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The Paradox of Deception: Lawyers, Negotiation, and an Appeal for Regulation

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INTRODUCTION

Effective negotiation skills are essential to the practice of law. A lawyer's effectiveness as a negotiator may often depend on a lawyer's willingness to lie.¹ Lying can be defined as "all means by which one might attempt to create in some audience a belief at variance with one's own ... includ[ing] intentional communicative acts, concealments and omissions."² Although the terms "lying" and "deception" are sometimes distinguished in academia, for the purposes of this paper the terms will be used interchangeably as the moral consequences are arguably the same.³

The tactical use of deception in negotiations has spurred debate in the legal ethics arena. Ethics tends to be concerned with upholding principles of honesty, fairness, and good faith. A lawyer's use of deceptive negotiation tactics would therefore seem to violate the rules of legal ethics. However, certain deceptive tactics are not only considered acceptable but are often even expected as part of common negotiation practice. The prevailing view in the legal profession seems to be that "lawyers are free to make use of at least some of the usual degree of deception involved in negotiations."⁴ This presents a compelling paradox: how can a legal negotiator act ethically but also deceptively?⁵

Given the practical realities of the legal profession, an examination into whether *any* amount of deception in negotiations is or should be ethically permissible would be ultimately uninformative. Rather, what must be analyzed is the *degree* of deception that we, as legal professionals, are willing to permit in negotiations on both an ethical and strategic basis.

This paper will first illustrate the importance of regulating deceptive conduct in legal negotiations. Second, this paper will examine the extent to which the Law Society of Upper Canada (LSUC), the Alberta Law Society, and the American Bar Association (ABA) address the issue of deception in

¹ Gerarld Wetlaufer, 'The ethics of lying in negotiations' (1990) 75 Iowa L Rev at 367 [Wetlaufer].

² *Ibid* at 337.

³ See Lisa G Lerman, 'Lying to Clients' (1990) 138 University of Pennsylvania Law Review 659, 663 [Lerman].

⁴ Stephen GA Pitel, "Lawyer or Liar? Breaking Down Public Perception" in David L Blaikie, Thomas A Cromwell, & Darrel Pink eds, *Why Good Lawyers Matter* (Irwin Law, 2012) 48 [Pitel].

⁵ James J White, 'Machiavelli and the Bar: Ethical limitations on lying in negotiation' (1980) *Am B Found Res J* 926 at 928 [White].

negotiation. Third, this paper will review the literature on the topic to demonstrate how permissible forms of deception may be distinguished from what may be considered inappropriate deceptive practices.

THESIS

This paper will draw on the Alberta Code, the ABA Model Code, and the literature on negotiation theory and practice to recommend reform proposals to the LSUC Rules. The LSUC Rules in their current state do not adequately address the issue of deception in negotiation. More detailed and clearer rules would not only provide lawyers with better guidance on how to conduct themselves in negotiations but would also improve the public perception of the legal profession as a whole.

i. The Importance of Regulating Deception in Negotiation

Each province in Canada requires that its lawyers abide by a code of legal ethics. These codes of ethics are “the primary source of guidance for how lawyers ought to behave in practice.”⁶ It is therefore imperative for the rules of legal ethics to clearly articulate and distinguish conduct that is ethically permissible from conduct that is ethically impermissible.

Many codes of legal ethics are silent with respect to how the rules of professional conduct are to apply in the negotiation context.⁷ As a result, some scholars have asserted that “in negotiation, more than in other contexts, ethical norms can probably be violated with greater confidence.”⁸

Lawyers will often disagree on where the appropriately line is to be drawn between acceptable negotiation tactics and “impermissible concealment or deception.”⁹ Consequently, if codes of legal ethics fail to provide proper guidance on how lawyers ought to behave in negotiations, lawyers

⁶ Avnita Lakhani, *Deception as a Legal Negotiation Strategy: A Cross-Jurisdictional, Multidisciplinary Analysis Towards an Integrated Policy Reforms Agenda* (PHD Thesis, Bond University, Faculty of Law 2010) at 15 [Lakhani]. See publications arising out of this thesis: 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 [Truth About Lying]; 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.

⁷ Pitel, *supra* note 4 at 48.

⁸ White, *supra* note 5 at 926.

⁹ Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, 5th ed (Toronto: Carswell/Thomson Reuters Canada, 2009) at 15-1.

may justify deceptive or dishonest behavior on the basis of personal ethics.¹⁰

Lawyers who adhere to a rule-based model of personal ethics may argue that, unless expressly prohibited by the law society rules, lying in negotiation will be ethically justifiable in all or most cases.¹¹ These types of lawyers may manipulate ambiguities in the ethical rules in their own favour and justify the use of certain deceptive practices based on their perception of their role as a lawyer. This “role morality” type of justification is problematic as it may “lead to lawyers making decisions and taking actions in a context devoid of ordinary moral beliefs, attitudes, and feelings, which are critical judgement to the exercise of good judgement.”¹² Further, justifying deception on the basis of role morality will arguably make it less likely that lawyers will “take personal responsibility” for their actions.¹³

