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LEGAL ETHICS IN THE NEGOTIATION ENVIRONMENT: A SYNOPSIS

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This article contends that the negotiation environment is an ethical environment. This is not a contentious position to adopt. However, the extent to which the negotiation environment is an ethically regulated environment may surprise some legal practitioners, especially those lawyers that employ deceptive strategies in negotiation. It is to such lawyers that this article is predominantly addressed, and the main aim of the article is to promulgate and explain the ethical constraints on negotiation practice.

I INTRODUCTION: THE SIGNIFICANCE OF NEGOTIATION

In an adversarial legal system there is a temptation to position the trial as the pinnacle of justice. There may be good reason to do so, and this is certainly the conventional approach, but the unfortunate flow on effect of placing one feature of the civil dispute resolution system above all others is that other facets of that system are thereby delineated as somehow being 'less' important than trial, and consequently tend to be less susceptible to scrutiny. In particular, the negotiation environment has traditionally been viewed by legal disciplinary authorities as an area of legal practice unworthy of serious examination compared to other areas of legal practice.[1] The judiciary have in the past reflected this attitude, consistently finding that the high standard of conduct required of members of the legal profession

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[1] See Jim Parke, 'Lawyers as negotiators: Time for a code of ethics?' (1993) 4 *Australasian Dispute Resolution Journal* 216, 220; Christine Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25 *UNSW Law Journal* 676, 678-81.

is more applicable with respect to duties to the court and clients, than with regard to conduct within the negotiation environment.[2]

Perhaps this view is partly a function of the private/public sphere dichotomy so prevalent in our society, with negotiation being viewed as essentially a 'private' matter between the parties to a dispute, and consequently outside the appropriate scope of regulation.[3] Whatever the reason, this past failure to appropriately regulate negotiation neglects to adequately consider the importance of negotiation to our entire civil justice system. The reality is that the practice of law, and (perhaps) the administration of justice, occurs more often in the negotiation setting than anywhere else. Although trial advocacy may be the glamourous ideal of civil justice, the overwhelming majority of all civil disputes are settled through negotiation.[4]

Negotiation is important because, unlike trial advocacy, it is pervasive and an inherent part of any civil litigation process.[5] It has been said that negotiation is 'central to virtually all forms of law practice',[6] a 'fundamental task within all aspects of the legal

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2 See, eg, *Myers v Elman* [1940] AC 282; *Law Society of NSW* v *Foreman* (1994) 34 NSWLR 408, 412 (Kirby P). For a comprehensive discussion and history of such duties see David A Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63.

3 This is consistent with Parker's point that traditionally lawyers' ethics have been more about lawyers' autonomy than anything else: see Parker, above n 1, 678.

4 See Gerald B Wetlaufer, 'The Ethics of Lying in Negotiations' (1990) 75 *Iowa Law Review* 1219, 1220; Van M Pounds, 'Promoting Truthfulness in Negotiation: A Mindful Approach' (2004) 40 *Willamette Law Review* 181, 181; Judy Gutman, 'Legal Ethics in ADR practice: Has coercion become the norm?' (2010) *Australasian Dispute Resolution Journal* 218, 219; Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2nd ed, 2014) 204; Art Hinshaw, Peter Reilly and Andrea Kupfer Schneider, 'Attorneys and Negotiation Ethics: A Material Misunderstanding?' (2013) 29 *Negotiation Journal* 265, 266.

5 Walter W Steele Jr, 'Deceptive Negotiating and High-Toned Morality' (1986) 39 *Vanderbilt Law Review* 1387, 1387.

6 Gary T Lowenthal, 'The Bar's Failure to Require Truthful Bargaining by Lawyers' (1989) 2 *Georgetown Journal of Legal Ethics* 411, 412.

profession',[7] and is arguably the 'quintessential lawyering activity'.[8] All lawyers negotiate repeatedly in the course of legal practice,[9] and lawyers negotiate more than they do anything else.[10] To exclude negotiation from professional conduct rules, and/or legislative or judicial regulation, is to exclude the main work of lawyers from ethical scrutiny. This would be absurd. It would be akin to saying that lawyers need only act ethically on rare occasions.

Lawyers must act ethically in negotiation for the civil dispute resolution system to aspire to a modicum of moral worth. If the vast majority of civil disputes are settled through a process with no ethical boundaries, then the system that allows (or maintains) this has little or no moral value. This was perhaps the case in the past, and may have contributed to the low public opinion of both the civil justice system and the lawyers that inhabit it.[11] The negotiation process is where the public will most likely see lawyers in action; it must be an ethical process. Given the importance of negotiation to legal practice and the civil dispute resolution system, it is arguable that the ethical standards applicable to negotiation play a much larger part in promoting 'justice' (broadly defined)[12] than the ethical principles concerning behaviour

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7 See Peter Reilly, 'Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help' (2009) 24 *Ohio State Journal on Dispute Resolution* 481, 488.

8 Hinshaw, Reilly and Schneider, above n 4, 277.

9 See Charles B Craver, 'Negotiation Ethics for Real World Interactions' (2010) 25 *Ohio State Journal on Dispute Resolution* 299, 300.

10 See Steele, above n 5, 1388.

11 It is of interest to note that in the *Roy Morgan Image of Professions Survey 2015*, in which almost 600 Australians were asked to rate (as either 'Very High', 'High', 'Average', 'Low', or 'Very Low') various occupations in terms of 'honesty and ethical standards', only 31 percent rated lawyers as either 'Very High' or 'High' in that respect. It is also of interest to note that lawyers have scored similarly low in that respect since the annual survey began approximately 30 years ago: <http://www.roymorgan.com/findings/6188-roy-morgan-image-of-professions-2015-201504280343>. For a discussion of public perceptions of lawyers and the civil justice system see Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (LexisNexis, 6th ed, 2014) 7-18.

12 See Lillian Corbin, Paula Baron, and Judy Gutman, 'ADR Zealots, Adjudicative Romantics and Everything in Between: Lawyers in Mediations' (2015) 38 *UNSW Law Journal* 492, who state that 'Australia's adversarial legal system has undergone radical change in recent years. Access to justice is no longer confined

in, and duties to, the court. Certainly, allowing, or ignoring, unethical conduct in the negotiation environment is detrimental to the health of the entire legal system,[13] and serves to erode public confidence in that system.[14]

The practice of law has always been largely based on negotiating settlement of disputes, but this has become even more of a focus recently with the creation in some jurisdictions of both an ethical and legislative duty to encourage settlement of a civil dispute.[15] The Australian judiciary have also adopted a policy of encouraging the settlement of all civil disputes.[16] Given the significance of negotiation, and the fact that, unlike in court (where the judicial officer, armed with rules of evidence and procedure, and able to wield the laws of perjury and contempt of court, may effectively discourage unethical conduct), there are few other safeguards in the negotiation environment, it has been argued that the ethical standards demanded of lawyers in negotiation, in terms of both good faith and integrity, should actually be *higher* than those demanded elsewhere in the litigation process.[17]

Perhaps this might be going too far, but it does seem reasonable to hold that negotiation should have at least the same attention as other aspects of litigation,[18] and the ethics applicable to the negotiation

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to a court system. There is a broader view of justice that extends beyond courts', at 492.

[13] See Hinshaw, Reilly and Schneider, above n 4, 278; *Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352 [75]-[77].

[14] See G E Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 5th ed, 2013) 699.

[15] See, eg, *Australian Solicitors' Conduct Rules 2015* (SA) r 7.2; *Rules of Professional Conduct and Practice 2005* (NT) r 10A.3; *Civil Procedure Act 2010* (Vic) s 22.

[16] See Mark J Rankin, 'Settlement at all Cost: The High Price of an Inexpensive Resolution?' (2009) 20 *Australasian Dispute Resolution Journal* 153, 153-5.

[17] See Steele, above n 5, 1403; Gino Dal Pont, 'Are ethical principles malleable in the negotiation environment?' (2008) 46(8) *Law Society Journal* 42, 43; Parke, above n 1, 223; See also *Legal Services Commissioner v Mullins* [2006] LPT 012, [34]; *Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352, [74]-[76].

[18] See Bobette Wolski, 'Reform of the Civil Justice System 25 Years past: (In)adequate responses from law schools and professional associations? (And

environment should be no different than those required in court.[19] Certainly, if we hold that acting with honesty and integrity is a lawyer's ethical duty, then it makes little sense to apply different standards in that respect merely based on where the relevant conduct occurs;[20] otherwise one is implying that ethical obligations differ markedly merely due to situational geography.[21]

Accordingly, deceptive tactics should be no more tolerated in private negotiation than they are in court.[22] The 2006 decisions of *Legal Practitioners Complaints Committee v Fleming*[23] and *Legal Services Commissioner v Mullins*[24]seem to adopt this view.[25] In *Fleming* the Tribunal stated that 'just as in litigation a practitioner may not use dishonest or unfair means or tactics to hinder his opponent in the conduct of his case, so he ought not do so in other areas of practice'.[26] Similarly, in *Mullins* the Tribunal found that 'negotiants anticipate a measure of honesty from each other',[27] and lawyers should negotiate with the expectation that legal consequences should flow from any 'intentional deception about material facts'.[28] It should be noted that both *Fleming* and *Mullins* are tribunal, rather than higher court, decisions. However, although there is yet to be a definitive statement from a higher court concerning the specific ethical expectations of legal practitioners involved in a negotiation, courts

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how best to change the behaviour of lawyers)' (2011) 40 *Common Law World Review* 40, 64; *Legal Practitioners Complaints Committee* v *Fleming* [2006] WASAT 352, [76].

19 See Michael H Rubin, 'The Ethics of Negotiation: Are There Any?' (1996) 56 *Louisiana Law Review* 447, 472-6; Wolski, 'The Truth about Honesty and Candour in Mediation: What the Tribunal Left Unsaid in *Mullins'* Case' (2012) 36 *Melbourne University Law Review* 706, 708, 739; Dal Pont, above n 17, 42. Cf Selene Mize, 'Is deception in negotiating unprofessional?' [2005] *New Zealand Law Journal* 245, 247.

20 See Dal Pont, above n 17, 43.

21 Ibid.

22 See Parker and Evans, above n 4, 211.

23 [2006] WASAT 352.

24 [2006] LPT 012.

25 See *Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352, [74]-[76]; *Legal Services Commissioner v Mullins* [2006] LPT 012, [34].

26 *Legal Practitioners Complaints Committee* v *Fleming* [2006] WASAT 352, [74].

27 *Legal Services Commissioner v Mullins* [2006] LPT 012, [27].

28 *Legal Services Commissioner v Mullins* [2006] LPT 012, [28].

have nonetheless made it quite clear that a 'blatantly dishonest'[29] lawyer will not be tolerated in that environment, and that 'there is an obligation on a practitioner to deal with all persons, practitioners or not, opponents or not, with honesty and fairness'.[30]

Notwithstanding such comments from the judiciary, there remains the need for a code of ethics for the negotiation environment.[31] Without a uniform code lawyers may have quite diverse opinions as to what constitutes ethical conduct in negotiation, and the absence of a code arguably carries the symbolic message that ethics do not matter as much within the negotiation environment.[32] Fortunately, in Australia we effectively have such a code through application of the current professional conduct rules. Prior to embarking upon a discussion of these rules, and the role they may play in ensuring ethical conduct in negotiation, it seems worthwhile to emphasise the continued demand for such a code of negotiation ethics (and the promulgation of those ethical principles) by highlighting the fact that many lawyers still exhibit unethical behaviour in the negotiation environment.[33]

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29 *Legal Practitioners Conduct Board v Hannaford* (2002) 83 SASR 277, 283 (Gray J).

