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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 2

Avnita Lakhani

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 (which appeared at (2007) 9(6) ADR 101) discussed the definition of lying and deception, and the various forms of lying. It then discussed 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' addressed 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 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.

The business of lying

It appears that modern society is so consumed with 'busy-ness' that little things like telling the truth or taking the time to prevent a lie seem inconsequential and not an efficient use our time. The Associated Press-Ipsos poll discussed at the beginning of Part 1 confirms this, as when a mother, trying to prevent her child from watching too many cartoons, told her 4-year that there were no more cartoons on TV, knowing full well that this was a lie.[1] As she explained, 'One day, he'll probably figure it out', and acknowledged that telling him the truth, though more time-consuming, would have been better, stating 'It's the easy trap of a lie' and '[i]t's easier than telling the truth.'[2]

What is it about 'busy-ness' or business that takes away our time so much as to engage in seemingly more efficient behaviour such as lying or deceiving rather than being honest?

Nature of business

In 1993 an internationally-renowned business scholar defined the purpose of business as:

> … exist[ing] to supply goods and services to customers, rather than to supply jobs to workers and managers, or even dividends to stockholders.[3]

Of course, business does not function outside the confines of market economics. As such the business person might qualify the statement and argue that while the purpose of business is to serve customers, business management 'must always, in every decision and action, put economic performance first.'[4] Without a focus on economic performance, a business would not be able to achieve its true purpose — to serve customers.

This is a far cry from 1970 when a future Nobel laureate in economics, Milton Friedman, wrote:

> … there is one and only one social responsibility of business — to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.[5]

It appears that society has accepted the first part of Milton Friedman's proposal yet found it unlikely to achieve its goals without the use of fraud or deception. In addition, it appears that Drucker tacitly endorses Milton's view by assuming that the only things that matter are serving the customer and achieving positive economic performance. Such principles have also come to embody much of the practice of law in modern society, though the legal profession's underlying goal is to administer justice.

Despite some thoughts to the contrary, it is now common ground that the practice of law is a business, though its aspiration may be to serve the public and the courts. In 1999 when the Australian Law Reform Commission issued its report on reforms in the federal civil justice system it recognized that a global economic model combined with changes in the legal market meant a shifting of the working practices of legal professionals from a service ideal to one that is based on business imperatives.[6] The global economy has only increased the nature of general competitiveness that was already inherent at the time Friedman made his statement about the nature of business. The legal professional had to also make a shift in practice in order to serve the needs of the global marketplace. With an increase in the number of lawyers, economic recessions and the application of free market principles to the legal profession, there has been even stronger competition among lawyers who already operate within a competitive adversarial system[7] that allegedly espouses a 'win at all costs' attitude.[8]

In addition negotiation is how business is generally done. The majority of negotiation literature, including

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the highly-touted *Getting to Yes*[9] and *Getting Past No*,[10] was written from the standpoint of business. Even the most commonly-used negotiation tactics, whether deceptive or not, come from the realm of business. In addition, when the ABA Model Rule 4.1 comment [1] stated 'under generally accepted conventions in negotiations', those conventions come from an understanding of standard business negotiation practices. In addition to rules and ethical norms, legal professionals must also contend with business custom and controls on deceptive behaviour.

Business controls on the use of lying

Law intersects with business in the law of contracts, which governs the creation, performance and enforcement of contracts, though not necessarily the negotiation of them. In the United States, for example, the *Uniform Commercial Code* (UCC) governs the performance and enforcement of sales and commercial transactions under a good faith standard.

The UCC defines good faith as 'honesty in fact and the observance of reasonable commercial standards of fair dealing.'[11] The doctrine of the duty of good faith as espoused in the UCC and the *Restatement (Second) of Contracts* respects the underlying principle of business which affirms the parties' freedom of contract. The duty of good faith respects the underlying principle, while still conveying the aspirational message of fairness, openness and honesty in the transactions concerned.[12]

Again, the UCC does not appear to control the negotiations leading up to the creation of the contract or thereafter. Under the law of contracts, a statement of value (as opposed to a property's tangible characteristics or history) is seen as an opinion. A lie about one's opinion is not actionable for the purposes of fraud.[13] In addition the UCC does not recognize statements of opinion as actionable or creating an express warranty.[14] Thus, allegedly deceptive tactics such as 'product puffing' survive the UCC test.[15]