Further, if the rules of legal ethics are unclear or silent with respect to how lawyers are to properly conduct themselves in negotiations, lawyers may rely on common negotiation practices to guide their behavior. Wetlaufer conducted a research analysis on how lawyers will typically justify the use of deceptive tactics in negotiation. The most common justifications were as follows: “there was no intent to lie”; “it was not ethically impermissible to lie”; “it was strategic speak”; “there is no duty of disclosure”; “it was only puffing”; “lying is permissible within the rules of the game”; “everybody does it”; and “lying is useful in negotiations.”¹⁴ Wetlaufer’s findings demonstrate “the extent to which acceptable forms of deception under conventional negotiation practice have crept into the lexicon and practice of lawyer negotiation.”¹⁵ His findings also point to “the tensions between what is ethically permissible under the legal ethics codes, what is legally forbidden, and what is expected under generally accepted

¹⁰ Pitel, *supra* note 4 at 51.

¹¹ Maurice E Schweitzer & Rachel Croson, Curtailing Deception: The Impact of Direct Questions on Lies and Omissions in Carrie Menkel-Meadow & Michael Wheeler eds, *What’s Fair: Ethics for Negotiators* (Jossey-Bass, 2004) at 177 [Curtailing Deception].

¹² Pitel, *supra* note 4 at 51.

¹³ *Ibid.*

¹⁴ Wetlaufer, *supra* note 1 at 1236-1248.

¹⁵ Lakhani, *supra* note 6 at 177; see also Cooley “numerous excuses and justifications lawyers typically marshal for lying in negotiation”

conventions of negotiation practice.”¹⁶ A negotiation practice that is widespread and common will not necessarily be ethical. Therefore, it is important for the rules of legal ethics to address both the intersection and possible discrepancies between what is ethical and what is acceptable under common negotiation practice.

Failing to effectively regulate the conduct of lawyers in negotiations may perpetuate the perception that lawyers belong to a profession that condones dishonest behavior. If lawyers are viewed to be untrustworthy, public confidence in the legal system will gradually erode.¹⁷ A loss of public confidence in lawyers would fundamentally undermine the negotiation process and the justice system as a whole. This demonstrates the fundamental importance of properly regulating deceptive behavior in negotiations.

ii. Law Society of Upper Canada Rules of Professional Conduct

The Law Society of Upper Canada (LSUC) regulates the conduct of lawyers in Ontario. The LSUC acknowledges the importance of negotiation as an alternate means of dispute resolution.¹⁸ Rule 3.2.-4 states that a lawyer, when appropriate, “should inform the client of ADR options and, if so instructed, take steps to pursue those options.”¹⁹ The rule further provides that a lawyer shall “advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis.”²⁰ By encouraging settlement as an alternate means of dispute resolution, the LSUC seems to be tacitly acknowledging how negotiations have become “a gatekeeper step for access to justice.”²¹ In *Hryniak v Mauldin*,²² the Supreme Court of Canada addressed the important role legal negotiations have in facilitating access to justice and stated:

¹⁶ Lakhani, *supra* note 6 at 178.

¹⁷ Pitel, *supra* note 4 at 5.

¹⁸ The Law Society of Upper Canada, “Rules of Professional Conduct”, Rule 3.2-4, online: LSUC <<http://www.lsuc.on.ca/lawyer-conduct-rules/>> [LSUC].

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ George Tsakalis, “Negotiation Ethics: Proposals for Reform to the Law Society of Upper Canada’s Rules of Professional Conduct”, online: (2015) 5:4 UWO J Leg Stud 3 at 3 <<http://ir.lib.uwo.ca/uwojls/vol5/iss4/3>> [Tsakalis].

²² 2014 SCC 7 [Hryniak].

ordinary Canadians cannot afford to access the adjudication of civil disputes. The cost and delay associated with the traditional process means that ... the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.²³

This would seem to suggest that the negotiation process, like the trial process, must be regulated in a way that produces fair, consistent and just outcomes.²⁴ If regulatory schemes fail to limit or control the use of deception in negotiations, negotiations may cease to be a reasonable alternative to litigation.

Certain LSUC rules ostensibly prohibit the use of deceptive negotiation tactics. LSUC Rule 7.2-1 provides that “a lawyer shall be courteous, civil, and act in good faith with *all persons* with whom the lawyer has dealings in the course of their practice.”²⁵ This ethical duty extends to “appearances and proceedings before ... arbitrators, mediators and others who resolve disputes, regardless of their function or informality of their procedures.”²⁶ This rule suggests that a lawyer owes a duty of good faith not only to his or her client but also to an opposing party in a negotiation. In order to comply with Rule 7.2-1, a lawyer must refrain from conduct that is “rude, provocative, or disruptive.”²⁷

It could be argued that telling certain types of lies in a negotiation (e.g. “selective disclosure, extreme initial offers, lies concerning bottom lines” etc.²⁸) is inconsistent with a lawyer’s ethical obligation to act in good faith. However, there is no specific requirement in Rule 7.2-1 that a lawyer act “honesty” or refrain from certain types of deceptive conduct.²⁹ Accordingly, some legal academics have suggested that it is what the LSUC rules “do not say rather than what they do say – that can cause us to question the extent of the commitment to honesty.”³⁰ Therefore, in Ontario, without further guidance or

²³ *Ibid* at para 24. But see Owen M Fiss, “Against Settlement” (1983-1984) 93:6 Yale LJ (“settlement of a school suit might secure the peace but not racial equality ... it is not justice itself ... [t]o settle for something means to accept less than some ideal” at 1085-1086).

