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ESSAY

Deceptive Negotiating and High-Toned Morality

*Walter W. Steele, Jr.**

"There is perhaps no profession after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law."¹

I. PREVALENT AMBIGUITIES

Rising concern about the adequacy of the adversary system to deal with disputes quickly, fairly, and economically has led to increased interest in a broad range of alternate dispute resolution mechanisms such as arbitration and the use of mini-trials. Presently, however, negotiation between disputants or negotiation between counsel for disputants is the best understood and most often utilized alternative to litigation. In fact, negotiating prior to litigating is so pervasive that it might be thought of as an inherent part of the litigation process.

From a lawyer's perspective, an advantage of negotiation over other forms of dispute resolution is that negotiation usually is done by lawyers. Litigators and negotiators are usually the same lawyers, and many lawyers negotiate more than they litigate. But consider the following points: (1) lawyers study litigation as an art and frequently attend courses about litigation; but lawyers seldom study negotiation as an art, and courses about negotiation are relatively rare; (2) litigators operate under sophisticated rules of procedure that prevent abuse and exploitation of one litigator by another, stronger litigator, but negotiators operate under primitive and obtuse rules of professional responsibility and under an amorphous set of professional mores common among lawyers.

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1. G. SHARSWOOD, AN ESSAY OF PROFESSIONAL ETHICS 55 (1896), cited in Rubin, *A Cause-erie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577, 578-79 (1975).

How can we account for the incongruity of lawyers calling themselves litigators when they actually negotiate for the most part? How can we account for the incongruity of lawyers possessing sophisticated litigation skills learned through concerted effort, although they spend most of their time negotiating with little or no formal training in the art of negotiation? Why was negotiation left at the starting gate, while litigation charged ahead as the most visible, if not the most useful, aspect of a lawyer's professional skill? Surely the skills and art of negotiating are no more difficult to teach and to learn than are the skills and art of trial advocacy. We must look for something other than teachability to account for the fact that litigation skills hold the limelight while negotiation skills are under-studied.

An answer to our little puzzle may be that explicit negotiation rules are controversial and value laden, while explicit rules of procedure for courts are pervasive and normative. Studying a negotiating rule brings forth remarkably varying opinions, but considering a rule of procedure for courts evokes little controversy. The adversary system unifies thinking about rules of procedure for courts, but no well-understood, commonly accepted unifying philosophy for negotiating exists. This lack of an underlying premise about negotiation may account in part for the fact that standards for negotiation are called "ethics," while standards for procedure in court are called "rules." Certainly, the lack of an underlying premise about negotiation accounts for the infrequent formal study of negotiation.

Much of the ambiguity surrounding standards of negotiation centers around trustworthiness. Unfortunately, trustworthiness and its outward manifestation — truth telling — are not absolute values. For example, no one tells the truth all of the time, nor is perpetual truth telling expected in most circumstances. To tell the truth in some social situations would be a rude convention. Consequently, when one speaks of the essential nature of trustworthiness and truth telling, one actually is talking about a certain circumstance or situation in which convention calls for trustworthiness or truth telling. Thus, a person considered trustworthy and a truth teller actually is a person who tells the truth at the right or necessary time. That person is adept at determining when the proper time for truth has come and perhaps even signals to the opposite party that now that person may be reliable.² Reliance is a signifi-

2. This concept of situational truth telling is taken from Hazard, *The Lawyer's Obligation*.

cant factor in trustworthiness. For example, in the typical sale of real estate a title search is routine without regard to how trustworthy the seller may be. No one relies on the seller's word. In that situation and in many others no significance whatsoever is attached to the value of the seller's trustworthiness. On the other hand, the virtue of trustworthiness can be quite useful in many other settings. In fact, one might suppose that clients often involve lawyers for the very reason that lawyers are perceived to be more trustworthy than the clients themselves.

Another aspect of the controversy over negotiating standards is abuse of power. Rules of procedure and, to some extent, rules of evidence help prevent one lawyer in a court controversy from taking unreasonable advantage of the other lawyer's vulnerability. For example, both lawyers are entitled to precise pleadings and discovery regardless of how experienced or inexperienced one lawyer might be. Rules of evidence, properly applied, prevent one lawyer from bullying the other despite one lawyer's dominant personal style. But there are no rules of procedure or rules of evidence governing the negotiating process, only ill defined rules of ethics. Consequently, the tactic of bullying and abuse of position has free reign in negotiation.

