

1990

Chipping Away at Lawyer Veracity: The ABA's Turn toward Situation Ethics in Negotiations

Ruth Fleet Thurman

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Ruth Fleet Thurman, *Chipping Away at Lawyer Veracity: The ABA's Turn toward Situation Ethics in Negotiations*, 1990 J. Disp. Resol. (1990)

Available at: <https://scholarship.law.missouri.edu/jdr/vol1990/iss1/5>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

CHIPPING AWAY AT LAWYER VERACITY: THE ABA'S TURN TOWARD SITUATION ETHICS IN NEGOTIATIONS

Ruth Fleet Thurman**

I. INTRODUCTION

Should the legal profession permit lawyers to lie when negotiating on behalf of clients? The virtually unequivocal position of the profession and commentators is "no," and such a position is generally followed by the American Bar Association Model Rules of Professional Conduct (Model Rules).¹ The Preamble to the Model Rules states, "[a]s a negotiator a lawyer seeks a result advantageous to the client but consistent with the requirements of *honest dealings with others*."² Model Rule 8.4(c) declares that dishonesty, fraud, deceit and misrepresentation constitute professional misconduct,³ and is based on a similar rule in the earlier American Bar Association Code of Professional Responsibility (Model Code).⁴ The Model Code also mandates that a lawyer shall not knowingly make a false statement of law or fact.⁵

When the American Bar Association (ABA)⁶ adopted the Model Rules in 1983, the Model Code provision was included. However, the Model Rules language reads, "false statement of *material* law or fact" in Model Rule 3.3, Candor Toward the Tribunal,⁷ and in Model Rule 4.1, Truthfulness in Statements

* "Situation ethics holds that both moral and legal rules are only relatively obliging and valid. Their claim upon us depends extrinsically upon variable circumstances." Fletcher, *Situation Ethics, Law and Watergate*, 6 CUMB. L. REV. 35, 36 (1975).

** Professor of Law, Stetson University College of Law; B.A., Smith College; J.D., Stetson University; LL.M., Columbia University.

The author thanks R. Kent Greenawalt, Cardozo Professor of Jurisprudence at Columbia University School of Law, in whose Seminar on Legal Philosophy this article received its genesis, and Professors Michael Finch, Calvin Kuenzel, and Michael Swygert, Stetson University College of Law, for their thoughtful critiques and encouragement.

1. MODEL RULES OF PROFESSIONAL CONDUCT (1983, revised 1989) [hereinafter MODEL RULES].
2. *Id.* at Preamble: A Lawyer's Responsibility (emphasis supplied).
3. *Id.* at Model Rule 8.4(c).
4. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (1980) [hereinafter MODEL CODE].
5. *Id.* at DR 7-102(A)(5).
6. American Bar Association [hereinafter ABA].
7. MODEL RULES, *supra* note 1, at Rule 3.3.

to Others.⁸ The narrowing of the veracity requirement in negotiations is clearly set forth in the official Comment to Model Rule 4.1.⁹ (Comments are intended as "guides to interpretation.")¹⁰ The Comment declares, "A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts."¹¹ The Comment continues, "[w]hether a particular statement should be regarded as one of fact can depend on the circumstance. *Under generally accepted conventions in negotiations* certain types of statements ordinarily are not taken as statements of material fact."¹² The Comment then singles out three exceptions to the veracity requirement for negotiators: (1) Estimates of price or value placed on the subject of a transaction; (2) a party's intentions as to an acceptable settlement of a claim; and (3) the existence of an undisclosed principal except where nondisclosure of

8. *Id.* at Model Rule 4.1, Truthfulness in Statements to Others

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.

COMMENT:

Misrepresentation:

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

Statements of Fact:

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 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, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by Client:

Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

Id. at Model Rule 4.1 and Comment.

9. *Id.* at Model Rule 4.1 Comment.

10. *Id.* at Preamble: Scope.

11. *Id.* at Model Rule 4.1 Comment.