²⁴ Tsakalis, *supra* note 21 at 3.

²⁵ LSUC, *supra* note 18 at Rule 7.2-1 [emphasis added].

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Tsakalis, *supra* note 21 at 9.

²⁹ Although LSUC Rule 3.2-2 requires a lawyer be “honest and candid”, this rule explicitly applies in the context of the lawyer-client relationship.

³⁰ Pitel, *supra* note 4 at 51.

clarification from the LSUC, it is unclear whether a lawyer's ethical duty to act in good faith requires a lawyer to adhere to a minimum standard of honesty in negotiations.³¹

In addition to a lawyer's ethical duty to act in good faith, LSUC Rule 2.1-1 requires a lawyer to "carry on the practice of law and discharge all responsibilities to ... *the public and other members of the profession* honourably and with integrity."³² Similar to Rule 7.2-1, Rule 2.1-1 suggests that a lawyer owes a duty of integrity to an opposing party in a negotiation. According to the rule, "a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust ... of the community, and avoid even the appearance of impropriety."³³ The commentary of the rule states that "if integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed"³⁴ and that "dishonorable or questionable conduct on the part of a lawyer in ... professional practice will reflect adversely upon the integrity of the profession and administration of justice."³⁵ Further, acting without integrity may lead to an erosion of "public confidence in the administration of justice and in the legal profession."³⁶

The use of certain deceptive tactics in negotiation has the potential to damage a lawyer's reputation, destroy public confidence in lawyers and adversely impact the integrity of the legal profession as whole. Therefore, it could be argued that lying in negotiations is inconsistent with a lawyer's ethical duty to act with integrity.³⁷ However, this is only speculative as the LSUC does not clearly define the concept of integrity nor does it give guidance to lawyers on how to act consistent with

³¹ *Ibid* at 50 ("this rule would send a much clearer message if it made specific reference to honesty").

³² *LSUC*, *supra* note 18 at Rule 2.1-2.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Pitel, *supra* note 4 at 50.

the notion of integrity. For this reason, the rule of integrity tends to be relegated to a supplementary role or a “general ethical principle,” rather than a stand-alone ethical duty.³⁸

In spite of a lawyer’s ethical obligations to act in good faith and with integrity, it can be argued that lawyers owe other “special duties” to their clients that “render ethically permissible, even mandatory, acts that we would otherwise regard as ethically *impermissible*.”³⁹ For example, when acting as an advocate, a lawyer has the ethical duty to “raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client’s case”⁴⁰ A lawyer may be able to justify the use of a wide range of deceptive tactics on the basis that he or she was “acting as a zealous advocate for their client.”⁴¹ Support for an adversarial and client-centric approach to negotiations is also found in the common law. In *Martel Building Ltd v Canada*, the Supreme Court of Canada stated that “[t]he primary goal of any economically rational actor engaged in commercial negotiation is to achieve the most advantageous financial bargain . . . in the context of bilateral negotiation, such gains are realized at the expense of the other negotiating party.”⁴²

Lawyers also have a general ethical obligation to “conduct all cases faithfully and to the best of [his or her] ability . . . and [to] faithfully serve and diligently represent the best interests of [his or her] client.”⁴³ This is sometimes referred to as a lawyer’s “duty of loyalty.”⁴⁴ Acting in a client’s best interests does not require that a lawyer achieve the fairest or most equitable outcome. Rather, it will often demand that a lawyer attempt to “get the best bargain” for their client.⁴⁵ Therefore, even if lawyers have

³⁸ Randal NM Graham, *Legal Ethics: Theories, Cases, and Professional Regulation*, 3rd ed, (Toronto: Emond Montgomery Publications, 2014) at 118 [Graham].

³⁹ Wetlaufer, *supra* note 1 at 356.

⁴⁰ *LSUC*, *supra* note 18 at Rule 5.1-1.

⁴¹ White, *supra* note 5 at 930.

⁴² 2000 SCC 60 at para 60.

⁴³ Graham, *supra* note 38 at 120.

⁴⁴ Wetlaufer, *supra* note 1 at 356.

⁴⁵ Pitel, *supra* note 4 at 48.

a general deontological duty not to lie, these rules seem to allow for the use of some level of deception in the negotiation context.⁴⁶

When viewed as a whole, the LSUC Rules seem to give conflicting ethical guidance to lawyers. On the one hand, Rule 7.2-1 and Rule 2.2-1 advocate a cooperative and non-adversarial approach to dispute resolution, which would presumptively prohibit the use of deception. On the other hand, Rule 5.1-1 and a lawyer's duty of loyalty encourages a competitive and client-centric approach to dispute resolution, which would arguably justify the use of various deceptive negotiation tactics. For this reason, it has been argued that the LSUC Code promotes "competing negotiation styles that, while not necessarily mutually exclusive, are often at odds with each other."⁴⁷ Without any further clarification from the LSUC, it is difficult to ascertain how a lawyer is to achieve a proper balance between acting as a zealous advocate on the one hand and conducting him or herself with integrity and good faith on the other.

