pruitt's descriptions of both the "boundary role position" and the lawyer-as-negotiator position result in the same potential competing interests between the representative and the client.<sup>35</sup>

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33. See, e.g., Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, in *NEGOTIATION AND SETTLEMENT ADVOCACY: A BOOK OF READINGS*, *supra* note 2, at 521.

34. See Rubin & Sander, *supra* note 6 at 505.

35. See Gifford, *supra* note 5, at 835; PRUITT, *supra* note 9, at 500; see also WIGGINS & LOWRY, *supra* note 2, at 498, SILVER, *supra* note 3, at 75.

Now before I get into further discussion of this potential conflict, it should be recognized that even though the potential of competing interests exists, there does not necessarily need to be a conflict. Clearly a good relationship between the representative negotiator and the bargaining opposite can militate to the benefit of both the representative lawyer and the client. As Gifford recognizes, negotiating fairly with the other side does not mean a "selling-out" of the client's interests.<sup>36</sup> Similarly, Pruitt argues that developing relationships with the other side can help both with the client's immediate outcome as well as potentially with future negotiations: "Because they communicate with one another over a period of time and share similar organizational positions, representatives often develop ties to one another. These ties can contribute to the reconciliation of conflicts that would otherwise be intractable."<sup>37</sup>

However, when interests do not align, the potential of conflict between the representative and the client is real and very typical. In these circumstances, the client-centered "zealous advocate" model advocates for the backgrounding of the representative's interests in favour of the client's preferences. This view of the negotiator's role fits Robert Cochran's model. For Cochran, if the representative lawyer viewed that a cooperative approach was appropriate, but the client preferred a competitive approach (perhaps in the context of a one-off real estate purchase for the client who does not anticipate being in a similar market position again), the client's preference should prevail. According to Cochran, regardless of the lawyer's preference vis-à-vis the bargaining opposite, the client has a "right to choose the negotiating style."<sup>38</sup>

On the traditional lawyer-client relationship model, this view is not controversial. In fact, it is still largely the dominant view.<sup>39</sup> The lawyer's role is to carry out the wishes of the client – period. As the argument goes, any other view of the role of the lawyer usurps a meaningful sense of client autonomy; and further, particularly given the virtual monopoly of power that lawyers have over the provision of increasingly essential legal services, any other view would essentially create an all-powerful oligarchy of lawyers.<sup>40</sup>

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36. Gifford, *supra* note 5, at 837; *see also* Gifford, *infra* note 106.

37. Pruitt, *supra* note 9, at 500.

38. *See* Cochran, *supra* note 21, at 540. For a useful discussion regarding the importance of context regarding the choice of negotiation style and strategy, *see* Gifford, *supra* note 33, at 521-23.

39. *See, e.g., infra* notes 59-60 and surrounding text.

40. Because I have written elsewhere on these arguments – *see infra* note 58 – I will not take them up further here. For a useful account of this argument, *see, e.g.,* Rob Atkinson, *How the Butler Was Made To Do It: The Perverted Professionalism of The Remains of the Day*, 105 YALE L.J. 177, 189 (1995) in which he argues:

The problem with this unsubtle view of legal representation, however, is that it is not fully supported in the literature or in codes of conduct,<sup>41</sup> and further, it ignores the daily reality of the negotiation process. Of course representatives will have interests. And so the question becomes: Why should those interests always take a back seat, particularly in cases – like the one involving my student – in which a client's position is "ridiculous?" In these circumstances, should lawyers be obligated to ignore their own views and interests and advance a "ridiculous" position? My view is that such an argument disingenuously ignores the reality of what actually goes on in the world of negotiations. Such an argument conveys an impoverished view of lawyering that does not make room for a representative's own views, interests and experiences in a given situation that may, at the end of the day, work to the benefit of the client's cause.<sup>42</sup> This ultimately cheapens the overall negotiation process to one that alienates negotiators – like my student – who are looking for a meaningful place to practice their skills in a professional, reasonable and fulfilling way. Further, to the extent that codes of conduct prohibit the advancement of "frivolous"<sup>43</sup> or "useless legal proceedings",<sup>44</sup> query whether advancing a "ridiculous" position amounts to unprofessional conduct.

The boundary-role position approach described by scholars like Pruitt and Gifford allows for the reality of potentially competing interests in the mind of the representative negotiator that zealous advocacy models tend to ignore. So when thinking about the potential interests at stake when preparing for a negotiation, the boundary-role position approach paints a more realistic landscape for the representative negotiator. At least now the tension in my student's mind has a voice and a place in the dialogue of negotiation preparation. And by actively recognizing these potentially

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The lawyer's job is to advise the client, faced with a bafflingly complex legal order. . .Not to assist the client in exercising autonomy up to the very margin allowed by law would be to usurp the role not just of judge and jury, but of the legislature as well. Ultimately, it would undermine the legitimacy of government itself.

41. See *infra* notes 66-70 and surrounding text.

42. I have been influenced here by ALLAN C. HUTCHINSON, LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY (2d ed. 2006).

43. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2006).

44. CODE OF PROF'L CONDUCT ch. III(6) (2006) (Can.) (stating the rules adopted by the Canadian Bar Association ("CBA")) (hereinafter "CPC"). See also RULES OF PROFESSIONAL CONDUCT R. 2.02(2) (2000) (Can.) (stating the rules adopted by the Law Society of Upper Canada ("LSUC")) (hereinafter "RPC").

competing interests, the lawyer can strategize about how to resolve them.<sup>45</sup> In a purely zealous advocacy model, these considerations are left off the table (or are at least the elephants in the room that no one is meant to talk about).