12. *Id.* (emphasis supplied).

the principal would constitute fraud.¹³ The reason for developing these three particular items as exceptions is unclear and is certainly inconsistent with the Preamble's *honest dealings with others* precept,¹⁴ and Model Rule 8.4's proscription against dishonesty, deceit and misrepresentation.¹⁵

This Article questions the wisdom of the Model Rule's exceptions to honest dealings in negotiations on several grounds: (1) Proponents of the exceptions have not offered empirical evidence or professional justification for this approach;¹⁶ (2) The approach will further tarnish the profession's image; (3) The approach will create a slippery slope that leads to unintended ethical violations; and (4) The approach will erode the high degree of trust, veracity and integrity required of lawyers as "officer[s] of the legal system."¹⁷ For these reasons, the Model Rule's exceptions to honesty in negotiations should be abolished by the ABA and by those states that have already adopted them,¹⁸ and proposals in other states to amend ethics codes or to adopt new rules to create the exceptions in negotiations should be defeated.

II. DISCUSSION

A fundamental precept of effective lawyering is assisting clients in realistically appraising their situation and evaluating the probability of achieving a desired result. The lawyer's experience, objective viewpoint, and ability to weigh competing alternatives assist clients in making decisions. Although clients make the ultimate decisions regarding the objectives of representation,¹⁹ clients are entitled to the lawyer's honest assessments and straightforward advice.²⁰ In negotiating, lawyers serve as "go-betweens" for the client in dealing with other

13. *Id.*

14. *See supra* note 2 and accompanying text.

15. *See supra* note 3 and accompanying text. Professor Charles Wolfram notes:

The final version of the Model Rules consists of a confusing set of rigid but contradictory commands, not all of the literal terms of which the same lawyer could possibly obey. The tangled skein was produced by the process of extensive floor amendment that significantly reshaped important parts of the Model Rules in the February 1983 meeting of the ABA House of Delegates.

C. WOLFRAM, *MODERN LEGAL ETHICS* 723 (1986).

16. *Id.* "How or why the bar concluded that a negotiation morality that rewards dishonesty is 'generally accepted' is never stated. The conclusion is certainly not based on existing empirical evidence. . . . Moreover, regardless of empirical verification, an ethics code should not condone conduct merely because it is 'generally accepted.'" Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers*, 2 *GEO. J. LEGAL ETHICS* 411, 425-26 (1988).

17. MODEL RULES, *supra* note 1, at Preamble: A Lawyer's Responsibilities.

18. Thirty states have adopted the Model Rules with modifications. Telephone interview with Joan O'Shaughnessy, Staff Attorney for the ABA Center for Professional Responsibility (April 21, 1989).

19. MODEL RULES, *supra* note 1, at Model Rule 1.2(a).

20. *Id.* at Model Rule 2.1 Comment.

parties.²¹ By conducting themselves in a conscientious and forthright manner, lawyers elevate the negotiation process to a higher plane.²² Likewise, if lawyers apply a lower standard of conduct during negotiations, the process is demeaned.

Devising enforceable standards of ethical behavior for the legal profession is not an easy task.²³ As commentators point out, if ethical norms are routinely violated, this will weaken the force of the norms, thus making it more difficult for the bar to follow, let alone enforce, its ethical rules.²⁴ This difficulty, however, should not dictate the rejection of "better and more desirable rules for poorer ones."²⁵ Arguably, it would be preferable to have no rules, rather than poor rules.²⁶ Since rules of ethics are normative and thereby shape expectations and behavior, great care should be taken to ensure that the rules adopted are consonant with the high level of trust and confidence that the public reposes in the practicing bar. Consequently, rules allowing lawyers to engage in puffery, deception, and lying are inappropriate and unacceptable because the public's trust and confidence in lawyers will diminish. In addition, allowing such conduct is inconsistent with a lawyer's obligation of integrity as an "officer of the legal system."²⁷

The original draft of the ABA Model Rules of Professional Conduct (Discussion Draft) imposed an obligation of "fairness" in negotiations.²⁸

Professor Geoffrey Hazard, Reporter for the Kutak Commission²⁹ that drafted the Model Rules, writes of the difficulty in drafting the "fairness"

21. "Negotiation is one of the most important activities of the practicing lawyer. It is the dominant method of resolving civil and criminal disputes and is also important in a non-litigation or transactional context such as in setting contract terms." Perschbacher, *Regulating Lawyers' Negotiations*, 27 ARIZ. L. REV. 75-76 (1985). "Legal negotiators put together the millions of daily transactions that keep social, economic, and legal structures functioning. . . ." Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, AM. B. FOUND. RES. J. 905, 911 (1983).

