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Regulating behaviour in ADR

The truth about lying as a negotiation tactic: Where business, ethics, and law collide … or do they?

Part 1

Avnita Lakhani

Oh what a tangled web we weave,
When first we practice to deceive[1]

This two-part article is part of a larger monograph that discusses various regulatory, ethical or community practice attempts to control the negotiation behaviours of legal professionals. In the current article the focus is on the many factors (legal, ethical and business practice) that affect the ability to successfully control a particular negotiation behaviour, namely deception. The purpose of the article is to initiate a dialogue about the legal, ethical and business tensions in trying to control lying as a negotiation tactic and whether such attempts can ever be successful in light of societal pressures, human nature, and acceptable negotiation theory and principles regarding such behaviour.

A subsequent article focuses on a detailed analysis of how ethical codes of conduct attempt to regulate the deceptive practices that may be used by legal professionals and whether such ethical codes of conduct are successful.

In June 2006 Associated Press-Ipsos in the United States conducted an informal poll of 1000 people about lying, which is something of a national pastime these days.[2] According to the poll, 52 per cent of those who responded said lying was never justified. At the same time over two-thirds agreed that lying was OK in certain circumstances, such as protecting someone's feelings.[3] Some responded that lying was a moral duty when you need to protect someone from serious harm.[4] It appears that even modern society tolerates lying in various circumstances, such as maintaining fairness, preserving confidences, maintaining reputation or avoiding harm.[5]

Lying (or deception) is acknowledged as a necessary and standard negotiation practice.[6] Some argue that lying is necessary in order to be an effective negotiator, especially for the legal professional.[7] Therefore, one would presume that lying is an essential skill of an effective lawyer.

While it appears that the majority of citizens condone lying in some form[8] and scholars consider it necessary for effective negotiations, only legal professionals are subject to a higher standard of behaviour through legislation and professional codes of ethics that sanction the lawyer if he or she is found to have breached these rules. Furthermore, some legal professionals are subject to legislation that controls the extent of the lie or deception. Is this fair? Is it appropriate or even possible to regulate the behaviour of legal professionals when they serve a society that actually acknowledges the need and, in some cases, the moral duty, to lie in certain circumstances?

This two-part article examines the nature of lying as a negotiation tactic and the effect of regulating such a tactic in light of legal, ethical and business considerations. Part 1 discusses the definition of lying and deception, and the various forms of lying. It then discusses the existing law and its attempts to regulate lying, especially as it pertains to legal professionals and the use of lying in negotiations. The section 'Ethics of lying' addresses the effect of ethics and ethical codes of conduct on lying. Part 2 of this article begins with the 'Business of lying': the nature of business and how the very essence of business and market economics fosters the use of lying as acceptable conduct. It continues with 'Deception under negotiation theory and principles … Is it really so wrong to lie?'. This looks at the effectiveness and efficiency of controlling deceptive behaviour as seen through the eyes of human nature, societal pressures and negotiation theory and principles. 'Future of lying as a negotiation tactic' discusses

Table 1

Pure 'white' lies/lies to save face[1]	Distributive lies[2]
• fairly harmless • meant just to 'grease the wheels of discourse' — move things along • focus is still on achieving a mutually acceptable agreement • lie is not intended to gain an advantage over the other party or disadvantage the other party.	• primary purpose is to gain an advantage over the other person • intentional lying to secure an advantage • includes lies about the nature, history and value of the negotiation subject, false promises, false threats, and false predictions as to the value of the negotiation subject and lies about clients' opinions or expectations.

1. Wetlaufer, see endnote 6 at 1225–1226.
2. Wetlaufer at 1224–1227.

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the future of lying as a negotiation tactic in light of the earlier discussions. Finally the article concludes with an inquiry on whether attempts to regulate lying will actually reduce the use of such a tactic during negotiations, whether by legal professionals or ordinary negotiators.

Lying versus deception: Is there a distinction?

Lying is generally defined as a false statement made with the intent to deceive, an intentional untruth.[9] Some scholars distinguish between two categories of lies and their distinct application, as presented Table 1.

Unlike pure 'white' lies, if distributive lies are believed and effective the 'liar becomes richer in the degree to which the victim becomes poorer'.[10] Distributive lies are inherently part of distributive bargaining because the assumption is that each party is trying to claim the maximum value out of a fixed pie. In order to do that parties will likely engage in distributive bargaining tactics, of which lying is central.

