

Legal Education & Practice

The ethics of negotiation

by Raymond Clough

Deception in the practice of law is the constant focus of ethical scholars. When lawyers act as negotiators, they are presented with unique dilemmas relating to the use of deception. The rules of ethical conduct in most jurisdictions do not adequately address these issues, and are generally unclear regarding the status of false statements made in negotiations.

Moreover, ethics rules generally urge zealous representation, which can conflict with efforts towards honesty. Lawyers constantly deceive designated opponents using the concept of the adversary system to justify extreme partiality. This system, it is argued, allows and even demands that in pursuing the client's interests, the interests of others be disregarded. The obligation to represent zealously has been employed to justify acts ranging from allowing an opponent to believe incorrect information to deliberately making false assertions.

The philosopher Immanuel Kant stated that every lie is an offence to humanity. If we are people first and lawyers second, such notions cannot be ignored, despite their apparent absence in the rules of professional ethics.

The nature of negotiation provides abundant motivation and opportunity to justify deception. Lawyers extract material gain not only for their clients but also for themselves when they make a favourable deal. The negotiator's dual objectives of creating value for one side and denying it to the other create a dilemma: maximum opportunity to advance those goals is not often gained by forthrightness. As importantly, accepted norms of negotiation may alter expectations of honesty which exist in other contexts.

RULES' LIMITATIONS

As examples of the inadequacy of the way in which formal rules address the ethical dilemmas of negotiation, we shall discuss rules operating in three representative jurisdictions: England and Wales, the US and Jamaica.

Neither the English rules of conduct nor the Jamaican canons of ethics specifically address a solicitor's actions in negotiations. General English ethics rules, as well as the decisions of the disciplinary committees, emphasise honesty in all aspects of law practice. Jamaica's rules give general encouragement towards practising with honesty and integrity but also fail to address directly the issue of honesty in negotiation.

As Michael H Rubin points out in his article 'The Ethics of Negotiations: Are There Any?' in the 1995 *Los Angeles Law Review* the predominant legal ethics rules in the US, the *ABA Model Rules of Professional Conduct*, do refer explicitly to negotiation but do not address the demands of bargaining with the same specificity that they address the demands of litigation. The preamble states:

'As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.'

The statement above provides little real guidance. Similarly, while the English and Jamaican rules place considerable general emphasis on honesty, and while decisions of the English Professional Purposes Committee and the Jamaican Disciplinary Committee suggest that truthfulness and disclosure are mandated in negotiations, the other bodies of ethics rules also leave attorneys with much discretion in navigating the ethics of dealmaking.

AMBIGUITIES

Lawyers in each jurisdiction are confronted with the difficulties of applying general rules of professional integrity to an idiosyncratic and morally ambiguous process. US model rule 4.1, for example, provides the following general guidance:

'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...'

In their *Guide to the Professional Conduct of Solicitors*, the English Law Society provides rules with sections analogous to this rule 4.1, stating that a solicitor should not deceive his or her client in the course of representation, but neither should he or she deceive others in order to further the client's interests. The English rules generally manifest strict requirements for honesty between solicitors.

It would appear that these rules could apply directly to a lawyer's conduct during negotiations, in which lawyers often make statements which appear to be facts regarding their client's position. However categorizing a statement as one of 'fact' is a subjective decision. The comment to US rule 4.¹ recognizes this and consequently fashions an exception for negotiation:

'This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements are not taken as statements of material fact.'

Interpreted broadly, this comment sanctions deception in negotiations. Interpreted narrowly, it invites difficult distinctions as to which circumstances produce which definitions of a 'fact'. The English have no such explicit exception for negotiation; but this may not prevent the familiar process of rationalizing deception by distinguishing statements unequivocally represented as fact from mere posturing, puffery, or opinion.

Jamaican attorneys are guided in such matters only by broad requirements. They are required to assist in maintaining the dignity and integrity of the profession by avoiding behaviour which would tend to discredit it. They must seek to obtain reasonable settlements when it is in the client's interests. Their canons require them to withdraw when a client has perpetrated and refused to rectify a fraud.

As with the other rules, the Jamaican

code expresses the expectation that attorneys not take part in blatant fraud, but does not appear to forbid zealously bargaining attorneys from bending the truth.

FACTS OR OTHERWISE?