The inherent ambiguity and lack of clarity in the LSUC Rules arguably perpetuates a 'negotiation culture' that encourages or at least does not expressly prohibit dishonest practice. The non-specific nature of the LSUC Rules allows lawyers to interpret the rules to their own advantage. As a result, the rules may have little to no influence at curtailing deceptive behaviours by lawyers in negotiations. Even honest lawyers who wish to abide by ethical rules "may be forfeiting a significant advantage for [their] client[s]" if opposing lawyers do not interpret the rules in the same way.⁴⁸ This illustrates a fundamental problem with the LSUC Code.

iii. The Alberta Code of Professional Conduct

Unlike the LSUC Code, the Law Society of Alberta's Code of Professional Conduct ("Alberta Code") provides specific guidance to lawyers on how to conduct themselves in negotiations. The

⁴⁶ Wetlaufer, *supra* note 1 at 357.

⁴⁷ Lakhani, *supra* note 6 at 10.

⁴⁸ White, *supra* note 5 at 927.

Alberta Code contains rules that explicitly address deceptive negotiation tactics. This approach to legal ethics distinguishes Alberta's Code from all other Canadian provinces.⁴⁹

Rule 6.02(2) of the Alberta Code states that a lawyer must not deliberately mislead another lawyer or colleague in any situation, "including a negotiation."⁵⁰ Misleading conduct is defined as "creating a misconception through oral or written statements, other communications, actions or conduct, failure to act, or silence."⁵¹ Rule 6.02(2) therefore has the potential to render a wide range of deceptive conduct ethically impermissible.

According to Rule 6.02(2), if a lawyer is asked a question that he or she is unable to truthfully answer due to client confidentiality, a lawyer cannot answer with a falsehood.⁵² In this type of situation, a lawyer must decline to answer. However, if declining to answer would "in itself be misleading," the lawyer is required to seek his or her "client's consent to such disclosure of confidential information as is necessary to prevent the other lawyer from being misled."⁵³ Unlike the LSUC Code, the Alberta Code specifically states that lawyers owe a duty of honesty to not just their clients, but to opposing parties in a negotiation.

Rule 6.02(3) of the Alberta Code provides that a lawyer "... must not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of a client's rights."⁵⁴ The application of this rule is triggered if two elements are present: 1) "an obvious mistake by opposing counsel" and a benefit flowing from that mistake to which the lawyer's client is clearly not entitled."⁵⁵ The commentary to Rule 6.02(3)

⁴⁹ Pitel, *supra* note 4 at 52 ("the Alberta approach is dramatically different from that adopted in other provinces, and it demands serious study.")

⁵⁰ Law Society of Alberta, *Code of Conduct*, Rule 6.02(2), online: Law Society of Alberta <<http://www.lawsociety.ab.ca/docs/default-source/regulations/code.pdf?sfvrsn=2>> [*Law Society of Alberta*].

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid* at Rule 6.02(3).

⁵⁵ *Ibid.*

importantly distinguishes an obvious mistake (such as a clerical or arithmetical error) from “an act or omission by another lawyer that appears questionable but that may have involved a conscious exercise of judgment.”⁵⁶ For example, although it may appear that an opposing party has mistakenly agreed to an “unfavourable contract or settlement offer,”⁵⁷ this “may have been the result of careful consideration, including factors of which the lawyer is not aware” rather than the result of an error.⁵⁸ If a lawyer becomes aware that he or she has unintentionally misled the opposing party during the course of the negotiation, the lawyer must “immediately correct the resulting misapprehension.”⁵⁹

The Alberta Law Society has attempted to provide its members with guidance on what types of deceptive conduct to avoid in negotiations. The Alberta Code addresses how a lawyer is to balance a client’s interests with his or her duty to “other lawyers, the public interest, and the need for a fair process.”⁶⁰ The Alberta Code is arguably less “client-centric” than the LSUC Code as it specifically focuses on a lawyer’s duty to opposing parties in a negotiation. Some legal scholars have argued that while in some cases, a client may be denied a certain benefit or bargaining advantage, “such losses are a small sacrifice for preserving the honour and integrity of the profession.”⁶¹

Although the Alberta Code overcomes many of the shortcomings in the LSUC Code, it fails to acknowledge that certain types of deceptive tactics may be an expected part of the bargaining process. “Misleading conduct” as defined in Rule 6.02(3) could potentially capture a range of lies and deceptive behaviours that most lawyers consider acceptable negotiation practice. The Alberta rules would be more in line with the practical realities of negotiation culture if the definition of “misleading conduct” was slightly more refined.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Pitel, *supra* note 4 at 52-53.

⁶¹ *Ibid* at 53.

iv. The ABA Model as a “Model”?

The United States has a national bar called the American Bar Association (“ABA”). The ABA has attempted to consolidate the different jurisdictional rules of legal ethics into a single model code: the ABA Model.⁶² The ABA Model demonstrates how it is possible for a code of legal ethics to distinguish impermissible forms of deception from deceptive tactics that are generally considered to be acceptable negotiation practice.