Deception, on the other hand, is defined as 'the business of persuasion aided by the art of selective display put

Table 2

Concealing the truth	
• includes to dissimulate or gloss over	Dissimulate = 'concealing the truth, like inconvenient or secret information either by camouflage, disguising appearance, or dazzle.'[1] *Example*: in military tactics, soldiers colour their faces and wear clothing to resemble the jungle or desert or other surroundings to conceal themselves from the enemy (camouflage). *Example*: disguising oneself as someone else so that you are not recognised or mistaken for another person (disguise appearance).
Exhibiting false information	
• accomplished by simulation • simulation accomplished by three techniques: (1) mimicry; (2) fabrication; and (3) attraction.[2]	In simulation, the primary goal is to convey false information by copying an existing model (mimicry), making up a new model that may not really exist (fabricate), or offering an alternative model (attract).[3] *Example*: in the animal kingdom, predators disguise themselves by altering their physical characteristics to blend into the environment in order to capture their prey (mimic). *Example*: A used car salesman uses a bait and switch tactic to 'attract' the buyer to a tempting feature in order to conceal a fault such as bad tyres (attract).

1 Wikipedia; see endnote 12.
2. Wikipedia.
3. Wikipedia.

into effect by two primary behaviours: 'hiding the real and showing the false.'[11] It is to 'intentionally distort the truth so as to mislead others' such that deception, rather than something being false, is at the essence of the lie.[12]

Deception may be of two varieties, concealing the truth or exhibiting false information, both of which are described in Table 2.

From the above discussion it appears that the deception is embedded in the lie. To the extent that the deception relates to something the actor believes to be false and thus conveys it to another party as false, the actor has engaged in a lie. For the purposes of this article, a lie includes deception to the extent that the intent is to create in the other party a false belief for the purposes of gaining an advantage, especially in negotiations. The rest of this part and the start of Part 2 discuss how law, ethics and business customs attempt to regulate deceptive behaviours, especially as used by legal professionals.

Law of lying[13]

If a person engages in a lie, how does the law prevent or control it? More specifically, how does the law control lying by members of the legal profession? In general there is no legal duty to tell the truth or to refrain from lying. However, there are certain laws which attempt to reduce the level of acceptable deception, namely laws against perjury, fraud and certain kinds of misrepresentation in the course of trade and commerce. These laws differ from country to country.

Reach of the law

In 1990 in a decision in the House of Lords, Lord Goff stated that 'everyone is free to do anything, subject only to the provisions of the law'.[14] Lord Goff reaffirmed a fundamental principle of our legal system, namely that one's liberty is subject only to that which is expressly prohibited by law.[15] This is where the tension lies between rules (law) and rights. Laws are rules of the state that either prohibit certain action or require action and are enforced via the police power of the state and the judicial system, subject only to the rights of the individual.[16] Such rules are not all-encompassing and generally exist as a means of dispensing justice or encouraging obedience to general norms. Rights, by contrast, are considered by some to block or direct the exercise of the state's police power. One interpretation of rights is that a right also 'gives rise to a corresponding duty or obligation'.[17] However, in today's world, a right is generally associated with an entitlement, something that 'ought to be satisfied, even if it does not give rise to a legally enforceable duty or obligation'.[18] The tension between rights and laws is important when considering the extent to which certain commonly acceptable behaviours of individuals, much less legal professionals, can or should be regulated.

Perjury

Most countries have laws against perjury. In common law countries such as Australia and the United States, it is a common law crime to intentionally lie about a material[19] matter in a court of law or in various sworn documents after having taken the oath or affirmation to tell the truth. In the US, under federal law, perjury is considered a serious criminal offence punishable with a fine or a prison sentence of up to five years.[20] In Australia where most criminal law is under State Acts, s 124 of the Queensland *Criminal Code 1899* provides that the maximum penalty for perjury is life imprisonment or 14 years imprisonment.[21] Under s 125 a person who fabricates evidence 'with intent to mislead any tribunal in any judicial proceeding' could be subject to a maximum penalty of seven years imprisonment.[22] Section 327 of the *Crimes Act 1900* (NSW) prescribes a maximum penalty of 10 years imprisonment for perjury.[23]

In brief, perjury undermines the efficient administration of justice and may result in undermining the power of the courts to carry out their duties. As such perjury is not to be taken lightly and legal professionals in particular have a duty to refrain from committing perjury, to prevent their clients to commit perjury and immediately to take steps to correct perjury committed by their clients in the course of a judicial proceeding.