So far we have identified the client's interests and the representative's self-interests largely relating to negotiation styles vis-à-vis the bargaining opposite. It is with these interests that the current boundary role position schools of thought leave us. And because these schools of thought consider more than simply the client's interests – they are an improvement on the typically one-dimensional client-centered views of the zealous advocate. However, there are other interests at stake that still need to be considered as part of the representative's self-interests as well as other interests involving ethics and the public.<sup>46</sup>

## 2. Pecuniary and Other Self-Interests

In addition to style and the representative's reputation vis-à-vis the bargaining opposite, there are other potentially thorny self-interests at stake – particularly when negotiating settlements in the context of litigation – that should be identified and put on the table as issues to be acknowledged and considered when preparing for a representative negotiation. So the second question that needs to be asked under this discussion of the representative negotiator's self-interests is: What pecuniary and other self-interests are at stake and what is the client willing to do about them?

Wiggins and Lowry have articulated that negotiating attorneys and their clients "are like allies in warfare. Outwardly they may have an identity of goals and are bound together by professional obligations; yet internally they may have divergent interests and inconsistent long term objectives."<sup>47</sup> A number of potential conflicting interests arise in these circumstances. For example, to the extent that a piece of litigation is worth much more to the lawyer as a going concern as opposed to a settled case, there are incentives to keep the case alive and advise against settlement.<sup>48</sup> Along these lines, the lawyer-as-potential-settlement-negotiator may also be much less risk averse when it comes to recommending trial over settlement, given potential desires for trial experience, exposure to the press, significant contingency fee rewards (which admittedly can cut both ways), and internal firm or community respect for being a tough, court-ready litigator (that also may be

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45. For a discussion about potentially irreconcilably competing interests, see *infra* Part IV.

46. Discussed *infra* in Parts III C-D.

47. WIGGINS & LOWRY, *supra* note 2, at 517.

48. For a brief discussion on this issue, see SILVER, *supra* note 3, at 75.

based, at least in tournament discourse, on the desire to be thought of as "partnership material"<sup>49</sup>). The choice of payment structures – for example percentage of outcome vs. hourly rate – may also impact a representative's interests vis-à-vis approaching a negotiation.<sup>50</sup>

The underlying interests that raise these concerns are real and should be put on the table and considered in the context of full, sophisticated negotiation preparations. And typically there are solutions. Unlike self-interests based on the representative's reputation, purely financial self-interests are relatively easy to deal with. Codes of conduct typically paint rather bright conflict of interest lines in these areas that allow (or require) lawyers, after recognizing the issues, to background their financial interests in the spirit of the very notion of lawyering itself.<sup>51</sup> When it comes to some of the other, more personal or subtle concerns – undiluted focus on the trial process, a need to maintain a tough and ready litigation pose, etc. – there are other solutions, in addition to codes of conduct that require attorneys to consider settlement,<sup>52</sup> which assist with potentially competing interests. For example, the use of parallel settlement counsel as a way not to distract the focused litigator from his or her endgame is a process – based on the literature<sup>53</sup> and on my first-hand experience with the use of settlement

49. For a general discussion of tournament theory in the context of law firm hierarchies and decision-making processes, see, e.g., MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991). For a critique of this discussion, see, e.g., David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms* 84 VA. L. REV. 1581 (1998).

50. Some of these concerns are contemplated in: WIGGINS & LOWRY, *supra* note 2, at 517, Rubin & Sander *supra* note 6, at 505; Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial in*, NEGOTIATION AND SETTLEMENT ADVOCACY, *supra* note 2, at 525, 530; Lucian Arye Bebchuk & Andrew T. Guzman, *How Would You Like to Pay for That? The Strategic Effects of Fee Arrangements on Settlement Terms in* NEGOTIATION AND SETTLEMENT ADVOCACY, *supra* note 2, at 553-54; Herbert M. Kritzer, *Fee Arrangements and Negotiation in* NEGOTIATION AND SETTLEMENT ADVOCACY, *supra* note 2, at 552.

51. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.8 (2006). Further, as Chomenki and Hart argue, "Good lawyers . . . recognize their natural self-interest on the matter of fees, particularly in contingency cases, and deal with the matter as clearly and comprehensively as they can." GENEVIEVE A. CHORNENKI & CHRISTINE E. HART, *BYPASS COURT: A DISPUTE RESOLUTION HANDBOOK* 142 (3d ed., 2005).

52. See, e.g., CODE OF PROFESSIONAL CONDUCT ch. III(6) (2006) (Can.).

53. See, e.g., William F. Coyne, Jr., *The Case for Settlement Counsel* (1999) 14 OHIO ST. J. ON DISP. RESOL. 367; see also James Freund, *Bridging Troubled Waters: Negotiating Disputes in* NEGOTIATION AND SETTLEMENT ADVOCACY *supra* note 2, at 518, 520.

counsel in complex civil litigation settlements – that can work quite effectively.

Complicating (and clouding) these potential conflicting interests is the lawyer's inability to understand, or willful blindness to, what the client's interests (and other interests) actually are at the outset, as opposed to what the lawyer assumes (or wants) them to be. As Leonard Riskin recognized, the traditional zealous advocate tendency – based on the "lawyer's standard philosophical map" – blinds the lawyer to a number of things including the potential needs of the client that may not be "legally meaningful," including many non-financial issues relating to "honor, respect, dignity, security, and love . . ." <sup>54</sup> To assist with this impoverished tendency of the traditional advocate, particularly in favour of promoting the benefits of mediation, Riskin argues in favour of expanding the traditional map. All interests, and not simply those located on the adversarial map, need to be taken into account and understood as part of the lawyer's role as a representative. As I have recently argued elsewhere, education, an open-mindset, and a shift in the adversarial culture are all already leading to these ideals becoming more of a reality. <sup>55</sup>

### *C. Representative Lawyer's Ethical Interests*

According to a March 2006 statement by Brian A. Tabor, Q.C., President of the CBA: "Standards of professional ethics form the backdrop for everything lawyers do." <sup>56</sup> As such, any model of lawyering – including lawyers as negotiators – must actively embrace interests of an ethical nature. Therefore, in addition to reputational, pecuniary, and other self-interests, there are also significant (potentially related) ethical interests of the representative negotiator that need to be carefully considered in the context of developing the negotiator-as-professional model. There are two points of discussion here. The first, fundamental point deals with the relevance of the representative negotiator's own moral code. The second point deals with other ethical interests at play in a representative negotiation.

