PROMOTING TRUTHFULNESS IN NEGOTIATION: A MINDFUL APPROACH

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I. INTRODUCTION

If "only saints and fools can be relied on to tell the truth" in negotiation,[1] it is destined to remain a domain of deceit.[2] But does it have to be that way? Is deception endemic to negotiation? Are lawyers, in particular, doomed to be deceitful in its course? I do not think so.

Nevertheless, when I recently broached the topic of truthfulness in negotiation with an esteemed ADR[3] colleague, he was remarkably skeptical. In fact, he went so far as to say that lawyers should not be expected to be truthful in negotiation, and that any suggestion to the contrary would be pretty far-fetched.

Although I cannot speak with certainty to the rationale of my esteemed colleague, I surmise that such a response stems in great part from the stereotypical resolution of two competing ethical considerations. On the one hand, the lawyer is generally expected to be forthright in her[4] dealings with others;[5] on the other, the lawyer is con-

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1. Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1233 (1990) (explaining the impact of high stakes and common assumptions upon truthfulness in negotiation).

2. *Cf.* Scott R. Peppet, *Can Saints Negotiate?: A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83, 90-95 (2002) (debating the constraints that a "saintly" lawyer may face in competitive negotiation situations). *See generally* discussion *infra* Part II.

3. Alternative, or Appropriate, Dispute Resolution. Negotiation is a principal means of ADR.

4. Although I have generally made reference to the feminine gender in preference to the

fronted with a more immediate and specific expectation that she will act as the advocate, and protector, of her client's interests.[6] Needless to say, those expectations may conflict in the real world of negotiation. Worse yet, when they do appear at odds, truth is frequently the first casualty.

Therein lies the rub. Negotiation is a dispute resolution process that, by definition, involves "conferring, discussing or bargaining to reach agreement."[7] Moreover, it is "an interactive communication process by which two or more parties who lack identical interests attempt to find a way to coordinate their behavior or allocate scarce resources in a way that will make them better off than they could be if they were to act alone."[8] Yet how can the parties be said to have reached an "agreement" if deceived in the process? And how can the parties truly be said to have coordinated their behaviors or allocated their resources if the communication process takes a less than truthful course? I submit they cannot.

Deception serves not only as an impediment to integrative bargaining[9] and the achievement of mutually satisfactory results, but also as a practice inimical to a system of justice that depends so heavily upon negotiation to resolve the majority of its disputes.[10] Consequently, rather than condoning deceptive tactics, the legal profession should redouble its efforts to promote an "ethics infrastructure" more consistent with the evolving settlement culture within which the lawyer lives.[11]

So what can be done to encourage more truthful conduct in negotiation? And, what can be done to reconcile the lawyer's responsibility to provide "zealous" representation of her client's interests with the competing, if not conflicting, desire that she participate in negotia-

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masculine for purpose of example in this Article, I would presume either to apply equally.

5. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 4.1 (2002) (unless otherwise specifically indicated herein, all references are to the Rules as revised through February 5, 2002).

6. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2002).

7. WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 907 (3d ed. 1994).

8. RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRATEGY 1 (2002).

9. *See generally id.* at 111-47.

10. *See Developments in the Law: The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1852 (2000) (citing Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1342 (1994)) (emphasizing the prominence of negotiation as a means of dispute resolution).

11. James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U. L. REV. 255, 272 (1999).

tion in a candid manner? Some commentators believe the answer lies in a modification and modernization of the rules of professional conduct for the lawyer-negotiator.[12] However, as promising as that might sound, I doubt that it is enough.

In my opinion, the solution to finding a more truthful course in negotiation may lie in the practice of mindfulness.

> Mindfulness is an ancient Buddhist practice which has profound relevance for our present-day lives. This relevance has nothing to do with Buddhism per se or with becoming a Buddhist, but it has everything to do with waking up and living in harmony with oneself and with the world. It has to do with examining who we are, with questioning our view of the world and our place in it, and with cultivating some appreciation for the fullness of each moment we are alive. Most of all, it has to do with being in touch.[13]

By cultivating mindfulness, the lawyer opens the door to greater awareness, and reconciliation, of the lawyer's multitude of concerns—including the issue of truthfulness.

In a sense, the premise of this Article—i.e., the prospect that mindfulness will contribute to greater truthfulness in negotiation—may be viewed as a logical extension of recent efforts to expand the lawyer's professional and personal horizons. Such efforts are exemplified by the thought-provoking works of Steven Keeva[14] and Leonard Riskin.[15] Riskin, in particular, has gone to considerable length not only to explain how the practice of mindfulness may be of general benefit to the legal profession,[16] but also to articulate how mindfulness may be of positive effect on the lawyer as a negotiator.[17] To the extent that mindfulness frees the lawyer from limiting mindsets that tend to obfuscate opportunities to create value,[18] it provides the lawyer with the opportunity to find greater truth and harmony within herself and, in turn, within her negotiation practices.

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12. *See* discussion *infra* Part II.

13. JON KABAT-ZINN, WHEREVER YOU GO, THERE YOU ARE: MINDFULNESS MEDITATION IN EVERYDAY LIFE 3 (1994).

14. STEVEN KEEVA, TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE (1999).

15. Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002); s*ee* Symposium, *Mindfulness in the Law & ADR*, 7 HARV. NEGOT. L. REV. 1 (2002).

16. Riskin, *supra* note 15, at 45-63.

17. *Id.* at 53-59.

18. *See id.* at 48-56.

To practice mindfulness is to proceed upon a path to greater awareness.[19] Hopefully, this Article will serve as a guide for the lawyer-negotiator, and provide some food for thought along the way. Part II of this Article examines reasons why the lawyer may employ deceptive negotiation strategies, as well as the shortcomings of rule-based controls. Part III explores the concept of mindfulness and how mindfulness may influence a more truthful course in the lawyer's practices. This Article concludes with the proposition that the interests of truthfulness in negotiation would be best promoted by ethical principles that are nurtured from within—and that mindfulness provides a key to such internal ethical growth.

19. The characterization of mindfulness as a process, as well as a condition, is consistent with its Eastern roots. The word *Tao*, Chinese for "way" or "path," metaphorically describes life and the quest for meaning. KABAT-ZINN, *supra* note 13, at 87.