Fraud

The common law crime of fraud is another primary way in which the law attempts to control lying. Fraud is generally defined as 'a *knowing misrepresentation* of a *material fact* on which the victim reasonably *relies* and which *causes* damages'.[24] In fraud a person may gain a benefit or advantage (usually economic) by causing a person to act when the person has a lawful right not to or preventing a person from acting when the person has a lawful right to act.[25] If the victim relies on the other party's statements or representations such that the victim incurs economic harm, the victim is entitled to seek redress at law. For example, in Australia under s 408C(2) of the Queensland *Criminal Code 1899*, the maximum penalty for fraud is five years generally and up to 10 years in special circumstances.[26] Under s 185 of the *Crimes Act 1900* (NSW), the maximum penalty for fraudulently causing a person to execute an instrument that results in damages is seven years.[27] In brief, fraud, much like perjury, is considered a grave offence against the law's attempt to maintain civil order.

Misrepresentations in commerce and trade

A third way that law has attempted to regulate lying, especially in commerce, is through imposing rules on the degree of acceptable or unacceptable misrepresentations.[28] These rules vary from country to country.

In the United States sales and commercial transactions are generally regulated via the *Uniform Commercial Code* (UCC). The UCC requires a general duty of good faith in the performance and execution of agreements.[29] Good faith under the UCC is defined as 'honesty in fact and the observance of reasonable commercial standards of fair dealing'.[30] Likewise the *Restatement (Second) of Contracts* affirms the duty of good faith and fair dealing in the performance and execution of contracts,[31] though neither the UCC nor the *Restatement (Second) of Contracts* requires good faith or fair dealing in the *negotiation* of contracts. In general, barring evidence of fraud, UCC supports the parties'

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right to contract and to freely negotiate to reach an agreement. Commercial law in the US does not impose a duty to inform the other party of relevant facts or to impose good faith during negotiations. In addition negotiators are not required to divulge certain information to their opponents unless there is a special relationship, express contractual or statutory duties require disclosure, or there is a chance of fraud in the transaction.[32] In brief, in the US it appears that while there are sufficient 'rules' around performing and enforcing an agreement, the parties have greater 'rights' with respect to freely negotiating such agreements.

The situation seems slightly different in Australia where the *Trade Practices Act 1974* (Cth) (TPA) generally governs sales and commerce transactions involving a corporation. The purpose of the TPA is to benefit Australians by promoting free competition and fair trade, while advocating for consumer protection.[33] The TPA governs nearly all business practices,[34] though some areas do not fall within the scope of 'business' for the purposes of the TPA.[35] Section 52 of the TPA appears particularly relevant for attempting to control misrepresentation or lying in business practices as it prohibits businesses from 'engage[ing] in conduct that is misleading or deceptive or likely to mislead or deceive.'[36] Through its broad application, s 52 certainly affects the negotiation behaviour of legal professionals, especially those who represent businesses and engage in commercial transactions. The message of s 52 appears to be one of broad application and zero tolerance for misleading or deceptive practices.

There are four major ways in which s 52 attempts to control gross misrepresentations, as highlighted in Table 3.

In brief, the reach of the law in attempting to control lying extends to perjury, fraud and misrepresentation in trade or commerce. At least in the US, a duty of good faith also appears to play a part in attempting to set legal boundaries on what might be construed as deceptive conduct in negotiations. In Australia the duty of good faith appears to be a rule of construction rather than a matter of law or implication in fact.[37] In sometimes conflicting opposition to law, ethics appears to tackle the issue of lying in a different manner.

Ethics of lying

This section looks at how ethics and morality attempt to control lying and whether law should take into account the ethical or moral implications of rules created to control lying.

At the start *ethics* needs to be distinguished from *morals* and from *legal ethics*, though the terms are sometimes used interchangeably. For the purposes of this section of the article, the following definitions apply:

- *Ethics* includes the various theories and schools of ethics that attempt to describe the kind of moral action, conduct, motive or character that a society ought to embody — how society ought to behave.[38]
- *Legal ethics* involves '[u]sages and customs among members of the legal profession, involving their moral and professional duties towards one another, towards clients, and toward the courts.'[39]
- *Morals* or *morality* are, in contrast, 'the law of conscience'.[40] It is generally a personal standard of what is right or wrong, perhaps based on an aggregate view of the ethical rules and principles. More importantly, morals are 'cognizable and enforceable only by the conscience or by the [moral sense] of right conduct, as distinguished from positive law.'[41] Morals do not require strict or logical proof and may be based simply from a sense, a belief or even a conviction of what is right or wrong. Morals seem to have a randomness that the law tries to 'correct' by imposing a societal standard of what constitutes appropriate and acceptable conduct so as to maintain some sense of civil order.

Of course, it might go without saying that each one of these — ethics, legal ethics, and morals — can be opposing forces during a negotiation.