Analyzing the legitimacy of abuse of power during negotiation makes one even more ill at ease than analyzing lack of trustworthiness during negotiation. Prevarication is a situationally acceptable folkway (e.g., "everything is fine, Mother"), and we can move readily from that posture to the idea that lack of trustworthiness is normal during negotiation. Abuse of power, on the other hand, is not socially acceptable and brings forth at least mild contempt whenever and wherever encountered. Accordingly, a novice to the subject of standards for negotiating might postulate that rules of negotiating are more tolerant of prevarication than they are of abuse of power. As we shall see later, that is not the case.

II. LET'S DANCE! CONVENTIONAL NEGOTIATING ETHICS

To most practitioners it appears that anything sanctioned by the rules of the game is appropriate. From this point of view, negotiations are merely, as the social scientists have viewed it, a form of game; observance of the expected rules, not professional ethics, is the guiding precept. But gamesmanship is not ethics.³

gation to Be Trustworthy When Dealing with Opposing Parties, 33 S.C. L. REV. 181, 183 (1981).

3. Rubin, *supra* note 1, at 586.

As practiced by many attorneys, deception is the spirit of negotiation. Negotiating lawyers misstate facts, willfully mislead by manipulating known facts, or fail to correct an opponent's ignorance or misconception about matters central to the negotiation. These tactics vary in sophistication from merely putting on a false face to expressly lying about the extent of settlement authority. In a broad sense, justifications exist for this less than honest standard for negotiating. A lawyer's devotion to the client's interest is so compelling that some lawyers feel justified, if not compelled, to employ some deception when negotiating.⁴ This viewpoint assumes that clients have a right to a lawyer who engages in deception. Unfortunately, the Model Code of Professional Responsibility and its modern cousin, the Model Rules of Professional Conduct, do not adequately address whether or not clients have a right to a deceptive lawyer.⁵

Another justification for less than honest and straight-forward negotiating is the belief that a convention exists among lawyers to mislead during negotiations. This viewpoint, when carried to its logical conclusion, means that lawyers expect to negotiate with one another much like the proverbial used car salesperson. What a curious postulate for a learned and "high-toned" profession to adopt. One wonders how even the most experienced lawyer in a negotiation can tell the difference between an honest party upon whom he can rely, and a deceitful party, upon whom he should not rely.

A final justification for less than honest and straight-forward negotiating is that deceit is inherent to negotiation. Are misrepresentations essential to negotiations? Certainly non-lawyer negotiators engage in deception from time to time. Should we expect something else from lawyers?⁶ Consider the negotiating standards of two holy men, one a willing buyer and the other a willing seller. If their personal commitments to holiness prevented them from making the slightest misrepresentation or from engaging in any abuse of their bargaining positions, how would the ultimate outcome of their negotiations differ from the outcome achieved by two lawyer negotiators? If deceit truly is inherent to negotiation, the outcome achieved by the holy men could not be defined as the

4. See generally *id.*

5. See *infra* text accompanying notes 7-27.

6. For presentations of a new frame of reference about expectations of the legal profession that renounce notions of deceit and avarice as appropriate, see R. FISHER & W. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981) and T. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT* (1981).

product of a negotiation. But if the results achieved by their methods are somehow better or fairer than the result achieved by lawyers, then perhaps the legal definition of negotiation should be changed.

None of these rationalizations for deceptive negotiating is fully satisfactory. As a consequence, each prevaricating negotiator relies upon one or some combination of them. Each negotiator feels more or less justified to deceive or to abuse power when negotiating, depending upon how well the chosen rationalizations satisfy the moral imperative of that particular negotiator. The result might be thought of as a disco dance floor full of negotiators, some more adroit than others, some more at ease with the music than others, and each very definitely free to "do his own thing." Obviously, what is missing is a specific and reasonably thorough set of standards for negotiating.

III. A REVIEW OF THE CONVENTIONAL RULES

The existing standards for negotiating include statements in the Model Code of Professional Responsibility; statements in the new Model Rules of Professional Conduct; a few cases based largely on principles of contract law, not principles of ethics; and a few statutes criminalizing lawyer deceit. A review of these sources highlights the areas that most need fresh thinking and action.

