TRUTH OR CONSEQUENCES
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Is Honesty in Negotiations the Best Policy?

“Runs like a top. Owned by a little old lady who only drove it to church….” In some negotiations, we expect misrepresentation and non-disclosure. Regulations aside, caveat emptor is still the rule of the day in those situations. But what is anticipated when attorneys negotiate? Is “puffing” when giving an opinion of value appropriate? Should you threaten litigation which is not seriously contemplated? Is failing to reveal a serous defect in your position part of your ethical obligation?

Writers on the ethics of attorney representations in negotiations take widely varied positions. A comprehensive survey of opinions on the lawyer’s duty in negotiations is found in Ruth Thurman’s *Chipping Away at Lawyer Veracity: The ABA’s Turn Toward Situational Ethics in Negotiations*, 1990 J.Disp.Resol.103, 105-1110 (1990). Opinions contained in Ms. Thurman’s article range from Mahatma Ghandi’s approach (“Do not lie under any circumstances whatsoever, keep nothing secret.”) to the opposite extreme voiced by Professor James J. White, in *White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 4Am.B.Found.Res.J. 926, 931-35 (1980). White suggests that misleading the other side is the very “essence of negotiation.”

The Model Rules provide inconsistent guidance on the ethics of veracity in negotiations. The Preamble to the 2002 Model Rules of Professional Conduct sweepingly states: “As a negotiator, a lawyer seeks a result advantageous to the client, but consistent with the requirements of honest dealings with others.” The actual rules are considerably narrower.

Model Rule 4.1 “Truthfulness in Statements to Others” prohibits only (a) false statements of material fact or law, and (b) failure to disclose material facts when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless the disclosure is protected by Rule 1.6 regarding confidentiality. Comments to the new Rule observe that attorneys must be truthful when communicating with others on behalf of their clients, but it continues that counsel “generally has no affirmative duty to inform an opposing party of relevant facts.”

Model Rule 8.4 (c) states “it is misconduct for a lawyer to …engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” However the comments to the rule suggest that this higher standard of honesty does not apply to attorneys when they are representing clients.

While some attorneys will draw the line at “puffing” and others may feel comfortable making downright misleading statements in negotiations, making the best deal is a strong driving force in a competitive profession. However, two studies indicate that honesty may be the best policy, at least in terms of how you are viewed by your colleagues.

Andrea Schneider in *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 Harv.Neg.L.R. 143, 185-189 (2002) surveyed 2500 lawyers in the Midwest to learn what type of negotiating style they perceived was effective. That survey identified two negotiating styles: “problem-solving” and “adversarial”. Surveyed lawyers believed those attorneys using a “problem-solving” style were ethical, trustworthy and fair-minded. The lawyers who used the “adversarial” style were perceived as “manipulative, suspicious and bluffers”.

Gerald R. Williams, Professor of Law at Brigham Young University, and lecturer at the Harvard Program on Negotiation, has also identified two basic negotiation types from his research into attorney negotiation: the "cooperative" and the "aggressive" negotiator. In identifying objectives and traits in common among effective negotiators of both patterns, Williams found that engaging in ethical conduct and getting a fair settlement were identified as an objective of all effective negotiators. Honesty and ethical behavior were also identified as common traits of these negotiators.

The author of *Why Lawyers (and the Rest of Us) Lie & Engage in Other Repugnant Behavior*, Mark Perlmutter believes that lawyers lie primarily out of fear. Perlmutter believes that they should face their fears with courage and he has established an "integrity feedback loop" as part of his Texas law practice. The first step in the loop is a letter to opposing the counsel.

In the letter Perlmutter pledges to do his best to promote ethical, responsible, and cost-effective representation with civility and integrity. He commits himself to work with counsel to exchange sufficient information to fairly evaluate the case, to make good-faith efforts to settle and to afford opposing counsel a fair opportunity to present the merits of their case. Perlmutter then pledges to treat the matter as a problem to be resolved and to avoid playing "gotcha", thereby reducing the chances of an arbitrary result. Finally, Perlmutter invites the opposing party and counsel to evidence their support for the principles set out in the letter, observing that his interest is not a binding agreement, but an expression of cooperation.

The integrity loop next involves self-reflection by the attorney, comparing his conduct with the pledge reflected in the letter. Lastly, Perlmutter invites the opposing counsel and client to comment on his civility and ethics, and whether he attained the goals of the pledge. He encourages them to offer any ideas about how he could do a more effective and professional job.

Perlmutter's approach is diametrically opposed to the path generally taken by attorneys seeking to resolve a dispute. Some attorneys, in all likelihood Professor White, would argue that Perlmutter's approach is inconsistent with counsel's duty to vigorously represent the client. Seldom does a client encourage his attorney to be straightforward and cooperative and most consumers of legal services are ecstatic to win on a technicality. At the same time research indicates that utilizing cooperative, honest and ethical behavior in negotiations is perceived by opposing attorneys as effective. Perhaps honesty could be the best policy.