ABA Model Rule 4.1 explicitly deals with deception in negotiation. The rule states that “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 ...”⁶³ The commentary on the rule provides that,

under generally accepted conventions in negotiation, certain types of statements are not taken as statements of material fact ... [e]stimates of price or value placed on the subject of a transaction and a party’s intention as to an acceptable settlement of a claim are ordinarily in this category.⁶⁴

By explicitly prohibiting lies only in reference to “material facts” the ABA seems to be implicitly allowing the use of deception as long as it does not relate to material facts. For example, it has been suggested that the wording of Rule 4.1 allows a legal negotiator to “engage in ‘product puffing’, exaggeration of the value of a product, and even outright lying or deception within the bounds outlined [in the rule].”⁶⁵ These types of deceptive behaviours are widely considered to be acceptable in common negotiation practice.⁶⁶ In contrast, empirical studies have shown that lawyers typically view lies about material facts to be “unethical, inappropriate, and unacceptable.”⁶⁷ The ABA therefore forbids conduct

⁶² American Bar Association, “Model Rules of Professional Conduct”, online: ABA <http://www.americanbar.org/groups/model_rules_of_professional_conduct> [ABA Model Rules].

⁶³ *Ibid* at Rule 4.1.

⁶⁴ *Ibid*.

⁶⁵ Truth About Lying, *supra* at 6 at 7.

⁶⁶ *Ibid*.

⁶⁷ Curtailing Deception, *supra* note 11 at 177.

that many legal professionals already consider to be inappropriate. As a result, the ABA Model is not only practically informative but it also seems to be in line with the current negotiation culture.

When compared with the LSUC Code and the Alberta Code, the ABA Model seems to offer more effective and practical guidance to lawyers. The Alberta Code is arguably too specific as it seems to prohibit any type of misrepresentation in negotiation, even lies that are widely considered to be an acceptable part of negotiation practice. The LSUC Code is arguably overly broad as it seems to permit a potentially limitless range of deceptive behavior. The ABA Model, in contrast, seems to strike an appropriate balance between the general and specific.

v. The Literature on Deception in Negotiation

Negotiation theory recognizes that “parties to a negotiation, even one that starts out as interest-based, may engage in deceptive tactics as part of the [negotiation] game.”⁶⁸ However, the question remains: what happens when the rules of legal ethics conflict with widespread negotiation conventions or practices? Some lawyers argue that the rules of legal ethics must “bow to prevailing negotiation ethics which condone certain forms of deception.”⁶⁹ Others argue that prevailing negotiation ethics must give way to the rules of legal ethics. The literature on deception in negotiation offers persuasive insight on how the rules of legal ethics should properly intersect with generally acceptable negotiation practices.

Cooley suggests that legal ethical rules must be “compatible with the [negotiation] 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 ...”⁷⁰

Therefore, what must first be determined is the nature and purpose of legal negotiation.

⁶⁸ Lakhani, *supra* note 6 at 307.

⁶⁹ *Ibid* at 179.

⁷⁰ John W Cooley, ‘Defining the ethical limits of acceptable deception in mediation’ (2003) 4 *Pepp Disp Resol LJ* 263 [Cooley].

According to Bordone, a “successful” negotiation is one that leads to a “good outcome.”⁷¹ A good outcome is not “boiled down to a binary question of whether a particular ... [party] won or lost.”⁷²

Rather, the characteristics of a “good outcome” are defined as follows:

better than [the parties’] best alternative to a negotiated agreement (BATNA); meets [the parties’] interests very well, the interests of the other side acceptably ...; is the most efficient and value-creating of many possible sets of deal terms; [and] improves or at least does not harm the relationship between the parties where ‘relationship’ is defined as the ability of the parties to ‘manage their differences well.’⁷³

In light of Bordone’s criteria, the “purpose” of negotiations may be condensed into three fundamental objectives. First, to secure a mutually advantageous outcome that leaves the parties no worse off than they would have been otherwise.⁷⁴ Second, to reach a mutually advantageous outcome in an efficient manner. Third, to come up with as many value-creating ways of expanding the “pie.”

The literature suggests that lies which conflict with the three fundamental negotiation objectives will effectively undermine the negotiation process as a whole. However, lies that advance – or at least do not hinder – these objectives, are more likely to be considered part of the negotiation game.

a. *Mutually Advantageous Goal*

The mutual advantage approach to negotiation permits parties to “initiate deception, so long as the possibility is fair (and hence mutually understood by the involved parties) and potentially mutually advantageous.”⁷⁵ There are many lies that are mutually understood by both parties to be an expectable part of the bargaining process. If successful, these types of lies may have the potential to give rise to mutually satisfactory outcomes.

⁷¹ Robert C Bordone, ‘Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes’ (2005) 21 *Ohio State Journal on Dispute Resolution* 1, 16.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ Alan Strudler, On the Ethics of Deception in Negotiation in Carrie Menkel-Meadow & Michael Wheeler eds, *What’s Fair: Ethics for Negotiators* (Jossey-Bass, 2004) at 138 [Strudler].