22. See, e.g., R. FISHER AND W. URY, *GETTING TO YES* (1981). "Principled negotiations produces wise agreements amicably and efficiently." *Id.* at 86.

23. See, e.g., White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, AM. B. FOUND. RES. J. 926, 938 (1980).

24. See, e.g., *id.* at 937.

25. *Id.* at 938.

26. *Id.* See also, e.g., Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99 (1982). "If we cannot enforce the rules, it may be advisable to eliminate them." *Id.* at 125. Cf. Lowenthal, *supra* note 16, at 442-43. "[R]ecognition that violation of drunk driving laws is widespread is hardly a reason to abolish those laws. . . . They may deter some from engaging in wrongful conduct, and also may serve a valuable educational function by helping to clarify societal values." *Id.*

27. MODEL RULES, *supra* note 1, at Preamble: A Lawyer's Responsibilities.

28. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2(a) (Discussion Draft 1980) [hereinafter *Discussion Draft*].

29. ABA Commission on Evaluation of Professional Standards, named for the first Commission Chairman, the late Robert J. Kutak, Esq. [hereinafter *Kutak Commission*].

standard and the vehement reaction it engendered.³⁰ Hazard concludes that, nationally, lawyers are not in consensus about fairness in negotiations. Further, Hazard believes that there is little agreement concerning the means to enforce fairness in the negotiation process.³¹

Notwithstanding that the fairness requirement was not incorporated into the Model Rules as adopted,³² the current exception to the truthfulness requirement for negotiations, as provided by the official comment to Rule 4.1,³³ should not be allowed.

Ethics is more than a matter of external compulsion. "Ethics is a form of critical reasoning, not a matter of indoctrination or blind obedience to external authority, but an internal development of natural cognitive and emotional capacities which express our moral nature in the form of principles that we accept for ourselves and universalize for others."³⁴

When lawyers devise ethical standards that affect others as well as themselves, they must step back and examine the relevant issues and options from an objective viewpoint.³⁵ What is sought to be accomplished by a standard? What are lawyers' aspirations and highest concerns in serving the public? The nature of the lawyer's varied roles in society raises important issues of moral responsibility. Professor Charles Fried and others ask the question, "Can a

30. Hazard, *The Lawyer's Obligation to Be Trustworthy When Dealing with Opposing Parties*, 33 S.C.L. REV. 181, 191-92 (1981). The general requirement in 4.2(a) of the Discussion Draft of the Proposed Model Rules (1980) that lawyers be "fair" encompassed a concept of truthful representations. *Id.* at 191.

The idea underlying the Kutak Commission's original proposal was not very complicated: the lawyer, as the instrument of a transaction, should be the guardian of its integrity Many members of the Commission and certainly the Reporter were very surprised at the vehemence of the objections. "Vehemence" is the correct word, since much more heat than light was forthcoming in the reaction to the proposal.

Id. at 192.

31. *Id.* at 193.

32. MODEL RULES, *supra* note 1, at Model Rule 4.1. *See supra* note 8.

33. *Id.* at Model Rule 4.1 Comment. *See supra* note 8.

34. Richards, *Moral Theory, the Developmental Psychology of Ethical Autonomy and Professionalism*, 31 J. LEGAL EDUC. 359, 373 (1981). *See also, e.g.*, Lowenthal, *supra* note 16, at 413. "The concept of an ethic, a principal of desirable conduct that is morally binding on the conscience of the professional, is not limited to legal duties." *Id.*

35. *See, e.g.*, Elkins, *Moral Discourse and Legalism in Legal Education*, 32 J. LEGAL EDUC. 11 (1982) (suggesting that lawyers should see themselves as strangers would:

As 'outsider' one can scrutinize what is happening, what one is being asked to do, what is being said by others, the claims and justifications which are being used to support an idea, concept, or theory. If we persist in this inquiry, we ultimately confront the fundamental values which underlie our pursuit).