30 *Lander v Council of the Law Society of the Australian Capital Territory* (2009) 231 FLR 399, 419.

31 See, eg, Parke, above n 1, 225-8; Ross, above n 11, 496; Wolski, above n 18, 65.

32 See Dal Pont, above n 14, 697; Lowenthal, above n 6, 444.

33 It should be noted that there is a relative scarcity of Australian scholarship with regard to lawyer behaviour in the negotiation environment. Consequently, much of the research relied upon in the following section (and in the article as a whole) is from USA commentaries on the issues. The author acknowledges that there are marked differences between the US and Australian legal professions, and in particular '[t]he law and practice of lawyering in Australia have long imposed stronger obligations on lawyers to act as "officers of the court" to restrain client misconduct than in the United States': Christine Parker, Robert Eli Rosen, and Vibeke Lehmann Nielsen, 'The Two Faces of Lawyers: Professional Ethics and Business Compliance With Regulation' (2009) *Georgetown Journal of Legal Ethics* 201, 205-6. Nonetheless, although possibly not directly applicable to the Australian situation, there is enough commonality between the US and Australia to make such references relevant and valid for the purposes of this article.

II SUSPECT NEGOTIATION PRACTICES

For many lawyers, dishonest and deceptive conduct in negotiation is standard practice.[34] It is both widespread and common.[35] It has been said that deceit prevails in negotiation;[36] that the negotiation environment is a 'domain of deceit';[37] and that 'deception is the spirit of negotiation'.[38] There have been a number of recent empirical studies that confirm that at least a large minority of lawyers fail to adhere to the truth in the negotiation environment,[39] and it has even been suggested that many lawyers actually engage in 'fraudulent behavior' in the negotiation environment.[40] It is arguable that deceit in negotiation is the time-honoured approach of the legal profession, and perhaps White best sums up the traditional legal negotiator in this respect:

> On the one hand the negotiator must be fair and truthful; on the other he must mislead his opponent. Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful

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[34] See Michelle Wills, 'The Use of Deception in Negotiations: Is it "strategic misrepresentation" or is it a lie?' (2000) 11 *Australasian Dispute Resolution Journal* 220, 220-1. Indeed, lawyers may have been taught to lie; Ross has made the point that some textbooks on negotiation even suggest lying during the course of negotiation as not just a permissible, but even a necessary, tactic: Ross, above n 11, 494. It should be noted that the textbooks to which Ross refers were published over two decades ago. See also Parke, above n 1, 221-3; Reilly, above n 7, 483-4.

[35] See Reilly, above n 7, 519; Wetlaufer, above n 4, 1224; Reed Elizabeth Loder, 'Moral Truthseeking and the Virtuous Negotiator' (1994) 8 *Georgetown Journal of Legal Ethics* 45, 69; Lowenthal, above n 6, 412; Parke, above n 1, 221-3; Craver, above n 9, 312.

[36] See Wills, 'The Use of Deception', above n 34, 220; Parke, above n 1, 223; Reilly, above n 7, 491-2.

[37] Pounds, above n 4, 181.

[38] Steele, above n 5, 1390.

[39] See Deborah Schmedemann, 'Navigating the Murky Waters of Untruth in Negotiation: Lessons for Ethical Lawyers' (2010) 12 *Cardozo Journal of Conflict Resolution* 83, 92-6. Indeed, some studies suggest that it is a majority that so fail: see Hinshaw, Reilly and Schneider, above n 4, 278; and perhaps even as much as 70 percent of lawyers routinely lie in negotiation: see Pounds, above n 4, 186; Schmedemann at 93.

[40] Hinshaw, Reilly and Schneider, above n 4, 284-5.

> negotiators and those who are not lies in this capacity both to mislead and not to be misled.[41]

This is consistent with Raiffa's view that deception is inherent to effective negotiation.[42] Of course, none of this should be altogether surprising, as it is an easy strategy to adopt, and 'the temptation to increase one's negotiating power through controlling, concealing or distorting information may prove difficult to resist'.[43] Suffice to say that the use of deceptive tactics by lawyers in negotiation is not unusual, and is probably somewhat entrenched in legal practice.

So, what do lawyers tend to lie about during a negotiation? The easy answer is 'many things', but the most common misrepresentations concern price, values, interests and priorities.[44] Lies about price and value are especially common.[45] One of the more standard lies employed in the negotiation environment is to misrepresent a client's bottom line or reservation point.[46] This occurs when the lawyer states something along the lines of 'my client will not accept anything less than $X to settle this matter', when the lawyer has specific instructions that the bottom line is actually less than $X. This scenario represents the conventional positional bargaining approach, whereby each negotiator begins with an extreme position that does not actually reflect the client's true position, and gradually makes concessions until settlement is achieved.[47] Indeed, it has been asserted that deception is 'an integral component of positional bargaining',[48] as

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41 James J White, 'Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation' (1980) 5 *American Bar Foundation Research Journal* 926, 927-8.

42 See Howard Raiffa, *The Art and Science of Negotiation* (Harvard University Press, 1982) 142-3. Even opponents of deceitful conduct concede that it can be 'highly effective': see Wetlaufer, above n 4, 1230.

43 See Wills, above n 34, 222.

44 For a comprehensive list of the more common strategies in this respect see Wetlaufer, above n 4, 1223-6. See also Wills, above n 34, 223-4; Reilly, above n 7, 492-3.

45 See Steele, above n 5, 1395; Mize, above n 19, 248.

46 See Lowenthal, above n 6, 423; Pounds, above n 4, 187.

47 See Roger Fisher, William Ury, and Bruce Patton, *Getting to Yes: Negotiating an Agreement Without Giving In* (Century Business, 2nd ed, 1991) 6.

48 See Wills, above n 34, 222.

such hard bargaining practices 'derive their power largely from deception'.[49] Perhaps the temptation to lie and deceive also stems from a distributive (rather than integrative) bargaining approach?[50] Certainly, 'lying offers significant distributive advantages to the liar'.[51]

A lawyer may not only lie or otherwise deceive as to his or her client's bottom line, but also their authority to settle, the overall strength of the client's case (and the related willingness to go to court), or the existence of applicable authority or other objective standards. A lawyer might also deceive his or her opponent as to what interests, goals or priorities the client views as important. For example, a common strategy is to make fictitious statements as to client positions or interests, overstating or exaggerating the importance of those interests or positions to the client, and correspondingly making demands based on those positions or interests, all along with the intention of compromising or conceding those demands later in the negotiation, in return for far more important compromises from the other side to the dispute.[52] One thereby deceives both as to the significance of what one is giving up, and as to the relative insignificance of what one receives in exchange for those (actually unimportant) concessions.[53] This strategy has been described merely as 'strategic misrepresentation',[54] rather than an unethical or deceitful course of conduct. However, such a view is tenuous: the tactic is self-evidently deceitful as the original demands were pure contrivances.[55]

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49 See Scott R Peppet, 'Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining' (2002) 7 *Harvard Negotiation Law Review* 83, 91.

50 See Pounds, above n 4, 186. In addition, perhaps both hard bargaining and lying in negotiation are simply male templates for action anchored in legal history?: see Kevin Gibson, 'The New Canon of Negotiation Ethics' (2004) 87 *Marquette Law Review* 747, 751. He argues for this from an interpretation of Gilligan's work: see Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982).

51 Wetlaufer, above n 4, 1230.

52 See Wills, above n 34, 224.

53 See Raiffa, above n 42, 142.

54 Ibid.

55 See Mize, above n 19, 246; Wills, above n 34, 224.

Some might argue that all such lies about bottom lines, confidence in the strength of a client's case, or 'strategic misrepresentation' with regard to client priorities, are not really lies at all, but simply 'strategic posturing'.[56] This view holds that such statements are not ethically unsound because they do not misrepresent the material facts of the matter in dispute,[57] but rather the negotiating process itself. In other words, from this perspective it matters what constitutes the subject matter of the knowingly false statement.[58] Although some argue that such 'distinctions …. make no difference',[59] there is some basis for this proposition that not all lies are unethical. Of course, Kant would disagree, but from a certain teleological or consequentialist perspective some lies may be justified if the result of such conduct is in sum positive, or at least not harmful. For example, one might lie to lubricate social interaction — so called white lies — and in some circumstances these might be justified.[60] However, even such so-called 'harmless' lies have a negative effect, as they are still untruths,[61] and may 'erode inhibitions against lying in more harmful contexts'.[62]As Loder explains, 'deception is often …. more detrimental' than most suppose.[63]

Furthermore, if we are to assess ethicality by reference to the consequences of such conduct, we should recognise that there are clear benefits to the deceiver associated with utilising deceptive tactics; put simply, such conduct would not exist if there were no advantage to the deceiver.[64] If a misrepresentation is successful it benefits the liar as it thereby 'distorts the deceived's understanding and ability to reason about courses of action',[65] so is instrumentally effective in creating a

56 Mize, above n 19, 245; See also Raiffa, above n 42, 142.
57 See Bobette Wolski, 'On Mediation, Legal Representatives and Advocates' (2015) 38 *UNSW Law Journal* 5, 18.
58 See Mize, above n 19, 247.
59 Wetlaufer, above n 4, 1242.
60 See Loder, above n 35, 60.
61 See Wetlaufer, above n 4, 1243-4.
62 Loder, above n 35, 60; See also Pounds, above n 4, 213.
63 Loder, above n 35, 46.
64 See Wetlaufer, above n 4, 1272.
65 Loder, above n 35, 51.

strategic advantage for the liar.[66] Indeed, it has been argued that 'one's effectiveness in negotiations depends in part upon one's willingness to lie'.[67] To put it another way, if lawyer A lies, then the honest, trusting lawyer B may be at a severe disadvantage,[68] and lawyer A may consequently get a better outcome in the short-term.[69] For example, lying about reservation price or bottom line can reap substantial rewards.[70] Specifically, lying about a client's bottom line can lead to a more favourable result for the client because it creates a manufactured and misleading zone of agreement. For example, Party A may be willing to pay up to $140 to settle the dispute, and Party B may be willing to accept no less than $110 to settle the dispute. If Party B lies and states that only an offer of $130 will suffice and nothing less, then Party B has increased their profit, as provided Party A does not discover the lie, s/he will accept that offer as it is within the range Party A is willing to accept. Much like the prisoners' dilemma in game theory, one may profit from lying and betraying the other.[71] The lawyer making the misrepresentation has done so to deceive his/her opponent in the negotiation, and the goal of that deception is to accrue strategic benefits for the deceiver;[72] hardly a laudable end goal from a teleological perspective.

Given the clear strategic advantages of lying and/or deceiving in the negotiation environment, combined with the fact that the temptation to lie is made even more 'difficult to resist'[73] because a lie

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66 See Reilly, above n 7, 496-9; Wetlaufer, above n 4, 1221; Pounds, above n 4, 184-6.

67 Wetlaufer, above n 4, 1220.

68 See Steele, above n 5, 1395; Lowenthal, above n 6, 411.

69 See Schmedemann, above n 39, 105.

70 See Wetlaufer, above n 4, 1226.

71 See Gibson, above n 50, 748. It is for such reasons that it has been said that 'only saints and fools can be relied on to tell the truth': Wetlaufer, above n 4, 1233.

72 It should be noted that this may not be the only impetus to lie. For example, Woolley and Wendel believe that not enough attention has been given to the function of 'the individual's personal features – about, *inter alia*, her dispositions, personality, character, cognition, emotions, or virtues': Alice Woolley and W Bradley Wendel, 'Legal Ethics and Moral Character' (2010) 23 *Georgetown Journal of Legal Ethics* 1065, 1066. Further, they hold that 'cognitive and social psychology are important tools for understanding how people make ethical decisions' at 1067.