By contrast in Australia the *Trade Practices Act 1974* (Cth) (TPA) governs similar transactions. While the TPA does not expressly govern negotiations, s 52 does attempt to impose strict guidelines with respect to negotiation tactics or other conduct that might be deceptive or misleading or construed to be deceptive or misleading.[16]

In addition some federal statutes in Australia, such as the *Native Title Act 1993* (Cth), have also adopted the good faith standard in negotiations, setting out various indiciae of how to determine if good faith in negotiations has been undermined.[17] Such indiciae include, but are not limited to:

(1) unreasonable delay;
(2) unexplained failure to communicate with other parties;
(3) failure to take reasonable steps to facilitate and engage in discussions with other parties;
(4) failure to respond to requests for relevant information in a reasonable amount of time; and
(5) adopting an inflexible non-negotiable position.[18]

Interestingly enough, the approach to the doctrine of good faith in the *Native Title Act* appears, in spirit, to satisfy Professor Bordone's argument that, because of process pluralism in the area of dispute resolution, ethical guidelines should be drafted to 'serve as facilitators for the particular kinds of behaviours, attitudes, and conditions that ennoble the professional activities and goals'[19] of those engaging in that profession, rather than as obligatory or punishable guidelines of 'what to do or not to do'. Whether such an approach is likely to be more successful than the current rule-commentary approach used today remains to be seen; however, such an approach might be relevant in certain situations.

In brief the formal business controls on the use of deceptive tactics include the common law of contracts, certain state and federal statutes specifically governing sales and commerce transactions, and a doctrine of good faith. Each of these tools appears consistent with both market economics, the notion of free and open competition, as well as the belief in the parties' rights and freedoms to contract.

However, is that enough? Perhaps, more importantly, would acceptable and prevailing negotiation theory and principles condone or support further attempts to reduce lying and other deceptive tactics? This is the focus of the next section.

Deception under negotiation theory and principles … is it really so wrong to lie?

Underlying and intersecting with business, ethics and law are known negotiation theories and principles at work, borne out of research, practice and an understanding of how successful negotiations work. When looking at ways to control deception, negotiation theory and principles may have some surprises for legal professionals, ethicists and business people — in short, all of us.

Changing engrained assumptions in the social fabric

It could be argued that lying is as old as time! It is part of the fabric of human nature. From the time of the Ten Commandments, where lying was strictly forbidden, society has 'evolved' to accept that there may be times when lying is necessary and the best strategy, such as when attempting to avoid hurting other people's feelings or when it might cause harm. Society even appears to tolerate outright lying in certain circumstances.[21]

In 1894 John Locke recognized this fascinating aspect of human nature, stating:

> It is evident how men love to deceive and be deceived since rhetoric, that powerful instrument of error and deceit, has its established professors, is publicly taught, and has always been had in good reputation … men find pleasure to be deceived.[22]

In 1968 Arendt argued that:

> … our ability to lie — but not necessarily our ability to tell the truth — belongs among the few obvious demonstrable data that confirm human freedom.[23]

Scholars argued that lying is one of man's distinguishing features from the animal kingdom. The ability to tell a lie and to do so effectively became the hallmark of human creativity and freedom, a god-given right as argued by some.[24]

In 1983 Barwise and Perry affirmed this by basically arguing that it is only because people violate the conventions of language (that is, by lying) that we are able to 'recognize truth as uniformity across certain utterance situations.'[25] They seem to argue that it is because people lie that we are able to tell what is considered a standard of truth; if they did not, then we would 'never notice truth as a property of some utterances and not others.'[26] Thus, it appears that the modern justification for lying was borne, or could it just be confirmation of what was already true?

