

## I. Fairness in Negotiation

At core of many ethical discussions in negotiation is the question of how much “truth” or “fairness” we owe others involved in or affected by the negotiation, both in terms of our work within the process and in terms of the substantive outcomes. Within the process, a central issue concerns the management of information. Negotiation is largely about information: asking for it, giving it, analyzing it and using it to forge agreements. It is important to remember that negotiations are mostly taking place in private with no trial, no public testimony, no recordings etc. Moreover, the substantive outcomes are rarely subject to external review for legality or fairness. Therefore, there is a tendency towards more violations of ethical obligations in negotiation than in other contexts in which lawyers operate.

Key fairness questions framed several different ways:

- When O.K. to lie or misrepresent?
- What candor is required or expected?
- When to cooperate or defect?
- When to create or claim value?
- Should I act as I would want others to act towards me or as I might expect them to act in a world of presumed scarce resources and competition?

The obligation to behave truthfully is embodied in Model Rule 4.2(a) directing lawyers to “be fair in dealing with other participants.” Comments on the rule say “Fairness in negotiation implies that representations by one or on behalf of one party to the other party be truthful.” Though further commentary make exceptions to this rule in ways that throw into question the fundamental meaning of the rule, as will be outlined later.

Note: “personal integrity” is considered to be one of the most important attributes of a skilled and successful negotiator.

## **II. Consider how your style or framework for negotiation affects ideas of fairness and how much candor or misrepresentation is required or permitted.**

The “adversarial” or more competitive approach to negotiation assumes a world of limited resources and identifies the counterpart

negotiator as an opponent. The primary task in a negotiation is to claim value and ensure maximum gain for oneself or one's client. In this framework, a savvy negotiator is more prone to see information as something to guard and manipulate. There is significant fear that the opponent will use information offered to take advantage and claim more value. The negotiation is a battle in which there are likely to be winners and losers and one must behave accordingly.

The "collaborative" approach to negotiation assumes that a cooperative, teamwork approach to the problem or issues to be negotiated will lead to solutions that create value and allow all parties to improve their outcomes. There is more emphasis on discovering the true needs or "interests" underlying surface strategies or "positions," listening for understanding and creating value. In this framework, it is important to share sufficient information to build relationship, identify interests and build the understanding necessary to discover the more creative possibilities for mutual gain.

Of course, a more nuanced understanding is that negotiations generally require both competitive and collaborative skills, focusing on creating AND claiming value. In fact, the tension of balancing these tasks is often described as the "negotiator's dilemma" The dilemma is how to be collaborative enough at the right times and in the right ways that you maximize the full potential for optimal outcomes in the negotiation *while also being* competitive enough at the right times and in the right ways that you obtain your fair share of the value created.

Both the competitive and the collaborative negotiator can be ineffective. The ineffective competitor is so guarded and positional that little or nothing is accomplished and relationships and reputations are damaged in the process. Similarly, the ineffective collaborator may be too quick to reveal too much without testing for reciprocity or building a foundation of trust, leaving the collaborator vulnerable to exploitation. And both styles must watch out for the likelihood that their approach to the negotiation and their assumptions about others involved may become a self-fulfilling prophecy.

### **Philosophical View: What is a "lie"?**

Deception: any deliberate act or omission by one party taken with the intention of creating or adding support to a false belief in another party. There is a fine line between allowing another party to continue to hold a false belief and supporting a false belief.

### **Ethics are contextual:**

Factors that may influence our truthfulness:

- Your role (agent? Principal?)
- Relationship with counterpart negotiator (Opponent?, Esteemed colleague? Friend? Family? Fiduciary duty?)
- Anticipated style/approach to fairness of counterpart negotiator
- Deal context (one time transaction? High or low stakes? Anticipate future encounters and/or further dealings?)
- Environment (cultural norms and expectations? Professional norms? Visibility of the negotiation? Any external review?)

### **Common explanations for lying or misleading:**

- Duty to client
- Everyone does it
- They did it first
- The other side will have an unfair advantage if I don't
- It's a game
- They won't find out
- It wasn't a significant lie
- The end justifies the means

**Or variations on denial:** It wasn't really a "lie":

- I was "putting things in the best light,"
- It was "puffery" or "slight exaggeration"
- I just didn't correct him
- I just deflected or avoided
- I was silent or omitted talking about it

### **Consider which "School" of Ethics you generally ascribe to and the pros and cons of that school**

**Richard Shell's advice - "aim high"**

**Poker School**, - It's a game with a set of rules and deception is essential to effective play. Outright fraud is not o.k. but one can skate close to edge.

Critique - 1. Assumes everyone treats negotiation as a game. 2. Everyone knows the rules could 3. Law is far from certain in setting boundaries

**Idealist School**, - Do the right thing even if it hurts. Bargaining is an aspect of social life not a game with a set of rules. The same rules should apply at home and in business. Idealists don't rule out deception, but are very uncomfortable with it.