Ethics, legal ethics and morality distinguished

Some argue that ethics is more stringent than law, law less stringent than ethics.[42] In addition ethics is seen as even more stringent than *custom*,

Table 3

Managing deceptive conduct under the Trade Practices Act, under s 52

A higher standard of proof than the 'reasonable person' standard used under the common law system	The broad standard adopted under s 52 is based on the effect or impact of negotiation conduct such as bluffing or high-low offers on 'the not particularly intelligent or well-informed', the 'gullible as well as the astute', 'the intelligent and the not so intelligent', or the 'unsuspecting modest member of the community'.[1]
Under s 52 the focus is not on the *intent* of the person making the misrepresentation but on the 'actuality of the *effect* of the conduct'[2] on the person who is on the receiving end of an alleged misrepresentation or fraud	• Subjective assessments (exaggerations or product puffing) are generally non-actionable. For example: 'this is the tastiest soup I have ever had'; 'this car is the best I have ever owned', are based on individual likes and dislikes. • Objective comments about a product that can actually be measured can be actionable.[3] For example: 'this is the heaviest'; 'this is the largest' are measurable and can be actionable. • Silence can be actionable. If what you disclose creates a half-truth, there is an obligation to disclose the remaining relevant facts to prevent misleading or deceiving the other party about what you know. • Section 52 will punish lies of omission (not telling the whole truth) in the same manner as lies of commission (intentional lies).[4]
Liability under s 52 extends not only to the principal offender but also to any agents who aid, counsel, or encourage a breach of s 52[5]	• Employees and agents of a business are equally liable and may incur personal liability. • A legal professional acting as negotiator could be held personally liable for any misrepresentations made on behalf of the company and also exposes the company to liability. • Section 52 appears to convey a very strong, zero-tolerance message to would-be offenders.
Section 52, in contrast to the UCC, applies to all conduct in trade and commerce (goods and services),[6] including negotiations and advertisements[7]	• Advertisements directed at the public will be scrutinized under s 52 standards. • Individual negotiations as well as negotiations between entities, no matter how small or large or 'commercial', will be subject to the s 52 standard. This is an interesting extension of s 52 powers since most negotiations are generally not so open or documented as to easily determine foul play.

1. Warren Pengilley, '"But you can't do that anymore!" — The effect of section 52 on common negotiating techniques' (1993) 1 *Trade Practices Journal* 113 at 114.
2. Pengilley above at 114.
3. Pengilley above at 115.
4. Pengilley above at 118–119.
5. Pengilley above at 114.
6. TPA s 55A.
7. Pengilley above at 114. It should be noted that there is a similar section in the Canadian *Competition Act*, s 52 (False or misleading representations).

defined as the need to conform to the behavioural patterns of a community, whether personal or professional.[43]

Whereas law must deal with such external factors as problems of ascertaining the facts of past events, motives of the person charged, possibility of error, data conflicts, and the transaction costs of trying to do justice, ethics seems immune to such limitations. Law must deal with and allow for certain deceits that either have little or no effect on the outcome of the case or are difficult or impossible to prove.[44] The limitations, practicalities and transaction costs inherent in the legal system demand that the law allow for certain deceptive practices. Indeed, it appears that legal ethics is especially formulated to work within the 'limitations' of the law, thus the perception that the legal professionals' code of ethics is not really 'ethics'.[45] However, if legal ethics was the same as the prevailing ethical norm, would legal ethics condone lying, deception or 'puffing' as normal negotiation behaviour? Conversely, if ethics was to be replaced by legal ethics, would that make the legal system more efficient and predictable? Such questions are at the heart of the problem of conflicting perceptions about legal professionals' behaviour when carrying out their duty to justice versus their duty to a client.

Morality on the other hand has no such limitations. Morality, unlike law, is concerned with fairness and choice such that being *legally* right is not the

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same thing as being *morally* right.[46] Morality is sometimes described as a social sense, a 'product of communal life and a well-developed moral sense in an individual'.[47] Morals, then, could be a personal sense of what is right and wrong as developed during the socialisation process, such as through family. Morals then are the by-products of values which are 'the ideals we aspire to, the beliefs to which we attach particular significance, the essence of our desire … signposts giving meaning to our lives'.[48] These values provide the personal ethical framework which helps us determine what is right or wrong.

In brief, the differences inherent in legal ethics, ethics and morality could potentially create conflicts of perception, resulting in the lack of credibility in the legal system as well as the scrutiny and public criticism of legal professionals. Such differences may also explain the differences in how law, ethics and business deal with the issue of lying or deception in negotiations. Ethics, in particular, creates a layer of complexity when dealing with attempts to regulate deceptive behaviour, especially where such ethical norms collide with the 'legal ethics' of the legal profession.