Early scholars may have justified lying by stating that it was essential to human creativity and freedom. However, social psychology confirms the propensity of people to lie in a variety of circumstances simply because the heuristics and systematic biases inherent in human nature increase the probability of lying.[27] For example, it is natural for people to:

(1) believe our own cause is just over the other party's saying the same;
(2) to assume the worst with regards to our adversary's motives, character and conduct yet assume the best with respect to our own;
(3) to accept as sufficient the justifications we give to ourselves regarding the lies we tell but to devalue the justification of others;
(4) to believe that the lies we tell are better justified than those told by our opponent; and
(5) to devalue an offer or opinion of another party without any reason, simply because they come from someone else.[28]

Such inherent human biases, combined with a competitive negotiation environment, only increase the probability that people will lie in negotiations.[29]

Additional evidence can be found in the engrained workings of modern society. Today a global economy, advanced technology and the economic rise of once third-world economies have created increased competition. Competition, by nature, involves the importance and pursuit of 'winning'.[30] Competitors generally engage in competitive, win-lose, fixed-pie thinking.[31] As a result, parties in competition will tend to use distributive bargaining tactics to claim the maximum value from a presumably fixed-pie. Such distributive bargaining tactics are, by their very nature, not cooperative. Lying is one such tactic and can be used strategically in an attempt to gain maximum advantage in a negotiation. This appears even truer for legal professionals in an adversarial system, whose careers depend on effective negotiations to deliver results.[32]

Finally, the use of deception is engrained into society by legal professionals' clients. Clients have come to expect the lawyer to serve as advocate and protector of the client as affirmed by the lawyers' tenets of duty, loyalty and zealous representation of their clients.[33] These professional tenants influence the negotiation behaviour of legal professionals and may include deception in an attempt to obtain the best possible outcome for their clients. The legal system expects this and so do clients. However, some argue that the duty of loyalty and zealous representation does not logically translate into an excuse to engage in deceptive tactics that might reflect poorly on the lawyer (by committing 'bad acts'), the legal profession or the public's perception of the integrity of the profession. The argument appears to be that the legal professional could condition an offer of representation on not committing such bad acts.[34] This would appear to be a challenge given that lawyers, as well as the general public, are 'trained' about such well-recognized negotiation tactics via books, articles on negotiation, law professors, and law books, and reinforced through experience.[35] As social scientists have repeatedly observed, changing such engrained behaviours is fundamentally hard given natural human tendencies, even if you are trying to make a 'discerning choice'.[36] In addition, controlling such practices may have an impact on justice or durable agreements long considered the hallmarks of effectively negotiated agreements?

In brief, evolutionary changes may or may not be right; however, ethical models have acknowledged such a change from Immanuel Kant's categorical imperative that one should never lie to today's personalistic or pragmatist ethics that it may be necessary and expected that people lie in certain circumstances.

Compromising versus maximizing 'the good outcome'

Perhaps one of the defining characteristics of effective negotiation is that the process is conducive to producing a 'good outcome'.[37] Whereas litigation is public and subject to the rules of the legal system, thus increasing the chances of adversarial relationships, negotiation seems to have the benefit

of rewarding cooperative behaviours because of its relative privacy from prying eyes, lack of excessive regulation, and partial separation from the legal system.

The definition of 'a good outcome' in negotiation includes the following, the outcome:

- is better than the BATNA;[38]
- meets personal interests very well, other party's interests acceptably, and interests of third parties at least in a tolerable manner;
- is considered the most efficient and value-creating agreement of the possible sets of deals that could be constructed;
- is based on acceptable norms of fairness or some external standard, criteria or principle outside of the negotiating parties such that it could be considered a good agreement;
- includes commitments that are 'smart, realistic and operational' by both sides;
- is premised on 'clear and efficient communication' and
- improves the relationship or, at least, does not cause harm to the relationship.[39]

Negotiation appears to help achieve such a 'good outcome' because of 'the potential to use creativity and mutual information exchange to produce deals that actually enlarge the size of the pie for the parties.'[40] Part of the creativity and mutual information exchange apparently means that parties must believe that they are in an environment safe enough to share information, even if there are some perceived lies.[41]

It would appear that, where lawyers are involved, imposing (too many) regulations on behaviour in negotiations might lead to inefficiency in the wrong hands. For example, in Australia one judge noted that while professional practice (ethical) rules do serve a purpose, too many rules regulating a legal professional's behaviour may backfire. This is because:

> Lawyers tend to see rules as things to be circumvented in pursuit of the client's interests … they may be honoured in the letter but ignored in the spirit … resulting in avoidance rather than compliance.[42]

The Australian Law Reform Commission has argued that this is no more clearly demonstrated than by the increased use of civil procedure rules as a delay tactic, to bury documents, to file a claim without enquiry into the merits of the application,[43] and as a general means to overburden the other party by deliberately raising its costs of representation.[44] In brief, one of the key benefits of negotiation is the ability to use creativity, informal small talk, a relational approach and mutual information exchange in hopes of 'obtaining a value-maximizing, Pareto-optimal outcome in negotiations.'[45] This means accepting the fact that some deception will likely occur, if only because it is human nature. Imposing additional rules might reduce the efficiency of the process, causing the players in the game to find other, more creative ways to deceive.

It's just part of the game!

For many practitioners and scholars law is considered just a game with its own set of unique rules.[46] Because negotiation is considered integral to the practice of law,[47] negotiation is also said to be a game, though the rules are not as rigid as with the practice of law. Therefore it could be argued that not only is it inefficient to impose harsh regulations around the behaviour of a 'game', but changing the rules of the game would only confuse the players, who already accept the rules, written or not.[48]

First, negotiation theory and principles recognise the use of distributive, fixed-pie, competitive negotiation tactics, including deception.[49] While negotiation theory does not directly support the use of lying in negotiations, it does recognise that parties to a negotiation, even one that starts out as interest-based, may engage in deceptive tactics as part of the game. As discussed in Part 1 of this article (in 'Ethics in bargaining'), a negotiator with a 'poker' ethic,[50] end-results ethic or personalistic ethics that condones lying is not likely to have a problem with using deceptive tactics, regardless of his opponent. A deceptive tactic is simply an acceptable part of the game.

Second, the rules of the game for the legal professional permit a certain amount of deception. In the US, for example, Rule 4.1 of the *Model Rules of Professional Conduct* has withstood over 20 years of debate and criticism

regarding its apparent support for certain perceived deception in negotiations.[51] It appears that even the drafters of Rule 4.1, when referring to 'generally accepted conventions in negotiation,'[52] recognize that there are certain understood and acceptable steps to the negotiations dance, such as a history of offers, puffing and certain exaggerations, that are normal. Furthermore, scholars provided insight that the drafters most likely realized that words alone are insufficient to impact on behaviour and that imposing additional rules would only serve as another bargaining chip under the current legal culture.[53]

Similarly in Australia s 52 of the *Trade Practices Act* also allows for certain levels of deception, such as opinions that might inadvertently turn out to be false and subjective assessments of products and services.[54] While s 52 imposes standard of proof lower than the 'reasonable person' standard, it nonetheless allows for shades of deception.[55]

Finally even practitioners, including mediators, recognize that deception and some lying are an inherent part of negotiations, whether mediated negotiations or those conducted between the parties themselves. As such, no amount of regulation will completely eliminate its use. For example Cooley argues that a mediator can end up being one of most ardent users of deceptive tactics in order to manipulate information for the benefit of the parties, especially in caucused mediations.[56] Furthermore, as the 'chief information officer' of the negotiation, a mediator is in a unique and powerful position to control the flow of information, the content, the framing of information, and engaging in his/her own set of tactics quite apart from those used by the parties.[57]

As such, it is understood that not only will the parties engage in certain deceptive behaviour, so will the mediator. As noted by mediation pioneer, Christopher Moore:

> The ability to control, manipulate, suppress, or enhance data, or to initiate entirely new information, gives the mediator an inordinate level of influence over the parties.[58]

Indirectly stated, it seems that the mediator may also engage in, whether intentionally or in the course of duty, some forms of deception for the purpose of enhancing the chances of 'a good outcome'.[59] Even if additional rules were implemented regarding candour, some practitioners argue that the rules:

> … must be compatible with the game's nature and purpose … must not significantly interfere with the means by which the players can accomplish the game's purpose [i.e., to resolve conflict] … must be comprehensible, reasonable, and fair … [and] must be capable of compliance by all the game's players in all situations.[60]

This seems a high bar to place on imposing truthfulness in negotiations.