According to DR 7-101(A) in the Model Code of Professional Responsibility (the "Model Code") a lawyer shall not intentionally fail to seek the lawful objectives of his client. From that postulate one can make convincing arguments about a lawyer's duty to get the "best" deal — not the "fairest" deal. DR 7-102, however, casts a heavy shadow on such a broad interpretation of DR 7-101. DR 7-102, entitled "Representing a Client Within The Bounds of The Law," provides, *inter alia*:

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

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

. . . .

(5) Knowingly make a false statement of law or fact.

. . . .

(7) Counsel or assist his clients in conduct that the lawyer knows to be illegal or fraudulent.⁷

Furthermore, to these limiting provisions of DR 7-102(A) we can add the broader prohibition of DR 1-102(A)—which deals with lawyer misconduct—that states a lawyer shall not “[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”⁸

Surprisingly, these rules, although not expressly aimed at negotiating per se, express a reasonably comprehensive frame of reference for honest negotiation. A lawyer is told to seek the lawful objectives of his client. Then a lawyer is told that attempting to accomplish that purpose should not involve the following: (1) asserting a position merely to harass or maliciously injure another;⁹ (2) knowingly advancing a claim unwarranted under existing law¹⁰ (note that no mention is made about claims unwarranted by the facts); or (3) assisting the client in conduct that the lawyer knows is fraudulent.¹¹ Finally, the lawyer is told *twice* that he is not to make false statements of law or fact, including engaging in deceit.¹²

These provisions could eliminate deceitful negotiation or negotiation by the abuse of power; yet we know that deceit and abuse of power are common negotiating ploys. The debate presently centers on the degree to which deceit and abuse are to be tolerated, not on whether or not they should be a part of negotiating. There can be several explanations for what seems to be a general disinterest on the part of lawyers in adopting these requirements of the Model Code into negotiating practice. The following three explanations come to mind: (1) lawyers can find direct conflict between express or implicit instructions from their clients and those disciplinary rules; (2) the confidentiality of a lawyer's knowledge about his client may conflict with the requirement of the rules; and (3) the courts do not support the aforementioned rules. Any or all of these three reasons might form a reasonable argument for con-

7. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102 (1979).

8. *Id.* DR 1-102(A).

9. *Id.* DR 7-102(A)(1).

10. *Id.* DR 7-102(A)(2).

11. *Id.* DR 7-102(A)(7).

12. *Id.* DR 7-102(A)(5), DR 1-102 (A)(4).

ducting deceitful negotiations, despite such statements as: "A lawyer shall not . . . engage in . . . deceit."¹³

Let us examine the first hypothesis: that clients instruct lawyers explicitly or implicitly to negotiate deceitfully. Too much professional diffidence exists between clients and lawyers to expect that proposition to be true, at least in a majority of cases. For the most part clients come to lawyers for lawful relief and for honorable service, not for fraudulent relief and for deceitful service. Furthermore, our present disciplinary rules give a lawyer ample opportunity to guide a client away from thoughts of deceitful tactics. The Model Code's EC 7-8 provides:

In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions.

The new Model Rules of Professional Conduct (the "Model Rules") are more specific with two provisions on point. Rule 2.1 provides: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."¹⁴ The Comment [1] to Rule 1.3 states:

A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.¹⁵

Lawyers cannot hide behind fidelity to client to rationalize deceitful negotiation. Not only is it unrealistic to believe that many clients actually instruct lawyers to behave in a deceitful manner, a lawyer's code of ethics encourages him to guide the client away from any such thoughts.

The second hypothesis to justify ignoring those provisions in the DRs that require forthrightness in negotiation is that a lawyer is prohibited from revealing confidential information, thus making forthright negotiation virtually impossible. DR 4-101(B)(1) does prohibit a lawyer from revealing his client's "confidences" or "secret,"¹⁶ and Model Rule 1.6 appears to go even further by prohibit-

13. *Id.* DR 1-102(A)(4).

14. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983).

15. *Id.* Rule 1.3 Comment [1].