Overview of predominant theories of ethics

Four predominant ethical philosophies now coexist with three generally accepted bargaining (negotiation) ethics models. When legal professionals engage in negotiations for their clients, the legal ethics of a lawyer may conflict with these dominant theories of ethics.

If, as some argue, legal ethics has gone far beyond the bounds of the prevailing ethical theory, then what is the prevailing ethical theory? Is there one? Is the legal profession using an ethical theory that is outdated and inefficient such that it creates a negative public perception of lawyers and undermines the legal system? A look at some of these predominant theories of ethics may shed some light.

Dominant ethical philosophies

There are four predominant ethical philosophies.[49]

- First is *end-result ethics*, which argues that one should pursue a course of action that gets the greatest return on investment.[50] End-result ethics is based on determining the rightness of an action by considering the consequences of the action. As such, end-result ethics can be regarded as utilitarianism, which is also a consequentialist doctrine.[51] End-result ethics, therefore, judges the *consequences* of the action, rather than the will or intention of the actor behind the action (Kantianism or duty ethics) or the authenticity or good faith with which the action is performed (existentialism).[52] Law, for the most part, appears to be based on end-result ethics though certain bodies of law, such as criminal law and some forms of torts, do take into account the intentions of the actor.
- A second philosophy, *duty ethics*, states that the best course of action is one based on the duty to obey or uphold certain rules and principles, such as the law.[53] This means that one's actions should be guided by primary moral principles, or 'oughts' and that the ultimate good is 'a life of virtue (acting on principles) rather than pleasure.'[54]
- A third line of ethical reasoning is *social contract ethics*, in which the best course of action is one in line with established customs, norms and values, of an organisation or community,[55] such as codes of ethics, body corporate laws and business industry customs and usage. Legal ethics is likely a form of social contract ethics, though it could be argued that legal ethics is its own brand of ethics uniquely formulated for the limitations of the legal system.
- A fourth approach is *personalistic ethics*. Under this approach the right course of action is based on one's personal conscience or convictions.[56] As such personalistic ethics is most closely tied with morals.

Ethics in bargaining

In contrast, or perhaps complementary, to these generally accepted ethics theories, some notable dispute resolution scholars have also argued for three slightly different schools of ethics as they pertain to bargaining (negotiations) and its effects on deceptive practices within negotiations.[57]

- The first is the *'poker'* school of bargaining, which holds that negotiations are like a poker game and, as such, must be played by the rules of the game. In this bargaining ethics scenario, lying is simply like a poker chip, bluffing is allowed (even expected) but 'hiding cards or reneging on one's bets is not allowed'.[58]
- The second bargaining ethics school is the *idealist* school, which argues that bargaining is an inherent part of life. The ethics used in one's personal life should be the same ethics used in negotiations.[59] It follows that if, in your personal life, you do not condone lying, then you should not lie in your negotiations. The idealist school of bargaining ethics does not exclude lying, especially in certain circumstances such as protecting someone's feelings. Because this model more closely integrates religion and philosophy, it appears to be a combination of social contract and personalistic ethics models discussed above.
- Finally, the third bargaining ethics school is the *pragmatist* approach. This approach argues for acting based on what is practical, realistic or sensible, given the circumstances. In regard to lying, the pragmatist recognises that deception is part of negotiations but would rather not use it given the long-term costs of using such a tactic, such as relational, reputation or transaction costs.[60] The pragmatist approach may be more closely associated with end-result ethics since both appear to look at the potential (costly) consequences of using a tactic such as deception within negotiations.

In brief, the four dominant ethical theories and the three bargaining ethics set the stage whenever a negotiation is in play. The bargaining ethics of the negotiator, whether client or legal professional, may conflict with the prevailing ethical norms, or even the ethics of a mediator if one is employed to assist in the negotiations. In addition tactics such as lying and deception continue to plague negotiations and legal professionals, tactics which professional ethics codes try to control.

Ethical attempts to control lying

The primary way in which the legal profession attempts to self-regulate and to control lying is via professional ethics or legal profession practice rules. Professional practice rules are

generally prescriptive (that is, duty-directed, stating specific duties or rules) or aspirational (that is, virtue-directed, stating some desired conduct that is expected).[61]

In Australia the legal profession is regulated on a State and Territory basis with similar rules. For example, the NSW Parliament enacted a *Legal Profession Act* in 1987 while in the Queensland *Legal Profession Act* was enacted in 2004. There are some notable differences from jurisdiction to jurisdiction. However, a set of uniform rules called the *1995 Advocacy Rules* has been endorsed by the Australian Bar Association and adopted by NSW, Queensland and the ACT.[62]