In brief negotiation is widely understood to be a game, a dance of sorts where certain accepted and tacitly agreed-upon 'rules' apply. Part of those unspoken rules is the bargaining game in which negotiation tactics such as deception, puffing and exaggeration are normal and not to be taken at face value. In fact, they are sometimes considered efficient to the extent that parties expect them and the transaction costs are likely built-in to the negotiation. Even as leading scholars might herald a move towards a more cooperative, integrative, interest-based negotiation model as more appropriate, reality seems to indicate that practitioners face deceptive tactics even in the more 'honest' interest-based negotiations.

Dealing with transaction costs of imposing candour in negotiations

While there may be potential benefits in imposing laws on candour in negotiations, there are likely to be costs as well, costs which might outweigh the potential benefits. First, the legal system is not without its limitations. It has contextual constraints, time constraints and is subject to resource and cost constraints just like any other business. For example, law deals with attempting to reconstruct past events, not so much in 'finding facts' but in attempting to re-determine what might have happened based on many peoples' perspectives of the events.[61] Because law, and therefore legal professionals, becomes a 'player' after the game has already started, there is possibility for error on many levels.[62] In addition, law must account for transaction costs associated with providing the service of 'justice'. Because of these inherent limitations, law might have to accept some forms of deceit, such as those which will not affect the overall outcome of the case, impose an insurmountable burden of proof, or which are undetectable.[63] In an effort to meet the goals of access to courts, speedy trial, justice and remedies, the legal system must weigh the transaction costs of doing justice with the costs of actually uncovering the truth.

In addition, while imposing candour in negotiations is an admirable goal, even proponents recognize that the transactions costs associated with this would be the biggest hurdle. First, a higher standard would become 'one more weapon in the adversarial arsenal, with each side threatening to bring ethics violation charges against the other.'[64] This would result in an increase in overall transaction costs for handling the case. Second, the private and dynamic nature of most negotiations might preclude imposing a more restrictive rule on candour. Because of the variety of processes as well as the near infinite number of topics which are the subject of negotiation, rules imposing truthfulness would have to be either very detailed or very general, neither quite meeting its intended goal.[65] Finally, if one begins restrictions on lies and attempts to impose truth, where does it stop? What other behaviours will be the subject of regulation? At what point will such regulations become inefficient due to lack of enforcement, compliance, or indifference?

Future of lying as a negotiation tactic

Where does the future of lying in negotiations sit? At this moment the future of deception and its various forms as a negotiation tactic lies in the eye of the beholder. If the beholder is a legal professional, a 'poker' player and a fan of the social contract ethic, lying is part of the negotiations dance. If the beholder is a legal professional, a pragmatist and a religious man, lying may be part of the game, but only in very specific instances such as to prevent harm.

To the extent that negotiation remains a rather personal and private process not subject to prying eyes or strict regulation, the use of deceptive practices will continue. To the extent that the ordinary

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citizen is not severely punished for telling a lie, however 'white' or 'noble', the use of lying as a tactic will continue and lawyers should not incur the wrath, or at least not a higher burden of the punishment, for such practices than the citizens they represent.

Even if negotiation is more regulated than today, lying may still continue because, it could be argued, it is human nature. So, is it possible to completely eradicate the use of deceptive tactics within negotiations? Is it feasible or even economical to do so? Is it possible to have a unified set of ethical rules specifically for negotiations that takes into account all the various lies people tell and how to manage them? Perhaps the answers to such questions also lie in the eye of the beholder, whether he/she is engaged in law, ethics, or business or simply trying to negotiate themselves between these seemingly disparate realms.

Conclusion

As a negotiation tactic, lying and other forms of deception are not generally considered permissible. However, reality presents another story, where deception is sometimes permissible, sometimes necessary, and sometimes expected.