16. "[A] lawyer shall not knowingly: (1) Reveal a confidence or a secret of his client." MODEL CODE, DR 4-101(B)(1).

ing a lawyer from revealing information "relating to representation of a client."¹⁷ The Model Code's EC 4-2, however, sets out a kind of rule of reason for revealing confidences, part of which allows a lawyer to reveal that which the client has not expressly forbidden him from revealing if such information is necessary to the lawyer's professional employment — such as conducting negotiations.¹⁸ Furthermore, if a client refused a lawyer's request to reveal some relevant confidential fact that the lawyer's failure to reveal likely would amount to deceit, DR 1-102(A)(4)'s prohibition of engaging in deceit would *require* a lawyer faced with the recalcitrant client to withdraw.¹⁹

Under the new Model Rules of Professional Conduct, a lawyer with a client who is recalcitrant about revealing information during a negotiation is in a dilemma. 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 1.6.²⁰

Within the context of negotiating, Rule 4.1 leads one to several postulates. First, a lawyer cannot disclose a confidence, even though material to a negotiation, if the client instructs the lawyer not to reveal it, unless failure to reveal would result in the client's committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm — a very unlikely scenario.²¹ Second, if not limited by a client's instructions, a lawyer *must* reveal a fact material to the negotiation if necessary to avoid a fraud by the client.²² The older Model Code did not

17. "A lawyer shall not reveal information relating to representation of a client unless a client consents after consultation . . ." MODEL RULES, RULE 1.6

18. EC 4-2 provides *inter alia*: "The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when . . . necessary to perform his professional employment . . ." MODEL CODE, EC 4-2.

19. "A lawyer representing a client . . . shall withdraw from employment . . . if [h]e knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule." *Id.* DR 2-110(B).

20. MODEL RULES, Rule 4.1.

21. Note that Rule 4.1(b) is modified by Rule 1.6, which states, *inter alia*:
 (a) A lawyer shall not reveal information relating to representation of a client unless the client consents. . . . (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm. MODEL RULES, Rule 1.6.

22. "In the course of representing a client a lawyer shall not knowingly . . . fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting . . .

define "fraud."²³ The newer Model Rules define "fraud" as conduct having a purpose to deceive, not mere failure to apprise another of relevant information.²⁴ Because a client with a *purpose* to deceive (*i.e.* fraud) invariably will expressly forbid the lawyer to reveal material facts, this second postulate is of little practical value.²⁵ Third, a lawyer cannot make a false statement of material fact or law.²⁶ This particular postulate should come as no surprise. After all, a profession aspiring to be high-toned would not tolerate its members making false statements, a fortiori materially false statements. Consequently, confidentiality between lawyer and client is not a justification for a lawyer declaratively lying about a material fact or law during a negotiation. Finally, a brief caveat might be added. Deceitful or not, lies about price, value, and some other matters are practically sacrosanct to conventional negotiation. If lawyers were forbidden from engaging in these lies, they would be at a tremendous disadvantage when negotiating with any nonlawyer. Consequently, lawyers are permitted to lie about these matters during negotiation.²⁷ In summary, we can say that Rule 4.1 does little to guide a lawyer during negotiation when the lawyer's concern is how much, if any, confidential client information can be revealed. In fact, Rule 4.1 says more about what deceit *is permitted* in the name of confidentiality than it says about what deceit is *not permitted*.

IV. DO THE COURTS SUPPORT THE APPROACH OF THE DR'S?

Few cases in which the precise question is the effect of deceitful negotiation by an attorney have reached appellate courts. *McVeigh v. McGuerren*²⁸ presented an instance in which a lawyer

a fraudulent act by a client . . ." *Id.* Rule 4.1.

23. A discussion of use of the word "fraud" in DR 7-102(B)(1) can be found in MARU, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 324-25 (1979).

24. MODEL RULES, Terminology, ¶ 4.

25. *Id.* Rule 4.1 Comment [3].

26. *Id.* Rule 4.1(a). Rule 4.1(a) is substantially similar to DR 7-102(A)(5), except that Rule 4.1(a) refers to "material" fact whereas DR 7-102(A)(5) refers merely to "fact."

27. Rule 4.1(a) states: "In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person." Obviously, matters like price and value are material facts in any negotiation. Nevertheless, the authors of the Code have announced by fiat that price and value are not "facts." Comment [2] to Rule 4.1 states, *inter alia*: "Under generally accepted conventions of 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 in this category. . . ." *Id.* Rule 4.1 comment 2.