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54. Leonard Riskin, *Mediation and Lawyers* 43 OHIO ST. L. J. 29, 44 (1982); see also Docherty & Campbell, *supra* note 6.

55. See Trevor C. W. Farrow, *Globalizing Approaches to Legal Education and Training: Canada to Japan* 38 HOSEI RIRON J. OF L. & POL. 144 (2005); FARROW, *supra* note 4.

56. See CPC, *supra* note 44, at "President's Message."

### 1. What Kind of Lawyer is the Representative Negotiator?

The basic question that I am interested in here is: What kind of lawyer is the representative negotiator? Is the negotiator a zealous advocate driven solely by the client's self-interest; or is the negotiator an agent whose moral outlook also counts in the calculus of the principal-agent relationship, particularly regarding the kinds of cases taken, the results sought, and the tools used? This question – that goes to the heart of professionalism itself – has been nicely framed by Rob Atkinson:

Should a professional always do all that the law allows, or should the professional recognize other constraints, particularly concerns for the welfare of third parties? This question divides scholars of legal ethics and thoughtful practitioners into two schools: those who recognize constraints other than law's outer limit, and those who do not.<sup>57</sup>

Because I have written elsewhere on this topic relating to lawyers generally,<sup>58</sup> I will only briefly develop the basic issues here as they relate specifically to the representative negotiator. As a preliminary matter, there continue to be strong arguments for following Atkinson's second school: what counts is what is legal, and non-legal considerations – including a lawyer's personal ethical interests – are not relevant in terms of the lawyer's representation of his or her client. Traditional and still dominant views of the lawyer's role as a zealous advocate – as reinforced by codes of conduct<sup>59</sup> and academic literature regarding the lawyer's role in general<sup>60</sup> and the negotiator's role in particular<sup>61</sup> – support this school of thought.

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57. Atkinson, *supra* note 40, at 184 (footnote omitted).

58. See Trevor C. W. Farrow, *Ethical Lawyering in Theory and in Practice* (forthcoming).

59. See, e.g., MODEL RULES, *supra* note 43, at pmbl. ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system"), CPC, *supra* note 44 at ch. IX (rule) ("When acting as an advocate, the lawyer must. . .represent the client resolutely, honourably and within the limits of the law"). See also, R. 4.01:

The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law . . . [w]hen acting as an advocate, a lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case.

60. See, e.g., Fuller, *supra* note 17; Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation* 85 YALE L.J. 1060 (1976); MONROE H. FRIEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* (1975). For a very useful debate on the limits of the adversarial system and the role of the lawyer, compare Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities* AM. BAR FOUND. RES. J. 637 (1986) with David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper* AM. BAR FOUND.



The problem is that, notwithstanding this dominant school of thought, some representative negotiators, as a practical matter, are persuaded by Atkinson's other school of thought: that non-legal considerations – again including a lawyer's personal ethical interests – should not be irrelevant. Again drawing on examples from my teaching, many students are uncomfortable with the notion of negotiating deals, the underlying ethical consequences of which they fundamentally disagree with.<sup>62</sup> For instance, going back to my original example of the negotiation student who was representing a client with ridiculous and crazy instructions in an hypothetical role-play, when pushed in the de-brief session on whether she would take that case, she responded: "I'm not sure, if I had a choice, that I would work for someone like my client in the negotiation . . . she's an egomaniac."

Fortunately, representative negotiators do have a choice. So the question then becomes: Why should we pursue a model of professionalism that requires representative negotiators to negotiate deals on behalf of their clients that they would never negotiate for themselves or in any event that they think are ridiculous? The answer in my view is that we should not. Clearly there are times, particularly after a retainer has been accepted and negotiations are under way, when the lawyer may be asked to take positions professionally that he or she would not take personally.<sup>63</sup> But these situations aside, there are many occasions when the lawyer's interests and views should be voiced in the spirit of improving the underlying cause as well as the overall system, notwithstanding an individual client's initial desires. In this spirit, Allan Hutchinson, for example, argues for a model that does not require lawyers "to forgo moral judgment", for to do otherwise

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RES. J. 637 (1986), and Andrew L. Kaufman, *A Commentary on Pepper's "The Lawyer's Amoral Ethical Role"* AM. BAR FOUND. RES. J. 657 (1986). See also Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban* AM. BAR FOUND. RES. J. 657 (1986); Abe Krash, *Professional Responsibility to Clients and the Public Interest: Is There a Conflict?*, in PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION, *supra* note 66, at 445.

61. See, e.g., Cochran, *supra* note 21.

62. Such examples include the following hypothetical negotiations. (1) A rich, speculative, private land developer asks you to negotiate a deal with a slum landlord over the purchase of a fully-functioning low income rental facility that currently houses 80 families in favour of its demolition and replacement with a high-end multi-use condo facility that would house 8 high income families. (I have been influenced by Duncan Kennedy regarding this hypothetical. See Duncan Kennedy, *The Responsibility of Lawyers for the Justice of Their Causes*, 18 TEX. TECH. L. REV. 1157, 1162 (1987).) (2) The CEO of a large privately-held downsizing transnational security firm asks you to negotiate a deal that would result in the termination of all employees of the Jewish or Muslim faith, based on your client's unfounded occupational requirement theory that these employees, while "good people", simply pose too much of a reputational and security risk (in terms of attacks against security officers in the field) and therefore are too costly to the firm.