This article has attempted to provide a prismatic view of the complexities involved in attempting to regulate the use of lying as a negotiation tactic, especially as it might impact the legal profession. The view, as seen from the standpoint of law, ethics and business has been discussed according to acceptable negotiation theory and principles. Because negotiation is not just an important lawyering skill but also part of society's social fabric, understanding the use of lying from the standpoint of negotiation may help paint a fuller picture of this enigmatic tactic and whether attempts to regulate this behaviour among legal professionals may prove successful or not, without first addressing societal justification for its use and acceptance. ●

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Endnotes

1. CNN, 'You look great' (11 July 2006) available at <www.cnn.com/2006/HEALTH/07/11/lies.we.tell.ap/index.html> (as of 22 July 2006).
2. Above note 1.
3. Peter F Drucker (1985) *Management: Tasks, Responsibilities, Practices* (New York: Harper & Row).
4. Drucker above note 3 (identifying profit as just a component, 'not the explanation, cause, or rationale of business behavior and business decisions, but rather the test of their validity.')
5. Reason Foundation (October 2005) 'Rethinking the Social Responsibility of Business: A Reason debate featuring Milton Friedman, Whole Foods' John Mackey, and Cypress Semiconductor's TJ Rodgers' (Mackey, who disagrees with Friedman, quoting him on his theory of business 35 years ago).
6. Australian Law Reform Commission (1999) *Discussion Paper 62: Review of the Federal Civil Justice System* (Discussion Paper 62) at 2 (citing M Solomon 'Client relations: ethics and economics' (1991) 23 *Arizona State Law Journal* 155; D Dawson 'The legal services market' (1995) 5 *Journal of Judicial Administration* 147; M Kirby 'Legal professional ethics in times of change' *Paper* St James Ethics Centre Forum on Ethical Issues (Sydney 23 July 1996).
7. Discussion Paper 62. 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 at 21–22.
8. Discussion Paper 62 at 8.
9. Roger Fisher and William Ury *Getting to Yes: Negotiating Agreement Without Giving In* (1991).
10. William Ury *Getting Past No: Negotiating Your Way from Confrontation to Cooperation* (1993).
11. UCC § 1-201(20) (2001).
12. Anne M Burr (2001) 'Ethics in negotiation: Does getting to yes require candor?' *56-JUL Disp Resol J* 8 at 12–13.
13. E Farnsworth, *Contracts*, §§ 4.11, 4.14, at 236 and 247.
14. UCC § 2.313(2 (1989).
15. Gerald Wetlaufer, 'The ethics of lying in negotiations' (1990) 75 *Iowa L Rev* 1219 at 1244–1245. See also James

White, 'Machiavelli and the Bar: ethical limitations on lying in negotiation' (1980) *Am B Found Res J* 926 at 932 (noting that 'puffing' may edge towards being an express warranty (and thus actionable) the closer a seller's statements become more particular rather than just general statements abut the value of the product.) This appears consistent with s 52 of the TPA which makes objective assessment of products potentially actionable where they can be measured as against another product for validity.

16. *Trade Practices Act 1974* (Cth) s 52 (Misleading or deceptive conduct).

17. Discussion paper 62 at 20.

18. Discussion paper 62 at 21 (citing *Western Australia v Taylor* (1996) 134 FLR 211); D Spencer 'Complying with a requirement to negotiate in good faith' (1998) 9 *ADRJ* 226 at 224–225.

19. 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 at 9–10.

20. Most commonly recognized as the 9th Commandment (Exodus 20:16 'Thou shalt not bear false witness against thy neighbour.')

21. John W Cooley, 'Defining the ethical limits of acceptable deception in mediation' (2004) 4 *Pepp Disp Resol LJ* 263.

22. ames A Barnes, *A Pack of Lies: Towards a Sociology of Lying* (Cambridge UP 1996) p 3.

23. Barnes above note 22 at p 3 (discussing Arendt (1968: 250)).

24. Barnes above note 22 at p 3 (discussing Arendt (1968: 250)).

25. Barnes above n 113 at p 3 (discussing Barwise and Perry (1983: 18)).

26. Barnes above note 22 at 3 (discussing Barwise and Perry (1983: 18)).

27. Wetlaufer above note 15 at 1232; also Korobkin and Guthrie (2004) 'Heuristics and biases at the bargaining table' 87 *Marq L Rev* 795; Chris Guthrie (2004) 'Insights from cognitive psychology' 54 *J Legal Educ* 42.