Id. at 45-46.

lawyer be a good person?"³⁶ In other words, can the lawyer conform to the traditional concept of a professional -- one devoted to his client's interests and authorized, if not required, to do some things for the client that the lawyer would not do for himself -- and at the same time live up to "the ideal that one's life should be lived in fulfillment of the most demanding moral principles, and not just barely within the law."³⁷ Fried answers the question affirmatively, reasoning that, by preserving clients' autonomy and legal rights, the lawyer acts morally.³⁸ The lawyer may not, however, *lie* or cheat for a client.³⁹ Fried describes lying in negotiations as an offense to both the integrity of the victim as a rational and moral being, and to the lawyer's own moral status.⁴⁰

Despite strong moral arguments such as Fried's and traditional prohibitions against lawyers' engaging in deceit or misrepresentation, the ABA House of Delegates sanctioned this behavior in negotiations by adopting Model Rule 4.1⁴¹ and its accompanying Comment.⁴² Model Rule 4.1, as previously mentioned, forbids lawyers while representing clients from knowingly making a false statement of *material* fact to a third person and from failing "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 the ABA's rule on confidentiality.⁴³ The Comment to Rule 4.1 states in part that during negotiations, some statements are not to be considered statements of "material fact," thus logically (under the rule) exempting them from the requirement of truthfulness and disclosure.⁴⁴

36. Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

37. *Id.* at 1060-61.

38. *Id.* at 1074-75. One commentator would limit Fried's argument to legal rights that protect important individual moral rights and fundamental political liberties but not necessarily other legal rights: In some instances it may not be morally right to exercise the legal rights and may be wrong for a lawyer to help him do so. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U.L. REV. 63, 86 (1980).

39. *Id.* at 1083 (emphasis added).

40. *Id.* at 1085.

Every speech act invites belief, and so every lie is a betrayal. . . . It is precisely my point that a man cannot lie just in his representative capacity; it is like stabbing someone in the back 'just' in his representative capacity. The injury and betrayal are not worked by the legal process, but by an act which is generally harmful quite apart from the legal context in which it occurs.

Id. In making these statements, Fried cites the following authorities: Augustine, *Lying*, in TREATISES ON VARIOUS SUBJECTS (R. Deferrari ed. 1952), and I. KANT, THE METAPHYSICAL PRINCIPLES OF VIRTUE, 90-93 (J. Ellington trans. 1964).

41. MODEL RULES, *supra* note 1, at Model Rule 4.1. See *supra* note 8.

42. *Id.* at Model 4.1 Comment. See *supra* note 8.

43. *Id.* (emphasis added).

44. *Id.*

The Comment to the rejected earlier version of Rule 4.1, as described by Hazard, mandated that lawyers negotiating in behalf of a client "be fair in dealing with other participants."⁴⁵ That Comment provided that, "[f]airness in negotiation implies that representations by or in behalf of one party to the other party be truthful."⁴⁶ Having said that, however, the Comment undercut the fairness requirement by making the same exceptions as the adopted Comment to the present Model Rule 4.1⁴⁷ for estimates of price, value, and settlement intentions.⁴⁸ The rejected Comment, however, contained a confusing disclaimer: "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 can also vary according to the parties' familiarity with transactions of the kind involved."⁴⁹

The rejected Comment recognized that modern commercial and securities transactions may require disclosures by sellers that "go well beyond the classic rule of 'caveat emptor . . .'"⁵⁰ Moreover, the Comment added cryptically, "It is a lawyer's responsibility to see that negotiations conducted by the lawyer conform to applicable legal standards, *whatever they may be*."⁵¹

From these statements, one can infer that the Kutak Commission expected and countenanced at least some degree of lying or puffery, but gave little guidance as to where the line should be drawn. These statements,⁵² although not included in the Model Rules as ultimately adopted, reveal the drafters' thoughts. Indeed, the gist and spirit of the statements are carried into the current Comment to Model Rule 4.1.⁵³

Even if one believes that exceptions to truthfulness are permissible for estimates of price, value, and settlement intentions,⁵⁴ is it realistic to believe that lying in negotiations will stop with these items? Why should there be *any* exceptions to truthfulness? Is negotiation merely a game?