⁷⁵ *Ibid* at 153

Lying about one's reservation price, for example, is generally considered to be a "normal and expectable" part of the bargaining process.⁷⁶ If a lawyer were to state the truth about a client's reservation price, that lawyer may take "an unreasonable risk" if the opposing party chooses to exaggerate theirs.⁷⁷ For this reason, parties will often come to a mutual understanding that each of the parties in a negotiation will exaggerate their reservation price to a degree. This type of deception can be effective if the parties are "competent"; "[have] reason to know about the existence of conventions permitting limited deception"; and "[have] a fair and equal opportunity to safely get information about his opponent's reservation price."⁷⁸ The presence of these elements can help facilitate a "safe device for indirect communication" that both parties can use to their advantage.⁷⁹ This type of deception can be seen as useful tool that individuals who "neither know nor trust one another can use to work their way to a reasonable agreement."⁸⁰

Lying about one's reservation price can help produce mutually advantageous outcomes even when one party makes a gain at the other party's expense. A mutually advantageous outcome is not necessarily one that produces equitable results. If the use of deception allows one party to make a higher profit than the other, but leaves the other party no worse off than they would have been otherwise, the negotiation can still be classified as "mutual advantageous."

Wetlauffer provides the following example to illustrate how this can occur in practice.

A seller who enters into a negotiation for the purposes of selling his factory may have a reservation price of \$900,000. If a potential buyer comes to the negotiation table and states that she will not pay higher than \$1,200,000 for the factory, the seller has incentive to lie about his reservation price. The seller may state that his reservation price is \$1,100,000 (\$200,000 above his actual reservation price

⁷⁶ *Ibid* at 139.

⁷⁷ *Ibid* at 152

⁷⁸ *Ibid* at 153

⁷⁹ *Ibid* at 152

⁸⁰ *Ibid*.

of \$900,000). If the two parties agree to a final sales agreement of \$1,150,000 for the factory, both the buyer and the seller will come out of the negotiation satisfied.⁸¹ Even though the tactical use of deception by the seller allowed it to make a higher profit than the buyer, the buyer still paid less than than the maximum it was willing to pay.

Wetlaufer's example demonstrates that the advantages that both parties can gain from this type of deception may "outweigh the disadvantages of the costs of deceptive negotiation."⁸²

b. *Efficiency Goal*

Efficiency is one of the fundamental goals of negotiation.⁸³ An efficient negotiation is not necessarily one that is cost-effective. For example, a negotiation can be costly but still efficient if the "issues are dealt with in a timely manner with mutually beneficial outcomes."⁸⁴ As a result, lies that promote efficiency by helping facilitate timely settlements are more likely to be viewed as appropriate forms of deception.

White lies, for example, may help promote efficiency as they are often told "to grease the wheels of discourse, and to increase the likelihood that the parties will move quickly toward a mutually beneficial agreement."⁸⁵ White lies also tend to have a relatively harmless effect on the party the lie is told to.⁸⁶ Puffery is similar in kind to white lies. As a result, lawyers have generally considered both white lies and puffs to be permissible on both an ethical and strategic basis.⁸⁷

A basic level of trust is essential in a negotiation. Lies that lack credibility may "stand in the way of building trust" and fail to promote efficiency.⁸⁸ As a result, deceptive negotiation tactics such as false threats and bluffing should be used with caution. The rationale behind these forms of deception is to put

⁸¹ Wetlaufer, *supra* note 1 at 338-339.

⁸² Strudler, *supra* note 73 at 146.

⁸³ Geoffrey M Peters, 'The Use of Lies in Negotiation' (1987) 48 *Ohio State Law Journal* 1, 22 ("efficiency is and ought to be a goal of negotiations).

⁸⁴ Lakhani, *supra* note 6 at 43.

⁸⁵ Wetlaufer, *supra* note 1 at 338.

⁸⁶ White, *supra* note 5 at 934.

⁸⁷ Cooley, *supra* note 70.

⁸⁸ Strudler, *supra* note 73 at 146.

pressure on the opposing side to agree to a settlement or to make certain concessions.⁸⁹ For example, a party may threaten to walk away from the negotiation and bring the matter to court or threaten to inflict economic harm on the opposing party.⁹⁰ These types of threats are frequently used by more powerful negotiating parties with stronger BATNAs.⁹¹

These lies may promote efficiency by incentivizing parties to resolve the dispute in an effective and timely manner. However, in order for these lies to be successful, the threat or bluff must be credible.⁹² For example, if the deceptive party presents some reliable documentation in support of a threat, the threat will have more credibility and will be more likely to be believed by the opposing party. If a threat is not credible, “the less powerful party might resent the sense of coercion or inequity inherent in the ... [opposite party’s] demands and refuse to yield, even knowing that this course of action will cause harm to both sides.”⁹³ This demonstrates the importance of credibility, especially when there are power imbalances at play.