28. Wetlaufer above note 15 at 1232; Korobkin and Guthrie above note 27; Guthrie above note 27.

29. Wetlaufer above note 15 at 1232 (citing S Bok, *Lying: Moral Choices in Public and Private Life* (1978) at p 26, '[b]ias skews all judgment, but never more so than in the search for good reasons to deceive.').

30. Van M Pounds, 'Promoting truthfulness in negotiation: a mindful approach' (2004) 40 *Willamett L Re* 181 at 187.

31. Win–lose and fixed-pie mentality are generally associated with distributive bargaining.

32. Wetlaufer above note 15 at 1220.

33. Pounds above note 30 at 182; see also Wetlaufer above note 15 at 1220 and 1272.

34. Wetlaufer above note 15 at 1255.

35. Cooley above note 21 at 268.

36. Pounds above note 30 at 224 n 252.

37. Bordone above note 19 at 17.

38. Best Alternative to a Negotiated Agreement — the agreement that is better than the walk-away point.

39. Bordone above note 19 at 16–17 (citing Bruce Patton, 'Negotiation', in Michael L Moffit & Robert C Bordone (eds 2005) *The Handbook of Dispute Resolution* 279–303); see also Roger Fisher, (1985) 'A code of negotiation practices for lawyers', 1 *Negot J* 105 at 107–108.

40. Bordone above note 19 at 17.

41. Note that one person's 'truth' could be another's 'lie' given self-serving biases, natural human tendencies to discount others' opinion, and even cultural communication barriers.

42. Discussion paper 62 at 7

43. A Lakhani (2006) 'The fog has not lifted — a study of s 198J of the Legal Profession Act of New South Wales in light of acceptable negotiation theory and principles' 18 *Bond Law Review* 1 at 61.

44. Discussion paper 62 at 8. The same can be said of the US, UK and other legal systems.

45. Bordone above note 19 at 19–20.

46. Discussion paper 62 at 7; see also Cooley above note 21 at 266–267, 274–276; Pounds above note 30 at 189.

47. Wetlaufer above note 15 at 1220. There are also numerous books and articles that support this.

48. Compare Wetlaufer above note 15 at 148–150 (arguing that the 'it's part of the game' excuse is ethically impermissible because there are no rules to negotiation within the meaning of the word 'rules').

49. Some would argue that distributive, fixed-pie negotiations is no longer the more widely supported theory and that interest-based negotiation is the new model (see eg Bordone above note 19 at 16–20); however, such views are also disputed, especially in more competitive markets.

50. 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.

51. Pounds above note 30 at 189, 195–196 (more recently, modifications to Rule 4.1 were considered at the Ethics 2000, but not adopted); See also Section IV.C for further discussion on Rule 4.1 of the American Bar Association *Model Rules of Professional Conduct*.

52. ABA Model Rules of Professional Conduct Rule 4.1 comment 2.

53. Pounds above note 30 at 195–196. See also Discussion Paper 62 at 7–9.

54. 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 113–114.

55. Pengilley above note 54 at 113–117.

56. Cooley above note 21 at 264–266.

57. Ab Cooley above note 21 at 264–266.

58. Christoper Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (1986) p 269.

59. Compare Discussion Paper 62 at 8 (arguing that even if deception is part of the game and may work, the game is leading to inefficiency and ineffectiveness through manipulation by the players.

60. Cooley above note 21 at 274–277.

61. Wetlaufer above note 15 at 1235. See also John Wade (2003) *Negotiation Workbook* (discussing the nature of 'finding facts' as a process within the legal system and how it is deceptive because a legal professional cannot 'find facts' but only attempt to reconstruct them.

62. Wetlaufer above note 15 at 1235.

63. Wetlaufer above note 15 at 1235.

64. Pounds above note 30 at 195 (citing See Robert H Mnookin et al, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* 293–294 (2000)).