45. Discussion Draft, *supra* note 28, at Rule 4.2.

46. *Id.* at Rule 4.2 Comment.

47. *Id.*

48. MODEL RULES, *supra* note 1, at Model Rule 4.1 Comment. *See supra* note 8.

49. Discussion Draft, *supra* note 28, at Rule 4.2 Comment.

50. *Id.*

51. *Id.* (emphasis added).

52. *Id.*

53. MODEL RULES, *supra* note 1, at Model Rule 4.1 Comment. *See supra* note 8.

54. *Id.*

In a thoughtful commentary, Judge Alvin B. Rubin questions the wisdom of allowing "rules of the game" to govern law practice.⁵⁵ He deplores equating negotiation to a game and insists that lawyers act honestly and in good faith, so that persons dealing with them need not be as cautious as if trading in a bazaar.⁵⁶ An ethic, he notes, is morally binding and not just a rule of the game.⁵⁷

A less stringent view is espoused by Professor James White. According to White, successful negotiators must be able to mislead like poker players, and even the most honest and trustworthy do so.⁵⁸ White discusses five cases showing the difficulty of formulating a rule that will cover all types of lying during negotiations.⁵⁹ In the first example, the lawyer misrepresents his true opinion about the meaning of a case or a statute.⁶⁰ The second case involves distortion of the value of a case or the subject matter involved.⁶¹ In the third case, a negotiator includes a series of false demands to trade for concessions from the other side.⁶² In the fourth case, the plaintiff's lawyer says, "I think \$90,000 will settle this case. Will your client give \$90,000?" The defense lawyer has authority to settle for that amount, but wants to settle for less.⁶³ In the fifth case, the lawyer represents three persons charged with shoplifting. Two have told him they will plead guilty and one says that he will not. The lawyer informs the prosecutor that the two will plead guilty *only if* the third is allowed to go free.⁶⁴

55. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577, 586 (1975).

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.

Id.

56. *Id.* at 589. Judge Rubin maintains that the legal profession is not expecting too much if its members are required to negotiate honestly and in good faith, regardless of the other side's expertise or sophistication. He cited the ABA oath of admission to the bar: "I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor." *Id.* at 593.

57. "It is inherent in the concept of an ethic, as a principle of good conduct, that it is morally binding on the conscience of the professional, and not merely a rule of the game adopted because other players observe (or fail to adopt) the same rule." *Id.* at 589.

58. White, *supra* note 23, at 927.

59. *Id.* at 931-35.

60. *Id.* at 931.

61. *Id.* at 932.

62. *Id.*

63. *Id.* at 932-33.

64. *Id.* at 933 (emphasis supplied).

White found the first three cases easy.⁶⁵ In the first case, he said it is all right in or out of court to argue an interpretation of a case or statute favorable to a client's position even if the lawyer does not personally agree with that interpretation.⁶⁶ White is correct as long as the law is not being falsely represented. The Model Code⁶⁷ and Model Rules⁶⁸ permit good faith argument for extension, modification or reversal of existing law. Such argument is not "frivolous" even though the lawyer personally does not believe the argument will ultimately prevail.⁶⁹

In the second case, White thinks that distortion of the value of a case or other subject matter by the lawyer is permissible even though it conflicts with his "dispassionate analysis of the value of his case."⁷⁰ He cited section 2-313 of the Uniform Commercial Code as permitting *general* statements concerning value to be made without the law treating them as warranties.⁷¹ Exception must be taken to White's conclusion, because distortion of value of the subject of the negotiation need not rise to the level of warranty before it is improper. It is wrong for a lawyer to lie for a client.

