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## Breaking Faith: Machiavelli and Moral Risks in Lawyer Negotiation

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# BREAKING FAITH: MACHIAVELLI AND MORAL RISKS IN LAWYER NEGOTIATION

MICHAEL S. MCGINNISS\*

## ABSTRACT

This article examines the ethics of lawyer negotiation through the viciously scratched lens of Niccolò Machiavelli's *The Prince*, in which he advises political rulers about what he considers realistic principles for decision making and action. For background, the article introduces some core elements of Machiavelli's moral philosophy and its often subtle but nevertheless persisting influence on the American legal profession and the practice of negotiation. After reviewing the most important aspects of the law of lawyer negotiation, it considers concepts of risk in the negotiation process, including informational and moral risks. The article proposes that negotiation practices manifesting Machiavellian faith breaking and "effectual truth," rather than a lawyer's commitment to good faith and honest dealing, create moral risks of harm to lawyer integrity, as well as to relationships with clients and within the community. It concludes by advancing a realistic ideal for virtuous negotiation, founded in the keeping of faith with opposing counsel and parties, and promoting the virtues of respect for other persons, loyalty to clients, and justice from fair processes.

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## I. INTRODUCTION

*False words are not only evil in themselves, but they infect the soul with evil.*

—Socrates<sup>1</sup>

*How praiseworthy it is for a prince to keep his faith, and to live with honesty and not by astuteness, everyone understands. Nonetheless one sees by experience in our times that the princes who have done great things are those who have taken little account of faith and have known how to get around men's brains with their astuteness; and in the end they have overcome those who have founded themselves on loyalty.*

—Machiavelli<sup>2</sup>

American legal scholar and literary critic James Boyd White has described the practice of law as “the experience of making and remaking language under pressure.”<sup>3</sup> This pressure exists, in some form and degree, in each task a lawyer may be called upon to perform in representing a client. It exists in the ethical challenges a lawyer confronts when reconciling competing professional duties and in reconciling those duties with the dictates of the lawyer’s personal conscience.<sup>4</sup> It exists when a lawyer advises a client, and in doing so must exercise independent professional judgment, render candid advice, and decide whether and how to offer counseling on moral considerations relevant to the client’s situation.<sup>5</sup> And, as White examined through the virtuous and idealistic lens of Socrates’ dialogue in Plato’s *Gorgias*,<sup>6</sup> this pressure exists when a

1. PLATO, *Phaedo*, reprinted in 1 THE DIALOGUES OF PLATO 385, 475 (115e) (Benjamin Jowett trans., Oxford at the Clarendon Press 4th ed. 1953).

2. NICCOLÒ MACHIAVELLI, THE PRINCE 68-69 (Harvey C. Mansfield trans., Univ. of Chicago Press 2d ed. 1998) (1531).

3. James Boyd White, *The Ethics of Argument: Plato’s Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 882 (1983) [hereinafter White, *The Ethics of Argument*].

4. See Michael S. McGinniss, *Virtue Ethics, Earnestness, and the Deciding Lawyer: Human Flourishing in a Legal Community*, 87 N.D. L. REV. 19 (2011) [hereinafter McGinniss, *Virtue Ethics*] (noting “the moral challenges lawyers face because of their ethical position as individuals owing competing professional duties to clients, the courts, and other persons who are affected by the actions of lawyers and their clients”); MODEL RULES OF PROF’L CONDUCT Preamble 7 (AM. BAR ASS’N 2015) (“[A] lawyer is . . . guided by personal conscience.”).

5. See MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N 2015); see also Michael S. McGinniss, *Virtue and Advice: Socratic Perspectives on Lawyer Independence and Moral Counseling of Clients*, 1 TEX. A&M L. REV. 1 (2013) [hereinafter McGinniss, *Virtue and Advice*] (examining the ethical and moral responsibilities of lawyers in their role as advisors to clients, “with continual reference to . . . Socrates,” and proposing, as an ideal for moral counseling, a conception of the lawyer as a “trustworthy neighbor”).

6. “Plato’s *Gorgias* is about the ‘ethics’ of argument in a literal sense of that term (which in Greek means both ‘habit’ and ‘character’) for the main issue to which it returns again and again is

lawyer advocates on behalf of a client before a tribunal, or by communications with opposing counsel or with an unrepresented party.

This article will examine the ethics of lawyer negotiation through the viciously scratched lens of Niccolò Machiavelli's *The Prince*, in which he advises political rulers about what he considers realistic principles for decision making and action. The foremost concern of this article will be the moral risks to integrity, clients, and community a lawyer takes when, for the sake of achieving an adversarial advantage in negotiations, the lawyer becomes a Machiavellian "breaker of faith."<sup>7</sup> Part II introduces some core elements of Machiavelli's moral philosophy and its often subtle but nevertheless persisting influence on the American legal profession and the practice of negotiation. Part III reviews the most important aspects of the law of lawyer negotiation found in professional conduct codes and in common law principles of civil liability. Part IV considers the concept of risk in lawyer negotiation, including: (1) "informational risks" and the conventional understanding of negotiation as a "game" whose objective is to resolve informational risks to the advantage of the client; and (2) "moral risks," and how negotiation practices manifesting Machiavellian faith breaking and "effectual truth,"<sup>8</sup> rather than a lawyer's commitment to good faith and honest dealing, create moral risks of harm to lawyer integrity, as well as relationships with clients and within the community. Finally, Part V will advance a realistic ideal for virtuous negotiation, founded in the keeping of faith with opposing counsel and parties, and promoting the virtues of respect for other persons, loyalty to clients, and justice from fair processes.

## II. MACHIAVELLI, LEGAL ETHICS, AND THE MODERN PROFESSIONAL

Niccolò Machiavelli was an Italian Renaissance political theorist and the author of *The Prince*, which his prominent interpreter and translator Harvey C. Mansfield has called "the most famous book on politics ever

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the kind of character a person defines for himself and offers to others—the kind of life and community he makes—when he chooses to think and talk in one way rather than in another." White, *The Ethics of Argument*, *supra* note 3, at 849.

7. MACHIAVELLI, *supra* note 2, at 62.

8. "[S]ince my intent is to write something useful to whoever understands it, it has appeared to me more fitting to go directly to the *effectual truth* of the thing than to the imagination of it." MACHIAVELLI, *supra* note 2, at 61 (emphasis added). See HARVEY C. MANSFIELD, MACHIAVELLI'S VIRTUE (1966) [hereinafter MANSFIELD, MACHIAVELLI'S VIRTUE] (observing Machiavelli rejected "the [Aristotelian] principle that a thing should be defined by its excellence," instead "demanding the 'effectual truth,' in which a thing is defined by its upshot or outcome").

written.”<sup>9</sup> Machiavelli was a contemporary of both Martin Luther in Germany<sup>10</sup> and Thomas More in England.<sup>11</sup> But besides their contemporaneity, they had little in common. The philosopher Alasdair MacIntyre has described Machiavelli as the “Luther of secular power,”<sup>12</sup> and More’s self-sacrificing relinquishment of secular power in deference to the dictates of his Christianity-formed conscience<sup>13</sup> stands in stark contrast with Machiavelli’s advocacy of self-preservation in and through power as the highest principle for social and political life.<sup>14</sup> For Machiavelli, “[m]oral rules are technical rules about the means to these ends.”<sup>15</sup> Moreover, such “rules” are to be discerned, and ensuing actions to be judged, not by reference to any *a priori* standards, objectively grounded in either theological or secular-rationalist truths, “but solely in terms of their consequences.”<sup>16</sup> Machiavelli commits himself to the notion that

9. Harvey C. Mansfield, *Introduction* to NICCOLÒ MACHIAVELLI, *THE PRINCE* vii (Harvey C. Mansfield trans., Univ. of Chicago Press 2d ed. 1998) (1531). Machiavelli was born in 1469 and died in 1527. *Id.* at xxix-xxxi.

10. Martin Luther (1483–1546), a German priest and theologian, was a leading figure in the Protestant Reformation. See Harold J. Berman & John Witte, Jr., *The Transformation of Western Legal Philosophy in Lutheran Germany*, 62 S. CAL. L. REV. 1573, 1660 (1989).

11. Thomas More (1478–1535) has been described as “the patron saint of Catholic lawyers.” Veryl Victoria Miles, *A Legal Career for All Seasons: Remembering St. Thomas More’s Vocation*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 419, 420 (2006). After refusing on grounds of faithful conscience to take the Oath of Supremacy to King Henry VIII, he was convicted of treason and executed based on perjured testimony. *Id.* at 422-23.

12. ALASDAIR MACINTYRE, *A SHORT HISTORY OF ETHICS: A HISTORY OF MORAL PHILOSOPHY FROM THE HOMERIC AGE TO THE TWENTIETH CENTURY* 127 (2d ed. 1998).

13. See Edward McGlynn Gaffney, Jr., *The Principled Resignation of Thomas More*, 31 LOY. L.A. L. REV. 63, 72-73 (1997) (examining More’s “principled resignation” as Lord High Chancellor based on King Henry VIII’s claim “to absolute authority over the church”). In contrast to Machiavelli’s secular prince, who “was to act solely from considerations of power politics,” for Luther “the Christian prince . . . should be inspired to govern in a decent and godly way, promoting the well-being of his subjects. This was interpreted to mean that a ruler in the earthly kingdom should not tolerate any injustice but should defend against and punish evil and should help, protect, and maintain the right, according to what each one’s office or station may require.” Berman & Witte, *supra* note 10, at 1593-94 (footnotes and internal quotation marks omitted).

14. “For Machiavelli the ends of social and political life are given. They are the attainment and holding down of power, the maintenance of political order and general prosperity, and these latter, in part at least, because unless you maintain them, you will not continue to hold power.” MACINTYRE, *supra* note 12, at 127.

15. *Id.* at 128. Although Machiavelli’s moral relativism dispenses with any concept of absolute truth (rationalist or otherwise), his philosophy reflects his desire for human beings to exercise maximum “rational control” for the ends of self-preservation and aggrandizement, particularly through the manipulation of others. “What is rational control? . . . [T]he idea of modernity. That idea requires subjecting our entire lives, holding nothing back—which means holding nothing sacred as exempt—to an examination by our reason as to whether we can live more effectively. . . .” Harvey C. Mansfield, *Rational Control, or, Life without Virtue*, NEW CRITERION, Sept. 2006, at 39, 39. As Mansfield observes, “The idea of rational control was conceived by Machiavelli and continued by a series of modern philosophers who followed him and considered themselves a movement.” *Id.* at 40.

16. MACINTYRE, *supra* note 12, at 128.

“consequences are calculable,”<sup>17</sup> and that “[t]he study of history yields empirical generalizations from which we can derive causal maxims,” to be used as each given occasion arises “*to influence other people, rather than as answers to the question, What am I to do?*”<sup>18</sup>

As Mansfield explains, Machiavelli’s moral philosophy rebels against the ideas explored and embraced by the Greek philosophers Plato and Aristotle, rejecting their search to understand the true and the good as ultimate realities having intrinsic value beyond their useful effects:<sup>19</sup>

For Machiavelli, reason does not cooperate with imagination to see the perfection of a thing. The very virtues constituting the perfection of the soul according to Plato and Aristotle must not be understood as perfect or part of perfection. They are “qualities,” a neutral term, that bring “either blame or praise,” to be appreciated as they appear to others only as effects. Their effectual truth is quite different from the truth one imagines when they are merely thought out without regard to their effect. *When looked at from the standpoint of effectual truth, the virtues that Socrates induced from his companions because they were true or real virtue turn out to be apparent virtue quite opposed to effectual virtue, now said to be real virtue.* Machiavelli reverses the upward course of Socratic argumentation and brings it “down to earth.” The effect, and not the intent understood as intent toward perfection, is the locus of good, and when judging the intent from the standpoint of the effect, vice, or some combination of vice and virtue, is more powerful than virtue alone, and blame is more effectual than praise.<sup>20</sup>

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17. *Id.*

18. *Id.* (emphasis added).

19. Harvey C. Mansfield, *Machiavelli’s Enterprise*, NEW CRITERION, Oct. 2013, at 4, 9 [hereinafter Mansfield, *Machiavelli’s Enterprise*]. He explains:

To reform contemplative philosophy, Machiavelli moved to assert the necessities of the world against the intelligibility of the heavenly cosmos and the supra-heavenly whole. *His* nature, as opposed to that of Plato or Aristotle, lacked the lasting or eternal intelligibilities of nature as they conceived it. To assert the claim of nature against theology Machiavelli changes nature into the world, or, more precisely, because the world is not an intelligible whole, into “worldly things.” This world is the world of sense.