65. Pounds above note 30 at 194–196.

ADR diary

- **NADRAC** will be holding its 3rd **National Alternative Dispute Resolution Research Forum**. The Forum will be held on 13 and 14 July 2007 at the La Trobe University City Campus in **Melbourne**. It will provide an opportunity for researchers to discuss their research, as well as trends and issues in researching Alternative Dispute Resolution. For more information please contact the NADRAC secretariat by phone (02) 6250 6272, by email with the subject 'Research Forum Enquiry' to <nadrac@ag.gov.au>, or by fax (02) 6250 5980.
- The **Australian Dispute Resolution Association (ADRA)** will be holding a conference on 22 June 2007 at the Australian Museum in **Sydney**. With Dr Vera Ranki as the keynote speaker, the conference is aimed at experienced practitioners of ADR, as well as students and those wishing to learn more about this area. The focus of the conference will be two-fold; to reflect on the past 20 years of ADR in Australia, and to discuss the future path of ADR. Media personality Julie McCrossin will facilitate a discussion with representatives of peak dispute resolution bodies. A limited number of bookings are available. For more information about this conference, visit <www.adra.net.au> or phone 0418 965 875.
- The **Australian Commercial Dispute Centre (ACDC)** will be holding one-day workshops in **Sydney** on 3 July and 12 September 2007. These workshops will include foundation skills and information to handle conflict and disputes. It is also an opportunity for participants to prepare themselves for the ACDC Mediation Course. For more information or to reserve a place, visit <www.acdcltd.com.au>.
- The **Australian Commercial Dispute Centre (ACDC)** will also be holding 4 and 5-day Mediation workshops that incorporate activities, practice, coaching and an optional accreditation assessment day. These will be held in **Sydney** on 23–27 July and 17–21 September 2007. An additional course will be held in **Melbourne** on 20–24 August 2007. For more information, visit <www.acdcltd.com.au>.
- **LEADR** Association of Dispute Resolvers will be holding 4-day mediation training sessions in Australia and New Zealand. These courses are open to individuals who are keen to add mediation to their professional skill set, in addition to those who are engaged in dispute resolution on a daily basis. Australian courses will take place in **Sydney** on 8–11 August and 7–10 November; in **Adelaide** on 12–15 September; in **Melbourne** on 17–20 October; in **Brisbane** on 31 October–3 November; in **Hobart** on 20–23 June; in **Canberra** on 1–4 August; and in **Perth** on 17–20 October. New Zealand courses will be take place in **Auckland** on 7–10 November; in **Wellington** on 20–23 June; and in **Christchurch** on 22–25 August. Early registration is recommended, and can be done at <www.leadr.com.au>.
- For **advanced mediation practitioners,** the Australian Commercial Dispute Centre will be holding advanced mediation training courses. The first day of the course will be devoted to discussions and coaching, while the second day will involve advanced stimulated mediation roleplays. Participants will be assessed for ACDC Advanced Mediation Accreditation in their specialist field of interest on the third day. These courses will be held in **Sydney** on 31 October–1 November 2007. For more information, or to book a place, contact <stevegibbeson@acdcltd.com.au>, or visit <www.acdcltd.com.au>.
- The **Trillium Group** will be holding 4-day Negotiation and Mediation Workshop. This course will be centered on the concept of principled negotiation and will involve practical training in effectively resoling disputes. These courses will be held in **Melbourne** on 25–28 September; and in **Perth** on 21–24 August. For more information or to register, visit <www.thetrilliumgroup.com.au>.
- The **Centre for Effective Dispute Resolution (CEDR)** are holding their fast track mediation skills training course in **London** on 4–10 July 2007. This initial skills training course includes one practice day and two assessment days. For participants who wish to undertake the CEDR Accreditation, practice days will be held on 19 June and 11 October, while accreditation will occur on 26 June or 18 October 2007. For more information or to reserve a place, contact <training@cedr.co.uk> or visit <www.cedr.co.uk>.
- The **Centre for Peaceful Solutions** and the **Centre for Non-Violent Communications,** in conjunction with Dr Marshall Rosenberg, are holding the 'Living in Harmony with our values in a Profit-Driven World' conference in **Gozo**, **Malta**. The conference, which is being run from 18–20 September 2007, will focus on workable ways to cross social, cultural and economic divides without compromise or resentment. It aims to provide individuals and organisations with more effective strategies to meet their needs, while at the same time positively resolving conflict. For more information, or to reserve a place, please visit <www.mariaarpa.co.uk/global.html> or email <maria@mariaarpa.co.uk>.
- *Please email details to <carolyn@richmondventures.com.au> to submit information for publication in ADR Diary.*

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