The third case involves what White considers a "false demand,"⁷² a technique in multiple-issue bargaining in which one side includes a series of demands about which "it cares little or not at all. The purpose of including these demands is to increase one's supply of negotiating currency. One hopes to convince the other party that one or more of these false demands is important and thus successfully to trade it for some significant concession."⁷³

White believes false demands are an acceptable negotiating technique.⁷⁴ He states, "Such behavior is untruthful in the broadest sense; yet at least in collective bargaining negotiation its use is a standard part of the process and is not thought to be inappropriate by any experienced bargainer."⁷⁵ White further states, "[a] layman might say that this behavior falls within the ambit of 'exaggeration,' a form of behavior that while not necessarily respected is not regarded as morally reprehensible in our society."⁷⁶

Again, exception must be taken to White's conclusion because this negotiating technique can become morally reprehensible and can cause great harm. In

65. *Id.* at 934.

66. *Id.*

67. MODEL CODE, *supra* note 4, at DR 7-102(A)(2).

68. MODEL RULES, *supra* note 1, at Model Rule 3.1.

69. *Id.* at Model Rule 3.1 Comment.

70. White, *supra* note 23, at 932.

71. *Id.* (emphasis supplied).

72. *Id.*

73. *Id.*

74. *Id.* at 934.

75. *Id.* at 932.

76. *Id.* at 934.

working out a divorce or separation settlement, for example, one may legitimately include in a list of demands those items the client would really like to have. One should, however, draw the line at encouraging a client to demand custody of children purely for purposes of gaining bargaining leverage. Demand for custody by a parent who does not, in fact, want custody (usually because he or she realizes that the children are better off with the other parent), is likely to create hostility and cause the divorce proceedings to escalate into hotly contested, expensive, and emotionally charged litigation. All this is done in an effort to gain concessions from the other side. The considerable harm done to the parties by this maneuver is nothing compared to the harm done to the children.

The last two cases White finds troubling. In response to the question, "Will your client give \$90,000?"⁷⁷ White reports that many, and perhaps most, lawyers will be forced to lie or to reveal that they have been given such authority. He adds, "Some might say that the rules of the game provide for such distortion, but I suspect that many lawyers would say that such lies are out of bounds and are not part of the rules of the game."⁷⁸ White correctly concludes that a lawyer should not lie, but turn aside such questions and avoid any inference from his silence.

As to the plea bargaining in the fifth case, White asks, "Is it conceivable that the act can be justified on the ground that it is part of the game in this context in that prosecutors as well as defense lawyers routinely misstate what they, their witnesses, and clients can or will do? None of these answers seems persuasive."⁷⁹ White is correct that it is not permissible to lie to the prosecutor in negotiating the plea bargain.

White appears to countenance lying by negotiators in some of these cases because of what he sees as limits on what the law can do. He states, "[i]n a sense rules governing these cases may simply arise from a recognition by the law of its limited power to shape human behavior."⁸⁰ He figuratively throws in the towel when he concedes, "[b]y tolerating exaggeration and puffing in the sales transaction, by refusing to make misstatements of one's intentions actionable, the law may simply have recognized the bounds of its control over human behavior."⁸¹

The error in both this suggestion, and the exception for lying in negotiations provided in Rule 4.1,⁸² is in the notion that rules of ethics must be set so that they accommodate the lowest possible threshold of professional behavior. Lawyers should abide by high and aspirational standards of conduct.

77. *Id.* at 933.

78. *Id.* at 934.

79. *Id.*

80. *Id.*

81. *Id.*

82. MODEL RULES, *supra* note 1, at Model Rule 4.1 Comment. See *supra* note 8.

Lawyers' influential position in society, together with their fiduciary responsibilities, demand uncompromising levels of trust, integrity, and veracity. Countenancing puffery, exaggeration, distortion and outright lying in negotiations is inconsistent with this high standard, especially in light of the indispensable role of lawyers in our legal system. Lawyers ought not be compelled to lie for clients or to compensate for the lies of opposing counsel who comfortably exploit the exception to veracity as set out in the Comment to Model Rule 4.1.⁸³

White suggests that truthfulness ought to be determined contextually by the subject matter of the negotiation, and the region and background of the negotiators,⁸⁴ and type of law practice.⁸⁵ This thinking represents another outgrowth of a *situational ethics* framework of analysis. The difficulty of devising standards applicable to the wide range of activities⁸⁶ embraced by negotiation and the wide range of proficiency, skill, and sophistication among lawyers from divergent backgrounds, contrary to White's suggestion, does not justify relaxing requirements of integrity and veracity in negotiations.