63. For a general discussion, see, e.g., *id.* See also the brief discussion on the topic of the timing of withdrawal, *infra* at note 65.

reduces them to "amoral technicians with significant drawbacks and limitations . . ." <sup>64</sup> What this looks like in practice is making choices about what negotiations a representative takes, and what tools and negotiation styles they are willing to use once a client is taken on. Of course this is all done with the client's knowledge and instructions. And if instructions are not forthcoming, the lawyer should get off the file. <sup>65</sup>

Before we dismiss all of this as moral meandering without a sound basis in legal policy, we should also recognize that professional codes of conduct – as supported by competing academic literature <sup>66</sup> – support the relevance of a lawyer's morality, sense of justice, honour, and ethics. For example, according to the preamble and scope of the *Model Rules*: "the Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules." <sup>67</sup> The CPC states: the "lawyer should not hesitate to speak out against an injustice." <sup>68</sup> Similar considerations regarding the relevance of broad notions of morality and honour obtain in various regional jurisdictions. For example, according to *The Lawyer's Code of Professional Responsibility (LCPR)* of the New York State Bar Association ("NYSBA"), "A lawyer should be temperate and dignified, and refrain from all illegal and morally reprehensible conduct." <sup>69</sup> Further, according to the preface of the *Code of Professional Conduct* of the Law Society of Alberta ("LSA"): "the

64. Allan C. Hutchinson, *Legal Ethics for a Fragmented Society: Between Professional and Personal*, in *THE CIVIL LITIGATION PROCESS: CASES AND MATERIALS* 157 (Janet Walker gen. ed., 6th ed. 2005).

65. It is acknowledged that getting off a file is more difficult, although certainly not impossible, once a negotiation has commenced or is imminent. Ideally, then, if withdrawal is seen as an option, it should occur with the client's consent, or at least with the client's full knowledge, as soon as possible in the life of the representative-client relationship prior to a negotiation.

66. See, e.g., Kennedy, *supra* note 62; Hutchinson, *supra* note 64; Menkel-Meadow, *Toward Another view of Legal Negotiation: The Structure of Problem Solving*, *supra* note 5. See also Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, in *PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION*, *supra* note 60, at 4; Luban, *supra* note 60; Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 671. See also *id.* at 690-95, (arguing, among other things, that in lawyering situations in which arbiters are not present – expressly invoking the lawyer's role as a "negotiator" or "counselor" – the "non-advocate lawyer should be held morally accountable for assistance rendered the client even though the lawyer is neither legally nor professionally accountable").

67. MODEL RULES, *supra* note 43, at pmb1. See also *id.* at 7, 9.

68. CPC, *supra* note 44, at ch. XIII.3.

69. NYSBA, *LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY*, Canon 1, EC 1-5, available at [http://www.nysba.org/Content/NavigationMenu/Attorney\\_Resources/Ethics\\_Opinions/Lawyers\\_Code\\_of\\_Professional\\_Responsibility/CodeofResponsibility.pdf](http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Ethics_Opinions/Lawyers_Code_of_Professional_Responsibility/CodeofResponsibility.pdf).

rules and regulations . . . cannot exhaustively cover all situations that may confront a lawyer, who may find it necessary to also consider . . . general moral principles in determining an appropriate course of action.<sup>70</sup>

Although not uncontroversial, there is therefore a tension even within the various codes of conduct between the responsibility to zealously represent a client and the potential role for the lawyer's own ethical interests, whether based on morality, a sense of honour or some other social norm. Regardless, there is clearly a basis for the relevance of – and in my view an overriding professional obligation at least to consider – the lawyer's own ethical interests in the context of his or her role as a representative negotiator.

As such, these interests – which are not recognized by either the simple client-centered models or the more expanded boundary role position models of representative negotiation – should be recognized as interests that influence the lawyering and negotiation processes and, as such, need to be on the table for discussion when the negotiator-as-professional sits down to prepare for the representative negotiation process. The end calculus becomes a discussion between the representative lawyer and the client.<sup>71</sup> The final decision of whether to stay with the representative always rests with the client. But the fundamental decisions regarding whether and how the negotiation is handled are also decisions regarding which the lawyer should have determining input. Any other model, not only turns a blind eye to reality, but also impoverishes the responsibilities and possibilities of the representative's role.

## 2. Other Ethical Interests of the Representative Negotiator

In addition to the fundamental question of the relevance of the representative negotiator's personal moral compass, there are other ethical issues that come up all the time in representative negotiations that need to be considered and discussed with the client. Gifford, when discussing the boundary role position model, does contemplate the notion of professional responsibility in passing:

When negotiating on behalf of the client . . . the lawyer is drawn in conflicting directions. On the one hand, she is obligated professionally to obtain the most favorable settlement

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70. LSA, *Code of Professional Conduct*, available at, LSA <http://www.lawsocietyalberta.com/files/Code.pdf>, at preface. *See also* RPC, *supra* note 44, at r. 4.01(2)(b) (although pitched to lawyers in their capacity as advocates, this rule provides that: "a lawyer shall not . . . knowingly assist or permit the client to do anything that the lawyer considers to be . . . dishonourable . . .").

71. *See, e.g.*, Menkel-Meadow, *supra* note 5, at 813-17.

possible during the negotiations . . . On the other hand . . . he must respond to pressures from his negotiating counterparts . . . and pursue settlements that are fair and just to both parties. The pressure on the lawyer to accommodate these tensions . . . results in part from the expectations of future contact with the other lawyers *and in part from the traditional courtesy and fair play among lawyers.*<sup>72</sup>

While this is right, ethical considerations involve more than simply "courtesy and fair play among lawyers." Terms like "courtesy," "fair play," and – as Silver articulates, the "duty of 'good faith' towards other counsel"<sup>73</sup> – are unlikely to be precise enough, or wide-reaching enough, to place adequate limits on "dishonest bargaining practices"<sup>74</sup> and other such negotiation tactics. What we are therefore talking about, in addition to "fair play", etc., is a full range of ethical and professional considerations, including obligations of confidentiality, truth-telling, the avoidance of conflicts of interest, and the like. Neither the client-centered model nor the boundary role position model adequately and expressly embraces a full consideration of the representative negotiator's ethical considerations and interests.

That is because, surprisingly, the consideration of ethics continues to be a relatively new issue in negotiation theory. As Eleanor Norton comments, "[t]here has been little evidence of or interest in coherent standards or express norms for appropriate behavior in negotiations."<sup>75</sup> Similarly, as Lynn Epstein comments: "[n]egotiations have always enjoyed a certain amount of protection from ethical constraints. This protection is due to a longstanding tradition of allowing parties to negotiate freely, and without restrictions that encompass other aspects of legal representation. Historically, this freedom surrounded most negotiations in a shroud of secrecy."<sup>76</sup> Although there is starting to be more focus recently on ethics and negotiation,<sup>77</sup> Epstein's description still largely obtains. Often when

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72. Gifford, *supra* note 5, at 835-36 (emphasis added).