Critique: Ideals sometimes make it hard to proceed in realistic way and leaves Idealists open to exploitation by those with less high standards. This could be particularly problematic for a lawyer exposing a less idealistic client to exploitation.

Mark Twain adage: *“Always do right. This will gratify some people and astonish the rest.”*

**Pragmatist** – What goes around comes around. The pragmatist sees deception as necessary sometimes but prefers to avoid it if there is some other alternative. Pragmatists are concerned about effects of deception on present and future relationships. They are less worried that lying is “wrong” and more that it may cost them more in the long run.

### **Depends on philosophy of lawyering?**

- A. Client centered approach – most focused on what will best serve interest of the client?
- B. Minimizing the likelihood of discipline, malpractice or harm to professional reputation (defensive lawyering principle)
- C. Focus on rules of professional responsibility with principle of “court first, client second” (lawyer as officer of the court)
- D. Consistency with personal moral values

### **III. We are Bound to Obey the Laws Regulating the Negotiation Process Regardless of Our Negotiation Framework or Style**

#### **American Law in General**

- No general duty of “good faith”
- Key is law of fraud

#### **Fraud:**

1. knowing,
2. misrepresentation of
3. material
4. fact
5. on which a victim reasonably relies
6. causing damages

#### **California Rules of Professional Conduct Rule 1-100**

Rules regulate conduct of members through discipline.

Rules are binding upon all members of the Bar.

Members are also bound by B&P § 6000 et seq. and court opinions.

Ethics opinions not binding, but persuasive

#### **California B&P § 6068**

Duty of an attorney to employ only those means as are consistent with truth...

... and never mislead the judge or any judicial officer by an artifice or false statement of fact or law.

#### **ABA Model Rule 4.2(a)**

Directing lawyers to “be fair in dealing with other participants.”

### **ABA Model Rule 8.4**

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

### **ABA Model Rule 4.1: Truthfulness in Statements to Others**

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

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

#### Model Rule Comments:

- A lawyer has no affirmative duty to inform an opposing party of relevant facts.
- A misrepresentation can occur if the lawyer affirms a statement of another person that the lawyer knows is false.
- A partially true but misleading statement or omission can be the equivalent of an affirmative false statement.
- “Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.” Such as:
  - Estimates of price or value
  - A party’s intentions as to an acceptable settlement of a claim
  - Existence of an undisclosed principal

### **Restatement 3<sup>rd</sup> Law Governing Lawyers § 98**

A lawyer communicating on behalf of a client with a nonclient may not:

- (1) Knowingly make a false statement of material fact or law to the nonclient;
- (2) Make other statements prohibited by law; or
- (3) Fail to make a disclosure of information required by law.

#### Comments

Certain statements are considered “nonactionable hyperbole” or a reflection of a state of mind...

...such as statements of price or value.

It depends on whether the recipient “would regard the statement as one of fact ...or as merely an expression of the speaker’s state of mind.”

### **ABA Formal Opinion 06-439 – Truthfulness In Negotiations**

It is not unusual in a negotiation for a party, directly or through counsel, to make a statement in the course of communicating its position that is less than entirely forthcoming....”

For instance, o.k. to:

- (1) Understate willingness to make concessions
  - (2) Misstate bottom line
  - (3) Deceive as to ultimate goals and objectives
  - (4) Exaggerate strengths, minimize weaknesses of factual or legal position
  - (5) Buyer overstate confidence in alternate sources of product
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It depends on whether the recipient “would regard the statement as one of fact ...or as merely an expression of the speaker’s state of mind.”

False statements include:

“A party’s actual bottom line or the settlement authority given to a lawyer is a material fact.”

But one can “downplay a client’s willingness to compromise, or present a client’s bargaining position without disclosing the client’s ‘bottom line’ position, in an effort to reach a more favorable resolution.”

### **Rule 1.1 ABA Model Rules –**

A lawyer shall provide competent representation to a client”

i.e. don’t practice in areas you don’t understand..

### **ABA Model Code of Prof. Resp: Disciplinary Rules**

DR 7-101: A lawyer shall represent a client zealously

DR 7-102(a): A lawyer shall not:

(3) conceal or knowingly fail to disclose that which he is required by law to reveal

(7) counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent

### **ABA Model Rule 1.3**

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

COMMENT: A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf

California prohibits threats of criminal, disciplinary or administrative agency actions to gain advantage in a civil lawsuit.