73 Wills, above n 34, 222; See also Wetlaufer, above n 4, 1230.

is generally not discovered,[74] some lawyers continue to do so, so it is no surprise that a number of justifications have been offered up by those wishing to persist with the practice. Of course, it should be recognised at the outset that rationalisations for deception just indicate the 'moral imperative of that particular negotiator',[75] and that excuses to lie or otherwise deceive are inherently unsatisfactory[76] because such justifications 'proceed from an initial but unspoken assumption — that being less than truthful is acceptable conduct for a member of the legal profession'.[77] That being said, it is nonetheless worthwhile to analyse the most common justification offered to excuse or justify lying and deception in negotiation: that of client interest.[78]

III CLIENT INTEREST

The main justification advanced for the ethical acceptability of deceit within the negotiation environment is that of client interest.[79] That is,

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74 See Lowenthal, above n 6, 411; Parke, above n 1, 223; Wetlaufer, above n 4, 1230-2.

75 Steele, above n 5, 1391.

76 For a comprehensive critique of the various justifications and excuses offered see Wetlaufer, above n 4, 1236-71.

77 Rubin, above n 19, 458. To put it another way, a lie is still a lie, and reference to client interests (or any other purported justification) does nothing to change that: see Lowenthal, above n 6, 416, 423.

78 One might argue that puffery is also a commonly utilised justification for lying within the negotiation environment. This issue will not be discussed here because an adequate analysis of puffery is beyond the scope of this article and because puffery may be distinguished from client interest in the sense that the argument from puffery is not so much an argument justifying deception, but rather an argument that making false statements within the negotiation environment is not deceiving because no one actually believes that what is being said is true in such an environment. It is of interest to note in this respect that in *Mullins* the argument was made that disciplinary bodies should recognise that commercial negotiations are conducted on a tacit assumption that knowingly false statements will be made, and accordingly no sanctions should be imposed for such conduct, but this argument was soundly rejected by the tribunal: *Legal Services Commissioner v Mullins* [2006] LPT 012, [25]-[26].

79 See Rubin, above n 19, 458. The client interest justification is well made by White. Of course, as indicated earlier, White also sees nothing morally wrong with deception within negotiation without the need for any justification, and

some lawyers believe that without some form of deceit, a lawyer cannot hope to satisfy the duty to act in the client's best interests, which in a negotiation entails getting the best result for the client;[80] thus, client interest justifies deception.[81] This view is so ingrained that many lawyers that regard themselves as otherwise generally honest will nonetheless engage in deceptive conduct when they perceive that it is in their client's interest to do so,[82] and it has even been suggested that some 'lawyers may be more willing to lie on a client's behalf than they would on their own'.[83]

Although the client interest justification may be described as an immature or simplistic ethical position,[84] from a more traditional professional ethics perspective reference to the duty to the client might, at first glance, seem a plausible justification because there is no doubt that a lawyer owes an ethical duty to act in the client's best interests. This duty is evident from all professional conduct rules, but it is also an ethical duty more broadly speaking. Dare has made the point that 'lawyers have *moral* grounds for regarding themselves as having duties to their clients which may allow or require them to act in ways which would be immoral were they acting outside of their professional roles'.[85] That is, the role of lawyers in society — protecting client's legal rights — is itself moral as it serves a public

indeed views misleading the other side as an essential component of the 'game' of negotiation: see White, above n 41, 926-8.

80 See Robert J Condlin, 'Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role' (1992) 51 *Maryland Law Review* 1, 71.

81 See Steele, above n 5, 1390; Rubin, above n 19, 468-71. This 'client interest' focus raises an often neglected, but pertinent, question: how do clients feel about this attitude? Steele makes the salient point that generally 'clients come to lawyers for lawful relief and for honourable service, not for fraudulent relief and for deceitful service'; consequently, lawyers seeking to adhere to the duty to act in the client's best interests should be guiding clients away from deceitful tactics, rather than encouraging them: see Steele, above n 5, 1393.

82 See Pounds, above n 4, 182.

83 Hinshaw, Reilly and Schneider, above n 4, 278.

84 As Parker explains, a 'responsive' or 'morally activist conception of ethics' is the more mature and reasoned approach, which 'means that lawyers should be responsive to broader ethical concerns than merely the narrow self-interest of clients. They will consider the impact of all their actions on justice, the integrity of the legal system and, perhaps, other social values': Parker, above n 1, 687.

85 Tim Dare, 'The Ethics in Legal Ethics' (2010) 13 *Legal Ethics* 182, 182.

purpose.[86] However, whether this demands or permits utilising deception as a strategy in negotiation is highly questionable. Indeed, the Federal Court has recognised that although there is a duty to represent a 'client's interests forthrightly and without fear or favour', it has simultaneously stressed the 'obligation on a practitioner to deal with all persons, practitioners or not, opponents or not, with honesty and fairness'.[87]

The above judicial statement may be viewed as an expression consistent with the modern civil dispute resolution practice, whereas it is arguable that the more extreme client interest perspective is predicated upon a somewhat anachronistic conception of legal representation: that of the zealous advocate operating exclusively within an adversarial system. The adversarial advocate concept of legal representation has a long history,[88] and professional legal ethics have traditionally reflected this zealous adversarial advocate model.[89] The client interest approach is the traditional approach of the adversarial advocate. Under such a model, the client's interests, and duties to the client, are the predominant concern of both legal practice and professional ethics,[90] which allows (or causes) lawyers to be amoral in their approach to ethical decision making;[91] that is, by reference to the duty to protect the client's best interests, a lawyer may rationalise almost any conduct without taking moral responsibility for that conduct.[92] It is easy to see how the zealous advocate model thus creates a strong impetus to practice deception in negotiations.[93] With such an (un)ethical perspective the lawyer need only ask: what is in the client's best interests? Lawyers adopting this concept of legal

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86 Ibid 183-5.

87 *Lander* v *Council of the Law Society of the Australian Capital Territory* (2009) 231 FLR 399, 419.

88 See Parker, above n 1, 678; Mize, above n 19, 248.

89 See Parker, above n 1, 680, 700-3; Wolski, above n 18, 60-1.

90 See Parker, above n 1, 678; Wolski, above n 18, 61. It is of interest to note that Parker points to four possible approaches to ethical reasoning, with the adversarial advocate approach being one of the most dominant in legal practice: see Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30 *Monash University Law Review* 49, 57-60.

91 See Wolski, above n 18, 61.

92 See Parker, above n 90, 57; Parker, above n 1, 686.

93 See Hinshaw, Reilly and Schneider, above n 4, 285.

ethics believe that they are required to achieve as much as possible for the client,[94] and it has been found that many lawyers that embrace this perspective do not see what they do for the client as unethical because they view themselves as simply playing their designated *role* within the legal system;[95] this 'role morality'[96] perspective allows such lawyers to do within this context what they would not do outside of this role.

However, even if the zealous adversarial advocate model of lawyering has served a necessary (and perhaps even honourable) purpose in the past (and it is certainly arguable that it has done so during historical moments of despotism in government), it is highly questionable whether the current civil justice system continues to reflect this adversarial past.[97] Although our contemporary civil justice system remains adversarial in principle, recent developments, such as case management, the judicial policy of encouraging settlement of all civil disputes, the legislative obligation to consider settlement in some jurisdictions, and the pervasiveness of ADR (both private and court sanctioned, and in some cases court mandated), results in our civil justice system exhibiting what may be labelled a 'diluted' form of adversarialism. Certainly, once a civil dispute moves from litigation to negotiation, a lawyer's role should change. In particular, the adversarial advocate approach to legal practice and ethics must necessarily be diminished (if not abandoned) within the negotiation environment.[98] As the Tribunal noted in *Fleming*:

> In seeking to settle a matter pursuant to his client's instructions or the procedures of the Court, the practitioner, in some senses, gives up his 'adversarial' role in favour of a 'negotiating' role. In that co-operative role it is important that practitioners may be relied upon by the other party and his advisers to act honestly and fairly in seeking a reasonable resolution of the dispute. If everything a practitioner says in negotiations

94 See Parker, above n 1, 679.
95 See Pounds, above n 4, 189-90.
96 Parker, above n 1, 686.
97 See Parker and Evans, above n 4, 222-3; Corbin, Baron and Gutman, above n 12, 509.
98 See Parker and Evans, above n 4, 218-20.

> must be checked and verified, many of the benefits and efficiencies of a settlement will be lost or compromised.[99]

This does not mean that lawyers must practice collaborative lawyering,[100] or 'ethics of care' lawyering,[101] but simply that in a negotiation the adversarial approach must be somewhat subdued because compromise, and thereby dispute resolution, would be almost impossible if one maintained a purely adversarial outlook in that environment.

On the other hand, some argue that even within the self-evidently less adversarial environment of a negotiation, deception remains justified by reference to the duty to advance the client's interest.[102] However, even accepting this antiquated view that the lawyer must advance the client's interests above all else, it does not necessarily follow that this justifies deception in the negotiation environment. Leaving aside for now the fact that one can be both loyal and zealous without practising deceit,[103] it is questionable whether acting deceitfully in a negotiation actually achieves that desired best result for the client, as the adversarial approach usually leads to distributive bargaining, or 'zero-sum' negotiation (whereby what is gained by one party is lost by the other),[104] which precludes a more integrative bargaining approach (whereby one seeks a 'win-win' outcome) which may be the best result for both parties.[105] Put simply, adopting an extreme adversarial stance within a negotiation precludes the exploration of more varied, innovative and possibly productive dispute resolution. Being deceitful within the negotiation environment may

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99 *Legal Practitioners Complaints Committee* v *Fleming* (2006) 48 SR (WA) 29; [2006] WASAT 352, [75].

100 Loder probably hopes for more than can be expected by casting negotiation as opportunities for 'moral truthseeking through dialogue that helps conversants to test ideas': Loder, above n 35, 47.

101 See Parker, above n 90, 68-74.

102 See Craver, above n 9, 310-11.

103 See Wetlaufer, above n 4, 1257.

104 See Reilly, above n 7, 494.

105 Ibid 495. The benefits of this approach may be simply demonstrated by reference to the classic fruit and rind example, whereby a settlement moves from 50/50 satisfaction to 100/100 satisfaction: see Wetlaufer, above n 4, 1227.

also result in a failure to achieve settlement of the dispute in instances where settlement would have likely otherwise occurred. For example, if A will accept $80, but no less, to settle an action, and B is willing to pay up to $80 to settle that action, but B's lawyer states that s/he will only pay $70 to achieve that, then there may be no agreement; the lie has thereby deprived both sides of a mutually beneficial result.[106]

Furthermore, it may well be that the client's best interests are not necessarily advanced by getting the best possible deal; that is, client interest might be viewed 'in the context of the client's network of relationships',[107] and in particular preserving those relationships. In many instances a particular client may be much better served by his/her lawyer adopting a more cooperative approach in negotiations with the other party to the dispute. Indeed, it has been demonstrated in a number of studies that there are practical advantages to being honest,[108] and an honest negotiator is more effective in the long run than the dishonest one,[109] and further that interest-based bargaining (ie a mutual problem solving approach to dispute resolution) and similar approaches 'are optimal over repeated encounters'.[110]

Even if there are short-term gains to be had by lying within a negotiation for a particular current client, this does not justify such lying as there may be long term disadvantages for that client, or future clients, that outweigh the short term benefits for the present client.[111] For example, an issue often ignored by advocates of the client interest justification is that lying may actually be inconsistent with the duty to act in the best interests of a client because if the lie is discovered, and this leads to further conflict and expensive litigation, then the lie has

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106 See Wetlaufer, above n 4, 1227.