73. SILVER, *supra* note 3, at 76-77.

74. *Id.*

75. Eleanor Holmes Norton, *Bargaining and the Ethics of Process* 64 N.Y.U.L. REV. 493, 506 (1989) in WIGGINS & LOWRY, *supra* note 2, at 594.

76. Lynn A. Epstein, *Cyber E-Mail Negotiation vs. Traditional Negotiation: Will Cyber Technology Supplant Traditional Means of Settling Litigation?* 36 TULSA L. J. 839 at 845 (2001), in WIGGINS & LOWRY, *supra* note 2, at 544.

77. See, e.g., WHAT'S FAIR: ETHICS FOR NEGOTIATORS (Carrie Menkel-Meadow & Michael Wheeler eds., 2004); DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE (Phyllis E. Bernard & Bryant Garth eds., 2002); HANYCZ ET AL, *supra* note 4; MACFARLANE, *supra* note 4, at 258-80; WIGGINS & LOWRY, *supra* note 2, at 497, 589-45; CRAVER, *supra* note 5, at ch. 17; SILVER, *supra*

ethics are raised, it is typically done in passing,<sup>78</sup> as an afterthought, or at least as a separate discussion that does not form part of the central make-up of the representative negotiator's very being as a professional.<sup>79</sup>

This inadequate treatment of ethics jeopardizes the adequate training, ethical preparation and professional conduct of representative negotiators. As Wiggins and Lowry have argued, "there is a clear potential for conflict between the attorney's own values and the perceived duty of single-minded zealous advocacy on behalf of the client's interests."<sup>80</sup> Shockingly, this impoverished state of affairs – that results in a "confounding [of] the boundary of professional responsibility and negotiation ethics" – apparently makes it "difficult to . . . make prescriptive statements about truth telling and lawyers."<sup>81</sup> These acknowledgments amount, in my view, to a remarkably sad state of affairs. If lawyers cannot be counted on, or at least mandated to tell the truth, who can? What we are left with then is a relatively barren ethical terrain that leaves the representative negotiator without adequate guidance for ethical negotiation.<sup>82</sup> Current practices encourage Gross and

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note 3, at 77, n.15; MNOOKIN ET AL., *supra* note 32, at 274-94; ANDREW J. PIRIE, *ALTERNATIVE DISPUTE RESOLUTION: SKILLS, SCIENCE, AND THE LAW* 122-24 (2000); ADAMS, *supra* note 3, at 136-46. *See also* STEPHEN B. GOLDBERG, FRANK E. A. SANDER & NANCY H. ROGERS, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* (Aspen 4th ed., 2003); Kimberlee K. Kovach, *Lawyer Ethics Must Keep Pace With Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards* 39 *IDAHO L. REV.* 399 (2003); Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to Be Trustworthy When Dealing With Opposing Parties*, 33 *S.C. L. REV.* 181 (1981); Gary T. Lowenthal, *The Bar's Failure to Require Truthful Bargaining By Lawyers*, 2 *GEO. J. LEGAL ETHICS* 411 (1988); David A. Lax & James K. Sebenius, *Three Ethical Issues in Negotiation*, *NEG. J.* 363 (1986); James M. Bowie, *Ethical Issues in Construction Mediation: Are There Any Rules?*, 24 *CONSTR. LAWYER* 33 at n.1 (2004); J. Keith Murnighan, D. A. Cantelon & T. Elyashiv, *Bounded Personal Ethics and the Tap Dance of Real Estate Agency*, in *Advances in Qualitative Organizational Research* 1, vol.3 (J.A. Wagner III, J.M. Bartunek & K. D. Elsbach, eds., 2001) (also noted in MNOOKIN & SUSSKIND, *supra* note 6, at 286-87).

78. For example, in the index of a leading collection of essays on the issue of representative negotiation, the topic of "ethics" has only two references, both of which simply refer to discussions about agents' ethics in passing (and neither of which is directly related to the ethical obligations of lawyers as representative negotiators). *See* MNOOKIN & SUSSKIND, *supra* note 6, at 320. In another text on representation in mediation and negotiation, "ethics" has no references in the index. *See* SILVER, *supra* note 3, at 199 (other than the term "good faith", which has one entry, and has been discussed *supra* at note 73 and accompanying text).

79. Although far from determinative evidence of the relative importance of legal ethics vis-à-vis other negotiation topics, in one of the leading casebooks on the subject of negotiation (WIGGINS & LOWRY, *supra* note 2), the issue of ethics – although raised briefly in passing (*see, e.g.*, WIGGINS & LOWRY, *supra* note 2, at 497) – is raised in chapter 16 of 16 chapters. Similarly, "Negotiation Ethics" is chapter 17 of 17 chapters in CRAVER, *supra* note 5.

80. WIGGINS & LOWRY, *supra* note 2, at 589.

81. *Id.*

82. For professional obligation requirements, *see, e.g.*, MODEL RULES, *supra* note 43, at pmbl., para. 2, (providing that "as negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others."); *See also id.* at r. 4.1; For a summary

Syverud, for example, to ask questions such as: "Under what circumstances should a party make a sincere offer? An outrageous demand? An insincere threat to go to trial?"<sup>83</sup> Further, for example, Norton comments that "the concept of truthfulness in negotiation raises unique ethical questions because in most circumstances candor is not necessarily required."<sup>84</sup> Silver articulates that representative lawyers "can be misleading, can bluff and can threaten action at will."<sup>85</sup> Further, Boule and Kelly argue that, even for lawyers governed by professional codes of conduct, "in negotiation . . . exaggeration and sheer puffery are tolerated."<sup>86</sup> As such, Wiggins and Lowry question whether "the profession should attempt to police lying in negotiation" at all.<sup>87</sup>