*Id.* at 9.

20. *Id.* at 9-10 (emphases added) (quoting MACHIAVELLI, *supra* note 2, at 61). Mansfield notes, “The well-known phrase *verità effettuale*, announcing what is loosely called Machiavelli’s realism, occurs just this once in all of Machiavelli’s writings and nowhere else, so far as I know, in any other writings of the Renaissance.” MANSFIELD, MACHIAVELLI’S VIRTUE, *supra* note 8, at 19.

Accordingly, for Machiavelli, the “effectual truth” about virtue “is *what it gets you*. But virtue gets you ‘ruin rather than preservation’ unless you ‘learn how to be able *not* to be good.’”<sup>21</sup> And “[w]hen Machiavelli praises virtue, it would seem necessary to make the ability to do evil a *part* of virtue.”<sup>22</sup> Nevertheless, “such vicious virtue achieves its effect only in contrast with what people usually expect from virtue, [which is] that it not include vice. Thus Machiavelli’s notion of virtue, which welcomes the vices, must continue to coexist with the old notion, which is repelled by them.”<sup>23</sup> A person’s decision to use the ability “*not* to be good” should be made “according to *necessity*.”<sup>24</sup> And in each case, what “necessity” exists and what it requires as to action is decided with an unrelenting focus on the desired objectives of obtaining and maintaining power, and preserving oneself and benefiting those who are beneficial to oneself.<sup>25</sup> He believes “[n]ecessity simplifies by ‘going directly’ to the effect without regard to opposing claims and doubtful or contradictory reasonings [about what is ‘good.’] Machiavelli recommends acting first and reasoning—rationalizing—afterwards.”<sup>26</sup>

Lawyers, too, have been known to act first and rationalize afterwards.<sup>27</sup> When such action involves dishonesty—i.e., breaking faith—in the practice

21. MANSFIELD, MACHIAVELLI’S VIRTUE, *supra* note 8, at 19 (emphases added) (quoting NICCOLÒ MACHIAVELLI, THE PRINCE 15 (1531) (Mansfield’s translation)).

22. *Id.*

23. *Id.* “Machiavelli questions the primacy of the good and dethrones it as the object of human action. Men do not have a natural preference for real or true good as opposed to what is merely apparent, as was the basis for Socrates’s arguments. They are satisfied (‘satisfied’ and ‘stupefied’) with the apparent good they see in ‘good effects,’ especially if they are impressive or sensational. Good effects are what they appear to be; they are deeds, *fait accomplis*.” *Id.*

24. MACHIAVELLI, *supra* note 2, at 61 (emphasis added).

25. See MANSFIELD, MACHIAVELLI’S VIRTUE, *supra* note 8, at 19 (observing that to Machiavelli, “[v]irtue is not for its own sake and not for the sake of self-improvement but for the use of others—subjects and friends—in self-aggrandizement”).

26. Mansfield, *Machiavelli’s Enterprise*, *supra* note 19, at 11. Beyond his discarding the idealism of classical moral philosophy, there is evidence in his writings that Machiavelli regarded Christianity and its doctrines with disdain, though one he took care to avoid expressing too conspicuously. “Although it is true . . . that sprinkled throughout Machiavelli’s writings” are multiple references to God, “just behind this orthodox veneer lies a forceful criticism of not only the clergy, but also Christianity itself.” VICKIE B. SULLIVAN, MACHIAVELLI’S THREE ROMES: RELIGION, HUMAN LIBERTY, AND POLITICS REFORMED 4 (1996). As Machiavelli would have it, Christian doctrines have “enfeebled human beings,” reducing “all politics to fundamental weakness” when a ruler adheres to “Christian notions of such politically important conceptions such as cruelty, humility, and human virtue.” *Id.* at 5.

27. “In response to a lawyer’s statement that ‘[telling the truth in civil litigation] is, of course, a very attractive proposition. But . . . while it might be nice in a perfect world, it is not the way the system operates in litigation in this country,’ the indignant court in *Monsanto Co. v. Aetna Casualty and Surety Co.*, 593 A.2d 1013 (Del. Super. Ct. 1990) stated that ‘I am compelled in the strongest way possible to reject counsel’s observations as being so repugnant and so odious to fair minded people that it can only be considered as anathema to any system of civil justice under



of negotiation, the lawyer who looks will find multiple sources of support for rationalizing it: these include various legal ethics and negotiation scholars, the customs of practice in a particular legal community, and even, in some regards, the professional conduct rules themselves.<sup>28</sup> Among the scholarly advocates of calculated faith breaking, Machiavelli has at times been explicitly identified for his influence. In a leading 1980 article entitled *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, James J. White insists the use of deception is essential to an effective negotiation: “The critical difference between those who are successful negotiators and those who are not lies in [the] capacity both to mislead and not to be misled.”<sup>29</sup> As for customs of practice, recent empirical studies about lawyers<sup>30</sup> and law students<sup>31</sup> negotiation-related ethics reflect that attitudes either tolerating or embracing the carefully measured use of deception are rather widespread in the legal profession.<sup>32</sup> Finally, this

law.” David Barnhizer, *The Virtue of Ordered Conflict: A Defense of the Adversary System*, 79 NEB. L. REV. 657, 707 n.144 (2000).

28. As David Barnhizer has noted, the legal profession’s experiences (and struggles) with truthfulness in the adversary process have not occurred in a cultural vacuum:

[T]he lack of truth and even more importantly the unwillingness to pursue truth as a critical precondition of resolving disputes and obtaining social goods has permeated our entire society. In our “progressive” society, truth has increasingly become the victim of outcome. As undesirable as our “culture of lies” might be, it represents a largely irreversible phenomenon. Coping with the culture we have created leaves us with the need for strong dispute resolution systems, ones with a power sufficient to “overawe” competing interests to the extent sufficient to ensure the decisions, once rendered, are complied with.

Barnhizer, *supra* note 27, at 708-09. He further opines that despite “claims to the contrary, the adversary system is not directed toward ascertaining truth. It is about obtaining and protecting shares of power for specific interests.” *Id.* at 709. In so describing the adversary system, Barnhizer is effectively invoking (though not by name) Machiavelli and his moral philosophy of “effectual truth.” See *supra* notes 19-26 and accompanying text.

29. 1980 AM. B. FOUND. RES. J. 926, 927 (1980) [hereinafter White, *Machiavelli and the Bar*]; see also Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. ON DISP. RESOL. 481, 481 n.1 (2009) (citing STUDIES IN MACHIAVELLIANISM (Richard Christie & Florence L. Geis eds., 1970), and its discussion of “studies indicating that people who demonstrate strength in a personality variable called ‘Machiavellianism’ are more likely to lie when they need to do so, better able to tell lies without feeling anxious, and more persuasive and effective in their lies”).

30. Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95 (2011).

31. Andrew Hogan, Note, *The Naïve Negotiator: An Empirical Study of First-Year Law School Students’ Truth-telling Ethics*, 26 GEO. J. LEGAL ETHICS 725 (2013).

32. See Hinshaw & Alberts, *supra* note 30, at 147-50 (survey data revealing a substantial number of practicing lawyers “would violate the requirements of [the current ethics rules] by agreeing to engage in a blatantly fraudulent negotiation tactic” involving deception by omission, “if asked to do so by their client”); Hogan, *supra* note 31, at 738 (2012 first-year law student survey reflecting “the majority of respondents [were] uncomfortable making an untrue statement or would not risk making a possibly untrue statement, even if the client would benefit,” but also that “the vast majority of respondents are risk-prone to omissions that would benefit their client or do not see the omission as a risk”). In an interesting 1989 study, Scott S. Dahl asked fourteen

persistent strain of Machiavellian moral philosophy has found its way into and persisted within the professional conduct standards promulgated by the American Bar Association (“ABA”) and implemented by most states.

### III. THE LAW OF LAWYER NEGOTIATION

Against this backdrop of Machiavellian moral philosophy, the law of lawyer negotiation has evolved and taken root in the American legal profession. This article will now outline and assess some of the key elements and interpretations of the professional conduct rules (including significant alternative approaches that have not been embraced by the profession) and identify several important common law principles of civil liability relating to negotiations.

#### A. ABA MODEL RULES OF PROFESSIONAL CONDUCT

The Preamble to the ABA Model Rules of Professional Conduct (“Rules”) specifically carves out “negotiator” as one of several “functions” a lawyer performs in representing clients and declares that “[a]s negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of *honest dealings* with others.”<sup>33</sup> In the same paragraph, the Preamble describes the function of an “advocate” as one in which “a lawyer zealously asserts the client’s position under the rules of the adversary system.”<sup>34</sup> This treatment of “negotiator” and “advocate” as distinct functions is consistent with the larger organization and headings employed by the Rules (with the series of Rules under the heading “Advocate” focused on a lawyer’s ethical obligations in matters that involve proceedings, whether adjudicative or nonadjudicative).<sup>35</sup> Nevertheless, from the standpoint of legal ethics, negotiating is best understood as a function performed by a lawyer acting in the *role* of an advocate—one who

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lawyers with active civil litigation practices a series of detailed questions about various aspects of negotiation ethics, including a question about the desirability or feasibility of a “fairness or good faith standard to be imposed on negotiating attorneys.” Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 REV. LITIG. 173, 180-81, 194 (1989). One respondent “pointed out that ‘everything is on the table in a negotiation, and if you get “out-foxed” then that’s your problem.’ A colorful attorney remarked that the idea [of a good faith standard for negotiations] sounded like ‘something an academic would propose’ because one cannot negotiate without some element of deceitfulness.” *Id.* at 194. In response to another question in the survey, “[t]wo of the attorneys indicated that they saw nothing wrong with making blatantly dishonest statements. One quipped that ‘everyone knows you’re lying about your authority.’ Another added that puffed statements are ‘typical tools of negotiating.’” *Id.* at 193.

33. MODEL RULES OF PROF’L CONDUCT, Preamble 2 (AM. BAR ASS’N 2015).

34. *Id.*

35. *Id.* r. 3.1-3.9.

communicates with others to promote the lawful interests of the client, including through the techniques of persuasion.<sup>36</sup>

1. *Truthfulness in Statements to Others: Rule 4.1*

Rule 4.1 on “Truthfulness in Statements to Others” provides:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person;  
or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.<sup>37</sup>

The Comment to Rule 4.1 consists of two paragraphs, the first entitled “Misrepresentation”:

A lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for

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36. For some legal ethicists, the decision whether or not to cast the negotiating lawyer in the role of “advocate” is a highly significant one for the assessment of moral responsibility and accountability. Murray L. Schwartz, who considers the negotiation task to be a “nonadvocate” role for the purpose of moral analysis, has said:

For the advocate, two principles are posited as necessary to the effective working of the adversary system: a Principle of Professionalism, which obliges the lawyer within professional constraints to maximize the likelihood that the client will prevail, and a Principle of Nonaccountability, which relieves the advocate of legal, professional, and moral accountability for proceeding according to the first principle.

Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 671 (1978). Schwartz asserts “these principles cannot be transferred automatically to the nonadvocate, because the absence of a third-party arbiter in the negotiating/counseling situation fundamentally changes the lawyer’s role.” *Id.* He concludes that negotiating lawyers, as “nonadvocates,” are morally obligated to “refrain from assisting the client by ‘unconscionable’ means or from aiming to achieve ‘unconscionable’ ends, with the term ‘unconscionable’ drawing its meaning largely from the substantive law of rescission, reformation, and torts.” *Id.*

37. MODEL RULES OF PROF’L CONDUCT r. 4.1 (AM. BAR ASS’N 2015). Rule 1.6 pertains to the confidentiality of “information relating to the representation of a client,” which may not be revealed by a lawyer “unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [an exception identified in the Rule].” *Id.* r. 1.6(a).

misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.<sup>38</sup>

The second paragraph of the Comment takes on the task of restricting what counts as unethical falsehood in a statement made by a lawyer and does so by tightening up what counts as a “fact”:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.<sup>39</sup>

The text of Rule 4.1 and its Comment is subject to criticism on several compelling grounds. First, its text prohibits only lawyers’ knowingly false statements (i.e., lies) about “material” fact or law, in contrast to Rule 3.3, which prohibits knowingly false statements of *any* fact or law when those statements are made to a tribunal.<sup>40</sup> Therefore, according to the ABA’s Model Rules, lawyers are allowed to lie<sup>41</sup> to an adversary about facts or law

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38. *Id.* r. 4.1 cmt. 1. Rule 8.4(c) provides “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” *Id.* r. 8.4(c). In a 2006 opinion, the ABA’s Standing Committee on Ethics and Professional Responsibility expresses its view that Rule 8.4(c) “does not require a greater degree of truthfulness on the part of lawyers representing parties to a negotiation than does Rule 4.1.” Amer. Bar Ass’n, Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-439, at 2 n.2 (2006). “Indeed,” it explains, “if Rule 8.4 were interpreted literally as applying to any misrepresentation, regardless of the lawyer’s state of mind or the triviality of the false statement in question, it would render Rule 4.1 superfluous, including by punishing unknowing or immaterial deceptions that would not even run afoul of Rule 4.1.” *Id.* *But cf.* Amer. Bar Ass’n, Comm. on Ethics & Prof’l Responsibility, Formal Op. 93-370, at 5 (1993) (citing Rule 8.4(c) as additional support for its opinion Rule 4.1 prohibits a lawyer from making a false statement to a judge about the lawyer’s settlement authority in a court-assisted dispute resolution process).

39. MODEL RULES OF PROF’L CONDUCT r. 4.1 cmt. 2 (AM. BAR ASS’N 2015) (emphases added).

40. *Id.* r. 3.3(a)(1). See, e.g., James J. Alfani, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U. L. REV. 255, 266-67 (1999) (stating “when it comes to negotiations, the rule prohibits only ‘material’ lies,” and “thus opens the door to what some refer to as ‘puffery,’ and others as lying, in negotiations.”).

41. Sissela Bok defines a “lie” as “any intentionally deceptive message which is *stated*.” SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 13 (Vintage Books 2d ed. 1999) (1978). Moreover, Arthur Isak Applbaum states, “The act of intentionally inducing a belief in others that one believes to be false ordinarily counts as *deception*, whatever else it may count

even when making the same statement to a judge would subject the lawyer to disciplinary sanctions. The reliance on the adversary/tribunal distinction was also explicit in a 1993 opinion from the ABA Standing Committee on Ethics and Professional Responsibility (“ABA Ethics Committee”):

While . . . a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention *between opposing counsel*, a party’s actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie *to a judge* in pretrial negotiations would be improper under Rule 4.1. . . . The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.<sup>42</sup>

Several states, including North Dakota, have adopted a variation of Rule 4.1 that does not include a materiality limitation,<sup>43</sup> thereby broadening the expectation of truthfulness with others in representing clients to prohibit all knowingly false representations of fact or law. Moreover, despite the language in the ABA Ethics Committee’s opinion plainly stating “a party’s actual bottom line or the settlement authority given to a lawyer is a material fact,”<sup>44</sup> the practice of intentionally misrepresenting such facts about bottom lines or settlement authority is nevertheless defended by leading commentators on negotiation as an ethically acceptable tactic.<sup>45</sup>

Next, although the first paragraph of Rule 4.1’s Comment notes a negotiating lawyer “generally has no affirmative duty to inform an opposing party of relevant facts,” it also cautions “[m]isrepresentations can . . . occur by partially true but misleading statements *or omissions* that are

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as.” ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* 104 (1999) (emphasis added).

42. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 93-370, at 5 (1993) (emphases added); see also DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* 54 (2008) (stating that under the Rules, “lawyers’ commitments to clients over truth grow stronger when only third parties, rather than tribunals, might be deceived”).

43. See, e.g., N.D. RULES OF PROF’L CONDUCT r. 4.1 (2015) (“In the course of representing a client a lawyer shall not make a statement to a third person of fact or law that the lawyer knows to be false.”). North Dakota, in fact, has never included the materiality limitation in its version of Rule 4.1. *Id.* In 2004 and 2005, respectively, Virginia deleted “material” from Rule 4.1(a) and Minnesota adopted a version of Rule 4.1 similar to North Dakota’s (but omitting “to a third person”). See Am. Bar Ass’n, Center for Professional Responsibility Policy Implementation Committee, Comparison of ABA Model Rule of Professional Conduct and State Variations, Rule 4.1, at [http://www.americanbar.org/content/dam/aba/administrative/professionalresponsibility/mrpc\\_4\\_1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professionalresponsibility/mrpc_4_1.authcheckdam.pdf) (May 6, 2014). In 2009, when New York first adopted the Model Rules format, it omitted the word “material” from Rule 4.1. *Id.*

44. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 93-370, at 5 (1993).

45. See, e.g., *infra* notes 52, 108-13 and accompanying text (discussing Charles B. Craver’s views).

the equivalent of affirmative false statements.”<sup>46</sup> So how should a negotiating lawyer determine which “omissions” are acceptable (particularly when client confidentiality concerns are prevalent) and which “omissions” are “the equivalent of affirmative false statements”? With a vacuum of specific guidance from paragraph one,<sup>47</sup> and given the affirmative support of certain deceptive negotiating tactics in paragraph two,<sup>48</sup> the Comment creates a smooth glide path for reasoning that factual omissions having substantial deceptive effects on an adverse party are ethically acceptable under the Rule in many (if not most) circumstances.<sup>49</sup>

In addition to rejecting Rule 4.1’s materiality limitation for prohibiting knowingly false statements, North Dakota and other states have also declined to adopt the second paragraph of the ABA’s Comment, with its permissive and accommodating attitude toward deceptive negotiating tactics.<sup>50</sup> However, for the vast majority of states that have adopted this language, in 2006 the ABA Ethics Committee offered an opinion explaining its views about (1) what a “statement of material fact” is under Rule 4.1(a) and (2) what statements are merely “opinion” rather than assertions of “fact”:

[S]tatements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client’s willingness to compromise, or present a client’s bargaining position without disclosing the client’s “bottom line” position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatement of the strengths or weaknesses of a client’s position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the

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46. MODEL RULES OF PROF’L CONDUCT r. 4.1, cmt. 1 (AM. BAR ASS’N 2015) (emphasis added).

47. “Rule 4.1 does little to guide a lawyer during negotiation when the lawyer’s concern is how much, if any, confidential client information can be revealed. In fact, Rule 4.1 says more about what deceit *is permitted* in the name of confidentiality than it says about what deceit is *not permitted*.” Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387, 1395 (1986).

48. “Rule 4.1 . . . has the high-minded title: ‘Truthfulness in Statements to Others.’ . . . On the face of it, it seems to say that a lawyer should not lie.” Alfini, *supra* note 40, at 266. The limitations created by the Comment, however, instead reflect the American Bar Association has “unambiguously embraced ‘New York hardball’ as the official standard of practice.” *Id.* at 267 (quoting Gary Tobias Lowenthal, *The Bar’s Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411, 445 (1988)).

49. *See, e.g.*, discussion *infra* Part IV.A.

50. *See* N.D. RULES OF PROF’L CONDUCT r. 4.1 (2015) (including the first paragraph of the Comment from the ABA’s Model Rule, but not the second).

negotiation. Such statements generally are not considered material facts subject to Rule 4.1.<sup>51</sup>

Negotiations scholar Charles B. Craver takes this already subtle parsing of “fact” versus “opinion” even further than does the ABA Ethics Committee, based on what he sees as the customary expectations lawyers bring to the bargaining table:

A crucial distinction is drawn between statements of lawyer opinion and statements of material fact. When attorneys merely expressed their *opinions*—for example, ‘*I think* the defendant had consumed too much alcohol’ and ‘*I believe* the plaintiff will encounter future medical difficulties’—they are not constrained by Rule 4.1. *Opposing counsel know that these recitations only concern the personal views of the speakers.* Thus, personal view statements are critically different from lawyer statements indicating that they have witnesses who can testify to these matters. If representations regarding witness information [are] knowingly false, the misstatements would clearly violate Rule 4.1.<sup>52</sup>

Because most statements prefaced “I think” or “I believe” impliedly assert a good faith factual basis exists for having the thought or holding the belief, describing them as mere “opinion” and not subject to an ethical duty of truthfulness is an unavailing sidestep.<sup>53</sup> Arthur Isak Applbaum refers to this kind of semantic game as “institutional redescription”:

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51. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-439, at 6 (2006). As to the last quoted sentence, the ABA Ethics Committee allows that “[c]onceptually, such statements could be viewed as violative of other provisions of the . . . Rules if made in bad faith and without any intention to seek a compromise.” *Id.* at 6 n.18 (citing as examples Rules 4.4(a) & 3.2).

52. Charles B. Craver, *Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive*, 38 S. TEX. L. REV. 713, 727 (1997) (emphases added).

53. Reed Elizabeth Loder persuasively argues a lawyer’s affirmative misstatements about a client’s “bottom line” or the lawyer’s settlement authority cannot properly be described as mere “opinion” or intrinsically non-material or non-factual “value” statements:

[One] approach to denying that the bottom line remark counts as deception is to argue that the remark is not a statement or assertion at all; that the first part of the definition of a lie, a statement believed false, is not satisfied. The Comment [to Rule 4.1] adopts this tactic [such that] the lawyer whose client has authorized her to accept fifteen thousand dollars, may state the following to the opponent without lying: “My client won’t take less than twenty thousand dollars.” According to the Comment, such statements are statements of value, not fact, and thus not prohibited by the language of the Rule. . . . This position would be plausible if the lawyer were venturing an opinion of what the case was worth, such as, “we have trouble accepting your offer for a case worth around \$20,000.” Instead, the statement, “my client won’t accept less than \$20,000,” is a report of the client’s minimum threshold, a *fact* communicated to the lawyer before the session. Thus, the lawyer does assert factual information—the fact

Some manipulation of belief in negotiation counts in the law as fraud, and some counts, both in the law and in positive legal ethics, merely as “puffing and bluffing.” But no institutional re-description can do away with the prior description of [deception as] “intentionally inducing a false belief,” or can block counting intentionally inducing false belief as deception. Though the law and positive legal ethics may count certain representations as mere puffery or bluffery, legal rules and rules of professional practice cannot by themselves undo the prior description of deception. When puffing and bluffing is accomplished by making untrue statements, such as “My client will not accept anything less” when you have good reason to believe that this is not the case, . . . you are lying. That the law has some standard of what counts as a “material” misrepresentation of fact is of no consequence to the prelegal description. Because descriptions persist, the law does not determine what is or is not properly described as a lie.<sup>54</sup>

It is ultimately self-serving for the legal profession to justify such institutional re-description on the ground that these forms of deception are consistent with “generally accepted conventions of negotiation.” Moreover, as a general matter, the Rules do not present themselves as simply codifying extrinsic “conventions” of the practice of law, but rather as themselves establishing the normative standards for professionally responsible conduct.<sup>55</sup>

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that the client made a statement about a minimally acceptable figure—and it is disingenuous to categorize the statement as one of opinion or value.

Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45, 73-74 (1994) (footnotes omitted). The relevant ABA Ethics Committee opinions contain more support for Loder’s view on this issue than Craver’s. A 1993 opinion calls a lawyer’s representations about client settlement authority (when a judge is involved in the dispute resolution process) statements of “material fact,” (*see supra* notes 38, 42-44, and accompanying text), and a 2006 opinion seeks carefully to limit the permissible scope of facts relating to client settlement authority about which a lawyer may make false statements. *See supra* notes 38, 51, and accompanying text. *See generally* MARKOVITS, *supra* note 42, at 274 n.74 (“The point of the lawyer’s claim about her client’s settlement reservation price is for the other side to accept, and act on, its truth, and the Comment therefore cannot wish the lie away by claiming that it is not factual or material.”).

54. APPLBAUM, *supra* note 41, at 105. Applbaum insightfully asks if “lies about most opinions, evaluations, and future intentions do not count” as material, “why . . . does anyone waste breath making such statements?” *Id.* at 105-06.

55. *See* Hogan, *supra* note 31, at 730 (in reference to Rule 4.1 and Comment [2], noting that “[s]cholars have additionally identified the obvious problem of who is it that decides what ‘generally accepted conventions’ are and why this standard is applicable in this rule but not in other areas of the *Model Rules*” (citing Carrie Menkel-Meadow, *Ethics, Morality and Professional Responsibility in Negotiation*, in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 119, 119-154 (Phyllis Bernard & Bryant Garth eds., 2002))).