Is White correct in his assertion that successful negotiators must be able to mislead like poker players and that even the most honest and trustworthy do so?⁸⁷ Is misleading the same as lying? What is a lie? What is the harm in a little lying? Webster defines a "lie" as "an assertion of something known or believed by the speaker to be untrue with intent to deceive . . . an untrue or inaccurate statement that may or may not be believed true by the speaker . . . something that misleads or deceives."⁸⁸

Philosopher Sissela Bok defines a "lie" as "an intentionally deceptive message in the form of a *statement*."⁸⁹ When she began her study of lying, Bok wrote that she looked to moral philosophers for guidance and concluded that in addition to hurting the liar and the victim, lies harm society by lowering

83. *Id.*

84. White, *supra* note 23, at 931.

85. *Id.* at 929.

86. "[I]n the legal arena, negotiation includes dispute resolution, rule making, and transaction planning, virtually all law and legal processes must be infused with negotiation processes." Menkel-Meadow, *supra* note 21, at 908.

"Negotiation may concern dispute settlement, settlement of litigation, organization of an enterprise, conclusion of a contract, labor relations, government regulatory activity, custody and support in a family matter, and other legally significant relationships." Discussion Draft, *supra* note 28, at Rule 4 Introduction.

87. See *supra* note 58 and accompanying text.

88. MERRIAM-WEBSTER NEW COLLEGIATE DICTIONARY 689 (9th Ed. 1988).

89. S. BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 15 (1978) (emphasis in original).

the level of trust and social cooperation.⁹⁰ Relations among human beings are founded on some degree of veracity, without which institutions collapse.⁹¹

Bok recommends a "test of publicity"⁹² which asks which lies, if any, would reasonable persons justify. The test requires reasonable persons to look for non-deceptive alternatives and moral reasons for and against the lie from the perspective of those potentially deceived or affected by the lie. The test also considers the value to society of veracity and accountability, and whether informed consent to be deceived has been freely given (as in playing poker or bargaining in a bazaar where each tries to outwit the other). The reasonable persons would consider the harm to persons outside the deceptive situations, such as distrust, loss of personal standards, and spreading of deception by others in retaliation or limitation.⁹³

Consent, Bok observes, must be based on adequate information, ability to make a choice, and freedom to opt out.⁹⁴ Informed consent eliminates the discrepancy between liar and dupe. Thus, reasonable persons would probably have no objection to buyer and seller trying to outwit each other by bargaining deceptively in a bazaar.⁹⁵

Even if Bok's test of publicity countenanced lying in a bazaar or a poker game, the question remains whether negotiations by lawyers should be placed on a par with bargaining in a bazaar or playing poker. Looking beyond the liars and dupes to the harm to persons outside the situation, one can see that lying spreads and multiplies the harm and abuse, thereby increasing the damage.⁹⁶ Moreover, the absence of clear-cut standards as to what is acceptable increases the likelihood of abuse.⁹⁷

It is easy to see that blatant deception in negotiations can produce these harmful results. Even trivial puffery, if told with the objective of shading the truth or in an effort to distort or mislead, undermines the integrity of the liar, who will then find it easier to slide into more serious levels of lying and distortion. Like pedestrians crossing the street against red lights or automobile drivers exceeding the speed limit, law abiding citizens find themselves falling into the same practices when they observe large numbers of persons violating the law. If many lawyers shade the truth when they negotiate in behalf of clients, the practice will spread by imitation or retaliation and will spill over into more serious distortions. The ultimate outcome is loss of trust and goodwill toward lawyers and the law. Bar association public relations cam-

90. *Id.* at xix and Chapter 2.

91. *Id.* at 31.

92. *Id.* at 100.

93. *Id.* at Chapter 7.