This ethically questionable state of affairs in representative negotiation should not be tolerated, particularly for representative negotiators who are also members of the bar and subject to professional obligations. The negotiator-as-professional must actively embrace ethical problems, both in preparation with the client and then during the negotiation process itself. And to the extent that a client seeks to foreground her personal interests over the ethical concerns and interests of the representative negotiator, that move must be either rejected through active discussions with the client – which often in any event work to the benefit of the client's case<sup>88</sup> – or the lawyer

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and treatment of the *Model Rules* and proposals regarding negotiation and professionalism, see, e.g., ABA, Standing Committee on Ethics and Professional Responsibility, "Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation" (Formal Ethics Opinion 06-439, 12 April 2006), *Mediation and Negotiation*, *supra* note 3, at 77; For a background discussion, see generally WIGGINS & LOWRY, *supra* note 2, at 597-600; In Canada, see CPC, *supra* note 44, at ch. III(7), (providing that "[w]hen advising the client the lawyer must never knowingly assist in or encourage any dishonesty . . .", and further *ibid.* at chs. I(5)(g), (h), and in the context of the lawyer as advocate, chs. IX(2)(e), (3). See also RPC, *supra* note 44, at r. 2.02(5). Cf. LSA, *Code of Professional Conduct*, *supra* note 70, at ch. 11 ("The Lawyer as Negotiator") (providing a wide-ranging set of ethical prescriptions for lawyer negotiators). For comment on the LSA's position, see *Mediation and Negotiation*, *supra* note 3, at 77, n. 15.

83. GROSS & SYVERUD, *supra* note 50, at 327.

84. NORTON, *supra* note 75, at 508. *But cf.* *Model Rules*, *supra* note 43, at R. 4.1.

85. SILVER, *supra* note 3, at 77.

86. LAURENCE BOULLE & KATHLEEN J. KELLY, *MEDIATION: PRINCIPLES, PROCESSES, PRACTICE* 158, (Candn. ed., Toronto and Vancouver: Butterworths, 1998).

87. WIGGINS & LOWRY, *supra* note 2, at 590.

88. See CORRY, *supra* note 9, at 88 (stating that "[i]f informal conferences [in the bargaining process] are to be successful . . . research has shown that . . . [t]he negotiator must speak truthfully in indicating areas of flexibility in the party's position."). See also ADAMS, *supra* note 3, at 139-46; See generally PEPPET & TULUMELLO, *supra* note 32, at 284 (giving further treatment of the issue of discussing ethical issues "explicitly" with clients).

must get off the file in accordance with principles of professionalism. In my view there is no middle ground. James White has argued that much of the difficulty in regulating negotiation behaviour comes from the fact that "negotiation is a non-public behaviour."<sup>89</sup> That may be right as a descriptive matter. However, we do not seem to have an appetite for accepting borderline ethical behaviour in law's public sphere. We should be even less accommodating of such behaviour in the private sphere.<sup>90</sup>

#### D. *The Public's Interests*

The fourth general set of interests at play in representative negotiations includes the public's interest. While notions of personal morality and ethical considerations<sup>91</sup> are bound up with notions of the public good, particularly in the context of the regulation of lawyers, a further question also needs to be considered: should a representative negotiator consider, during deliberations with the client, the public worth of a given outcome of the negotiation process? In my view, the answer is yes for the negotiator-as-professional.

Here again traditional models of representative negotiation are either actively against these sorts of public-welfare considerations (based in zealous advocacy principles) or essentially silent. A typical example of this opposition is the following statement by Abe Krash: a lawyer's "views of the public interest are immaterial to his [or her] professional responsibility."<sup>92</sup> For Riskin, the basic reason for this opposition or silence is that models of lawyering that celebrate the zealous advocate blind the lawyer to, or mandate against, a number of considerations including "the overall social effect of a given result."<sup>93</sup>

In opposition to this indifference, Duncan Kennedy – on the theory that lawyers should "[t]ry . . . [their] best . . . to avoid doing harm with . . . their] lawyer skills" – argues that lawyers "shouldn't take the case if . . . they] think it would be better for society, or more moral, for the client to lose."<sup>94</sup> Similarly, Allan Hutchinson argues for a "fresh account of legal ethics [that] would . . . encourage lawyers to develop a critical morality that encompasses such pressing issues as 'what kind of lawyer do I want to be?' and 'what

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89. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation* (1980) AM. BAR FOUND. RES. J. 926 (1980) (cited in WIGGINS & LOWRY, *supra* note 2, at 595).

90. See, e.g., LSA, *supra* note 70, at ch. 11. See also MODEL RULES, *supra* note 43, at pmb1., para. 2.

91. See, e.g., *infra* Part III.C.

92. RISKIN, *supra* note 60, at 449 (citing Krash, *supra* note 60).

93. RISKIN, *supra* note 54, at 44 (footnote omitted).

94. KENNEDY, *supra* note 62, at 206-07 (citing Krash, *supra* note 60).

interests am I going to spend my life serving as a lawyer?"<sup>95</sup> Finally, at the 1971 "Excellence in Advocacy" program of the Advocacy Institute, held in Ann Arbor, Michigan, the celebrated author Martin Mayer argued that:

[I]f lawyers cannot look at the society as a whole and say that certain aspects of their work . . . represent a plus for this society and for the world of our children, then they had better look to last-ditch defenses. Better yet, lawyers should try to find a way to salvage what is worth doing out of their work and be influential in the production of what is going to happen next.<sup>96</sup>

Again, these are certainly not uncontroversial positions, particularly given the underpinnings of the dominant zealous advocate model located in strong notions of a freedom-seeking adversary system. But they are positions, again, that certainly find support in current codes of conduct. For example, the CBA states that the "primary concern" of the *CPC* is "the protection of the public interest."<sup>97</sup> Accordingly, "the lawyer should not hesitate to speak out against an injustice."<sup>98</sup> So to the extent that a representative negotiator is being asked to take a position that she considers not to be in the "public interest" or that amounts to an "injustice" (terms that are not typically defined in codes of conduct), then she is professionally encouraged to seek alternative solutions and/or to "speak out." In my view these alternatives specifically include speaking out during negotiation preparation sessions with a client who is trying to advance a cause that amounts, in the eyes of the lawyer, to an "injustice;" or in the eyes of my negotiation student, to something that is "ridiculous." This will obviously be context and lawyer specific. But that is OK. And it is certainly not a reason to shy away from the opportunity to do good, or at least to avoid doing harm, with a representative's negotiation skills. That is the opportunity and the responsibility of the negotiator-as-professional.