James J. Alfini has proposed revisions to Rule 4.1 and the second paragraph to its Comment to increase the expectations of truthfulness in alternative dispute resolution proceedings that are not supervised by a tribunal. Specifically, he recommends deleting the materiality limitation from the text of Rule 4.1(a); inserting a new Rule 4.1(b) prohibiting a lawyer from “assist[ing] the client in reaching a settlement agreement that is based on reliance upon a false statement of fact made by the lawyer’s client”; and replacing the second paragraph of the Comment with language stating a lawyer should “inform the client of the lawyer’s duty to be truthful and the lawyer’s inability to assist the client in reaching a settlement agreement that is procured in whole or in part as a result of a false statement of material fact or law made by the client.”<sup>56</sup> Alfini makes excellent recommendations,<sup>57</sup> which should be expanded to include *all* lawyer negotiations. State and local bar associations should also consider adopting standards for “good faith” negotiation practice similar to those which have existed in the District of Columbia since 1996, including the principle that lawyers “will not knowingly misrepresent or mischaracterize facts or authorities or affirmatively mislead another party or its counsel in negotiations.”<sup>58</sup>

## 2. *Dealing with Unrepresented Persons: Rule 4.3*

For most lawyers, the vast majority of their negotiations occur with opposing counsel representing the adverse party. But what about negotiations with unrepresented adverse parties? Should Rule 4.1,

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56. Alfini, *supra* note 40, at 270-71.

57. If considered for adoption by the ABA, the word “material” in the proposed second paragraph of the Comment (as quoted above) should be stricken for substantive consistency, as Alfini wisely suggests this word should be omitted from the Rule because it “open[s] the door to lying.” *See id.* at 269-70.

58. See D.C. BAR VOLUNTARY STANDARDS OF CIVILITY (adopted by the D.C. Bar Board of Governors, June 18, 1996; amended March 11, 1997), *cited in* Menkel-Meadow, *The Limits of Adversarial Ethics*, in *ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATION* 140 n.34 (Deborah L. Rhode ed., 2000) [hereinafter Menkel-Meadow, *The Limits of Adversarial Ethics*] as an example of a state bar seeking “to enact some substantive rules of ‘good faith and fair dealing’ representations in business transactions and other negotiations.” These standards also express professional expectations of good faith and fair dealing to “honor all understandings with, and commitments . . . made to, other attorneys,” to “stand by proposals we have made in negotiations unless newly received information or unforeseen circumstances provide a good faith basis for rescinding them,” and to “encourage . . . clients to conduct themselves in accordance with this principle.” *Id.* They state that lawyers “will not make changes to written documents under negotiation in a manner calculated to cause the opposing party or counsel to overlook or fail to appreciate the changes” and “will clearly and accurately identify for other counsel and parties all changes that we have made in documents submitted to us for review.” *Id.* Finally, they provide that “[i]n memorializing oral agreements the parties have reached, we will do so without making changes in substance and will strive in good faith to state the oral understandings accurately and completely,” including with letters of intent. *Id.*

including the permissive Comment language about what counts as “fact” and what are described as “generally accepted conventions of negotiation,” apply with equal force in those circumstances? And do other Rules provide further limitations or otherwise help us to understand the ethical duties of a negotiating lawyer? Although several Rules have implications in the negotiation context,<sup>59</sup> the most important is Rule 4.3 on “Dealing with Unrepresented Person,” which provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.<sup>60</sup>

Concerning negotiations with unrepresented persons, the Comment to Rule 4.3 offers the following explanation, clarifications, and reassurances:

Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. *This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person.* So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, *the lawyer may inform the person of the terms on which the lawyer’s client will enter into an agreement or settle a matter*, prepare documents that require the person’s signature and explain *the lawyer’s own view of the meaning of the document or the lawyer’s view of the underlying legal obligations.*<sup>61</sup>

Rule 4.3 acknowledges the risk that in representing a client, a lawyer may overreach and take improper advantage of an unrepresented person.<sup>62</sup>

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59. For example, Rules 3.2 (Expediting Litigation) and 4.4(a) (Respect for Rights of Third Persons) have some implications for the use of negotiation (and certain tactics in the course of negotiation) for the purpose of delay (Rule 3.2) or to “embarrass, delay, or burden” the adverse party (Rule 4.4(a)). MODEL RULES OF PROF’L CONDUCT r. 3.2, 4.4(a) (AM. BAR ASS’N 2015).

60. *Id.* r. 4.3.

61. *Id.* r. 4.3, cmt. 2 (emphases added).

62. *See id.* (referring to “the possibility that the lawyer will compromise the unrepresented person’s interests”).

An awareness of this ethical risk is implicit in its Comment language touching on negotiation. In fact, when viewed side-by-side with Rule 4.1's Comment—with its duty-narrowing text and exculpatory tone—Rule 4.3's Comment virtually endorses the virtues of lawyer straight-talk. It speaks with an objective perspective about “the terms” of an agreement or settlement and about “the lawyer’s view” (not necessarily the lawyer’s subjective and personal one, but one formed reasonably and in objective good faith)<sup>63</sup> of what legal rights and obligations actually exist and what interpretations of relevant materials should be applied.<sup>64</sup>

In a comment to its provision on dealing with “a non-client who is not represented by a lawyer,”<sup>65</sup> the American Law Institute’s Restatement (Third) of Law Governing Lawyers (“Restatement”) offers two distinct reasons for embracing enhanced protections for unrepresented persons in negotiation:

Active negotiation by a lawyer with unrepresented non[-]clients is appropriate in the course of representing a client. . . . *Lawyers should in any event be trustworthy.* Moreover, by education, training, and practice, lawyers generally possess knowledge and skills not possessed by non[-]lawyers. Consequently, *a lawyer may be in a superior negotiating position when dealing with an unrepresented non[-]client, who therefore should be given legal protection against overreaching by a lawyer.*<sup>66</sup>

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63. *Cf. id.* r. 3.1 (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”). An objective test is used in determining whether a lawyer has complied with Rule 3.1’s requirements of non-frivolousness and good faith. *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 3.1-1 (2015-2016 ed.), Westlaw (under Rule 3.1, “the duty of a lawyer not to bring frivolous cases and arguments does not rest on whether the client has a subjective intent to harass or injure a third person”; instead, unlike DR 7-102(A)(1) of Model Code of Professional Responsibility, “the test in Rule 3.1 is an objective test”). I recommend the lawyers employ a similarly objective normative standard for good faith and honest dealing in negotiations. *See infra* Part V.

64. MODEL RULES OF PROF’L CONDUCT r. 4.3, cmt. 2 (AM. BAR ASS’N 2015).

65. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 103 (AM. LAW INST. 2000). The Restatement provides “the lawyer may not mislead the non[-]client, to the prejudice of the non[-]client, concerning the identity and interests of the person the lawyer represents” and “must make reasonable efforts to correct misunderstanding [about the lawyer’s role, known or reasonably known] when failure to do so would materially prejudice the non[-]client.” *Id.*

66. *Id.* § 103, cmt. B. It is noteworthy that in support of “legal protection against overreaching by a lawyer,” this comment points to the principle of contract law creating liability where there is “justifiable reliance on assertion of *opinion*, because of asserting person’s special skill, judgment, or objectivity.” *Id.* (emphasis added) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 169(b) (AM. LAW INST. 1981)); *see also* Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers’ Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 138 (1997) (urging states to adopt rules detailing “the behavior that is prohibited when an attorney deals with an unrepresented opponent, including statements made in the course

Thus, the Restatement identifies trustworthiness as a lawyerly virtue in dealing with an unrepresented person, and one that has ethical significance along with the general deterrence objective against overreaching conduct by lawyers. The virtue of trustworthiness stands out as an independently valuable element of professional character the lawyer must maintain even when its compromise would benefit the client in a negotiation.

When viewing Rule 4.3 together with the Restatement, it is reasonable to conclude the positive law of legal ethics *already* requires a higher standard of truthfulness for lawyers when negotiating with unrepresented persons than with opposing counsel.<sup>67</sup> Nevertheless, in light of the subtlety with which this principle is articulated, there is merit to the idea of codifying it with greater force and clarity. Some, such as Victoria L. Haneman, would go even further in forging increased protections for unrepresented persons, in the form of a rule creating a duty of fairness that encompasses not only a lawyer's good faith and fair dealing but also the lawyer's avoidance of substantively unfair outcomes.<sup>68</sup> Regardless of whether the opposing party is represented by counsel, significant doctrinal and practical reasons exist for *not* imposing on lawyers a duty to ensure the substantive fairness of negotiations.<sup>69</sup> That said, Haneman's proposal is

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of negotiations," and which "should err on the side of protecting the unrepresented party, even at the risk of impeding the lawyer's ability to obtain a quick settlement.").

67. Cf. Dahl, *supra* note 32, at 193 (based on interviews with fourteen lawyers from a variety of law practice areas, finding "[a] bare majority of the lawyers believed that attorneys should be held to a higher standard when negotiating with unrepresented parties").

68. The text of Haneman's proposed rule reads:

A lawyer appearing against an unrepresented opponent shall not unfairly exploit his opponent's ignorance of the law or the practices of the tribunal, nor take advantage of the opponent's misinformation, ignorance or inexperience. In dealing with an unrepresented party, a lawyer must not take advantage of economic disparities to harass the unrepresented party or bring about unjust results. Upon learning that a party is appearing pro se, a lawyer shall not continue litigation that is inconsistent with applicable law. A lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation.

Victoria J. Haneman, *The Ethical Exploitation of the Unrepresented Consumer*, 73 MO. L. REV. 707, 739 (2008).

69. See discussion *infra* Parts V.B and V.C. In an influential 1975 article supporting a duty of fairness in negotiation that would embrace substantive considerations as well as fair processes, Judge Alvin B. Rubin nevertheless recognizes the practical challenges such standards would face in implementation:

Since bona fides and truthfulness do not inevitably lead to fairness in negotiations, an entirely truthful lawyer might be able to make an unconscionable deal when negotiating with a government agency, or a layman or another attorney who is representing his own client. Few lawyers would presently deny themselves and their clients the privilege of driving a hard bargain against any of these adversaries [even] though the opponent's ability to negotiate effectively in his own interest may not be equal to that of the lawyer in question.

based on a moral principle of “ordinary language”—that is, “the normative proposition that professionals must respect and not exploit the ‘layperson intuition’ of the layperson opponent”—which has considerable force when applied to the expectations for lawyer truthfulness in negotiations with unrepresented persons.<sup>70</sup> In that context, “[a] non-attorney will rely upon the reasonable notion that justice does not run contrary to basic precepts of common sense, and *that the courts will not permit their officers to represent what they know is a falsehood.*”<sup>71</sup> Stated differently, as cynical as many members of the public may be about the honesty of members of the bar, they should be presumed to expect the courts’ rules do not *authorize* lawyers to lie to them in order to gain an advantage for their clients. More importantly, the Rules should be written in such a way as to make the public’s morally intuitive presumption also plainly correct as a matter of law.

## B. CIVIL LIABILITY

In addition to navigating the somewhat ambiguous ethical boundaries created by the professional conduct rules, negotiating lawyers must also be concerned with the common law civil liability principles applicable to these processes and enforceable against lawyers, their clients, or both. This article will briefly sketch some of these key principles, with a focus on civil liabilities based on failures to be truthful.

### 1. *Lawyers*

In a recent comprehensive study of lawyers’ professional responsibilities and civil liabilities in negotiations, Douglas R. Richmond examines how “[l]awyers’ dishonesty in negotiations . . . exposes them to potential civil liability for fraud, negligent misrepresentation, or aiding and abetting a client’s fraud or breach of fiduciary duty.”<sup>72</sup> Lawyers might assume that statements of fact or law that comply with Rule 4.1 could not lead to the imposition of civil liability on their part; but, as Richmond points out, this is not necessarily true:

[L]awyers’ duty of truthfulness under Rule 4.1(a) is not perfectly congruent with potential civil liability for misrepresentation.

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Alvin B. Rubin, *A Causerie on Lawyers’ Ethics in Negotiation*, 35 LA. L. REV. 577, 590 (1975) (emphasis added).

70. Haneman, *supra* note 68, at 740-41.

71. *Id.* at 741 (emphasis added).