28. 117 F.2d 672 (7th Cir. 1940), *cert. denied*, 313 U.S. 573 (1941).

made a material misrepresentation of fact to an opponent during a negotiation. The court held that the resulting compromise settlement could be set aside and that the offended party could recover damages against the deceitful attorney. The attorney in *McVeigh* was seeking to reduce a large claim for past due child support when he stated that his client was without significant funds. In fact the client had inherited a large sum of money. In a criminal case, a lawyer was disciplined for entering into plea negotiations with the state while knowing that her client-defendant willfully had misled the state into thinking that the client-defendant was the client-defendant's brother.²⁹

A more interesting example of judicial attitudes toward deceitful negotiating by an attorney emerges in *Kath v. Western Media*.³⁰ In *Kath* an attorney first rejected a \$12,000 offer made during negotiations, but after learning privately that a key witness had lied during his deposition, the attorney reopened negotiations and accepted the \$12,000 offer without revealing this newly discovered information. Careful note should be made of the strong argument that the attorney would be revealing confidential information under Rule 4.1 of the Model Rules if he revealed the witness' misrepresentation. The court held that the attorney had a duty to reveal this material information to the other side and vacated the settlement.

Court opinions requiring fairness from attorneys during the negotiation process may indicate a similar expectation by the legislatures in numerous states that have passed statutes criminalizing deceitful conduct by lawyers. For example, a New York statute³¹ makes it a misdemeanor for an attorney to engage in "any deceit" with intent to deceive a court or any party. In a somewhat more limited fashion, Minnesota makes it a misdemeanor for a lawyer to deceive a court or a party to a judicial proceeding.³² Depending upon one's viewpoint, it may seem curious that the annotations to those statutes do not reveal any prosecutions. Nevertheless, we can feel secure in saying that courts and the legislatures do support the notion of honest negotiation by attorneys, perhaps even beyond the requirements of the lawyers' own professional code of ethics.

29. *In re Discipline of Casby*, 355 N.W.2d 704 (Minn. 1984).

30. 684 P.2d 98 (Wyo. 1984).

31. N.Y. JUD. LAW § 487 (McKinney 1983). See also IND. CODE § 34-1-60-9 (1973).

32. MINN. STAT. § 481.07 (1971).

V. THE IMPACT OF FAIRNESS ON LOYALTY TO THE CLIENT

While there may be a few cases where the lawyer's honesty and fairness deny the client the benefit of a bargain, such losses are a small sacrifice for preserving the honor and integrity of the profession.³³

Among the many objections to the movement toward fairness as a standard for negotiating between lawyers, the objection that a fairness standard may detract from a lawyer's paramount obligation to the client is the most worthy of serious and concerned study. Indeed, if a single principle unifies the legal profession, it is paramount loyalty to the client's cause. Lord Brougham summarized the issue as only an English barrister could in his renowned defense of the Queen in 1820.

To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and, in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.³⁴

Eloquence aside, Lord Brougham is quite simply wrong. To postulate that the value of loyalty to client is higher than all other values not only does not comport with reality; it does not conform with the requirements of professional ethics.³⁵ Although loyalty to client is sometimes put forward by lawyers as an absolute value, a noticeable shift has occurred over the years in the approach taken by codified professional ethics. The original Canons of Professional Ethics stated in Canon 15:

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied.³⁶

Later, when the ABA adopted the Code of Professional Responsibility, the corresponding idea was located in DR 7-101(A)(3), which states: "A lawyer shall not intentionally . . . prejudice or

33. Burke, *Truth in Lawyering: An Essay on Lying and Deceit in the Practice of Law*, 38 ARK. L. REV. 1, 12 (1984).

34. D. MELLINKOFF, *LAWYERS AND THE SYSTEM OF JUSTICE* 511 (1976) (quoting 2 TRIAL OF QUEEN CAROLINE 8 (1821)).

35. See, e.g., MODEL RULES, DR 2-109(A)(1). ("A lawyer shall not accept employment on behalf of a person if he knows or if it is obvious that such person wishes to . . . conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person.") MODEL RULES, Rule 4.4 ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.").