Under the NSW *Professional Conduct and Practice Rules*,[63] legal practitioners[64] are obligated to 'act *honestly, fairly, and with competence and diligence* in the service of a client'.[65] Interestingly enough, this duty appears to only apply to section 1.1 and is not stated as an overarching statement of principle for all 16 rules dealing with client relations.[66] In contrast, the Statement of Principle for Rules 17–24 (Practitioner's Duties to the Court) clearly states that legal practitioners 'in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate, should act with *competence, honesty and candour*.'[67]

The Queensland *Legal Profession Act 2004*[68] does not appear to explicitly impose a duty of honesty or candour on the legal professional, either towards clients or the courts. This duty, however, appears to be implicit, inferred and expected since one of the characteristics of unsatisfactory professional conduct or professional misconduct is:

> … conduct for which a court has convicted an Australian lawyer of —
> (i) a serious offence; or
> (ii) a tax offence; or
> (iii) an *offence involving dishonesty* …[69]

Perhaps the lack of an explicit duty to be honest is reflective of an understood norm that honesty is to be expected in all dealings, whether legal or personal.

Like Australia's State and Territorial jurisdictions, the United States has legal profession disciplinary agencies across State jurisdictions that are regulated by that State's Supreme Court. However, the US also has a national bar: the American Bar Association (ABA). The ABA attempts to unify the codes of professional ethics across jurisdictions. One such example is the *ABA Model Rules of Professional Conduct* (ABA Model Rules). The ABA Model Rules are prescriptive and set up in a rule-commentary format whereas the Australian Model Rules do not appear to provide commentary.[70] In addition, neither the ABA Model Rules nor the Australian Bar Association Model Rules include specific guidelines with respect to lying or deceptive practices in negotiation, with one exception.

The ABA Model Rule 4.1 is seen by most scholars as the primary professional ethics rule that deals both with negotiation practice and with potentially deceptive tactics. Rule 4.1 states:

> 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. [71]

Furthermore, comment [1] to Rule 4.1 states that there is 'no affirmative duty to inform opposing counsel of relevant facts', while setting some guidelines to avoid misrepresentation.[72] In addition, comment [2] to Rule 4.1 specifically addresses negotiations by stating that:

> Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category …[73]

Thus, under ABA Model Rule 4.1 comment [2], it appears that one can engage in 'product puffing', exaggeration of the value of a product, and even outright lying or deception within the bounds outlined in comment [2]. However, Rule 4.1 comment [2] also cautions legal professionals against going beyond normal boundaries by warning them of applicable law and the potential for criminal and tortuous misrepresentation that could be actionable via cause of negligence or professional misconduct.[74]

Despite the apparent *carte blanche* under some model rules that allow lawyers to engage in certain kinds of lying and deception in negotiations, scholars ... assert that, from an ethical standpoint, the lying allowed ... is still not ethically permissible or excusable.

In contrast to the majority of US and Australian States, at least one of Canada's provinces has adopted a specific code of conduct for negotiators. The Professional Conduct Rules of the Law Society of Alberta, set up in rule-commentary format, has specific rules for lawyers acting as negotiators. Such rules (and commentary) include the prohibition against lying or misleading an opposing party intentionally or otherwise, requiring that lawyers communicate all settlement offers to the client regardless of value, and refrain from agreeing to a negotiated agreement that the lawyer knows to be criminal, fraudulent, or unconscionable.[75] As indicated earlier and aligned with the views of many scholars, there might be problems of proof in attempting to determine if a lawyer has breached the relevant sections because of the nature of the negotiations process.

Despite the apparent *carte blanche* under some model rules that allow lawyers to engage in certain kinds of lying and deception in negotiations, scholars such as Wetlaufer continue to assert that, from an ethical standpoint, the lying allowed under the legal professional rules is still not ethically

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permissible or excusable.[76] Scholars have also argued that the comments to Rule 4.1 provide little help in determining such questions as:

1. What is a material fact?
2. What is a false statement of law?
3. What is a false statement of material fact in a negotiation?[77]

In addition, there is ambiguity with regards to a lawyer's permissible conduct in negotiations because Rule 4.1 is embedded into a framework of ethical rules that seems initially meant to apply to litigation or the adversarial system.[78] This appears to beg the question — is negotiation just incidental to litigation or is it a separate process altogether deserving of its own set of ethical rules?[79] Even if there are separate ethical guidelines for negotiators, it is unclear whether such guidelines would completely prevent lying or deception in negotiations. In addition, another set of ethical guidelines would seem to only add to the confusion and apparent obligations under existing systems.