107 Reilly, above n 7, 487. See also Mize, above n 19, 245-6; Craver, above n 9, 307-8; Parker, above n 90, 73.

108 See Loder, above n 35, 93-4.

109 See Pounds, above n 4, 222-3; Mize, above n 19, 245-6.

110 Gibson, above n 50, 749. However, one should also be cautious about assuming that the integrative approach is always appropriate, or even possible. In many instances both sides will value and want the same distributive item, so conflict may be unavoidable: see Craver, above n 9, 304.

111 See Gibson, above n 50, 750.

directly cost the client, and any short-term or initial benefit to the client has been thereby eradicated.[112] More significantly, lawyers engaging in deceptive conduct in a negotiation are likely to harm their 'reputational interests',[113] and are unlikely to be believed in future negotiations,[114] thereby significantly diminishing their effectiveness as a negotiator[115] because '[b]asic trust is essential to bargaining interactions';[116] thus placing their future clients' best interests in jeopardy.[117] This point has been made by the Tribunal in *Fleming*:

> Practitioners who engage in misleading conduct or sharp practice can hardly expect to receive the trust and respect of their colleagues (much less of the Court). Yet such trust and respect is a fundamental requirement of a practitioner's practice if he or she is properly to play his or her part in the administration of justice and adequately to serve the interests of his or her client.[118]

Perhaps most telling against the client interest justification for deceit in negotiation is that reference to 'client interest' is ultimately indefensible when one realises what 'client interest' may mean: it is often nothing more than the self-interest of the lawyer. That is, if a lawyer represents a client for personal gain, then achieving the most for that client is directly related to the lawyer's interest. In the US, where plaintiff lawyers may be paid a percentage of the client's court ordered compensation or settlement amount, this relationship between client interest and lawyer interest is clear. In Australia, where legal fees are not usually connected to the monetary amount a client receives

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112 Ibid.

113 Reilly, above n 7, 487. See also Mize, above n 19, 245; Craver, above n 9, 307-8. Conversely, a 'reputation for truthfulness and fair dealing can be a source of power in negotiations': Michelle Wills, 'The Negotiator's Ethical and Economic Dilemma: To Lie, Or Not To Lie' (2001) *Australasian Dispute Resolution Journal* 48, 52. See also Lowenthal, above n 6, 433.

114 See Wetlaufer, above n 4, 1227; Mize, above n 19, 245.

115 See Lowenthal, above n 6, 441.

116 Craver, above n 9, 309. See also Schmedemann, above n 39, 112.

117 See Wetlaufer, above n 4, 1227.

118 In *Legal Practitioners Complaints Committee* v *Fleming* (2006) 48 SR (WA) 29; [2006] WASAT 352, [71].

(or saves) from the dispute,[119] this correlation may be less obvious, but nonetheless exists in the form of fostering the client relationship, advancing the market standing of the lawyer's firm, and furthering the lawyer's promotion prospects. Thus, arguing that deception is justified by client interest and the nature of the adversarial system is often 'ultimately nothing more than the argument that lying is ethically permissible whenever it is in the self-interest of the liar'.[120] Thus, the purported client interest justification is no justification at all,[121] because 'if self-interest were a justification for otherwise unethical behaviour, then the scope of ethics would have all but vanished'.[122] It should be noted that the argument presented here is that self-interest cannot justify unethical behaviour; not that being motivated by self-interest is, in itself, unethical or necessarily leads to unethical behaviour. However, adopting an ethical stance will often involve sacrificing self-interest,[123] and '[u]ndertaking deception for purely personal gain is blameworthy, even if a byproduct of that intention and action is to benefit another'.[124]

Finally, the client interest justification for deception in negotiation fails to recognise that the lawyer's paramount duty is to justice.[125] This duty might be interpreted narrowly, as a duty to the administration of justice, the courts, and the law,[126] or it may be given a more proactive definition of always acting to advance the public good.[127] Whatever way the duty is expressed, it clearly places an obligation upon lawyers

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[119] That is, unless a no-win/no-fee contract for legal services is operating, in which case the lawyer's interest (in getting paid for his/her services) is directly related to what the lawyer can achieve for the client.

[120] Wetlaufer, above n 4, 1254; See also Lowenthal, above n 6, 445.

[121] See Wetlaufer, above n 4, 1250-63.

[122] Ibid 1247-48.

[123] Ibid 1234.

[124] Loder, above n 35, 65; See also Ibid 1234.

[125] See Steele, above n 5, 1397-9. This has been described as the 'responsible lawyer' approach to ethical reasoning: see Parker, above n 90, 60-4.

[126] This view may be described as 'conservative' because it does not question the legal system or the law: see Ibid 64. This is also the view reflected in most professional conduct rules.

[127] See William H Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press, 1998) 138; Steele, above n 5, 1399.

to act in the interests of justice first, even to the detriment of the client.[128]

Thus, there seems no reasonable or adequate basis to justify deception in the negotiation environment by reference to a lawyer's duty to act in the client's best interests. However, as self-interest is one of the prime motivators for human action, there may be some lawyers that will continue to seek out the short-term benefits that may occur in certain circumstances from deceiving the other side during the course of a negotiation. To such lawyers what may be germane to point out is that such conduct is not necessarily in their self-interest, as deception is harmful, and not just to the party that is deceived, but also to the deceiver themselves; both professionally and personally.

The professional disadvantages with respect to reputational harm and thereby long-term dispute resolution efficacy have already been discussed.[129] The personal consequences are less easily defined, but clearly being deceitful impacts upon and damages one's own moral integrity.[130] This has been described as losing a bit of yourself in deceiving others.[131] As Loder explains:

> Honesty also is a virtue essential to moral growth, which depends on authenticity. On this depiction, deceiving others is a form of self-deception. Deception hides from view the essentially interactive route to moral growth and thus thwarts moral integrity and happiness.[132]

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[128] See Steele, above n 5, 1399, 1403. Indeed, it has been suggested that the current professional conduct rules, in stating that the highest duty is to the court and the administration of justice, might have thereby abandoned the adversarial model in favour of a 'responsible lawyering' approach: see Paula Baron and Lillian Corbin, *Ethics and Legal Professionalism in Australia* (Oxford University Press, 2014) 42-3.

[129] It should also be noted that some of the practices discussed earlier might be the subject of both prosecution and civil action, eg misrepresentation with intent to deceive for personal gain is defined as theft or fraud in certain circumstances: see Lowenthal, above n 6, 438; and such conduct might also be defined as misleading or deceptive pursuant to the *Competition and Consumer Act 2010* (Cth) sch 2 s 18.

[130] See Loder, above n 35, 53; Peppet, above n 49, 85.

[131] See Pounds, above n 4, 210.

[132] Loder, above n 35, 94.

Deception also harms society at large, as each lie may generate another lie (or 'defensive' lying) and is thus a self-perpetuating phenomenon.[133] Society cannot function if everybody lies and deceives, and such practices have 'adverse effects on a community's capacity for trust, efficiency, ethics, and reciprocity'.[134] Conversely, truth begets truth: one party's honesty creates trust within the negotiation and is often reciprocated,[135] and, as Ross explains, '[t]he more practitioners who adopt the human and moral position, the easier it is for the rest of the profession to learn to act in this way'.[136]

Deception within the negotiation environment is both harmful and ethically unsound, and both logically and morally unjustifiable. This presents a significant dilemma as such deception is clearly quite common. However, many surveys of lawyers have provided evidence that lawyers commonly lie because they are confused as to what actually constitutes ethical conduct within a negotiation.[137] Thus, deception in the negotiation environment may be partly due to ignorance of the ethical rules governing the negotiating process.[138] As stated in the introduction, there is ample evidence of a clear need for ethical standards in negotiation.[139] The major objective of this article is to promulgate the fact that basic codes of conduct in this respect now exist in Australia in the form of the current professional conduct rules operating in most jurisdictions. However, prior to discussing such rules, the appropriate function of formal ethical rules should be examined.

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133 See Wetlaufer, above n 4, 1227-8; Wills, above n 113, 49.
134 Wetlaufer, above n 4, 1229.
135 See Pounds, above n 4, 220-2; Mize, above n 19, 245; Parker and Evans, above n 4, 219.
136 Ross, above n 11, 51.
137 See Reilly, above n 7, 519.
138 See Steele, above n 5, 1389.
139 See Ibid 1391; Wolski, above n 18, 70-1; Lowenthal, above n 6, 412.

IV THE ROLE OF RULES

The role of conduct rules in creating, regulating or maintaining ethical standards is controversial. Some argue that ethics is essentially a matter of personal morality,[140] and that ethical decision making thereby occurs largely irrespective of the existence of specific professional conduct rules.[141] Certainly, it seems reasonable to hold that rules are insufficient ethical frameworks in and of themselves,[142] as ethics necessarily involves personal values and choices specific to the individual.[143]

However, what we are concerned with here are *legal* ethics, and legal ethics must be about *both* personal decision making and professional regulation.[144] What should also be recognised is that rules have power in a society such as ours that is ultimately governed by rules (it might even be argued that although rules are not sufficient, they are nonetheless necessary in a rule based society), and are perhaps

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[140] See, eg, David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press, 2007) 295-6; Michael Robertson, 'Challenges in the Design of Legal Ethics Learning Systems: An Educational Perspective' (2005) 8 *Legal Ethics* 222, 228.

[141] See Simon, above n 127, 3; Alice Woolley, 'The Legitimate Concerns of Legal Ethics' (2010) 13 *Legal Ethics* 168, 168-73; David Luban and Michael Millemann, 'Good Judgment: Ethics Teaching in Dark Times' (1995) 9 *Georgetown Journal of Legal Ethics* 31, 39-41.

[142] See Deborah L Rhode, 'Ethics by the Pervasive Method' (1992) 42 *Journal of Legal Education* 31, 40-1; Loder, above n 35, 86; Pounds, above n 4, 196; Robertson, above n 140, 228-9; Wolski, above n 18, 92; Lowenthal, above n 6, 443; Michael Robertson and Kieran Tranter, 'Grounding Legal Ethics Learning in Social Scientific Studies of Lawyers at Work (2006) 9 *Legal Ethics* 211, 212-15.

[143] See Baron and Corbin, above n 128, 25; Robertson and Tranter, above n 142, 224-6; Kim Economides, 'Learning the Law of Lawyering' (1999) 52 *Current Legal Problems* 392, 393.

[144] See Rhode, above n 142, 33. In this respect, Gillers' discussion of the meaning of 'legal ethics' is useful. He makes the point that the term 'legal ethics' may mean one or both of: 1. A particular jurisdiction's professional conduct rules; or 2. Ethics more broadly defined to mean immoral in the professional context of lawyers' work: see Stephen Gillers, 'More About Us: Another Take on the Abusive Use of Legal Ethics Rules' (1998) 11 *Georgetown Journal of Legal Ethics* 843, 843-4.

the most effective mechanism available to regulate and moderate lawyer behaviour,[145] if only because lawyers are comfortable following prescribed rules,[146] and are wary of the disciplinary consequences and/or penalties consequent upon breach of such rules.[147] As Corbin et al explain, due to the way that lawyers are trained, and by the nature that they accordingly think, lawyers 'will respect rules that tell them what to do'.[148] Thus, although rules may not create ethical principles, they may nonetheless play an important role in regulating ethical behaviour.[149] Professional conduct rules may also serve an important educational function,[150] and such rules are useful means by which to set minimum standards,[151] establish norms of appropriate professional conduct,[152] and provide valuable guidance;[153] thereby playing an important 'role in adjusting professional behavior'.[154] From this perspective rules are a useful 'starting point for ethical analysis'[155] and the development of the capacity for reflective moral judgment.[156] Thus, professional conduct rules may be seen as a significant part of the broader ethical system, with both rules and personal morality having a role to play in maintaining, developing, and ensuring lawyers' ethical conduct.[157]

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145 See Wolski, above n 18, 90-1.