36. CANONS OF PROFESSIONAL ETHICS Canon 15 (1908).

damage his client during the course of the professional relationship. . . ."³⁷ Currently, under the new Model Rules, Rule 1.3 simply states: "A lawyer shall act with reasonable diligence and promptness in representing a client."³⁸ Apparently, the excessively ambitious verbiage in the original canon has given way over the years as the obligation of the legal profession to the public good has increased.

Client loyalty and its corollary obligations of promptness, competency, and confidentiality exist because we want every client to have their legal rights fully implemented. We believe as a nation that full implementation is not possible in most instances unless lawyers are available, loyal, prompt, competent, and tight-lipped. Today, while no one quarrels with any of those ideas, some lawyers talk of going beyond those ideas to the next level of abstraction: that no client has a right (legal or otherwise) to use lawyers to do injustice. At this second level of abstraction a lawyer's loyalty obligation is tempered somewhat, as are the corollary obligations of promptness, competency, and confidentiality. The curious anomaly is that while lawyers continue to use loyalty to client as a stalking horse for maintaining the status quo in negotiating ethics, they also create specific exceptions to client loyalty when mandated by this second level of abstraction. Examples in the Model Rules abound: (1) A lawyer shall not counsel or assist a client in fraud or a criminal act;³⁹ (2) a lawyer may reveal confidences to prevent a client from committing a crime likely to result in substantial bodily harm;⁴⁰ (3) a lawyer may reveal confidences to establish a claim or to assert a defense in a controversy between lawyer and client;⁴¹ (4) a lawyer may withdraw if a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;⁴² (5) in rendering advice a lawyer may take into account moral factors;⁴³ (6) a lawyer may disclose matters as required in connection with a report of an evaluation to the public;⁴⁴ (7) a lawyer shall be candid with a tribunal, including revealing law adverse to his client, and if a proceeding is *ex parte*, a lawyer must reveal facts adverse to his

37. MODEL CODE, DR 7-101(A)(3).

38. MODEL RULES, Rule 1.3(d).

39. *Id.*

40. *Id.* Rule 1.6(b)(1).

41. *Id.* Rule 1.6(b)(2).

42. *Id.* Rule 1.6(b)(3).

43. *Id.* Rule 2.1.

44. *Id.* Rule 2.3(b).

client;⁴⁵ (8) a lawyer shall not violate the legal rights of third persons to obtain evidence;⁴⁶ (9) a lawyer may engage in public interest activity that may adversely affect the private interests of a client;⁴⁷ (10) a lawyer may not engage in conduct prejudicial to administration of justice.⁴⁸ In each of these instances the Model Rules permit, and in many instances require, a lawyer to do something that benefits the public good to the likely detriment of the client. Why, then, is the notion that negotiation should achieve a fair result through forthrightness a repugnant notion to so many lawyers?

VI. IS NORMALIZING A STANDARD OF FAIRNESS REALISTIC?

We have noted that categorical rules about negotiation are always controversial and frequently ignored. We have noted that some form of deceit, at least in the broadest sense of the word, is inherent in all negotiations and that a lawyer with an obligation to obtain the best result for a client cannot be expected, realistically, to negotiate outside the context of everyday convention. We have explored the rationalization that part of a lawyer's professional socialization is realizing the extent to which deceit and abuse of power may be employed during negotiations. Finally, we have explored the effect of several professional norms, such as confidentiality, on the prospects for candor and fairness in a negotiation between attorneys. Taken together, all of these factors seem to doom any hope of interposing fairness as a new, enforceable standard for the negotiating process. Nevertheless, some lawyers speculate and dream about a new approach to negotiation. Perhaps no better example of this plea for high-toned morality can be found than in the words of Judge Rubin:

Client avarice and hostility neither control the lawyer's conscience nor measure his ethics. Surely if its practitioners are principled, a profession that dominates the legal process in our law-oriented society would not expect too much if it required its members to adhere to two simple principles when they negotiate as professionals: Negotiate honestly and in good faith; and do not take unfair advantage of another— regardless of his relative expertise or sophistication.⁴⁹

Posed against Rubin and those of like mind is another group

45. *Id.* Rule 3.3(a)(3), (d).

46. *Id.* Rule 4.4.

47. *Id.* Rule 6.4.

48. *Id.* Rule 8.4(d).