In brief, codes of professional ethics along with the threat of professional misconduct or negligence actions attempt to supplement legal attempts at controlling deception during negotiations. However, because of questions regarding the very nature of negotiations, disparity between jurisdictions, or even cultural differences in negotiation, such attempts may be futile, especially when taking into account the *modus operandi* of the fast-paced, complex, market-driven business world in which we live. ●

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The second part to this article will appear in a future issue of the ADR Bulletin.

Endnotes

1. Sir Walter Scott, *Marmion, Canto vi. Stanza 17* (Scottish novelist, poet, historian and biographer, 1771–1832). This quote has frequently, yet erroneously, been attributed to Shakespeare.

2. CNN, 'You look great' (Tuesday, 11 July 2006). The informal survey had a margin of error of plus or minus three points. Available at <www.cnn.com/2006/HEALTH/07/11/lies.we.tell.ap/index.html> (as of 22 July 2006).

3. Above note 2: 52 per cent said lying was never OK while 65 per cent said lying was OK in certain circumstances, such as protecting someone's feelings or protecting them from serious harm.

4. Above note 2.

5. Above note 2. See also Sissela Bok, *Lying: Moral Choice in Public and Private Life* 58–59 (1989).

6. Gerald Wetlaufer, 'The ethics of lying in negotiations' (1990) 75 *Iowa L Rev* 1219, 1220; James J White, 'Machiavelli and the Bar: Ethical limitations on lying in negotiation' (1980) *Am B Found Res J* 926 at 928; John W Cooley, 'Defining the ethical limits of acceptable deception in mediation' (2004) 4 *Pepp Disp Resol LJ* 263 at 264.

7. Wetlaufer above note 6 at 1272; Cooley above note 6 at 264.

8. By lying, I also include deception. The distinction between lying and deception is discussed in the subsequent article.

9. The Random House *Dictionary of English Language* 1109 (2d ed 1987); *The Oxford English Dictionary* 899 (2d ed 1989); compare Wetlaufer above note 6 at 1223 (defining lying to include 'all means by which one might attempt to create in some audience a belief at variance with one's own').

10. Wetlaufer above note 6 at 1227.

11. Cooley above note 6 at 263; see also David Nyberg, *The Varnished Truth: Truth Telling and Deceiving in Ordinary Life* 66–67 (1992).

12. Deception, *Wikipedia, the free encyclopedia* available at http://en.wikipedia.org/wiki/Deception (describing deception as opposed to lying).

13. Note: In this article, law means actual legislation in place to control and punish lying (deception). It does not include codes of ethics or professional codes of conduct, both of which will be discussed later.

14. *Attorney General v Guardian Newspapers Ltd* [1990] AC 109 at 293 (Lord Goff in House of Lords decision).

15. Kay Lauchland and Bernard McCabe, 'The state, the individual and

rights' 1 (unpublished paper on file with the author.)

16. Above note 15.

17. Lauchland and McCabe above note 15 at 5.

18. Lauchland and McCabe above note 15 at 5–6.

19. Note: what constitutes a 'material' matter is subject to debate. Generally, a 'material' matter is something that could affect the outcome of the case.

20. United States Federal law: (1) 18 USC § 1621 (Perjury generally); (2) 28 USC § 1746 (Unsworn declarations under penalty of perjury) (treating unsworn statements as subject to perjury). See also Australia: The Queensland *Criminal Code 1899*, s 123 (Perjury) and s 126 (Fabricating evidence).

21. The Queensland *Criminal Code 1899*, s 124 (Punishment of perjury).

22. The Queensland *Criminal Code 1899*, s 125 (Fabricating evidence).

23. *New South Wales Crimes Act 1900* (as of 20 June 2006) s 327 (Offence of perjury)

24. G Richard Shell, 'When is it legal to lie in negotiations?' *Sloan Management Review 32*, no 3 (1991), pp 93–101.

25. M J Shanahan, P E Smith, and S Ryan (15th ed 2005) *Carters Criminal Law in Queensland* 687 (discussing s 408C of the *Criminal Code 1899* (fraudulent appropriation of power)).

26. The Queensland *Criminal Code 1899*, s 408C(2) (Fraud). Special circumstances include, for example, fraud by directors of a corporation.

27. *Crimes Act 1900* (NSW) (as of 20 June 2006) s 185: inducing persons by fraud to execute instruments.

28. Misrepresentations can take the form of fraudulent misrepresentations, negligent misrepresentations, and gross misrepresentations, all of which are the focus of a future article. As such, they are not discussed in detail here.

29. Uniform Commercial Code (2003) (UCC), section 1-304.

30. UCC, section 1-201(20).

31. *Restatement (Second) of Contracts*, Section 105, comment (c) (1981).