146 See Pounds, above n 4, 193-4; Parke, above n 1, 224; Ibid 91.

147 See Parke, above n 1, 223. Parke goes so far as to suggest that the lack of sanctions may facilitate unethical behaviour; See also Lowenthal, above n 6, 443.

148 Corbin, Baron, and Gutman, above n 12, 508.

149 See Lowenthal, above n 6, 444. Even Parker concedes that rules constitute a significant regulatory control: see Parker, above n 1, 676.

150 See Wolski, above n 18, 91; Lowenthal, above n 6, 443; Donald Nicolson, 'Mapping Professional Legal Ethics: The Forum and Focus of the Codes' (1998) 1 *Legal Ethics* 51, 53; Parke, above n 1, 224.

151 See Wolski, above n 57, 12.

152 See Stephen Pepper, 'Locating Morality in Legal Practice: Lawyer? Client? The Law?' (2010) 13 *Legal Ethics* 174, 181; Dal Pont, above n 14, 27-8; Loder, above n 35, 87; Wolski, above n 18, 89-91; Christine Parker, 'What Do They Learn When They Learn Legal Ethics?' (2001) 12 *Legal Education Review* 175, 198; Parke, above n 1, 224.

153 See Robertson, above n 140, 235; Parke, above n 1, 227; Robertson and Tranter, above n 142, 222.

154 Loder, above n 35, 87.

155 Pounds, above n 4, 197.

156 See Rhode, above n 142, 42.

157 The conduct of lawyers is also regulated through both common law (eg torts, contract, and equity) and legislation: see Wolski, above n 57, 11, however, the study of such legal obligations is beyond the scope of this article. One such

On the other hand, to say something is ethical merely because it is not prohibited by a specific ethical code is akin to saying something is moral simply because it is not prohibited by the law.[158] It is probably also the case that 'reducing judgment to rules or formulas lands us in an infinite regress of rules'.[159] Clearly, the development of an intrinsic individual ethical framework that assesses conduct by reference to higher aspirational values, rather than rule based norms, is the preferred approach to professional legal ethics. Parker goes further and states that a focus on professional conduct rules 'explicitly abandons ethics for rules'.[160] This may be so if one adopts an unthinking adherence to the rules, which may be described as an amoral approach to ethical decision making,[161] but if the rules are viewed as merely a consideration or tool in one's broader ethical armoury, then they may yet possess some utility.[162] Further, whether or not mere adherence to the rules constitutes an ethical 'negative' depends to a substantial extent on the content, effect and underlying values of those rules. If the rules are drafted appropriately, with a focus upon aspirational ideals such as 'justice', adherence to them may demand an assessment that will necessarily involve considering wider legal, political, economic, societal and even moral concerns; in other words, ethical decision-making.[163]

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relevant legal obligation might be to negotiate in good faith. For a discussion of this issue see Wolski, 'The Truth about Honesty', above n 19, 725-7; Wolski, above n 57, 21-3.

158 See Wetlaufer, above n 4, 1241; Loder, above n 35, 80. A useful illustration of the merit of this position is that some rules require what many might view as unethical conduct: see Alexander A Guerrero, 'Lawyers, Context and Legitimacy: A New Theory of Legal Ethics' (2012) 25 *Georgetown Journal of Legal Ethics* 107, 107.

159 Luban and Millemann, above n 141, 39.

160 Parker, above n 90, 53.

161 See Baron and Corbin, above n 128, 40-1.

162 See Loder, above n 35, 87.

163 However, a point to consider in this respect is the argument that any professional conduct rule that seeks to encapsulate an aspirational ideal, or is in another way relatively abstract or too vague, will be largely unenforceable because it will be open to multiple interpretations and thus adherence to the rule will often depend upon an individual lawyer's discretion in any case: see Lowenthal, above n 6, 415; John W Cooley, 'Defining the Ethical Limits of Acceptable Deception in Mediation' (2004) 4 *Pepperdine Dispute Resolution Law Journal* 1, 13-14; Robertson and Tranter, above n 142, 222.

Another criticism often advanced against the utility of professional conduct rules is the practical consideration of enforcement; or rather the unenforceability of such rules.[164] There are two arguments in this respect; theoretical and practical. First, it has been said that any conduct rule that is 'antithetical to the nature and purpose' of the legal practice area in issue, or is otherwise 'incomprehensible, unreasonable, or unfair, and/or that is incapable of compliance',[165] would not only be futile,[166] but 'apt to produce discouragement and disdain',[167] not just for that particular rule but it may possibly lead to a general 'disregard of all the rules and breed disrespect for the system of professional discipline'.[168] The practical (un)enforceability argument concerns issues of proof. This is especially pertinent with respect to deception within the negotiation environment due to the private and confidential nature of negotiations. [169] That is, any such deception is unlikely to be discovered (at least in the short-term),[170] and even if detected would be difficult to prove as unrecorded oral statements made during the course of otherwise 'without prejudice' settlement negotiations creates a number of problematic admissibility of evidence issues.[171] Consequently, there is only a slight chance of

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[164] See, eg, Reilly, above n 7, 523-5.

[165] Cooley, above n 163, 12. See also Gavin MacKenzie, 'The Valentine's Card in the Operating Room: Codes of Ethics and Failing Ideals of the Legal Profession' (1995) 33 *Alberta Law Review* 859, 870-1; Reilly, above n 7, 534.

[166] A related question raised by Woolley and Wendel is whether the artificial person that legal ethics (both theory and practice) creates (ie the sort of person that would obey all ethical rules and agree with the various theoretical justifications), is realistic, and, if not, whether we have thereby established an unattainable, or even undesirable, ethical standard or ideal: see Woolley and Wendel, above n 72, 1093-8.

[167] Dal Pont, above n 14, 29.

[168] Mize, above n 19, 248.

[169] See Reilly, above n 7, 482; Craver, above n 9, 307.

[170] See Lowenthal, above n 6, 411; Parke, above n 1, 223; Wetlaufer, above n 4, 1230-2; *Legal Practitioners Complaints Committee* v *Fleming* [2006] WASAT 352, [76].

[171] Of course, it should be noted that only settlement communications made in good faith are protected by settlement privilege and evidence of deceptive practices in negotiation might easily be rendered admissible through appropriate legislative amendments. However, it should also be noted that recording negotiations is itself unethical: see Dal Pont, above n 14, 702-3. It would also require 'whistleblowing' to a degree and scale that the legal profession has not shown any particular aptitude towards. For a discussion of the whistle-blower issue and evidence of the legal profession's reluctance in this respect see Ross, above n 11,

any sanctions flowing from such deception.[172] Reilly views this fact as signifying the futility of ethical rules because he contends that such rules can only ever influence behaviour when there is a realistic possibility of penalty for failure to adhere to those rules.[173]

However, ethics should not be concerned with issues of proof,[174] and Reilly's view ignores the fact that there is little empirical evidence to suggest that issues of unenforceability have any significant implications with respect to influencing ethical behaviour.[175] Furthermore, there is evidence to suggest that the promulgation of an ethical rule may have an impact upon lawyer behaviour regardless of effective sanctions,[176] provided the *possibility* of sanctions exist, and the fact of the matter is that deception within the negotiation environment is sometimes discovered and acted upon by regulatory authorities.[177] In any case, just because changing a certain unethical practice is difficult, this is no reason not to try.[178]

Although the extent to which formal conduct rules influence ethical practice is open to argument, it would seem reasonable to hold that such rules must have *some* effect in that respect. Thus, it seems worthwhile to at least consider what rules might apply in the negotiation environment. For the purposes of this article the focus will be on the current version of the *Australian Solicitors' Conduct Rules* (ASCR), as these rules were specifically drafted by the Law Council

183-91. For further discussion of the various issues surrounding the mandating of reporting of unethical conduct amongst members of the legal profession see Gino Dal Pont, 'Professional Conduct: Ethical Disclosure Reporting Other Lawyers' Unethical Behaviour' (2005) 43(2) *Law Society Journal* 46.

172 See Mize, above n 19, 248.

173 See Reilly, above n 7, 487. See also Parke who argues that without the threat of penalty unethical transgressors could act with relative impunity: Parke, above n 1, 223.

174 See Wetlaufer, above n 4, 1242.

175 See Loder, above n 35, 85; Lowenthal, above n 6, 441-2.

176 See Lowenthal, above n 6, 441-4.

177 See, eg, *Chamberlain v Law Society (ACT)* (1992) 43 FCR 148 at 154-156 (Black CJ); *Legal Services Commissioner v Mullins* [2006] LPT 12; *Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352.

178 See Wetlaufer, above n 4, 1272; Steele, above n 5, 1400.

of Australia as a template for uniform conduct rules and have now been effectively adopted by the majority of Australian states.[179] In addition, most of the rules contained within the ASCR are effectively mirrored in the various rules of jurisdictions that have yet to formally implement the ASCR.[180] Comment will be made when there are significant differences between the ASCR and other jurisdictions' professional conduct rules.

V THE PROFESSIONAL CONDUCT RULES

Consistent with the traditional ethical focus of the legal profession, the ASCR specifically regulates behaviour in court in a number of rules,[181] and provides for various expressions of the duty to the client,[182] but expressly addresses the conduct of solicitors within the negotiation environment in (arguably) only one rule.[183] Rule 22.1 states that: 'A solicitor must not knowingly make a false statement to an opponent in relation to the case (including its compromise)'. Clearly, other rules are also applicable to negotiation (and this argument will be addressed below), but as this is the only rule that specifically refers to negotiation, albeit somewhat indirectly through the parenthesised but

[179] SA and Qld have adopted the ASCR, while NSW and Vic have recently, through the Legal Services Council, under the *Legal Profession Uniform Law*, accepted the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, which effectively incorporates the ASCR. Similarly, the *Legal Profession (Solicitors) Conduct Rules 2015* (ACT) are almost identical to the ASCR. For convenience sake this article will mostly utilise the SA version — *Australian Solicitors' Conduct Rules 2015* (SA).

[180] Those jurisdictions being the NT and WA that possess, respectively: *Rules of Professional Conduct and Practice 2005* (NT); *Legal Profession Conduct Rules 2010* (WA). Tasmania is the odd jurisdiction out, possessing only the *Rules of Practice 1994* (Tas) which mostly deals with trust account and related financial matters. However, it is arguable that, by virtue of sections 125 and 219 of the *Legal Profession Act 2007* (Tas), the ASCR may also apply in Tasmania.

[181] See, eg, *Australian Solicitors' Conduct Rules 2015* (SA) rr 18-21, 23-29.

[182] See, eg, *Australian Solicitors' Conduct Rules 2015* (SA) rr 4.1.1, 4.1.2, 7-16.

[183] See *Australian Solicitors' Conduct Rules 2015* (SA) r 22.1.

broad term 'compromise',[184] it is appropriate to study this rule (and related rr 22.2 and 22.3) in some detail.