72. Douglas R. Richmond, *Lawyers’ Professional Responsibilities and Liabilities in Negotiations*, 22 GEO. J. LEGAL ETHICS 249, 290 (2009).

Many statements that are not treated as statements of material fact as a matter of professional responsibility, but which are instead considered to be “puffery” or “posturing,” are not similarly exempted under contract and tort law. As a matter of tort and contract law, the central question with respect to such statements is more commonly one of reasonable reliance.<sup>73</sup>

He elaborates that in civil lawsuits against lawyers, defending “misstatements in negotiations on the basis of puffery is of limited utility, because whether a statement is or is not actionable depends on its context, the lawyer’s actual knowledge, and the person to whom it is made.”<sup>74</sup> For example, in a given situation, “a lawyer’s seeming puffery, such as the statement that a parcel of land ‘is a lot of property for the money,’ may be actionable fraud.”<sup>75</sup> But, says Richmond, “[t]hat same statement would be unlikely to expose a lawyer to professional discipline under Rule 4.1(a)” based on the permissive language in its Comment.<sup>76</sup> He helpfully summarizes his practical advice for lawyers with some basic precepts and examples:

In a nutshell, if lawyers speak on material issues of fact or law, they must do so honestly. Whether a particular statement of fact or law is material generally requires case-specific inquiry, although the existence and amount of insurance coverage are always material facts. Lawyers’ duty of honesty clearly includes a duty to inform an opponent of a client’s death or of clearly applicable insurance. Lawyers’ duty of honesty also includes a duty to inform opposing parties of relevant facts (1) where a writing does not reflect the parties’ agreement; (2) when they know that an opponent holds a mistaken belief that, if uncorrected, will substantially deprive the opponent of the benefit of its bargain, or will materially lessen that benefit; or (3) in the incredibly rare situation where they owe the opponent a fiduciary duty.<sup>77</sup>

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73. *Id.* at 296 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98, cmt. c Rptrs. Note (AM. LAW INST. 2000)).

74. *Id.* (citing *Jeska v. Mulhall*, 693 P.2d 1335, 1337 (Or. Ct. App. 1985)).

75. *Id.* (quoting lawyer in *Jeska*, 693 P.2d at 1337).

76. *Id.* at 296-97. Richmond adds that the Comment to Rule 4.1 “prudently cautions lawyers to ‘be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.’” *Id.* (quoting MODEL RULES OF PROF’L CONDUCT r. 4.1 cmt. 2 (AM. BAR. ASS’N 2008)).

77. *Id.* at 297.

## 2. *Clients*

In addition to the potential civil liability lawyers face relating to information communicated or withheld in connection with negotiations, they must also consider the possible civil liability and other legal consequences to which their clients may be exposed. In an article focusing primarily on the duty to disclose material facts, Nathan M. Crystal explains that a lawyer's failure to comply with this duty may result in rescission of the client's contract, whether business transaction or settlement agreement.<sup>78</sup> Thus, even though the Comment to Rule 4.1 provides that a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts,"<sup>79</sup> under some circumstances "lawyers have a duty to disclose information to the opposing side."<sup>80</sup> Crystal points to Judge Alvin B. Rubin's much-discussed 1975 article on negotiation ethics and its stated principle that "if the client has an obligation to disclose information in connection with contract or settlement negotiations, lawyers have a parallel duty."<sup>81</sup> As examples, Crystal cites decisions in which courts ordered rescission of contracts "because plaintiff's counsel failed to reveal the death of the client,"<sup>82</sup> because the lawyer failed "to disclose basic facts when the lawyer [knew] that the other side [was] entering into an agreement based on a mistake about those facts,"<sup>83</sup> or because of "[n]ondisclosure of significant mathematical errors."<sup>84</sup>

When a duty to disclose exists and the lawyer violates this duty by withholding the facts subject to disclosure, and while acting with the client's actual or apparent authority, the client may also be found civilly liable for fraud in the transaction.<sup>85</sup> Under what circumstances will such

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78. See Nathan M. Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055, 1067 (1998-1999).

79. *Id.* at 1071-72 (citing MODEL RULES OF PROF'L CONDUCT r. 4.1, cmt. 1 (AM. BAR ASS'N 2015)).

80. *Id.* at 1069. Crystal notes that "Professor James [J.] White[,] in his influential article on negotiations[,] expressed his support (with some cautionary statements) for a proposed model rule of professional conduct that would have required lawyers to disclose information necessary to correct a manifest misapprehension of fact or law resulting from a previous representation made by the lawyer or known by the lawyer to have been made by the client." *Id.* at 1069 n.78 (citing White, *Machiavelli and the Bar*, *supra* note 29, at 935).

81. *Id.* at 1068 (citing Rubin, *supra* note 69, at 589).

82. *Id.* at 1069 (citing *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507 (E.D. Mich. 1983)).

83. *Id.* at 1070 (citing *Hamilton v. Harper*, 404 S.E.2d 540 (W. Va. 1991)).

84. *Id.* at 1073 (citing *Stare v. Tate*, 98 Cal. Rptr. 264 (Ct. App. 1971)).

85. See generally RESTATEMENT (THIRD) OF AGENCY § 7.03 (AM. LAW INST. 2006) (addressing a principal's direct and vicarious liability to a third party harmed by an agent's conduct).

non-disclosure be considered “the equivalent of misrepresentation”?<sup>86</sup> Crystal correctly describes this question as addressing “[t]he most difficult aspect of the duty to disclose,” because “the case law . . . seems to lack any unifying principles.”<sup>87</sup> He finds some clarity on this challenging but very important question by reviewing the case law against the backdrop of the Restatement (Second) of Contracts.<sup>88</sup> From this source he identifies four categories of disclosure: “(1) corrective disclosure; (2) disclosure of known mistakes in a writing; (3) fiduciary disclosure; and (4) disclosure of mistakes about basic facts when required by good faith.”<sup>89</sup> Discussing the fourth category, Crystal explains that a lawyer’s failure to correct mistakes about basic facts does not create liability unless it “violate[s] a standard of good faith and fair dealing.”<sup>90</sup> That said:

Some lawyers will argue that there is no professional agreement or consensus on the meaning of good faith and fair dealing in negotiations, and accordingly, this standard cannot be a basis for imposing disclosure obligations on lawyers. This argument should be rejected for several reasons. First, the fact that lawyers may disagree . . . is not an argument against the existence of such an obligation. . . . Second, lawyers are subject to the law, and . . . general contract and tort law recognize a duty to disclose information when required by good faith and fair dealing. Finally, lawyers should consider the consequences of the absence of a duty of good faith and fair dealing in connection with contract and settlement negotiations. *Do lawyers want to have a profession in which they do not have a right to expect good faith and fair dealing from their fellow professionals? Are lawyers willing to*

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86. Crystal, *supra* note 78, at 1076.

87. *Id.*

88. Section 161 of the RESTATEMENT (SECOND) OF CONTRACTS provides:

A person’s non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only: (a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material. (b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing. (c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part. [and] (d) where the other person is entitled to know the fact because of a relation of trust and confidence between them.

Crystal, *supra* note 78, at 1076-77 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 161 (AM. LAW INST. 1981)).

89. *Id.* at 1077 (citing also, regarding fiduciary nondisclosure, RESTATEMENT (SECOND) OF TORTS § 551 (AM. LAW INST. 1977)).

90. *Id.* at 1081.



*state publicly that the profession's values do not include good faith and fair dealing when ordinary business people must live by such an obligation?*<sup>91</sup>

The answer to these emphasized questions should be an emphatic “No.” Nevertheless, as Machiavelli’s precepts continue to cast their dim gray shadow over the customs and practices of the legal profession, there is a moral risk that the fleeting triumphs for lawyers who break faith with their fellow professionals or unrepresented members of the public will tempt others to follow in their footsteps. This temptation should be resisted, and this article will propose a path for how individual lawyers and their colleagues in the bar may instead foster a culture of faith keeping in their communities of practice.

#### IV. CONCEPTS OF RISK IN LAWYER NEGOTIATION

Negotiation has been defined as “any situation in which two or more parties are engaged in communications, the aim of which is agreement on terms affecting an exchange, or a distribution of benefits, burden, roles, or responsibilities.”<sup>92</sup> A lawyer’s practice of negotiation involves the assessment and confrontation of various kinds of risks. The law of lawyer negotiation defines the boundaries for the exposure of lawyer and client to “legal risks,” consisting of disciplinary action against the lawyer for violating professional conduct rules and potential civil liability (for lawyer or client). This article will now define and discuss two additional concepts of risk in lawyer negotiation—“informational risks” and “moral risks”—and how a lawyer’s choices about how to resolve them may impact the lawyer, the client, and the community.

##### A. INFORMATIONAL RISKS: NEGOTIATION AS A GAME

In all practical respects, negotiating lawyers must assess and confront “informational risk.” This encompasses uncertainties about points of fact or law flowing from the past to the present, as well as future contingencies impacting the value of the outcome, either where there is an agreed-upon resolution or, instead, a decision not to reach agreement.<sup>93</sup> Yet as Reed

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91. *Id.* (emphasis added).

92. Peter C. Cramton & J. Gregory Dees, *Promoting Honesty in Negotiation: An Exercise in Practical Ethics*, in CARRIE MENKEL-MEADOW & MICHAEL WHEELER, WHAT’S FAIR: ETHICS FOR NEGOTIATORS 108, 111 (2004).

93. See Loder, *supra* note 53, at 96. Emphasizing that “[n]egotiations typically occur in a backdrop of ambiguity and uncertainty,” Loder further explains that “[d]ifficulties in predicting how a decision-maker will perceive and resolve the case compound the uncertainties of law.” *Id.* Moreover, “[h]uman uncertainties also cloud the process because the lawyer cannot predict

Elizabeth Loder has said, even in the midst of these many uncertainties, the negotiation process still has “significant shape,” as “[a] successful negotiator identifies uncertainties but also outside boundaries.”<sup>94</sup> She elaborates about how this process unfolds:

A reasonable settlement outcome falls within [the] bounded range of possibilities. Those contours define the interactive process of compromise. Effective negotiators offer strong reasons for each demand and concession. These reasons emerge directly from the complex interaction between perceived possibilities and constraints. This looming tension between uncertainty and confidence characterizes the epistemological stance of the artful negotiator.

The tension exists whether or not the parties have treated each other with candor. It is inherent in the concept of legal truth.<sup>95</sup>

Given the pressure of resolving this informational risk, which will take different forms and be in different proportions in any given negotiations,<sup>96</sup> how should a lawyer develop the best strategy and approach to abide by the client’s objectives for the process? In the ample literature on negotiation tactics and ethics, it is fairly common to see negotiation described as a “game,” and, upon such description, to find the authors drawing analogies to the generally accepted moral standards for those who play these games.<sup>97</sup> In such comparisons, poker seems to be the most popular choice. As James J. White has said, “Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in

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personal responses to unfolding events. Participants in a negotiation cannot ‘know’ what the result should be.” *Id.* In discussing the role of lawyers in dispute resolution, Daniel Markovits observes “both ethical theory and empirical research suggest that disputants have a natural ethical inclination in favor of resolving disputes through reasonable reciprocal concessions.” Daniel Markovits, *Lawyerly Fidelity*, in *LOYALTY* 55, 89 (Sanford Levinson et al. eds., 2013) (footnotes omitted). “[M]ost clients,” however, “being inexperienced in the disputes in which they are engaged, are uncertain which concessions are in fact reasonable. Lawyers have experience and expertise that clients do not and can therefore help to resolve this uncertainty.” *Id.*

94. Loder, *supra* note 53, at 96.

95. *Id.* (footnotes omitted).

96. For example, the facts may be well-known, but the law unsettled; or the present facts and law may be clear, but the future contingencies less so.