49. Rubin, *supra* note 3, at 593.

of lawyers with the view that lawyer negotiators must have explicit and detailed commandments if they are to break free from the conventional, professional norms that now seem to compel deceitful negotiating practices. In the words of Professor White:

Pious and generalized assertions that the negotiator must be "honest" or that the lawyer must use "candor" are not helpful. They are at too high a level of generality, and they fail to appreciate the fact that truth and truthful behavior at one time in one set of circumstances with one set of negotiators may be untruthful in another circumstance with other negotiators.⁵⁰

To admit that changing current standards of negotiating practice among lawyers is difficult is not to admit that it is impossible. Indeed, some indicators are encouraging, although they may be dim. First, the recent appearance of law school courses on negotiation and the publication of some useful teaching materials for those courses are signs that future lawyers may be more willing to accept fairness as a standard in negotiating.⁵¹ As a corollary to the movement in law schools, the law reviews are giving more attention to the issue of the ethics of negotiating.⁵² Furthermore, admitting that conventions about negotiation are learned during the process of socialization into the profession is admitting that lawyers are taught norms for negotiating. Thus, arguments that lawyers expect deceit from another lawyer need not be interpreted as arguments in favor of deceit; rather they can be interpreted as arguments for *changing* what lawyers are taught to expect.

Many practicing lawyers now openly concede, at least at the intellectual level, the need to bring some sort of uplifting modifications to the practice of negotiating. Proof of this view can be found in the legislative history of Rule 4.2 of the new Model Rules of Professional Conduct. The 1980 Discussion Draft of Rule 4.2(a) stated: "In conducting negotiations a lawyer shall be fair in dealing with other participants."⁵³ Without more in the way of text or explanation, adoption of that rule, relying as it did on the nebulous concept of "fair" as the key descriptive phrase, probably would have done more harm than good. As proposed the rule could have

50. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RESEARCH J. 926, 929, quoted in Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99, 101-02 (1982).

51. Some of the better known teaching materials for law school courses in negotiation are: H. EDWARDS & J. WHITE, *THE LAWYER AS A NEGOTIATOR* (1977); G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS* (1978); and G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983).

52. See Guernsey, *supra* note 50.

53. MODEL RULES, Rule 4.2 (Discussion Draft 1980).

become a vehicle for lawyers with one set of values to characterize other, honest lawyers with different values as "unfair" and in violation of the rule.

As if anticipating such unintended and undesirable results, the drafters of the proposed rule added an explanation of fairness within the context of negotiation. Their approach is conservative. One part of the explanation of "fairness" stated:

Fairness in negotiation implies that representations by or in behalf of one party to the other party be truthful. This requirement is reflected in contract law, particularly the rules relating to fraud and mistake. A lawyer involved in negotiations has an obligation to assure as far as practicable that the negotiations conform to the law's requirements in this regard.⁵⁴

In reality, that commentary does little more than ask lawyers to follow existing case precedents concerning truth, concealment, fraud, and mistake.⁵⁵

For the benefit of lawyers who might be especially concerned about the impact of fairness on their attorney-client confidences, the drafters of the proposed Comment added this statement:

A lawyer could properly be regarded as having a professional responsibility to see that negotiations under his or her auspices are informed on all sides. However, to make a lawyer responsible for an opposing party's information about the matter in negotiation exposes the lawyer to charges of misfeasance that can be easily contrived, and exposes the transaction to additional risk of being legally avoided on the ground of mistake.⁵⁶

Whether intentional or not, that statement can be interpreted as an innovative way to avoid the controversy, discussed earlier, about the tensions surrounding a lawyer's client-related duty to keep confidences and a lawyer's society-related duty to achieve fair results.⁵⁷ Instead of confronting the issue of when a lawyer should reveal a client confidence because it promotes fairness in negotiations, the drafters deftly shifted the focus from fairness to allegations of lawyer misfeasance if fair disclosure becomes the norm. One might speculate whether a rationale for lack of candor based on self-interested protection from accusations of misfeasance is more palatable than the conventional rationale based on a lawyer's duty to his client.