There are strong incentives for categorizing some statements as 'non facts'. To quote an example posed by David Geronemus in his article 'Lies, Damn Lies and Unethical Lies: How to Negotiate Ethically and Effectively' (*Business Law Today*, May/June 1997), it arguably permits an attorney to say that his or her client will not sell for \$50,000 if the attorney feels the opposing side will go higher, even if the client has told the lawyer that he or she will sell for \$30,000.

In *The Journal of Legal Ethics* (1994), Elizabeth Loder Reed's article 'Moral Truthseeking and the Virtuous Negotiator,' demonstrates an argument which could be offered in further support of this type of misrepresentation: that the lawyer has no intent to deceive. This is because:

- (1) in a given bargaining context the opposing lawyer will not expect certain statements to be truthful, and
- (2) the one making such statements will not expect to be believed.

Moreover as one party is rarely able to discover whether the other party was telling the truth about the amount it would accept, one negotiator's honesty could give an unfair advantage to the other side if their negotiator is dishonest.

SENSE OF PROPRIETY

Other factors, however, intervene. In the English rules, unless he or she is specially requested, a solicitor does not have the responsibility of advising his or her client as to whether a sale for the particular amount is prudent. This rule implies that a solicitor should have little input as to what settlement his client should accept. Thus, if the client is willing to accept \$30,000, not only should the solicitor not be able to hold out for a larger sum, but unless asked should not be able to advise whether \$30,000 is a fair settlement.

In that context, a statement that 'my client won't accept less than \$50,000' reports a fact which one would

reasonably expect to have been communicated to the lawyer before the negotiation. Thus, arguably, that lawyer should be considered as asserting facts, and it is disingenuous to categorize the statement as one of opinion or value.

Even where attorneys are conscientiously trying to do the right thing in making a deal, limiting the requirement of honesty to facts presents practical problems. Deciding which representations are facts would be particularly daunting during a pressurized dialogue between impatient parties, and virtually impossible when, as in international negotiations, the parties have disparate attitudes about the nature and process of negotiation.

In addition to being impractical in some situations, an approach which classifies some statements as immune to the requirement of truth – such as the US *Model Rules* approach – is suspect at the level of basic morality. This overly facile sleight of hand avoids the basic moral necessity of justifying one's assertions. Whether making certain statements should be considered wrong or whether they can be justified in a given context, moral accountability requires that one accept the burden of justification. It could further be argued that the spirit if not the letter of professional ethics rules requires no less.

The preceding discussions cumulatively suggest that negotiating lawyers need to develop an internal sense of propriety in making ethical decisions about negotiation. Too much reliance upon the rules and formalistic interpretations thereof can be dangerous.

CONTEXT SPECIFICITY

While we are arguing that lawyers should develop an internal sense of propriety to fill in the gaps left by vague ethics rules and specious rationalizations, we concede this may be insufficient guidance in some negotiation contexts. Distinctive expectations, goals and communication styles of the parties do play a part in defining good faith and 'truth'. This is most obvious in negotiations involving parties from different cultures.

The ability to observe (or evaluate) the basic ethical duties of truth-telling and good faith during an international


negotiation may depend on a high level of cultural sensitivity. Ethical lawyers must understand the relevant values and ideals of the people with whom they negotiate. They must be aware that negotiators from different countries may have remarkably different approaches to negotiation norms and practices.

In making ethical decisions, the goal of a negotiation must be considered. Some groups, such as Americans, work singlemindedly towards securing a contract. Others, such as the relationship-oriented Japanese or the Chinese, aim chiefly to establish a long-term business association. In a negotiation between such disparate cultures, factual truth may be less important than observing ritualistic traditions of behaviour between the parties.

An American negotiator might discover that an Asian negotiator deviated from a previous agreement and interpret this as an act of deception. The Asian party, believing that business relationships must be amenable to any significant change in business conditions, would view this differently.

The authority to approve negotiations will also be dictated by the cultural background of each party. In the West, this authority often is assumed to reside with one person. In contrast, in Asian countries, decision-making is most often vested in a team, and negotiations are steeped in ritual and mutual respect. An uninformed American would consider this behaviour to constitute unethical tactics for withholding information or delaying progress.

CONCLUSION

Once the lawyer applies the basic requirements of applicable local ethics rules and studies the individual nuances of a given negotiation, he or she may still be faced with difficult and complex issues. Resolving these will require observance of the following universal principle: in choosing the professionally responsible course of action, a negotiating lawyer must go beyond the formal rules of conduct and consider the demands of personal conscience and moral accountability. 

Raymond Clough

Clough, Long & Co, Kingston, Jamaica