97. *See, e.g.,* White, *Machiavelli and the Bar*, *supra* note 29, at 929 (asserting that in deciding what duty a negotiating lawyer has to be honest or candid, “[t]here is no general principle waiting somewhere to be discovered”; instead, “mostly we are . . . hunting for the rules of the game as the game is played in that particular circumstance”); Jonathan R. Cohen, *When People Are the Means: Negotiating With Respect*, 14 *GEO. J. LEGAL ETHICS* 739, 775 (2001) (challenging those who justify lawyers’ use of deception in negotiation on the grounds that such deceit is a matter of “Custom – ‘That’s Just How the Game of Negotiation is Played. It’s a No-Holds-Barred Game Where Each Side Just Tries to Get the Best Deal It Can.’”).

a variety of ways he must facilitate his opponent's inaccurate assessment."<sup>98</sup> Barry R. Temkin contends "[t]he more aggressive negotiators, including the most ethically aggressive, often obtain optimal results for their clients and develop successful practices. The best bluffers frequently clean up at the poker table."<sup>99</sup> Scott R. Peppet acknowledges that "as a public relations matter, it would be easier on the bar to completely forbid all lying."<sup>100</sup> Nevertheless, as a more realistic matter of "moral pluralism" and as contemplated by Rule 4.1's Comment, Peppet insists that "[j]ust as bluffing is permitted in poker, so too should it be permitted in legal negotiations."<sup>101</sup>

But does conceiving of negotiation as a "game" lawyers play to resolve informational risk in favor of their clients tell us anything meaningful (logically or otherwise) about the morality of deceptions committed by lawyers?<sup>102</sup> Even if the rules or generally accepted customs in some games permit their players to engage in deception, calling negotiation a game does not necessarily mean deception should either be allowed by *its* rules or considered to be moral conduct by *its* participants.<sup>103</sup> Yet the "rules of the

98. White, *Machiavelli and the Bar*, *supra* note 29, at 927.

99. Barry R. Temkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?*, 18 GEO. J. LEGAL ETHICS 179, 183 (2004).

100. Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 510 (2005).

101. *Id.* at 511.

102. See APPLBAUM, *supra* note 41, at 113-20 (arguing negotiation does not require or legitimize deception, and challenging the "rules of the game" defense for such deception). As Howard Raiffa defines it, "Game theory studies how rational actors ought to behave when their separate choices interact to produce payoffs to each player." HOWARD RAIFFA, *NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING* (2002). When applied to negotiation analysis, Raiffa's "ought" serves the merely instrumentalist goal of maximizing returns:

Many people, when discussing the desirability of lying in a bargaining situation, say something like this: "I wouldn't like to lie against someone who is honest; that would make me the bad guy. But I don't want to be taken advantage of either, so I would lie if I thought the other was lying." Thus the usual rule is, "lie if you think they are lying." The equilibrium analysis shows that this intuitive notion is completely wrong—at least from the point of view of maximizing the return from any one particular negotiation. *The more honest the other party is, the less risk there is of destroying a possible deal by misrepresentation. And the more room there is to grab the surplus by misrepresenting. The more honest they are, the more it pays you to lie.* Conversely, the more dishonest they are, the greater the risk of reaching no agreement. The payoffs to lying go down, and the payoff to honesty goes up. Apparently, when you are dealing with a crook, the smart thing is to be honest.

*Id.* at 126 (emphasis added).

103. Arthur Isak Applbaum examines "smaller social games," such as poker and football, and discusses why they are distinguishable in morally significant ways from the "larger social games," such as lawyer negotiation:

In the case of smaller social games . . . one is more likely to think that game permission *does* create moral permission. For example, deception and violence are presumptive moral wrongs, but the rules of the game of poker permit deception, and

game” excuse for deceiving the opponent in negotiation is widespread in the literature on this subject. According to Temkin, “Lawyers posture, threaten, bluff, wheedle, obscure, misdirect, and, often, outright mislead adversaries in order to obtain advantage for their clients,” and “the ability to mislead and misdirect an adversary is generally considered a *virtue* among lawyers.”<sup>104</sup> Geoffrey C. Hazard, Jr. defines the ethical boundaries of truthfulness in negotiation in terms of what kinds of deception are “productive” and which are not; he observes that “[p]roductive negotiation requires a combination of openness about matters to be conceded and secrecy about one’s reserve position, a game of hide and seek within those limits.”<sup>105</sup> Hazard opines that “[p]ositively misleading statements are destructive because they frustrate achieving a positive result—‘getting to “yes”’ in the jargon of negotiation”; thus, “[c]are in expression and wariness in attention are . . . required in playing the game.”<sup>106</sup> Peter C.

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the rules of boxing, football, and hockey permit violence. It is widely believed that lying in poker and tackling in football are morally permissible, and widely believed that this is so because the rules of the games of poker and football permit such actions. Similarly, it is widely believed that the permissive rules of professional games such as lawyering . . . generate moral permissions to engage in deceptive and coercive tactics that, if not for their game permissibility, would be morally wrong.

APPLBAUM, *supra* note 41, at 114.

Unlike poker, consent to the rules of larger social games played by . . . lawyers . . . may be absent or defective. First, most public and professional games profoundly affect those who are not players. . . . Second, not all players are knowledgeable about the rules of the game. . . . Third, even when players are knowledgeable, they may face exit barriers or their alternatives may be so poor that their continued participation in an adversary game cannot be assumed fully voluntary.

. . . .  
 . . . [I]f the rules of the game require consent for their legitimation, then consent to a transaction does not necessarily legitimate the rules under which the transaction has occurred.

*Id.* at 116-17.

104. Temkin, *supra* note 99, at 182-83 (emphasis added).

105. Geoffrey C. Hazard, Jr., *Law Practice and the Limits of Moral Philosophy*, in *ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATION* 75, 89 (Deborah L. Rhode ed., 2000).

106. *Id.* Gerald B. Wetlaufer, with considerable regret, expresses a similar view about the effectiveness and prevalence of lying in lawyer negotiation:

Effectiveness in negotiations is central to the business of lawyering and a willingness to lie is central to one’s effectiveness in negotiations. Within a wide range of circumstances, well-told lies are highly effective. Moreover, the temptation to lie is great not just because lies are effective, but also because the world in which most of us live is one that honors instrumental effectiveness above all other things. Most lawyers are paid not for their virtues but for the results they produce. . . . Accordingly, and regrettably, lying is not the province of a few “unethical lawyers” who operate on the margins of the profession. It is a permanent feature of advocacy and thus of almost the entire province of law.

Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1272 (1990); *cf.* ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 152 (1993) (stating that “an advocate will want to engross as much of th[e] surplus [available in

Reilly asserts that lawyers “in negotiation must learn how to carefully and purposefully implement strategies and behaviors to defend themselves against those who lie and deceive—no matter the reasons prompting it.”<sup>107</sup>

Finally, Charles B. Craver insists that active deception is ubiquitous in lawyer negotiation.<sup>108</sup> Craver’s advice to lawyers focuses on what he considers “useful,” and he decries as “pious” and “hypocritical” those who regard truthfulness as an overriding moral concern in the process.<sup>109</sup> If the category of communication (e.g., “puffing,” “embellishment,” or responding to questions about “authorized limits or minimum settlement objectives”) is one in which the other participants should reasonably expect “mendacity,” “the usual dissembling,” or “outright prevarication,” Craver would reluctantly permit a lawyer to lie for the client’s advantage.<sup>110</sup> He dismisses concerns that deceptive negotiating tactics tend to materially damage “risk-averse” parties in favor of “risk-tolerant” parties in a way that is economically inefficient:

While this observation is undoubtedly true, it is unlikely to discourage the pervasive use of ethically permissible tactics designed to deceive risk-averse opponents into believing they must accept less beneficial terms than they need actually accept. It is thus unproductive to discuss a utopian negotiation world in which

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negotiation] as he can for his own client’s benefit, using cajolery, threats, and bluffing to do so,” but also allowing that “the use of these techniques has limits, for no third party will agree to terms from which he does not profit”).

107. Reilly, *supra* note 29, at 482. He offers “prescriptive advice . . . for minimizing one’s risk of being exploited in a negotiation should other parties lie,” which is “undergirded by the notion . . . that information exchange (or lack thereof) plays a pivotal role in all negotiations.” *Id.* at 482-83. He opines “the various strategies and behaviors influencing whether, when, and how information is obtained and/or exchanged are extremely important in the process of defending oneself (or one’s client) against lying and deception.” *Id.* at 483.

108. Craver recounts his teaching experiences: “I frequently surprise law students by telling them that while I have rarely participated in legal negotiations in which both participants did not lie, I have encountered few dishonest practitioners.” CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* § 17.01[2], at 592 (5th ed. 2005). He contends “the fundamental question is not whether legal negotiators may lie, but when and about what they may permissibly dissemble. Students initially find it difficult to accept the notion that disingenuous ‘puffing’ and deliberate mendacity do not always constitute reprehensible conduct.” *Id.* *Contra* Craver, this article respectfully submits that this kind of acculturation of law students and new lawyers to regard lying as acceptable (or even laudable) conduct in negotiation is detrimental not only to the students as future lawyers, but also to their clients and communities. *See* discussion *infra* Part IV.

109. CRAVER, *supra* note 108, § 17.01[2], at 592.

110. *Id.* Craver asserts “[a]lmost all professional bargainers . . . believe that advocates who ask these questions [about authorized limits or settlement objectives] have no right to expect forthright replies,” because “[t]he inquiries pertain to confidential lawyer-client matters that concern excluded client values or settlement intentions.” *Id.* Therefore, “most attorneys” say “that questions relating to these areas need not be candidly answered during the negotiation process.” *Id.* There is, however, a substantial difference between declining to candidly answer such questions and making knowingly false statements of fact in response to them. *See* discussion *infra* Part V.A.

complete disclosure is the norm. The real question concerns the types of deceptive tactics that may ethically be employed to enhance bargaining interests. *Attorneys who believe that no prevarication is ever proper during bargaining place themselves and their clients at a disadvantage. They permit their less candid opponents to obtain settlements that transcend the terms to which they are objectively entitled.*<sup>111</sup>

Craver concedes “[l]awyers must remember that they have to live with their own consciences, and not those of their clients or their partners,” and therefore “must employ tactics they are comfortable using even in those situations in which other people encourage them to employ less reputable behavior.”<sup>112</sup> Such lawyers, he says, will not only “experience personal discomfort, but they will also fail to achieve their intended objective due to the fact they will not appear credible when using those tactics.”<sup>113</sup> Thus, even when acknowledging the role of the lawyer’s conscience, Craver offers an outcome-driven justification for the lawyer to assuage it.

These contemporary defenses of deceptive negotiation tactics carry within them the long-traveled yet clear and distinct sounds of Machiavellian moral philosophy. Craver’s advice to lawyers is resonant with Machiavelli’s advice in *The Prince*:

For a man who wants to make a profession of good in all regards must come to ruin among so many who are not good. Hence it is necessary to a prince, if he wants to maintain himself, to learn to be able not to be good, and to use this and not use it according to necessity.<sup>114</sup>

A prudent lord, therefore, cannot observe faith, nor should he, when such observance turns against him, and the causes that made him promise have been eliminated. And if all men were good, this

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111. CRAVER, *supra* note 108, § 17.01[2], at 594 (emphases added). Craver poses “complete disclosure” as the only viable alternative to permitting lawyers to engage in active deception through the careful use of false or misleading statements. On the contrary, viable alternative strategies that do not involve lies or other forms of deception *do* exist for exchanging information and for responding to inquiries made by other participants in a negotiation (even inappropriately intrusive ones). See discussion *infra* Part V.A.

112. CRAVER, *supra* note 108, § 17.04, at 621.

113. *Id.*

114. MACHIAVELLI, *supra* note 2, at 61; cf. White, *Machiavelli and the Bar*, *supra* note 29, at 927 (“[I]f the low probability of punishment means that many lawyers will violate the standard, the standard becomes even more difficult for the honest lawyer to follow, for by doing so he may be forfeiting a significant advantage for his client to others who do not follow the rules.”); Wetlaufer, *supra* note 106, at 1230 (“Lying offers significant distributive advantages to the liar and the incentive to lie is therefore great. Moreover, because we understand that our adversary is under the same incentive to lie, we are highly attentive to the possibility that we are being conned and are predisposed to assume the worst.”).

teaching would not be good; but because they are wicked and do not observe faith with you, you also do not have to observe it with them. Nor does a prince ever lack legitimate causes to color his failure to observe faith.<sup>115</sup>

In Temkin's and Hazard's extolling the virtues of astuteness and cunning in lawyers who carefully mislead their adversaries in negotiation through deceptive tactics, one finds echoes of Machiavelli's praising the virtues of "the fox":

[T]he one who has known best how to use the fox has come out best. But it is necessary to know well how to color this nature, and to be a great pretender and dissembler; and men are so simple and so obedient to present necessities that he who deceives will always find someone who will let himself be deceived.<sup>116</sup>

But should lawyers resign themselves to living and practicing in a Machiavellian world in which negotiation is a faith-breaking game, whose participants will jockey for advantage through the astute disclosure of useful truths,<sup>117</sup> with measured doses of deception about those not

115. MACHIAVELLI, *supra* note 2, at 69; *see also* Alan Strudler, *On the Ethics of Deception in Negotiation*, in CARRIE MENKEL-MEADOW & MICHAEL WHEELER, *WHAT'S FAIR: ETHICS FOR NEGOTIATORS* 138, 138 (2004) ("The truth can get in the way of a good deal. So many people lie, dissimulate, and otherwise fail to tell the truth in negotiation. . . . [D]espite the commonsense moral presumption against deception more generally, some deception in negotiation, including lies about one's reservation price, may be morally acceptable." (footnote omitted)).