#### *E. Other Interests*

I have raised four basic sets of interests that I think must be considered by representative negotiators when approaching any given client's retainer. In addition, there may be other interests, including competing interests of

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95. HUTCHINSON, *supra* note 64, at 157 (citing WALKER, *supra* note 64).

96. Martin Mayer, *The Trial Lawyers*, in EXCELLENCE IN ADVOCACY 51, 60 (Grace W. Holmes ed., 1971).

97. *CPC*, *supra* note 44, at Preface.

98. *Id.* at ch. XIII(3).



various constituencies within a representative's own client (like, for example, when negotiating labour issues on behalf of a trade union or land claim rights on behalf of a group of native bands), or competing public interests (like, for example, when negotiating on behalf of a coalition of community groups or public-interest NGOs) that are not easily reconciled during a representative's contemplation of a given course of conduct.<sup>99</sup> Often traditional conflict of interest rules will assist with these considerations. However, in situations in which equally valid public interests are at stake, *bona fide* contextual and individual reflection may be the only available tool. Further, client or representative interests regarding race, gender, culture, and power may, and often do, significantly influence the negotiation process.<sup>100</sup> Regardless of the interest or choice, the point here is that active consideration of and deliberation about all interests must occur.

#### IV. POTENTIAL OBJECTIONS: ZEALOUS ADVOCACY AND CONFLICTING INTERESTS

Perhaps the two biggest obstacles to my vision of the negotiator-as-professional are both the dominant zealous advocate model itself and the potential of irreconcilably competing interests. Because I have already taken up objections from the zealous advocacy model in the context of representative negotiations,<sup>101</sup> I do not address them further here, other than briefly to say the following. There is no doubt that the arguments and considerations that I am advancing in this article are not supported by the still-dominant model of the zealous advocate. They are therefore neither uncontroversial nor unproblematic. However, because my vision of the lawyer-as-negotiator is supported, at least in part, from a theoretical perspective by both the literature and aspects of current codes of conduct; and further, as a practical matter, by the intuitions and experiences of both experienced and novice negotiators, there is clearly both something lacking about the current models and something appealing about my alternative model. So while I acknowledge the continued hurdles that dominant, zealous advocacy models put in the way of my arguments, because of their own problems, my view is that we need to continue to search for alternative

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99. See generally Docherty & Campbell, *supra* note 6 (considering negotiation in the context of potentially competing client interests).

100. There is a growing body of literature in the field of negotiation and dispute resolution dealing with all of these varied and important considerations. See, e.g., HANYCZ, *supra* note 4; See also WIGGINS & LOWRY, *supra* note 2, at chs. 11-12; MACFARLANE, *supra* note 4, at 180-215.

101. See, e.g., *supra* notes 58-60, and accompanying text.

models. The negotiator-as-professional is one such alternative model that, in my view, does a better job of capturing both theoretical opportunities and practical realities of the representative negotiation process.

Equally challenging to my arguments is a further question: what if the representative is not able to reconcile the competing interests in her mind in any given negotiation? The simple answer to this question is: just because the calculus is difficult does not mean that the lawyer should not engage in it. Resorting to the zealous advocate model for expediency reasons does not do justice either to it or to alternative models. A slightly more compelling answer comes from the realm of professional responsibility: lawyers are bound to consider a broad conception of the competing interests at stake in a negotiation, both as a competence matter and as an ethical matter. So professionally, the issue is likely closed. However, this again does not really deal with the practical – and typical – situation of competing interests. What should the lawyer do?

A typical situation involves a conflict between the interests of the representative's client and interests vis-à-vis the representative's bargaining opposite.<sup>102</sup> This conflict –discussed above<sup>103</sup> – is what Gifford and others identify as a "boundary-role conflict."<sup>104</sup> The obvious answer is to try to work out with the representative's client – during the preparation stage – a solution that maximizes the potential of both interests. For example, clients often do not appreciate the power of a good relationship between negotiators. Alternatively, they often do not realize, as generally discussed above,<sup>105</sup> that a good relationship between negotiators does not mean that their interests are being somehow inadequately protected.<sup>106</sup> This initial hard work with a representative's client, with full disclosure of the representative's views and interests, will typically resolve many of these conflicts. However, if a solution cannot be worked out, one option – that I have argued against<sup>107</sup> – is Cochran's preference for dominant client control.<sup>108</sup> The alternative vision that I am suggesting is leaving significant

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102. See, e.g., Rubin & Sander, *supra* note 6, at 505.

103. See generally *supra* Part III.B.

104. See, e.g., Gifford, *supra* note 5, at 836.

105. See *supra* note 36 and accompanying text.

106. For example, according to Gifford, "The lawyer's role as a moderating influence does not necessarily mean that she is 'selling-out' the interests of her client." See GIFFORD, *supra* note 5, at 836-37. See also *supra* note 36 and accompanying text.

107. See, e.g., *supra* note 41 and accompanying text.

108. See *supra* note 38 and accompanying text.

control with the lawyer that may ultimately lead, in particularly tough situations, to a lawyer's withdrawal from a case. While an imperfect solution, it is a preferable solution to preferring a model that impoverishes the importance of other interests (a model that potentially forces the lawyer to check him or herself – and his or her moral compass – at the door on arrival at work every morning).