This rule is evident in all jurisdictions other than Tasmania.[185] In WA the prohibition is not to 'knowingly make a false or misleading statement',[186] which is potentially a much broader proscription. The WA position is more in line with the duty of frankness in court, which in all jurisdictions extends beyond not knowingly making a false statement, to not misleading the court,[187] whereas the duty encapsulated in r 22.1 (with the exception of WA) is limited to not knowingly making a false statement. The implication being that, provided no knowingly false statement is made, misleading an opponent during a negotiation through other means is not in breach of r 22.1. It has been said that r 22.1 thus 'only minimally limits untruthfulness and unfairness'[188] because 'most lawyers … [are] … capable of legalistic arguments for why they should not be construed as having knowingly made a false statement'.[189]

This last point leads to the obvious question: what constitutes a knowingly false statement? The use of the word 'knowingly' indicates a subjective criterion; simply making a false or incorrect statement will

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[184] Under the *Australian Solicitors' Conduct Rules 2015* (SA), 'compromise' is defined in the 'Glossary of Terms' as including 'any form of settlement of a case, whether pursuant to a formal offer under the rules or procedure of a court, or otherwise'.

[185] See *Australian Solicitors' Conduct Rules 2015* (SA) r 22.1; *Australian Solicitors' Conduct Rules 2012* (Qld) r 22.1; *Legal Profession (Solicitors) Conduct Rules 2015* (ACT) r 22.1; *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) r 22.1; *Rules of Professional Conduct and Practice 2005* (NT) r 17.35; *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Vic) r 22.1.

[186] *Legal Profession Conduct Rules 2010* (WA) r 37(1).

[187] See *Australian Solicitors' Conduct Rules 2015* (SA) r 19.1; *Australian Solicitors' Conduct Rules 2012* (Qld) r 19.1; *Legal Profession (Solicitors) Conduct Rules 2015* (ACT) r 18.1; *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) r 19.1; *Rules of Professional Conduct and Practice 2005* (NT) r 17.6; *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Vic) r 19.1; *Legal Profession Conduct Rules 2010* (WA) r 34(1).

[188] Parker and Evans, above n 4, 217.

[189] Ibid 211.

not suffice to breach the rule if the maker of that statement was unaware of its inaccuracy.[190] Conversely, a statement that the maker believes to be false, but that is actually correct, probably does not violate the rule either. It seems reasonable to conclude that the rule encapsulates two tests — one subjective and one objective — and both tests must be met. The rule thus prohibits a false statement that is objectively false, made by a person that subjectively knows it to be false; in other words, a lie.[191]

Rule 22.1 is stated in unconditional terms: the prohibition on making a knowingly false statement is not limited by reference to any other duty;[192] most relevant for present purposes, the obligation is not made subject to any duty towards the client or the client's interests.[193] Rule 22.1 is not further explained, nor dealt with in the commentary to the rules,[194] nor has it been the subject of judicial review. However, the duty not to make a knowingly false statement is applied retrospectively, in that a solicitor 'must take all necessary steps to correct any false statement made by the solicitor to an opponent as

[190] Such an interpretation is supported by r 22.2, which obliges a solicitor to 'take all necessary steps to correct any false statement made by the solicitor to an opponent as soon as possible after the solicitor becomes aware that the statement was false' — that is, knowledge of such falsity is required.

[191] Loder has argued that a 'lie' is more than this, as her definition — 'a statement the speaker believes false, made to a recipient with the intent to induce the recipient to believe the statement' — adds the extra criterion of intention to deceive: Loder, above n 35, 50; See also Lowenthal, above n 6, 415. However, the addition of an intention requirement seems superfluous; what other reason is there to knowingly make a false statement, other than to deceive? It should also be noted that some have argued that 'lying' is difficult to define: see Reilly, above n 7, 489; Wills, above n 34, 222.

[192] Wolski has nonetheless suggested that r 22.1 might only apply to knowingly false statements of material facts and law, and not statements that simply 'exaggerate the client's position, values, bottom line and alternatives to settlement': see Wolski, above n 19, 717, 739.

[193] It might be argued that, as the 'duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty' (*Australian Solicitors' Conduct Rules 2015* (SA) r 3.1), then one may make a knowingly false statement to an opponent if that was demanded by the duty to the court and the administration of justice, but it is difficult to see how justice might ever be served by practising deceit.

[194] See Law Council of Australia, *Australian Solicitors' Conduct Rules 2011 and Consultation Draft Commentary* (Law Council of Australia, 2012).

soon as possible after the solicitor becomes aware that the statement was false'.[195]

Perhaps as recognition of the fundamentally adversarial nature of the legal system, the rules state that a false statement will not have been made 'simply by failing to correct an error on any matter stated to the solicitor by the opponent'.[196] In WA, as highlighted earlier, the proscription is not to 'knowingly make a false or misleading statement',[197] so the WA position with respect to failing to correct an opponent's error is accordingly more nuanced, with the WA rules explaining that although failing to correct such an error does not generally constitute a misleading statement, it will do so if 'by the practitioner's silence the opponent might reasonably infer that the practitioner is affirming the statement'.[198] In other jurisdictions this might also be a possibility, as although the rules state that failing to correct an opponent's error is not necessarily making a 'knowingly false statement', the wording (in particular, the use of the word 'simply' in r 22.3 above) suggests that, in some circumstances, such silence in the face of an opponent's error may constitute a 'knowingly false statement'. Certainly, as recognised in WA, further action on the opponent's error may be deceitful. For example, if the opponent's error is falsely confirmed by the solicitor, this would constitute a knowingly false statement. As stated above, in WA such affirmation may occur through omission, but it probably requires a positive statement in other jurisdictions, or perhaps, to constitute a deceitful omission, there must be a continued silence after a direct question from the opponent inquiring as to the accuracy of his/her erroneous statement. Whether failing to correct an opponent's error constitutes a knowingly false statement in the circumstances may ultimately depend

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[195] *Australian Solicitors' Conduct Rules 2015* (SA) r 22.2.

[196] *Australian Solicitors' Conduct Rules 2015* (SA) r 22.3; *Legal Profession (Solicitors) Conduct Rules 2015* (ACT) r 22.3; *Rules of Professional Conduct and Practice 2005* (NT) r 17.37. This is consistent with the duty not to mislead the court, as the ASCR make it clear that a solicitor 'will not have made a misleading statement to a court simply by failing to correct an error in a statement made to the court by the opponent or any other person' (*Australian Solicitors' Conduct Rules 2015* (SA) r 19.3) unless that error relates to binding authority at r 19.6.

[197] *Legal Profession Conduct Rules 2010* (WA) r 37(1).

[198] *Legal Profession Conduct Rules 2010* (WA) r 37(3).

on the motive of the party allowing the error to stand by their silence: that is, if the error is not viewed as relating to a significant or relevant matter by the party that chooses to proceed with the negotiation without correcting it, this may be less morally blameworthy than the party that consciously avoids correcting the error as it is perceived to be advantageous to that party not to correct the error. However, in finding a failure to correct an opponent's error to constitute a knowingly false statement, one is thereby adopting an interpretation of 'statement' that includes both conduct and omissions, and such an interpretation is probably too broad an approach to take,[199] as it may muddy the water beyond effective application; for example, other than in extreme and obvious cases (such as nodding ones' head in agreement), how may conduct in this regard be said to be 'knowingly false'? Thus, it seems likely that simply failing to correct an opponent's error will rarely be in contravention of r 22.1.[200]

As stated above, a narrow literal interpretation of r 22.1 leads to the conclusion that deception per se is not proscribed provided no knowingly false statement is made. This is unfortunate as deception might occur through means that perhaps may not be described as making a knowingly false statement; for example, as discussed with respect to failing to correct an opponent's error, deception might occur through conduct or omissions.[201] Nonetheless, for the purposes of this

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[199] See Loder, above n 35, 71-2.

[200] However, although r 22.3 seems to allow a lawyer to refrain from correcting an error made by the other side to the dispute, if the rules are viewed as a coherent whole such failure to correct appears contrary to the duty to act with integrity, especially if the error is an error of law: see William H Simon, 'Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives' (2010) 23 *Georgetown Journal of Legal Ethics* 987. In this sense, it is arguable that a solicitor may be under a duty to proactively ensure that the negotiation is only based on correct facts and law: see Lowenthal, above n 6, 430. On the other hand, it is arguable that correcting an opponent's error may be contrary to the duty to the client: see Monroe H Freedman, 'Critique of Philosophizing about Lawyers' Ethics' (2012) 25 *Georgetown Journal of Legal Ethics* 91. All in all, other jurisdictions would be well served by adopting the WA approach in this respect.

[201] See Loder, above n 35, 67. Loder provides a discussion of deception by conduct at 53-5, and a discussion of deception by omission at 55-7. Another example might be 'the provision of distorted information' that may be misleading without being 'knowingly false': see Wills, above n 34, 222.

article the author will assume that making a knowingly false statement is essentially lying, and lying conventionally requires 'an affirmative assertion';[202] that is, actual spoken or written communication. Of course, in determining that the rule should be interpreted narrowly and therefore only prohibits lying (and not other forms of deception), we should not lose sight of the fact that deception in all its forms is morally suspect, as all forms of deception are based upon a deliberate, intentional act.[203]

Fortunately, many other professional conduct rules also apply to the negotiation environment and may serve to prohibit deception more broadly defined.[204] For example, a solicitor *may not*: 'take unfair advantage of the obvious error of another solicitor or other person, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact';[205] in any action or communication 'make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates the other person';[206] 'use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person';[207] represent 'that anything is true which the practitioner knows, or reasonably believes, is untrue'.[208] In WA a legal practitioner must also 'not attempt to further a client's matter by unfair

[202] Loder, above n 35, 51.

[203] See Loder, above n 35, 79-88, who makes the same point from the other side, explaining that it would seem strange to say that Party A was deceived by Party B if Party B did not intend any deception; in such a case it would be more accurate to say that Party A was mistaken rather than deceived, even if that mistaken belief was (inadvertently) caused by Party B's statement, conduct or omission.

[204] Such rules, along with r 22.1, might also be buttressed by statutory duties, such as those currently operating in all Victorian courts (eg an express obligation to 'act honestly at all times in relation to a civil proceeding' (*Civil Procedure Act 2010* (Vic) s 17) and not to engage in misleading or deceptive conduct (*Civil Procedure Act 2010* (Vic) s 21)), but further discussion of such legislative duties and prohibitions are beyond the scope of this article.

[205] *Australian Solicitors' Conduct Rules 2015* (SA) r 30.1.

[206] *Australian Solicitors' Conduct Rules 2015* (SA) r 34.1.1; See also *Legal Profession (Solicitors) Conduct Rules 2015* (ACT) r 34.1.1; *Rules of Professional Conduct and Practice 2005* (NT) r 26.2.

[207] *Australian Solicitors' Conduct Rules 2015* (SA) r 34.1.3.

[208] *Rules of Professional Conduct and Practice 2005* (NT) r 26.1.

or dishonest means'.[209] Lying and other forms of deception also arguably contravene the duty to 'avoid any compromise to … [a solicitor's] … integrity and professional independence',[210] and misleading or deceptive tactics may fall foul of the duty to comply with the rules and the law,[211] as such conduct may constitute an offence.[212] Certainly, deceit in negotiation is inconsistent with the duty to 'be honest and courteous in all dealings in the course of legal practice'.[213] Indeed, one might mount an argument that being deceitful during a negotiation demonstrates that either a solicitor is 'not a fit and proper person to practise law'[214] or is engaging in conduct that is likely to a material degree to 'be prejudicial to, or diminish the public confidence in, the administration of justice'[215] or 'bring the profession into disrepute'.[216] Suffice to say, the application of such rules to the negotiation environment would serve to proscribe most forms of deception potentially operating in that environment.[217]

Nonetheless, whether such rules are applicable to negotiation is disputable. Utilising relevant principles of statutory interpretation, there is an argument that, with the exception of r 22.1 (and the related rr 22.2 and 22.3), no other rules actually apply to private negotiations.[218] That is, by including the phrase 'including its

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[209] *Legal Profession Conduct Rules 2010* (WA) r 16(1).

