

# Deception as a Legal Negotiation Strategy: A Cross-Jurisdictional, Multidisciplinary Analysis Towards an Integrated Policy Reforms Agenda

Presented by

## Avnita Lakhani

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Bond University Faculty of Law Queensland, Australia 4229

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## **DECLARATION**

Any studies in this thesis constitute work carried out by the candidate unless otherwise stated.

The thesis is less than 100,000 words in length, exclusive of footnotes, tables, figures, bibliography and appendices, and complies with the stipulations set out for the degree of Doctor of Philosophy by Bond University in Queensland, Australia.

#### **CERTIFICATION**

To the best of my knowledge and belief, I hereby declare that this submission is my own original work, except as acknowledged and cited in the text. All sources used in the study have been cited, and no attempt has been made to project the contribution of other researchers as my own.

To the best of my knowledge and belief, it contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Avnita Lakhani

9 August 2010

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#### **PUBLICATIONS**

#### Publications Arising Out of This Thesis

- Avnita Lakhani, 'The Fog Has Not Lifted Section 198J of the NSW Legal Profession Act in Light of Acceptable Negotiation Theory and Principles' (2006) 18.1 *Bond Law Review* 61; also published in *ADR Bulletin* as Parts 1 and 2 (2006).
- Avnita Lakhani, 'The Truth About Lying as a Negotiation Tactic: Where Business, Law, and Ethics Collide...or Do They?' (2007) Part 1/2, 9 *ADR Bulletin* 6; also accepted for publication in *Brief*, The Journal of the Law Society of Western Australia (2007).
- Avnita Lakhani, 'The Truth About Lying as a Negotiation Tactic' (Paper presented at LEADR's 9<sup>th</sup> International ADR Conference, Wellington, New Zealand, September 2007).
- Avnita Lakhani, 'Deception as a Negotiation Tactic: Fact or Fiction' (Paper presented at 'kon gress, LEADR's 10th International ADR Conference, Melbourne, Victoria, 9 September 2009).
- Avnita Lakhani, 'Deception as a Negotiation Tactic: A Study of the Views and Perceptions of Practitioners' *Update* (October 2009). *Update* is a monthly publication of LEADR.
- Avnita Lakhani, 'Deception as a Negotiation Tactic: A Study of the Views and Perceptions of Practitioners' (2010) 7(2) Rutgers Conflict Resolution Law Journal 1.

#### Other Publications

Available on request

#### Conference Presentations Related to This Thesis

- Presenter Cairns Law Conference, Cairns, Queensland, Australia (July 2006).
- Presenter National Mediation Conference, Hobart, Tasmania, Australia (May 2007).
- Presenter LEADR's 9th International ADR Conference, Wellington, NZ (Sept 2007).
- Presenter BURCS Seminar, Gold Coast, Queensland, Australia (May 2006 / Jan 2007).
- Presenter 'kon gress, LEADR's 10th International ADR Conference, Melbourne VIC (Sept 2009).
- Presenter International Legal Ethics Conference IV, Stanford, California (July 2010).

#### THESIS ABSTRACT

This thesis is a cross-jurisdictional, multidisciplinary study of the use of potentially deceptive conduct in negotiation by lawyers and the regulation of such deceptive conduct through the legal ethics codes.

Negotiation is considered a vital skill for every legal practitioner. Negotiation is also a fairly unregulated dispute resolution process yet ubiquitous in practice. One of the alleged acceptable tactics in negotiation is the use of some deception in certain forms. Potentially deceptive tactics such as bluffing, puffing, exaggerating the value of a deal, and certain settlement offers are considered a natural and acceptable part of the bargaining dance under acceptable negotiation theory. This is especially true in business.

Legal negotiators, however, work under very strict ethical codes of conduct which prohibit deception, misrepresentation, lying and fraud in any capacity. A lawyer is not supposed to lie – ever. This is due to the legal professional's multi-faceted duties of loyalty to the client, the court, the justice system, and the public interest. However, over the last few decades, legal professionals have incurred a negative perception of being liars and manipulators who themselves run afoul of the law and do not serve their clients' best interests.

While legal ethics codes are meant to curtail the deceptive behaviours of legal professionals, it is not entirely clear whether such attempts are successful or ever can be successful in light of acceptable negotiation practices which include some forms of deception.

This thesis focuses on four main research questions related to deception in legal negotiation. First, the thesis addresses whether lawyers engage in deception in negotiation. Second, the thesis discusses whether legal ethics codes address this issue by conducting a comparative study of the legal ethics codes of four common-law jurisdictions. Third, the thesis presents an original analysis of the legal ethics violations cases of one common-law jurisdiction. Finally, the thesis recommends a tripartite set of strategic, integrated policy reform proposals aimed at addressing the issues related to lawyer deception in negotiation.

Analysing the issue in a multidisciplinary capacity is essential to a better understanding of the role of ethics in the legal profession and the effect of regulating certain practices in negotiation. Through this understanding, the various stakeholders in the legal system are better able to assess the extent to which the legal profession can successfully support lawyers in their duties to their clients, the courts, and the public interest whilst also maintaining a successful, ethically-focused practice.