If lawyers adopted fairness as an explicit standard as proposed, questions would be raised about the inherently deceitful aspects of negotiation, such as overstating of price or value. The

54. MODEL RULES, Rule 4.2 Comment (Discussion Draft 1980).

55. See *supra* text accompanying notes 28-32.

56. MODEL RULES, Rule 4.2 Comment (Discussion Draft 1980).

57. See *supra* text accompanying notes 33-48.

drafters of the proposed rule dealt with that issue quite candidly.

The precise contours of the legal duties concerning disclosure, representation, puffery, overreaching, and other aspects of honesty in negotiations cannot be concisely stated. They have changed over time and vary according to circumstances. They also can vary according to the party's familiarity with transactions of the kind involved. Thus, the modern law of commercial transactions places duties of disclosure on sellers that go well beyond the classic rule of caveat emptor, and modern securities transactions often must conform to elaborate disclosure rules. It is a lawyer's responsibility to see that negotiations conducted by the lawyer conform to applicable legal standards, whatever they may be.⁵⁸

As mentioned previously, because the Model Rules drafters proposed fairness as a standard, a group of lawyers in fact do join with Judge Rubin's call for honest and candid negotiating practice. Admittedly, the wording of proposed Rule 4.1 left room for legitimate concern about interpretation. Instead of embracing the idea of a new high-toned morality for negotiating practice and attempting to lessen the vagueness of the proposed standard, however, the drafters voted for an entirely different version of Rule 4.1—one that totally ignores fairness. As adopted 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 1.6.⁵⁹

That lawyers should not deceive, should not mislead, or should not overreach is too much a part of the common morality to be ignored much longer. Normative negotiating conduct between lawyers cannot survive as a set of values distinct from values held by society at large. Fairness and honesty as concepts are too ingrained in the American mentality to be disregarded even by the legal profession. For now, each lawyer must decide on an individual basis, and perhaps even on a negotiation by negotiation basis, whether he will adopt a high-toned moral approach or a car salesman approach to negotiations, but one wonders how long the absence of specific standards for honesty and candor in negotiation will be tolerated.

58. MODEL RULES, Rule 4.2 Comment (Discussion Draft 1980).

59. MODEL RULES, Rule 4.1.

VI. A CONCLUDING PROPOSAL FOR A FAIRNESS STANDARD

As a starting point the following proposed rule is offered:

Obligation of Fairness and Candor in Negotiation

When serving as an advocate in court a lawyer must work to achieve the most favorable outcome for his client consistent with the law and the admissible evidence. However, when serving as a negotiator lawyers should strive for a result that is objectively fair. Principled negotiation between lawyers on behalf of clients should be a cooperative process, not an adversarial process. Consequently, whenever two or more lawyers are negotiating on behalf of clients, each lawyer owes the other an obligation of total candor and total cooperation to the extent required to insure that the result is fair.

Like other explicit statements this rule is value laden and provocative. Perhaps the best single answer to criticism of the proposal is to point out that the rule is not designed for specific situations; instead, the rule points toward an ethos of high-toned morality among negotiating lawyers. Will a rhetorical rule be taken seriously? We know that the courts have been consistent in insisting upon a standard that reflects fairness and candor. We know that clients do not have the right to expect lawyers to serve as a tool for deceit or for vengeance. From the client's perspective, a primary motivation for seeking a lawyer's help *should be* the expectation of a fair negotiation. Only in a situation when one party is represented and the other party is not does the represented client have the right to expect a lawyer to be governed by the less high-toned rules of the market place. The price of high-toned negotiation among lawyers is some lessening of the confidentiality of communication between lawyer and client. Ultimately, some clients will receive less from a settlement negotiated under the standard of fairness than they would have received before the change to the fairness standard. These losses, however, both in confidentiality of information and in settlement result, are losses that come about because lawyers are fairer negotiators. A loss paid for in fairness cannot be described properly as a loss.

Already the legal profession provides in DR 1-102(A)(4) that a lawyer should not engage in "deceit." Thus, it is not so much rules that must change as it is the convention of practice that must change. The process of debating a rule similar to that suggested by this Essay might serve to make an already incipient movement for change into a more vital force.

Of course, fair negotiation practices require more effort from the legal profession. But lawyers in negotiating situations have an adequate idea of what is fair, and many negotiators strive to reach fair results now. All that the proposed rule suggests is that a law-

yer not do that which his conscience and his experience tell him is unfair. The time for change has come.