[210] *Australian Solicitors' Conduct Rules 2015* (SA) r 4.1.4.

[211] See *Australian Solicitors' Conduct Rules 2015* (SA) r 4.1.5.

[212] For example, there are offences created for certain misleading or deceptive conduct under *Competition and Consumer Act 2010* (Cth) sch 2, the *Australian Consumer Law* (ACL).

[213] *Australian Solicitors' Conduct Rules 2015* (SA) r 4.1.2. See also *Legal Profession Conduct Rules 2010* (WA), r 6(1)(b).

[214] *Australian Solicitors' Conduct Rules 2015* (SA) r 5.1; *Legal Profession Conduct Rules 2010* (WA) r 6(2)(a).

[215] *Australian Solicitors' Conduct Rules 2015* (SA) r 5.1.1; *Legal Profession Conduct Rules 2010* (WA) r 6(2)(b).

[216] *Australian Solicitors' Conduct Rules 2015* (SA) r 5.1.2; *Legal Profession Conduct Rules 2010* (WA) r 6(2)(c).

[217] Indeed, Wolski has suggested that the rules, taken as a whole, demand that lawyers must act with 'fairness': see Wolski, above n 19, 728-9; Wolski, above n 57, 19.

[218] That is, by adopting a contextual approach to construction: see *Bropho v Western Australia* (1990) 171 CLR 1, 19-20 (Mason CJ, Deane, Dawson, Toohey, Gaudron, and McHugh JJ); *Project Blue Sky Inc v Australian Broadcasting*

compromise' in r 22.1, but nowhere else in the rules, one may be led to the conclusion that the drafter's intention was that other ethical rules should not apply to the compromise of a matter. However, this is a frail argument, as many of the rules that fail to expressly refer to negotiation (or compromise) nonetheless refer to extremely broad conduct, such as 'in all dealings in the course of legal practice',[219] or 'any action or communication associated with representing a client',[220] or 'engage in conduct in the course of practice'.[221] It would not be unreasonable to assume that negotiation would be included within such phrases, especially given the importance of negotiation to legal practice. As highlighted at the outset, lawyers perhaps negotiate more than they do anything else, so it would seem absurd to exclude all rules except r 22.1, as it would effectively release practitioners from other ethical obligations for the vast majority of their practice. In effect, such an interpretation would render the professional conduct rules largely worthless, as they would thereby only apply to a minority of a solicitor's work. As the 'Golden Rule' of statutory interpretation is to adopt a construction that avoids absurdity[222] — as it cannot be thought to have been the drafter's intention to adopt a construction that is irrational[223] — it would therefore seem highly likely that all the above mentioned rules apply to the negotiation environment.

Furthermore, deception within the negotiation environment is arguably contrary to the paramount duty to the 'administration of justice'.[224] As Mahoney JA explained almost two decades ago:

Authority (1998) 194 CLR 355, 381-384 (McHugh, Gummow, Kirby and Hayne JJ); *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019, 1029 (Kirby J).

219 *Australian Solicitors' Conduct Rules 2015* (SA) r 4.1.2.

220 *Australian Solicitors' Conduct Rules 2015* (SA) r 34.1.

221 *Australian Solicitors' Conduct Rules 2015* (SA) r 5.1.

222 See *Grey v Pearson* (1857) 10 ER 1216, 1234 (Lord Wensleydale); *Heading v Elston* (1980) 23 SASR 491, 494 (King CJ); *Lindner Pty Ltd v Builder's Licensing Board* [1982] 1 NSWLR 612, 615 (Samuels JA).

223 See *Footscray City College v Ruzicka* (2007) 16 VR 498, 505 (Chernov JA); *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297, 304-305 (Gibbs CJ); *Fry v Bell's Asbestos & Engineering Pty Ltd* [1975] WAR 167, 169-170 (Jackson CJ); *Pinner v Everett* [1969] 3 All ER 257, 258-259 (Lord Reid).

224 *Australian Solicitors' Conduct Rules 2015* (SA) r 3.1.

> A solicitor should be able to place reliance upon the word of another … If such assumptions cannot be made in the ordinary course of dealing between solicitors and each is required in prudence to check the truth of what the other has suggested, the administration of justice would be seriously impeded.[225]

It thus seems reasonable to hold, and this is the position adopted in this article, that all such duties and proscriptions as have been mentioned apply equally to the negotiation environment as they do to other areas of legal practice. Indeed, it has recently been suggested that the decision in *Mullins* has effectively confirmed that the ethical standards applicable in ADR are identical to those operating in court, and that this view is mirrored in the rules, which 'do not differentiate between the conduct required of lawyers in court and in other dispute resolution environments'.[226]

Most forms of deception traditionally utilised during a negotiation are thereby prohibited, but a somewhat grey area, for both definitional and ethical purposes, is whether these duties and proscriptions are violated by a solicitor merely failing to disclose certain information.[227] There is no question that non-disclosure can be misleading;[228] as Cooley explains, deception is defined 'by two principal behaviours: hiding the real and showing the false'.[229] One common strategy employed in this regard is that of utilising half-truths or providing

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[225] *Law Society of NSW* v *Foreman* (1994) 34 NSWLR 408, 445 (Mahoney JA).

[226] Baron and Corbin, above n 128, 84.

[227] As Wolski explains 'silence is generally not caught by the professional conduct rules': Wolski, above n 19, 721.

[228] See Pengilley, who argues that silence or half-truths may constitute misleading or deceptive conduct: Warren Pengilley, '"But you Can't do That Any More!" – The effect of section 52 on common negotiating techniques' (1993) 1 *Trade Practices Law Journal* 113, 119. The High Court has also made this point that non-disclosure or silence may be misleading or deceptive in all the circumstances of a negotiation: see *Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 369-371 (French CJ and Kiefel J).

[229] Cooley, above n 163, 1. See also Pounds, above n 4, 188. See also Rubin, above n 19, 457 who highlights how 'misdirection', whereby the other party is lead to an error concerning facts, law or the client's position, can be effectively achieved by silence.

'selective disclosure'.[230] In such instances one emphasises beneficial information and withholds negative information.[231] However, not all instances of non-disclosure are deceptive or intended to mislead, and it is clear in any case that there cannot be an ethical duty to provide full disclosure on every matter;[232] this is evident from both the nature of our adversarial system and duties owed to the client (especially those concerning maintaining client confidence), and the common law.[233]

Thus, as stated, non-disclosure is a grey area in this respect as although one should not deceive or attempt to deceive, one is simultaneously under no obligation to provide full disclosure.[234] This level of uncertainty is perhaps inevitable as '[h]uman discourse is far too supple to leave us with only the choice between lies and self-defeating disclosures of the whole truth'.[235] Perhaps Justice Burchett best sums up this situation: 'Traditional bargaining may be hard … [and] … No-one expects all the cards to be on the table. But the bargaining process is not therefore to be seen as a license to deceive'.[236] To ensure ethical conduct it is probably best practice to always assert the truth, rather than risk that one's silence may serve to deceive. For instance, one might employ the old chestnut — 'I do not have instructions to divulge that information'. Of course, this too would be a knowingly false statement if no such instructions had been received from the client, so perhaps the more honest personal response is better: 'I do not wish to divulge that information at this time'. In this

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230 Wills, above n 34, 223.

231 See Craver, above n 9, 321.

232 See Wetlaufer, above n 4, 1262; Wills, above n 113, 50; Wolski, above n 19, 708; Fisher et al, above n 47, 34. Cf Lowenthal, above n 6, 436.

233 See *Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 371 (French CJ and Kiefel J); *Lam v Ausintel Investments Australia Pty Ltd* (1989) 97 FLR 458, 475 (Gleeson CJ); *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164, 178 (Davies and Einfeld JJ).

234 Unless it is necessary to 'avoid a partial truth' or qualify a statement: Wolski, above n 19, 737; Wolski, above n 57, 18.

235 Wetlaufer, above n 4, 1247.

236 *Poseidon Ltd v Adelaide Petroleum NL* (1991) 105 ALR 25, 26 (Burchett J); See also *Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 370 (French CJ and Kiefel J).

way no disadvantageous disclosure has been uttered, no lie has been spoken, and silence has not been left to mislead or deceive. Indeed, being assertive about non-disclosure can be an effective strategy in negotiation. [237]

Taking all the above rules into consideration, which this author contends is the most rational approach and avoids both theoretical absurdity and practical futility, one may conclude that a lawyer is under various ethical duties during a negotiation. Indeed, if all the rules suggested above are applicable to the negotiation of a civil dispute, then one may readily note that the negotiation environment is thereby rendered as ethically regulated as the court environment. To summarise, a lawyer negotiating must act at all times with integrity and veracity, and lawyers acting in accordance with the rules will not lie or otherwise attempt to deceive during a negotiation.

An issue that requires brief discussion is the potential problem (mentioned earlier) that the honest ethical lawyer may be at a negotiation disadvantage (for that particular isolated negotiation) to the unethical dishonest lawyer,[238] especially if the ethical lawyer wrongly assumes the other lawyer to also be acting ethically.[239] That is, if party A is honest and believes party B to also be honest (which is not an unreasonable belief given that the conduct rules demand such honesty),[240] but party B is not honest, then party B may gain an advantage within the confines of that negotiation.[241] In essence, the argument is a modified form of the prisoner's dilemma from game theory:

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[237] For example, instead of simply refusing to state a bottom line one may refuse to state the client's bottom line, but also refer to what the court might award in the circumstances: 'I do not wish to tell you my client's bottom line, but I will discuss what a court is likely to award in this matter'. Provided the lawyer is well prepared and knowledgeable in this respect, not revealing a client's bottom line may readily produce a better final settlement than starting at an invented, and thereby unsubstantiated, bottom line.

[238] See Pounds, above n 4, 195.

[239] See Craver, above n 9, 342-3.

[240] See Mize, above n 19, 248.

[241] See Reilly, above n 7, 501-2.

> If both A and B are honest in the negotiation = good outcomes for both A and B will result;
>
> If both A and B are dishonest in the negotiation = mediocre outcomes for both A and B will result; but
>
> If A is honest and B is dishonest in the negotiation = the result will be a bad outcome for A and a good outcome for B.

Now, the above cannot purport to be some sort of immutable principle as negotiations are far too complex to predict outcomes based solely on one criterion (ie the comparative veracity of the participants), but, as indicated earlier, there are advantages to being able to deceive the other side in a negotiation, and it seems reasonable to hold that such advantages may be exaggerated if the other side is scrupulously honest. Clearly, such advantages will not arise in every such instance, but it seems reasonable to conclude that such advantages are not uncommon in the suggested comparative participant veracity scenario.

This may be so, but it does not constitute a sufficient reason to abandon the ethical approach. First, there are 'advantages, both moral and economic',[242] to being an honest negotiator. For example, as highlighted earlier, a reputation for honesty is a source of negotiating power,[243] and, conversely, a reputation for dishonesty severely hinders ones ability to effectively negotiate in the future.[244] Second, although many lawyers may act unethically in negotiation, many lawyers do not and negotiate with the utmost integrity;[245] consequently, the above mentioned disadvantages of being honest do not ensue as the other side

[242] Wills, above n 113, 55.