Again, the point of my model is not necessarily to solve all potentially thorny circumstances with a one-size-fits-all approach (that is one of the dangerously attractive features of the zealous advocate model). No nuanced model or code, in my view, provides such a solution. For example, as the *CPC* recognizes, "[i]nvariably, the practical application of the Code to the diverse situations that confront an active profession in a changing society will reveal gaps, ambiguities and apparent inconsistencies."<sup>109</sup> The negotiator-as-professional model does not necessarily offer further comfort. What it does offer, however, is a forced nod to reality that takes into account all that is going on in the representative's mind. It also – in a real way – takes seriously ethical, public and other interests that current representative negotiation models do not. And when conflicts do arise, the negotiator-as-professional is not apologetic, when appropriate, in preferring (with full disclosure to the client) ethical and public interests over those of his or her client. This again can align with the spirit of the professional obligations of lawyers generally. As the *CPC* provides, in situations of conflict or competing ethical considerations: "the principle of protection of the public interest will serve to guide the practitioner to the applicable principles of ethical conduct . . ."<sup>110</sup> Again, far from irrelevant, a lawyer's "personal conscience"<sup>111</sup> and "sensitive professional and moral judgment"<sup>112</sup> will animate a lawyer's thinking in applying and resolving competing ethical obligations.

At the end of the day, what the model offers is hopefully a nuanced calculus of all interests that are on the table. This account should assist in situating the representative's role vis-à-vis the client and others potentially involved or interested in a negotiation. In tough cases – when representative and client interests appear to collide – the model will assist in the difficult work that is done in advance of the negotiation in the context of discussions between the representative and his or her client when contemplating a retainer or, later, when preparing for a negotiation. And finally, if conflicts

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109. *CPC*, *supra* note 44, at Preface. *See also* MODEL RULES, *supra* note 43, at pmb., para. 9. *See also* notes 67-70 and accompanying text.

110. *CPC*, *supra* note 44, at Preface.

111. MODEL RULES, *supra* note 43, at pmb., para. 7.

112. *Id.* at para. 9.

persist, it is acknowledged – in these tough cases – that the model may not ultimately assist with the resolution of those conflicts. However, even then, the model will succeed in giving adequate authority and support to the representative who is trying – vis-à-vis the competing interests that are still at play – to work out what she should do, with knowledge of the client, including potentially declining to accept or continue with a retainer.

## V. CONCLUSION

What I have tried to argue is that representative negotiation models advanced to-date, like the zealous advocacy model or the "boundary role position" model lose sight of, or only pay passing lip service to, the many (and potentially competing) interests that make up the mindset of a representative negotiator. The negotiator-as-professional model takes seriously a much more expansive view of potentially competing interests in the mind of the representative negotiator. Because the different interests will come up in different ways and may or may not compete in any given situation, the importance of this model is not that it paints bright lines in terms of resolving all tensions at all times; but rather that it assists in identifying the competing interests at play and thereby forces the representative negotiator to address and potentially resolve competing interests and conflicts ahead of time rather than simply ignoring them, being unaware of them, being trapped by them, or being confined by them.

At the end of the day, choices need to be made in the negotiation process. And they need to be made with the client. Should different negotiation styles be considered? If so, who has the final say? Based on whose interests, etc.? What is the desired outcome? Again, whose interests should drive this calculus? And so on. These choices may also lead to representatives declining a given client's brief. This is all a healthy part of the negotiation process. And as I have argued, the alternative – ignoring these interests and tying the representative's hands in favour of blind zealous representation – is not a healthy (or professional) way to proceed.

Further, and in any event, representative negotiators should care about this discussion because the client's case, while clearly central to the representative's mental calculus, is only one case. The lawyer's approach and reputation as a representative negotiator in the legal community follow him or her for an entire career. And while it takes years to develop a solid reputation as a lawyer and negotiator, it takes about five minutes to destroy one. So the lawyer clearly has a personal, professional and financial stake in his or her reputation as a lawyer and negotiator – independent of the client –

vis-à-vis negotiation style and the bargaining opposite. These same interests will also likely be at stake for the representative's bargaining opposite. They therefore need to be considered as meaningful aspects of the processes when preparing for a negotiation.

The negotiator-as-professional model should find favour in, or at least be potentially beneficial to, all layers of the legal community. In terms of clients, to the extent that lawyers are hired to provide expertise, not only regarding the substance of a given problem, but also on the process of how that problem should be resolved, resting significant control over that process in the hands of lawyers should, as a systemic matter, work to the benefit of clients and their causes. It is also of benefit to clients on the theory that full communication is not only professionally required,<sup>113</sup> but is also beneficial to their interests.<sup>114</sup> The model will benefit lawyer representatives individually and the profession generally, not only in giving lawyers significant control over how they negotiate, but also in how they feel about themselves as empowered agents in the building of their clients' cases and their own careers. Finally, this model will also potentially benefit society as a whole, both through increased general professional behaviour as well as specific lawyering conduct that takes seriously social welfare considerations in the calculus of competing courses of conduct.

As I have readily acknowledged, there may be some cases in which competing interests do not lend themselves well to resolution, and in those cases, lawyers will need to think seriously about withdrawal from the case. But as I have argued, what we are talking about is not simply learning how to negotiate one case for one client, but rather what a lawyer – and certainly a representative legal negotiator – does during a significant portion of her day for a significant portion of her career. Without taking seriously all of these potentially competing interests, we proceed with a very impoverished sense of what that career has, does, can and should look like. Without taking seriously all of these interests, we do not have an adequate answer to my student who is otherwise dissatisfied and disillusioned with the potential of a career as a representative negotiator. The negotiator-as-professional model provides us with a better sense of the lawyer's role that will help to address some of the theoretical and practical challenges and opportunities of the representative negotiation process.

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113. See, e.g., MODEL RULES, *supra* note 43, at R. 1.4; CPC, *supra* note 44, at ch. III; RPC, *supra* note 44, at R. 2.02(1).

114. See, e.g., Docherty & Campbell, *supra* note 6, at 658. See also CHOMENKI & HART *supra* note 51, at 142 (arguing "[g]ood lawyers are scrupulously honest with their clients. They deliver good news and bad; they do not withhold unpleasant advice or distort it because the client will find it unpalatable.").