32. Anne M Burr (2001) 'Ethics in negotiation: Does getting to yes require candor?' *56 JUL Disp Resol J* 8 at 10 (citing G Richard Shell, 'When is it legal to lie in negotiations?' 93).

33. *Trade Practices Act 1974* (Cth) (TPA), s 2.

34. TPA, ss 2A and 2B.

35. TPA, ss 2A and 2B.

36. TPA, s 52.

37. See generally Elisabeth Peden (2003) *Good Faith in the Performance of Contracts* (discussing the nature of what role 'good faith' plays in the performance of contracts).

38. *Black's Law Dictionary* (6th ed 1990 West Publishing Co) p 553; see also Roy J Lewicki et al (5th ed 2006) *Negotiation* 236.

39. *Black's Law Dictionary* above note 50 at p 894. See also Mirko Bagaric and Penny Dimopoulos (2003) 'Legal ethics is (just) normal ethics: Towards a coherent system of legal ethics' *QUT Law and Justice Journal* 21, 3; Wetlaufer above note 6 at 1235–1236.

40. *Black's Law Dictionary* above note 38 at p 1008: 'Moral law'.

41. *Black's Law Dictionary* above note 50 at p 1008: 'Moral', part 2.

42. Wetlaufer above note 6 at 1235.

43. Wetlaufer above note 6 at 1236.

44. Wetlaufer above note 6 at 1235.

45. Wetlaufer above note 6 at 1235–1236.

56. Hugh Mackay (2004) *Right and Wrong* 37.

47. McKay above note 58 at 26.

48. McKay above note 58 at 18.

59. Note: These could be debated. See for example Graham (2004) *Eight Theories of Ethics* 126–161 (discussing utilitarianism in light of at least eight theories of ethics, from Immanuel Kant's categorical imperative (lying is not appropriate under any circumstances) to act utilitarianism, rule utilitarianism, existentialism, hedonism, and consequentialism.

50. Lewicki above note 38 at 236–237.

51. Graham above note 49 at 139.

52 Graham above note 51 at 137–138; Lewicki above note 38 at 241.

53. Lewicki above note 38 at 236–237. Immanuel Kant is considered the founder of this philosophy, sometimes referred to as 'duty for duty's sake'.

54. Lewicki above note 38 at 239.

55. Lewicki above note 38 at 236–237.

56. Lewicki above note 38 at 236–237.

57. G Richard Shell, 'Bargaining with the Devil without losing your soul' in Carrie Menkel-Meadow and Michael Wheeler, eds (2004) *What's Fair: Ethics for Negotiators* 65–69.

58. Cindi Fazzi (2005) 'Book Review: *What's Fair: Ethics for Negotiators* edited by Carrie Menkel-Meadows and Michael Wheeler' 60 JUL *Disp Resol J* 89 at 89.

59. Above note 58.

60. Above note 58.

61. The Australian Law Reform Commission (1999) *Discussion Paper 62: Review of the Federal Civil Justice System, 5. Lawyers and practice standards* 3 (Discussion Paper 62).

62. Discussion Paper 62 at 4.

63. *The Law Society of New South Wales Professional Conduct and Practice Rules: Legal Profession Act 1987* (NSW Professional Conduct and Practice Rules).

64. NSW Professional Conduct and Practice Rules: Introduction (defining 'practitioner' as '… persons practising as solicitors, or as barristers, or as barristers and solicitors').

65. NSW Professional Conduct and Practice Rules, section 1.1

66. NSW Professional Conduct and Practice Rules: Statement of Principle for Rules 1–16.

67. NSW Professional Conduct and Practice Rules: Statement of Principle for Rules 17–24 (emphasis added).

68. *Legal Profession Act 2004* (Qld).

69. *Legal Profession Act 2004* (Qld) s 246(c)(iii) (emphasis added).

70. Discussion Paper 62 at 9. See also 2004 ABA Model Rules of Professional Conduct and the Australian Bar Association Model Rules 2002.

71. ABA Model Rules, rule 4.1.

72. ABA Model Rules, rule 4.1 comment [1].

73. ABA Model Rules, rule 4.1 comment [2].

74. ABA Model Rules, rule 4.1 comment [2]. See also ABA Model Rules, rule 8.4 and related comments.

75. Discussion Paper 62 at 19; The Law Society of Alberta, *The Code of Professional Conduct — Chapter 11 (The Lawyer as Negotiator)* (February 2006) R 1–R5.

76. Wetlaufer above note 6 at 1241–1241.

77. Wetlaufer above note 6 at 267–269.

78. Robert C Bordone (2005) 'Fitting the ethics to the forum: A proposal for process-enabling ethical codes' 21 *Ohio St J on Disp Resol* 1.

79. Above note 78.

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