116. MACHIAVELLI, *supra* note 2, at 70. It is noteworthy that Hazard embraces, in many respects, the Machiavellian moral roots of his negotiation ethics:

The practice of law thus considered is incompatible with traditional virtues of autonomy, impartiality, and openness. It is, on the contrary, a Machiavellian calling, like politics, management, and other relationships in ordinary life. . . . Machiavelli still has a bad name, although his reputation has improved through the respectful attention he received from Sir Isaiah Berlin. Yet Machiavelli had profound insights, particularly in the claims that institutional structures are extremely vulnerable and that dissimulation is a useful alternative to physical force. Clients are also vulnerable or [should] consider themselves so; otherwise, they would not be seeking lawyers' assistance.

Hazard, *supra* note 105, at 89 (citing Isaiah Berlin, *The Originality of Machiavelli*, in *AGAINST THE CURRENT: ESSAYS IN THE HISTORY OF IDEAS* (1979)); *cf.* BOK, *supra* note 41, at 29 (remarking that Machiavelli, along with Friedrich Nietzsche, celebrated and advocated for the "hero" who "uses deceit to survive and to conquer," portraying such persons' deceit "with bravado and exultation").

117. Machiavelli regards faith keeping and faith breaking as equally praiseworthy, provided each is astutely and usefully employed:

How praiseworthy it is for a prince to keep his faith, and to live with honesty and not by astuteness, everyone understands. Nonetheless one sees by experience in our times that the princes who have done great things are those who have taken little account of faith and have known how to get around men's brains with their astuteness; and in the end they have overcome those who have founded themselves on loyalty.

MACHIAVELLI, *supra* note 2, at 68-69.

useful?<sup>118</sup> In a contest of interactive decision making involving informational risk, the temptation to resort to untruthfulness is a real one.<sup>119</sup> But for lawyers as individual human persons, and for the profession in which they practice and on which their clients and communities rely, the decision to succumb to this temptation is also hazardous. Although “gamesmanship is not ethics,”<sup>120</sup> it is nevertheless fraught with moral risks.

#### B. MORAL RISKS TO LAWYER INTEGRITY: NOTHING BUT “EFFECTUAL TRUTH”?

This article uses the term “moral risks” to express the threats of harm to moral character created by a person’s decisions and actions.<sup>121</sup> These risks may exist either for the individual person, for individual third persons who are directly impacted by the decisions and actions, or for a community of persons who experience their indirect impacts. Negotiating practices that have sprouted up from Machiavellian faith breaking and “effectual truth” pose moral risks to a lawyer’s integrity, to the lawyer’s clients, and to the community in which the lawyer lives and practices.

Machiavelli understands himself to be a realist, providing “useful” advice:

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118. Peter C. Cramton & J. Gregory Dees have offered advice on business negotiation ethics seeking to account for Machiavellian realities in the business world while upholding moral ideals:

The Machiavellian gap between what is done and what (ideally) ought to be done is real when it comes to deception in business negotiations. A purely moralistic (or philosophical) response is likely to be ineffective. A Machiavellian response is likely to make things worse. . . . [W]e prefer to explore means of constructively narrowing the gap, thereby making the world more honest.

Cramton & Dees, *supra* note 92, at 110.

119. See Bruce P. Frohnen & Brian D. Eck, *Whom Do You Trust? Lying, Truth Telling, and the Question of Enforcement*, 27 QUINNIPIAC L. REV. 425, 455 (2009) (“If the profession’s mores against lying were relaxed and attorneys thought lying was ethically insignificant because law is a game—or worse yet, a war—it would be natural and inevitable that lawyers would become pirates or facilitators of piracy rather than advocates for justice.”); *cf.* DIETRICH BONHOEFFER, ETHICS 108 (Neville Horton Smith trans., Simon & Schuster 1995) (1955) (noting when “there is no confidence in justice, whatever is useful is declared to be just”).

120. Rubin, *supra* note 69, at 586.

121. A person may or may not recognize that a particular decision or action involves moral risk; but, as C. Stephen Evans correctly notes, “The situations in which we are most clearly aware of our moral obligations are precisely the ones in which we strongly desire to do what is not morally permissible.” C. STEPHEN EVANS, GOD & MORAL OBLIGATION 159 (2013). Evans, speaking broadly of our moral obligations as human beings, also observes:

Human cultures that are vastly different in many ways and separated from each other historically and geographically have nonetheless generally recognized such principles as the following: (1) A general duty not to harm others and a general duty to benefit others; (2) Special duties to those with whom one has special relations: friends, parents, children, family members, fellow-citizens; (3) *Duties to be truthful*; (4) Duties to keep one’s commitments and promises; (5) Duties to deal fairly and justly with others.

*Id.* at 178 (footnote omitted) (emphasis added).



[S]ince my intent is to write something useful to whoever understands it, it has appeared to me more fitting to go directly to the effectual truth of the thing than to the imagination of it. And many have imagined republics and principalities that have never been seen or known to exist in truth; for it is so far from how one lives to how one should live that he who lets go of what is done for what should be done learns his ruin rather than his preservation.<sup>122</sup>

For Machiavelli, the “ruin” to be avoided and the “preservation” to be sought are solely grounded in securing power and materialistic outcomes.<sup>123</sup> But what if the “ruin” to be feared is to one’s own moral character, to one’s own integrity? And what if moral virtues are not merely “imagined” ideals but instead are enduring aspects of human flourishing that the practice of law, including negotiation, places at risk and in need of ongoing care for their “preservation”?<sup>124</sup>

Reed Elizabeth Loder discusses the meaning of moral integrity for the human personality and some reasons why “lying carries significant moral risks”<sup>125</sup> to a person’s integrity, independent of the harms such lies may also cause to others:

Integrity is difficult to define but, in part, is a condition of coherence of the moral personality—its wholeness and harmony. To that extent, integrity seems to require principled consistency of thought and action. Integrity is part of personal authenticity, or the propensity to act in accordance with one’s genuine feelings and to present an image to the world that reflects one’s true self. Lying damages authenticity because it involves making false assertions. In using words, a speaker expresses the self. By knowingly using words falsely, the speaker opposes the self in a fragmenting way.<sup>126</sup>

This understanding of moral integrity—and the dangers to which dishonesty subjects it—harmonizes well with an Aristotelian understanding of how character forms and deforms, including the virtue of honesty as an element of that character. In the *Nicomachean Ethics*, Aristotle attributes the

122. MACHIAVELLI, *supra* note 2, at 61.

123. See *supra* notes 14, 21-25, and accompanying text.

124. See DOUGLAS O. LINDER & NANCY LEVIT, *THE GOOD LAWYER: SEEKING QUALITY IN THE PRACTICE OF LAW* 233 (2014) (“Lawyers, more so than most any other professionals, need strong moral cores because of the temptations they regularly face to lie, deceive, or fudge.”).

125. Loder, *supra* note 53, at 53. Although “lying is morally suspect,” Loder does not assert it is always “necessarily wrong. The moral harms risked in lying, however, mandate . . . justification.” *Id.* at 53.

126. *Id.* at 52 (footnotes omitted).

formation of the moral virtues such as honesty to “habituation,” which is “repetition in the doing.”<sup>127</sup> Just “as a builder becomes a builder by building, a just person becomes just by doing just things. Likewise, by acting in an unjust manner in our transactions with others we can become unjust.”<sup>128</sup> Thus, a person forms the virtue of honesty by the repetition of honest actions, or the vice of dishonesty by the repetition of dishonest ones. As Bruce P. Frohnen and Brian D. Eck have explained Aristotle’s thought:

Our nature is such that we can develop in ourselves (as rulers can help develop in us through their laws) sets of habits that constitute character states. While no one desires to be vicious (to have the character of a vicious person, such as, say, one who is unjust) our desire to do vicious things can, if we give in to it and do the vicious acts, make us, in fact, vicious.<sup>129</sup>

They also observe that “[m]odern studies of human behavior bear out the general outlines of Aristotle’s argument as applied to lying: lying is a developmental process by which one learns to lie—that is, learns the means to make people believe something that is not true.”<sup>130</sup> Similarly, Loder specifically cautions that “[h]abitual lying may seep into character, becoming a fixed and intractable trait.”<sup>131</sup> In doing so, it causes damage to the self and its moral integrity.<sup>132</sup>

127. Frohnen & Eck, *supra* note 119, at 450 (citing ARISTOTLE, NICHOMACHEAN ETHICS 20-21 (W. D. Ross trans., Batoche Books 1999), <http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/aristotle/Ethics.pdf>).

128. *Id.* at 450-51 (citing ARISTOTLE, *supra* note 127, at 21).

129. *Id.* at 451 (citing ARISTOTLE, *supra* note 127, at 21, 52, 121). As Frohnen and Eck clarify, “In describing this constancy of character—the solidification of acts into habits and into states of character—Aristotle is not claiming that our nature is somehow utterly set in early life, but rather that habits, though not innate, become difficult to change once established because they become natural to us over time.” *Id.* (citing ARISTOTLE, *supra* note 127, at 121).

130. *Id.* (citing CHARLES V. FORD, LIES! LIES! LIES! THE PSYCHOLOGY OF DECEIT 69 (1996)); *see also* BOK, *supra* note 41, at 25 (“It is easy, a wit observed, to tell a lie, but hard to tell only one.”).

131. Loder, *supra* note 53, at 52. Frohnen and Eck describe how “the logic of lying tends toward habit formation: few lies can stand on their own—most require follow up lies to keep the original deceit from coming to light.” Frohnen & Eck, *supra* note 119, at 452. Lying also becomes “self-reinforcing,” because as “[t]he liar’s view of moral distinctions coarsens, psychological barriers to lying break down, and the behavior of the liar—even if he or she is not caught in the lie—changes in subtle ways such that others treat him or her with less trust.” *Id.*

132. Loder, *supra* note 53, at 52. Although habit is important in character formation, deformation may occur either gradually through repetition, or rapidly. As Loder puts it: “Something like damage to integrity may occur incrementally, through the habit of ‘small’ deceptions over time, or it may occur more precipitously in a given egregious act of deception.” *Id.* at 59. Moreover, integrity is itself a virtue of the human character, and one I have previously described as the unifying virtue for the practice of law. *See* McGinniss, *Virtue Ethics*, *supra* note 4, at 38; *see also* Reed Elizabeth Loder, *Integrity and Epistemic Passion*, 77 NOTRE DAME L. REV. 841, 846 (2002) (describing integrity as a personal attribute incorporating the qualities of “wholeness” and “constancy,” as well as traits of “distinctiveness” and “strength”).

The same ethical principles hold true for a person who becomes a member of the legal profession. If a lawyer is to form and maintain a personal and professional character distinguished by its integrity, cultivating the virtue of honesty is essential, and shedding and shunning the vice of dishonesty is critical. The world of law practice, though, is a place where “opportunities for deception abound.”<sup>133</sup> And as Frohnen and Eck have said, it is also a world “where deceptive countermeasures are a likely response from other lawyers, where others already are defined as adversaries and so may easily be defined as enemies not deserving of the truth, and where deceptive habits can be the result.”<sup>134</sup> Moreover, deceptive habits developed in the context of one professional role have a tendency to expand and affect conduct in other roles and tasks.<sup>135</sup> Thus, lawyer integrity faces grave moral risks when lawyers are encouraged by both Comment<sup>136</sup> and commentator to seek the client’s advantage in negotiation by carefully selecting and deploying deceptions about facts or law.<sup>137</sup> These moral risks are by no means assuaged by minimization tactics, such as justifying knowingly false statements of fact or law by calling them “non-material,” or merely an expression of “opinion” no reasonable person in a negotiation should accept as factually based.<sup>138</sup>

In this ethical analysis, how do we account for the lawyer’s duty of loyalty to the client, including the duty to abide by the client’s objectives for the representation and vindicate the client’s legal rights and interests to the best of the lawyer’s ability? Does this duty of loyalty impact what it means for a lawyer to be truthful and to exercise the virtue of honesty in a negotiation, and, if so, how? Peter J. Henning has distinguished the

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133. Bok, *supra* note 41, at 121.