### **When might an attorney have a duty to voluntarily disclose matters that hurt bargaining position?**

1. When negotiator makes a partial disclosure that is or becomes misleading in light of all the facts.
2. When the parties stand in a fiduciary relationship to each other

3. When the nondisclosing party has vital information about the transaction not accessible to the other side
4. When special codified disclosure duties such as contracts of insurance or public offerings of securities

**When are lies most likely to get you into trouble?**

- The less sophisticated the other party
- The closer you are to active assertion
- The greater your possible “duty” to the other, e.g. fiduciary relationship
- The more serious the implications (e.g. case where new expert found serious, life threatening damage in victim of car accident – not seen by first expert as reported in deposition and other discussion, and unknown to plaintiff’s counsel... now in negotiation)
- Where you have vital information not accessible to the other side (e.g seller knowledge of home defects)

**IV. Two Sides of the Coin: What to do when tempted to lie (other than lie)? How to respond to apparent unethical tactics or possible lies?**

**Instead of Lying**

- Refuse to answer (though refusal can be revealing.)
- Declare the question out of bounds (e.g. company policy forbids discussion of that...)
- Answer a different question
- Ask a question of your own
- Change the subject or dodge the question in some way
- Pause
- Do not lie – use truth to your advantage

**Richard Shell List of Suggestions**

<i>Instead of Lying About</i>	<i>Try this</i>
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 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

**In the face of possible unethical tactics or lies:**

Three general categories of Tactics:

1. Obstructive or Stone Walls (refusal to budge, or inability to move)
2. Offensive/Attacks (pressure tactics, push you to give in)
3. Deceptive/Tricks (dupe you into giving in)

Psychological influences involved in many tactics:

- play on fear of risk/loss,
- scarcity
- urgency
- commitment
- consistency
- reciprocity
- deference to authority
- liking

Examples of Tactics

- Low-balling (trick into commitment at certain price, then nudge up)
- Bid rigging (fake auction atmosphere)
- Good cop/Bad cop
- Lack of authority or false limits on authority or fake authority
- False demands
- False alternatives (other offers etc.)
- Phony issues
- Threats



- Misleading facts/information
- Overcommitment
- The Nibble (“just one more thing...”)
- Consistency Traps
- Reciprocity Ploys
- Exploding offer
- Take it or Leave it
- Scarcity Ploy
- Not correcting false information/impressions

#### How to Confront Tactics/Unethical Conduct?

*Note: Remember to put on your “radar” not your “armor.”  
“Don’t get mad, don’t get even..., get what you want.”  
(William Ury)*

A tactic perceived is no tactic

- Be prepared (have information so it’s hard to fool you)
- Ask direct and probing questions
- Seek independent sources of information
- Request verification
- Stick to standards
- Don’t be naïve (assume honesty/integrity of other)
- But don’t be overly suspicious (sometimes it’s not a tactic)
- Play “Colombo” (ask innocent/dumb questions)
- Ignore/Devalue
- Reframe it (e.g. convert hard core positional stance into an aspiration based on present information)
- Tit for Tat
- Name it (diplomatically) and negotiate process
- Give face-saving way out – Golden Bridges
- Look for mismatch between words and prior words or actions, facial expressions, body language, tone of voice etc. (helps reveal lies)
- If necessary, walk away from the negotiation

#### **V. Managing ethical tensions in the lawyer-client relationship**

“Most problems stem from desire to do best for client (zealousness) and the lawyer’s two other interests: behaving honorably towards others in a negotiation and self interest in preserving reputation and self-esteem.

##### Lawyer/Client Dilemmas:

- Lawyer’s own interests in fees conflict with client’s interest in settlement

- Lawyer as repeat player with long term reputation interest conflicts with client's interest in larger, short term gain.
- Lawyer desire to focus on law, create precedent, establish reputation conflicts with client focus on other interests (e.g. closure, maintain relationship)
- Lawyer and client differ on how they want to approach a negotiation
- Lawyer and client differ on whether settlement proposal is acceptable.

### Ideas for Managing

- Awareness of potential dilemmas
- Be careful in selecting clients
- Clear discussions and agreements with client of negotiation scope, approach and potential ethical considerations in negotiation
- Set up economic incentives to align attorney interests with those of the client
- Seek third party advice or assistance

### **VI. Identifying and addressing ethical challenges of representing clients in mediation**

Temptations in mediation? Deceive the mediator? What about mediator lies? How does the umbrella of confidentiality change the game?

### **VII. Further Food for Thought: Tests to Consider in Thinking about Negotiation Ethics**

1. Are the "Rules" known and accepted by all sides?
2. Can the situation be freely entered and left?
3. Self-image: When you look at yourself in the mirror, will you like the person you see?
4. Reciprocity: Would you be comfortable with that tactic being used against you?
5. Would you feel comfortable explaining what you're doing to the public?
6. Advising Others: Would you feel comfortable advising others to use this approach?
7. Social Result: What if everyone did it?
8. Designing the System: would you set up the system this way, not knowing ahead of time what role you'd have in the system?
9. Alternative Tactics: are there alternatives available that have fewer ethical ambiguities or costs?