[243] See Lowenthal, above n 6, 433; Wills, above n 113, 52-56; Craver, above n 9, 307-8.

[244] See Reilly, above n 7, 487; Wetlaufer, above n 4, 1227; Lowenthal, above n 6, 441; Mize, above n 19, 245; Craver, above n 9, 307-8.

[245] See Steele, above n 5, 1403; Ross, above n 11, 51. Ross also believes that the growing practice of ADR means that increasing numbers of lawyers will adopt such an ethical practice at 495.

is also acting ethically.[246] Nonetheless, the ethical lawyer needs to be mindful that unethical lawyers do exist, and an astute, honest lawyer should therefore plan for unethical colleagues. As Reilly points out, all such lawyers 'must learn how to carefully and purposefully implement strategies and behaviours to defend themselves against those who lie and deceive ... [thereby] ... minimizing one's risk of being exploited in a negotiation should other parties lie'.[247] Thus, the potential disadvantages for the ethical lawyer envisioned in the above modified prisoner's dilemma are avoidable with targeted preparation.

VI CONCLUSION: ETHICAL NEGOTIATION

The 21st Century Australian civil justice system is one that incorporates both traditional adversarial litigation and ADR in determining or settling a civil dispute. Deception in court, or with respect to any formal court process, has long been both unethical and illegal. ADR, and in particular the most common ADR process of party to party negotiation, is now as much a part of the civil justice system as traditional litigation, if not more so. Consequently, deception within negotiation should be no more tolerated than it is in court. One of the arguments put forward in this article is that the current Australian professional conduct rules recognise this view. This stands to reason because the effective administration of justice would not be possible if lawyers could not act with the expectation that most other lawyers would act honestly towards them. If lawyers follow the rules and act with honesty and integrity towards one another, the result is mutual respect and cooperation, which in turn 'promotes the efficient administration of justice'.[248] The civil justice system would not function if all lawyers saw and treated each other as inherently suspect; the system works because lawyers assume that they can rely on each other's representations and assurances.[249] It also needs to be

[246] Indeed, a recent US study found that there is actually a 'norm of ethical behavior' within the legal profession when it comes to negotiation: Hinshaw, Reilly and Schneider, above n 4, 284.

[247] See Reilly, above n 7, 482-3. Reilly goes so far as to suggest that the best mindset to adopt is to assume that the other side is lying and act accordingly at 525-32.

[248] Dal Pont, above n 14, 696.

[249] Ibid 696-7.

stated that the fact of the matter is that deception within the negotiation environment is never necessary;[250] there is no evidence to suggest that negotiation is inherently or intrinsically deceptive,[251] and it is indisputable that effective negotiation can occur without any form of deception.[252] Indeed, any attempt to deceive during a negotiation may be seen as a symptom of inadequate preparation, lack of knowledge, dearth of ingenuity, and/or a failure to modernise.[253]

It is clear that deception within the negotiation environment is unethical, in breach of the professional conduct rules, and may therefore be the subject of disciplinary action. Deceit during a negotiation should be avoided by all ethical lawyers. This author is unaware of any rational argument to the contrary. The final point to make is that acting ethically is actually best practice in any case; that is, the ethical negotiator is the better negotiator.[254] This conclusion is based on a number of reasons already discussed, but one that warrants repeating is that an ethical negotiator thereby establishes a reputation for honesty and integrity that immeasurably enhances that negotiator's effectiveness.[255]

Of course, an ethical negotiator need not be a passive, compassionate or even cooperative negotiator. In particular, as discussed earlier, in many circumstances non-disclosure is not unethical, provided that non-disclosure is not intended to deceive the opponent.[256] Certainly, being honest does not mean being utterly open and divulging all information; one does not need to be completely transparent in all circumstances in order to act with integrity.[257]

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[250] See Wetlaufer, above n 4, 1262; Wills, above n 113, 50-1.

[251] See Loder, above n 35, 102.

[252] See Peppet, above n 49, 94. This fact also makes deceit within the negotiation environment even more morally culpable as 'the availability of non-deceptive alternatives is relevant in analysing whether particular deception is justified': Loder, above n 35, 66.

[253] See Loder, above n 35, 88-93; Wills, above n 113, 51.

[254] See Craver, above n 9, 313-16.

[255] See Lowenthal, above n 6, 433; Wills, above n 113, 52-6; Craver, above n 9, 307-8.

[256] See Fisher et al, above n 47, 140; Lowenthal, above n 6, 426.

[257] See Steele, above n 5, 1388; Wills, above n 113, 49-50.

Indeed, given the nature of negotiation (ie that persuasion can be a crucial element of the process), laying all your cards on the table is not conducive to success at negotiation, especially if the other side is adopting a more traditional adversarial position-based approach to the process.[258]

To put this another way, the ethical negotiator is not necessarily a non-adversarial 'moral truth-seeking'[259] collaborative lawyer, and indeed may be an aggressive, adversarial, positional negotiator;[260] but an ethical negotiator is one that does not lie or otherwise seek to deceive his/her opponent.[261] This is not to say that such veracity is all that is required to be 'ethical'; only that it is an essential condition. This is also not to say that collaborative legal practice is to be discouraged, as the emphasis upon 'honesty and fairness, good faith and a just outcome'[262] inherent in the collaborative ideal has obvious ethical benefits.[263] Indeed, in many respects the collaborative law approach should be promoted, and we may soon witness the large scale and highly significant transition from adversarial to more collaborative dispute resolution,[264] but the fact of the matter is that our

[258] Dal Pont explains that if all relevant information had to be supplied to all the parties to a dispute 'there would arguably be limited scope for negotiation in its commonly understood sense: Dal Pont, above n 17, 42. Cf Wetlaufer who argues that full disclosure is useful because 'full and truthful disclosure is the key to identifying and exploiting opportunities for integrative bargaining': Wetlaufer, above n 4, 1227.

[259] For an examination of this concept see Loder, above n 35, 96-101.

[260] See Lowenthal, above n 6, 426; Wolski, above n 57, 34-40.

[261] See Wolski, above n 57, 39.

[262] Maxine Evers, 'The ethics of collaborative practice' (2008) 19 *Australasian Dispute Resolution Journal* 179, 180.

[263] The same might be said of the closely aligned system of practice of mindfulness: see, eg, Leonard L Riskin, 'The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers and their Clients' (2002) 7 *Harvard Negotiation Law Review* 1, and as it applies to negotiation it decrees that you do not deceive as you would not want to be deceived yourself; and that you should respect the interests of others as you would want your own interests to be respected by others: see Peppet, above n 49, 89.

[264] See Gutman, above n 4, 224.

civil justice system remains, at its heart, adversarial,[265] and thereby currently antithetical to such more communitarian models.[266]

Consequently, there is nothing unethical with trying to secure the best deal for ones' client (and indeed, lawyers have an ethical duty to do so), and in the adversarial context this goal may be furthered by taking advantage of the other side's lack of preparation, knowledge, or even intelligence.[267] In seeking to so persuade, or even manipulate[268] your opponent, one might be obstinate in refusing to answer questions, derisive of the opponent's client's case, and one may even ask for more than might be reasonably awarded by the court.[269] Provided this is all achieved without deception, no unethical conduct has necessarily occurred.[270] That is, one may be both competitive and ethical.[271] However, in this author's opinion, such adversarial approaches are nonetheless suspect in terms of realising the best outcome for the client, as they would tend to preclude more integrative and cooperative bargaining, which may be in the client's best interests, but if the lawyer adopting such strategies has reason to believe that the client's interests are best served in that manner, then the conduct should not be described as unethical. Of course, another issue to bear in mind when pursuing such aggressive tactics is that

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[265] See Wolski, above n 57, 44-5.

[266] See Craver, above n 9, 305; Peppet, above n 49, 90. Indeed, it has been suggested that the distinctions of collaborative practice may require its own ethical code: see Evers, above n 262, 185-8. Or further, that adopting a collaborative approach in such (adversarial) circumstances may itself raise ethical issues with respect to satisfying client duties. Craver highlights a number of such ethical issues: see Craver, above n 9, 335-45.

[267] See Wolski, above n 57, 47.

[268] See Craver, above n 9, 316. Of course, there may be a fine line between manipulation (which may be appropriate) and coercion (which is inappropriate). For a discussion of when persuasion may slip into coercion see Paul F Kirgis, 'Bargaining with Consequences: Leverage and Coercion in Negotiation' (2014) 19 *Harvard Negotiation Law Review* 69.

[269] See Wetlaufer, above n 4, 1246-7; Wolski, above n 57, 39.

[270] See Craver, above n 9, 314-16.

[271] Ibid. Cf Parker and Evans, above n 4, 218-20 who make the point that lawyers involved in negotiation should avoid adversarialism and be more collaborative. Compare with Wolski, who argues that '[a]dversarial behaviour (assuming it can be defined) cannot be isolated from non-adversarial behaviour and it cannot be eliminated': Wolski, above n 57, 39.

one's reputation is probably best served by being more courteous to one's opponent. Perhaps most telling against utilising such tactics is that a number of recent empirical studies have found that a competitive style in negotiation is far less effective than a cooperative approach.[272]

The courts have long held legal practitioners to high ethical standards. Lawyers are presumed to have 'moral character',[273] and courts have stressed that 'personal integrity is an essential attribute of a legal practitioner'.[274] The imposing of such high standards is justified by reference to the effective administration of justice. As Justice Gray explained:

> Legal practitioners play an integral part in the administration of justice. The obligations which accompany their position are commensurate with the responsibility involved. Practitioners have a number of duties including a duty to uphold the law, a duty to the court, a duty to their clients and a more general duty to members of the public. The court and the public demand a high standard from practitioners.[275]

It has been argued in this article that these high ethical standards are equally applicable to the negotiation environment; thus, any form of deception in negotiation should not be tolerated.[276] To practice deception in the negotiation environment is to harm oneself (through damaging one's reputation and personal moral integrity), one's client (through removing the possibility of beneficial settlements and exposing future clients to the negative effect of one's own deceitful reputation), and society itself (through adversely impacting the

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[272] For a summary and discussion of such studies see Craver, above n 9, 313-16.

[273] *Prothonotary of the Supreme Court of New South Wales v Fitzsimons* [2012] NSWSC 260, [9] (Adams J).

[274] *Legal Practitioners Conduct Board v Hannaford* (2002) 83 SASR 277, 279 (Williams J).

[275] *Legal Practitioners Conduct Board v Hannaford* (2002) 83 SASR 277, 281 (Gray J). See also similar comments in *Law Society of NSW v Foreman* (1994) 34 NSWLR 408, 412 (Kirby P); *Legal Practitioners Conduct Board v Clisby* [2012] SASCFC 43, [6] (Doyle CJ and Stanley J).

[276] See Steele, above n 5, 1400-1.

efficient administration of justice).[277] It has been the main purpose of this article to promulgate this ethical reality and highlight the fact that the duty to act honestly and with integrity within the negotiation environment is an essential component of a lawyer's paramount duty to justice. As some lawyers continue to fail to meet their ethical obligations in this area, further promulgation and clarification of such duties is clearly required (and both law societies and law schools should take the lead in this respect), but perhaps this article might be viewed as a serviceable contribution to that ongoing process of ethical education.

[277] That is, deception in negotiation is an impediment to any system of justice that depends so heavily upon negotiation to resolve the majority of civil disputes: see Pounds, above n 4, 182.