94. *Id.* at 103-04.

95. *Id.*

96. *Id.* at 104.

97. *Id.*

paigns may be able to dispel *myths* about lawyers, but not matters for which there is a *factual* basis.

To avoid this insidious cycle, lawyers engaged in negotiations should make it a practice to weigh their statements before speaking and ask themselves: Is this statement true? Is it necessary? Do I have an alternative? May I say nothing or tell the truth? Like the social white lie, told usually out of good intentions to be polite or save someone's feelings, puffery, exaggeration, or simple misstatements in negotiations can become ingrained and habitual. At that point, duplicity becomes a way of life. These types of deception can be reduced by consciously looking for alternatives, even without clear-cut standards as to what is acceptable.

Bok is correct that some forms of dishonesty might be tolerable in some settings such as the bazaar and poker examples,⁹⁸ but the lawyer engaged in negotiations is not in such a setting. The new Model Rule 4.1⁹⁹ redefines the negotiation setting in such a way as to demean and diminish the lawyers' role and ethics.

Model Rule 4.1¹⁰⁰ is also inconsistent with the precept set out in the Preamble to the Model Rules: "As negotiator a lawyer seeks results advantageous to the client but consistent with the requirements of *honest dealings with others*."¹⁰¹ If "advantageous results . . . consistent with honest dealings with others"¹⁰² were observed as the acceptable level of negotiations by the profession, sharp practices would not be countenanced and those who engaged in them would be ostracized and disciplined. As a consequence, lawyers and their clients could realistically evaluate the subject matter of the negotiations and plan accordingly.

III. CONCLUSION

Maintaining moral sensitivity and awareness is crucial to the practice of law. The profession must resist inroads on the lawyer's commitment to truth, and take steps to correct rules that lessen this commitment. The unique role lawyers occupy in our society and their position as officers of our judicial system require that their word be trusted. More is required of a lawyer than the custom of the marketplace, than bargaining in a bazaar, or in playing poker.

98. See *supra* note 93 and accompanying text.

99. MODEL RULES, *supra* note 1, at Model Rule 4.1 and Comment. See *supra* note 8.

100. *Id.*

101. *Id.* at Preamble: A Lawyer's Responsibility. (emphasis supplied)

102. *Id.* This rule is also inconsistent with the proscription against dishonesty, deception and misrepresentation. *Id.* at Model Rule 8.4(c).

Lawyers must feel that theirs is a worthy role and honorable profession.¹⁰³ Self-acceptance is vital to a lawyer's well-being and profoundly affects professional relationships and practices.¹⁰⁴

Lying in negotiations should not be countenanced, much less expressly authorized. Before this unprecedented diminution of legal ethics takes hold, its advocates should bear the burden of establishing that negotiation cannot occur without an element of dishonesty. Since no one has apparently made a persuasive argument that lawyer negotiators cannot operate on a high plane, the presumption of honest behavior should remain,¹⁰⁵ and the exception to the requirement of truthfulness for lawyers engaged in negotiations, created by Model Rule 4.1 and its Comment,¹⁰⁶ should be repealed.

103. In his autobiography, Mahatma Gandhi wrote:

I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby -- not even money, certainly not my soul.

M. GANDHI, *ALL MEN ARE BROTHERS* 18 (1958).

104. See, e.g., Elkins, *supra* note 35, at 50:

The fact is . . . that virtually every lawyer wants to feel that he is not only a good lawyer (in the sense of technical proficiency) but that he is a lawyer of impeccable integrity. He not only wishes this to be his public image, he wishes to think this of himself. Self-acceptance is a very important element--perhaps the most important element--of a wholesome, serviceable personality.

(quoting J. PIKE, *BEYOND THE LAW, THE RELIGIOUS AND ETHICAL MEANING OF THE LAWYER'S VOCATION* 91 (1963)).

105. "Trust and integrity are precious resources, easily squandered, hard to regain. They can thrive only on a foundation of respect for veracity." Bok, *supra* note 53, at 249.

106. MODEL RULES, *supra* note 1, at Model Rule 4.1 and Comment. See *supra* note 8.