Lies about material facts are widely considered to be ethically impermissible in negotiations. According to Jarvis and Tellam, “even if no violation of law would result, a lawyer must not make material misrepresentations, conceal material facts or advise or assist a client in doing so.”⁹⁴ Unlike lies about one’s reservation price, these types of lies have the potential to greatly hinder rather than enhance efficiency. It would be extremely difficult for parties to conduct their affairs in an efficient and productive manner if they constantly feared being deceived or misled about something as basic as a material fact.⁹⁵ As a result, the prevalence of these types of lies may effectively deter individuals from

⁸⁹ Peter C Cramton & J Gregory Dees, Promoting Honesty in Negotiation: An Exercise in Practical Ethics in Carrie Menkel-Meadow & Michael Wheeler eds, *What’s Fair: Ethics for Negotiators* (Jossey-Bass, 2004) at 113.

⁹⁰ *Ibid.*

⁹¹ Roger Fisher et al, *Getting to Yes: Negotiating Agreement Without Giving In* 100 (Bruce Patton ed, 2d ed 1991) (author coined the BATNA acronym: “Best Alternative to a Negotiated Agreement”).

⁹² *Ibid.*

⁹³ Russell Korobkin, “Bargaining Power as Threat of Impasse” (2004) 87 *Marquette L Rev* 867-71 at 871.

⁹⁴ Peter R Jarvis and Bradley F Tellam, “A Negotiation Ethics Primer for Lawyers” (1995-1996) 31 *Gonz L Rev* 549 at 551.

⁹⁵ Wetlaufer, *supra* note 1 at 340.

pursuing negotiation as an alternate means of dispute resolution in the future. Lies about material facts are expressly prohibited in the ABA Model Code for this reason.

Similar to lies about material facts, lies about one's authority are generally considered to be an impermissible form of deception in negotiations. When a lawyer falsely claims that he or she lacks the authority to decide on a certain subject matter, the opposing party may feel pressured to settle in fear of delaying the negotiation. Although these types of lies may ostensibly promote efficiency by potentially speeding up the negotiation process, parties who are manipulated in this way "may be resentful later and exercise their power either by failing to follow through on the agreement or by seeking revenge the next time the parties meet."⁹⁶ Therefore, the adverse impact these lies may potentially have on subsequent negotiations may outweigh any short-term benefits the lies produce.

If lawyers are able to consistently "get away" with these kinds of deceptive negotiation tactics, lawyers may fail to ask themselves whether truthful alternatives exist that could achieve the same intended purpose.⁹⁷ For example, instead of lying about his or her authority, a lawyer could state to the opposing side that he/she is not prepared to decide on a certain matter at the current time. Re-framing the statement in this way could have the same effect as the lie, but will not damage the lawyer's reputation nor the integrity of the legal profession.

The literature provides persuasive rationales to support why lawyers should avoid telling lies about material facts and lies about one's authority. It also demonstrates that a lawyer should exercise caution before exaggerating a client's reservation price, making a false threat, or even telling a white lie. Although these types of lies are generally considered acceptable as part of the negotiation game, a gross exaggeration about one's reservation price, a false threat that lacks credibility or a white lie that is told

⁹⁶ Carrie Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem Solving" (1983-1984) 31 UCLA L Rev 754 at 778 [Menkel-Meadow].

⁹⁷ Lerman, *supra* note 3.

without a genuine purpose may undermine the negotiation process as a whole. If society perceives the legal profession to be one that condones and frequently engages in lying when conducting affairs, public trust in lawyers will gradually start to erode. A decline in public trust can lead to a decline in “our ability to engage in effective communications and to make and exchange credible commitments.”⁹⁸

c. Value-Creating or “Problem-Solving” Goal

Russell Korobkin defines negotiation as:

an interactive communication process by which two or more parties who lack identical interests attempt to find a way to coordinate their behavior or allocate scarce resources in a way that will make them better off than they could be if they were to act alone.⁹⁹

This definition reflects the importance of effective problem-solving skills in negotiations. Parties who adopt a “problem-solving” or “value-creating” approach to negotiation¹⁰⁰ will try to come up with creative ways of reaching mutually beneficial outcomes by focusing on discovering each other’s true underlying values and interests.¹⁰¹ The Prisoner’s Dilemma illustrates the effectiveness of this type of negotiation strategy, especially when both parties are particularly “non-cooperative.”¹⁰²

Lies that involve a concealment of a client’s true interests may prevent parties from reaching a mutually beneficial agreement. If one party is unaware of what the other party wishes to gain from the negotiation, it will be extremely difficult to come up with creative ways of dividing the proverbial pie.¹⁰³ For example, one party may have been willing to make certain concessions or compromises (that would have been beneficial to the other party) but refrained from doing so because the other party concealed its true interests and values.¹⁰⁴ This demonstrates how a lack of transparency can effectively prevent parties

⁹⁸ Wetlaufer, *supra* note 1 at 340.

⁹⁹ Russell Korobkin, *Negotiation Theory and Strategy*, 2nd ed (California: Aspen Publishers, 2002) at 149.

¹⁰⁰ Jeremy Richler, *From Both Sides of the Table: The Art of Balanced Negotiation* (2006) 21 Windsor Rev Legal & Soc Issue 11 (a value creating approach to negotiation “is one where a negotiator views gains as mutually beneficial; that is, a party only gains if the adversary benefits as well ... [t]he objective of such a strategy is to create value so that both sides are otherwise better off than they initially were” at 1) [Richler].

¹⁰¹ Lakhani, *supra* 6 note at 72.

¹⁰² Richler, *supra* note 99 at para 17; See also Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books Inc, 1984) at 7.

¹⁰³ Strudler, *supra* note 73 at 152.

¹⁰⁴ *Ibid.*

from reaching a mutually advantageous agreement that may have otherwise been available to them. By acting in an un-cooperative manner, parties may “miss opportunities for expanding the range of solutions” and arrive at “unsatisfactory and inefficient” outcomes.¹⁰⁵

Effective communication is essential in any negotiation.¹⁰⁶ For a negotiation to properly progress, “negotiators must communicate to the other party their issues, interests, positions and goals.”¹⁰⁷ Omitting important pieces of information may have the effect of undermining the negotiation process as a whole.¹⁰⁸ For these reasons, concealing a client’s true interests is a form of deception that is generally considered to be “outside” the bounds of the negotiation game.¹⁰⁹

LSUC Reform Proposals

This paper recommends that the LSUC reform their Code of Professional Conduct to include rules that explicitly address the issue of deception in negotiations. Although the LSUC acknowledges the importance of alternate means of dispute resolution, it fails to recognize the lawyer’s specific role as a negotiator. The following proposals are influenced by the rules in the Alberta Code the ABA Model Code, as well as the literature on deception in negotiation.

Recommendation 1:

The LSUC should adopt a similar rule to Alberta’ Rule 6.02(2) that prevents lawyers from misleading other lawyers during negotiations. However, like ABA Rule 4.1, this rule should be limited to expressly prohibiting misrepresentations of material facts. In addition to prohibiting lies about material facts, this rule would also prevent a lawyer from lying about his or her authority.

Recommendation 2:

The LSUC should adopt a rule that requires lawyers to adhere to minimum standard of honesty and good faith in negotiations. Although a duty of honesty is implied in Recommendation 1, a separate

¹⁰⁵ Menkel-Meadow, *supra* note 95 at 776.

¹⁰⁶ Paul Emond, *The Essential Role of Communication in Negotiation* in Colleen Hanycz, Trevor C W Farrow & Frederick H Zemans ed, *The Theory and Practice of Representative Negotiation* (Toronto: E Montgomery Publications, 2008) at 249.

¹⁰⁷ *Ibid.*

¹⁰⁸ Wetlaufer, *supra* note 1 at 339.

¹⁰⁹ White, *supra* note 5 at 934.

ethical obligation of this nature would help reinforce the importance of honesty in the negotiation context. Establishing a minimum standard of honesty and good faith could also help enhance public confidence in both the negotiation process and legal profession as a whole.

The Supreme Court of Canada found it important to create a separate common law duty of honest performance in *Bhasin v Hrynew*.¹¹⁰ The duty of honest performance flows directly from the overarching principle of good faith and imposes a minimum standard honesty in all contractual relationships. The Court stated that the doctrine of honest performance may be relaxed in some contexts so long as its “minimum core requirements” are respected.¹¹¹ This rule would similarly recognize the contextual nature of negotiations, as what is acceptable in one context may be unacceptable in another due to “differences between civil and criminal contexts, factual matrices, and power relations between parties.”¹¹²

Although it has yet to be determined whether *Bhasin* applies in the negotiation context, the decision offers persuasive support for why legal negotiators should be required to uphold a minimum standard of honesty.

Recommendation 3:

The LSUC should enact a rule similar to Rule 6.02(3) of the Alberta Code. This rule would state that in a negotiation, a party must refrain from taking advantage of any obvious slip-ups or mistakes inadvertently made by the opposing party. This rule is particularly relevant where parties are of unequal bargaining strength as it would help prevent some of the adverse effects of power imbalances in negotiations. Further, this rule would encourage participation in the negotiation process and promote confidence in the legal profession.

¹¹⁰ 2014 SCC 71.

¹¹¹ *Ibid* at para 77.

¹¹² Tsakalis, *supra* note 21 at 10.

CONCLUSION

Legal negotiation has become an important dispute resolution alternative to litigation. It provides many Canadians with the opportunity to resolve disputes in a timely and efficient manner. However, failing to regulate certain types of deceptive behavior may unduly inhibit the negotiation process and potentially discourage participation in this alternative to costly and prolonged litigation. As a result, the LSUC Code needs to be revised to include rules that specifically address honesty and deception in negotiations.

Reforming the LSUC Code will not only better serve the individuals who rely on negotiation as a primary means of access to justice but will help improve the public perception of lawyers and the integrity of the legal profession as a whole. Rules that provide appropriate guidance to lawyers in negotiations may also increase the likelihood of mutually beneficial outcomes for the parties. Lawyers may be more inclined to adopt negotiation strategies that are cooperative and value-creating, rather than adversarial and client-centric.

Admittedly, drafting ethical rules that govern the negotiation process is an inherently difficult task. A certain level of precision and specificity is required in order for the rules to have any real influence on the behaviors of lawyers. However, if the ethical rules are too specific or conflict with generally acceptable negotiation practices, the rules may unintentionally inhibit the effectiveness of the negotiation process. The recommended proposals have attempted to strike a delicate balance between the general and the specific. The LSUC has a responsibility and duty to address this important issue in a positive and constructive way.