134. Frohnen & Eck, *supra* note 119, at 452. In her study of the moral and cultural significance of lying, Sissela Bok offers pointed observations about the attitudes and motives that underlie the telling of lies:

Liars share with those they deceive the desire not to *be* deceived. As a result, their choice to lie is one which they would like to reserve for themselves while insisting that others be honest. They would prefer, in other words, a “free-rider” status, giving them the benefits of lying without the risks of being lied to. Some think of this free-rider status as for them alone. Others extend it to their friends, social group, or profession.

At times, liars operate as if they believed that such a free-rider status is theirs and that it excuses them. At other times, on the contrary, it is the very fact that others *do* lie that excuses their deceptive stance in their own eyes.

Bok, *supra* note 41, at 23.

135. See Frohnen & Eck, *supra* note 119, at 450 (“[A] liar will not become an honest person simply on account of leaving the realm of negotiation and entering that of, say, client billing. The results are bad for the lawyer, the clients, and the legal system.”).

136. See discussion *supra* Part III.A (on Rule 4.1 and its Comment).

137. See discussion *supra* Parts III.A and IV.A.

138. See discussion *supra* Part III.A.

concepts of “honesty” and “truthfulness” for the practice of law and defined and explained the meaning of honesty for lawyers in advocating for their clients:

What does it mean to describe a person as honest? Importantly, the term is not the same as truth, which contains an objective—and often historical—character, referring to a specific past or present state of affairs or course of conduct. *Honesty is more of a personal characteristic, referring to the nature of the person’s expressions and actions that reflect integrity and trustworthiness.*<sup>139</sup>

. . . .

*An honest lawyer is one who can be trusted.* For the purposes of analyzing the rules that govern a lawyer’s conduct, I define honesty to mean that an attorney’s expressions and conduct are both *accurate* and *authentic*. An accurate statement is one that is truthful and does not intentionally deceive or mislead another person. Accuracy deals with the problem of the technically true but misleading statement or failure to disclose information that the listener would consider important. A deceptive statement would be inaccurate and therefore dishonest. At the same time, *a lawyer’s statements will be accurate even if they do not fully disclose the truth about a situation.* The attorney-client privilege, for example, may restrict what a lawyer can state to third parties, and accuracy requires that the lawyer not mislead while he also is maintaining the confidences protected by the rules of confidentiality.<sup>140</sup>

Henning then describes a lawyer’s “authentic expression” as “one that comprehends fairly the lawyer’s (and in certain circumstances the client’s) intentions.”<sup>141</sup> Authenticity implicates the “lawyer’s further obligation to ensure that the representation of the client is fair both to the client and to others, including courts and opponents.”<sup>142</sup> As Henning uses the term “fair,” it does not entail the elements of substantive, outcome-related fairness for which other legal ethics scholars have advocated.<sup>143</sup> Rather, the

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139. Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 209, 220 (2006) (emphasis added).

140. *Id.* at 221-22 (emphases added).

141. *Id.* at 222.

142. *Id.*

143. See, e.g., Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 813-17 (1984); Rubin, *supra* note 69, at 591-92; Schwartz, *supra* note 36, at 685-86.

fairness found in an honest lawyer's "authentic expression" consists in its compatibility with ensuring adverse parties and their counsel experience fair *processes* in resolving their legal matters.<sup>144</sup> It entails, in essence, an ethical obligation to engage one's opponents with respect<sup>145</sup> and in good faith<sup>146</sup> while loyally protecting and serving the client's interests.<sup>147</sup> Thus, as Henning notes, "A lawyer's statements and positions can be authentic while favoring the position of the client—indeed, that is required by the fiduciary relationship of the lawyer to the client. Authenticity does not mean achieving a result that is less than what the client seeks, so long as the lawyer has not acted dishonestly."<sup>148</sup>

By cultivating the virtue of honesty in the practice of law, and exercising it with the commitment and constancy that are hallmarks of integrity, a lawyer becomes more trustworthy. As I have noted in writing about a lawyer's moral counseling of clients in the advising role, "Trustworthiness is an essentially 'subjective' human quality, distinct in character from other more objective, largely technique-oriented attributes of a good lawyer."<sup>149</sup> Trustworthiness is intrinsically relational,<sup>150</sup> and in professional life, its presence (or its absence) infuses a lawyer's relationships with clients, courts, and community.<sup>151</sup> Thus, for a lawyer, building a reputation for trustworthiness, including in the practice of negotiation, is a highly worthwhile purpose.

Having a *reputation* for trustworthiness, however, is not enough. It would be for Machiavelli. With his concern only for the "effectual truth" about faith keeping—which lies in what you can use it to gain and then

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144. See discussion *infra* Part V.C.

145. See discussion *infra* Part V.A.

146. See discussion *infra* Part V.A.

147. Because of professional duties owed to the client, such as confidentiality, Henning acknowledges there will be times when an honest lawyer may need "to stand by when the truth is obfuscated or undermined. So be it, so long as the lawyer is honest in the representation." Henning, *supra* note 139, at 278. That said,

[t]hat a statement is technically truthful or has no truth value—the diatribe or personal attack—does not make it right for the attorney to offer it. The attorney must seek to advance the interests of the client, which means that the fact that a statement is true does not mean that it is proper.

*Id.*

148. *Id.* at 223.

149. McGinniss, *Virtue and Advice*, *supra* note 5, at 40.

150. *Id.* at 39 (citing ROBERT K. VISCHER, MARTIN LUTHER KING JR. AND THE MORALITY OF LEGAL PRACTICE: LESSONS IN LOVE AND JUSTICE 107 (2013)).

151. James Boyd White describes the "trustworthy lawyer" as "one who can be trusted to perform th[e] task [of mobilizing the materials of persuasion] honestly and intelligently," offering the best argument possible "in light of what can most persuasively and fairly be said on the other side." White, *The Ethics of Argument*, *supra* note 3, at 883. He adds, "It is the incompetent or sleazy lawyer who misrepresents or fudges the nature of the material, and his work is of little assistance to anyone." *Id.*

preserve for yourself and for those who benefit you<sup>152</sup>—he snaps the appearance of trustworthiness off from its reality: “Everyone sees how you appear,” he says; but “few touch what you are.”<sup>153</sup> He praises the value of *appearing* to possess qualities regarded as good, such as being “merciful, faithful, humane, honest, and religious”; but he warns much more emphatically against “always observing them,” which makes them “harmful.”<sup>154</sup> To Machiavelli, it is imperative “to remain with a spirit built so that, if you need not to be those things, you are able and know how to change to the contrary.”<sup>155</sup> He insists one “needs to have a spirit disposed to change as the winds of fortune and variations of things command him, and . . . not depart from good, when possible, but know how to enter into evil, when forced by necessity.”<sup>156</sup> A lawyer, for instance, may be tempted to seek immediate rewards by using one’s good reputation and apparent trustworthiness to catch an adversary off guard with an unanticipated betrayal.<sup>157</sup> So a reputation for trustworthiness is not enough.

The vices Machiavelli calls virtues are inconstancy of character and the will to break faith in a manipulative quest for power and unjust advantage over others.<sup>158</sup> A lawyer with integrity will recognize their viciousness, resist them, and cast them away. The truth of the authentic ideals in a lawyer’s character, the virtue of honesty, and a will constituted by good faith—these are the necessary foundations for a trustworthiness that is real and resilient and for having integrity for the practice of law that deepens and endures.

### C. MORAL RISKS TO CLIENTS AND COMMUNITY: RELATIONAL HARMS OF BREAKING FAITH

Just as trustworthiness is intrinsically relational, so is untrustworthiness. It is well known the legal profession struggles against a strong current of distrust within our American society, a phenomenon driven in part by an increased general tendency toward the distrust of others<sup>159</sup> but also by attitudes of concern directed specifically at lawyers.<sup>160</sup>

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152. See *supra* note 25 and accompanying text.

153. MACHIAVELLI, *supra* note 2, at 71.

154. *Id.* at 70.

155. *Id.*

156. *Id.*

157. Cf. Frohnen & Eck, *supra* note 119, at 459 (“One will deal differently with someone known to be dishonest than with one who has a reputation for veracity and fair dealing.”).

158. See discussion *supra* Part II.

159. See generally Megan Tschannen-Moran & Wayne K. Hoy, *A Multidisciplinary Analysis of the Nature, Meaning, and Measurement of Trust*, 70 REV. EDUC. RES. 547, 549 (2000). As Tschannen-Moran and Hoy explain:

This cultural condition only amplifies the moral risks when lawyers break faith with their adversaries in negotiations. Decisions to deceive and acts of dishonesty exacerbate relational harms between lawyers and clients and between lawyers and their communities, impacting not only the lawyers who make those decisions and take those actions, but also their professional colleagues in the legal community.

If prospective clients believe (with reason) that the professional norms, customs, and practices of the legal profession permit lawyers to commit carefully crafted deceptions in their service, then it should not be surprising they might trust their own prospective lawyers less than they would if those norms against dishonesty were more categorical.<sup>161</sup> That is, a lawyer who is permitted to lie and act in bad faith for your advantage, and thereby treat others “merely as a means to an end,” is a lawyer you may reasonably expect could treat you that way too.<sup>162</sup> In the short term, a particular client may benefit from a lawyer’s dishonesty, whether rationalized by the lawyer as demanded by the norms of zealous advocacy and the duty of loyalty, or by the lawyer’s genuine altruistic concern for the client’s welfare.<sup>163</sup> But

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Trust is not a feeling of warmth or affection but the conscious regulation of one’s dependence on another. In situations of interdependence, trust functions as a way of reducing uncertainty. The philosopher Baier has observed that we notice trust as we notice air, only when it becomes scarce or polluted. As life has grown more complex, as changing economic realities and changing expectations in society have made life less predictable, and as new forms of information dissemination have increased both the desire for and availability of negative information, we are beginning to *notice* trust more.

*Id.* at 549 (citations omitted); *see also* BONHOEFFER, *supra* note 119, at 108 (reflecting that when there is “no confidence in truth . . . even the tacit confidence in one’s fellow-man, which rests on the certainty of permanence and constancy, is now superseded by suspicion and an hour-to-hour watch on one’s neighbour”).

160. *See, e.g.*, LINDER & LEVIT, *supra* note 124, at 237 (“The public often knows full well what attorneys are up to when they lead clients through loopholes, dissemble, and obfuscate. And for the most part, they don’t like what they see.”).

161. Loder describes the “social harms” lies create:

By using words to make an assertion, a speaker relies on shared expectations that people usually mean what they say in words. Thus, lies threaten human communication by making linguistic institutions less reliable. A liar abuses and weakens expectations necessary to social life and, to that extent, a lie is a breach of trust. According to philosopher Immanuel Kant, every lie is an offense to humanity.

Loder, *supra* note 53, at 51-52.

162. *Cf.* Thomas L. Shaffer, *On Lying for Clients*, 71 NOTRE DAME L. REV. 195, 205 (1996) (“When a good person lies she seems to confront and then abuse the dignity of the person she lies to—an action that offends both the Kantian notion that a human person should never be used merely as a means to an end, and the ideology that yearns for a communitarian ethic.”).

163. Recent psychological research findings show that “dishonesty is . . . more likely when the cheating is done to help another person,” which has been called “altruistic cheating.” LINDER & LEVIT, *supra* note 124, at 239 (quoting DAN ARIELY, *THE (HONEST) TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE—ESPECIALLY OURSELVES* 222 (2012)). “When you help someone you really care about, it becomes easy to cheat and at the same time still think of

once the Machiavellian foot is allowed in the door of the lawyer-client relationship, clients should not be thought unwise to guard against its influence in their own communications with their lawyers. As Frohnen and Eck express a similar point, “[T]he norm of truth telling must be defended [all the] more vigorously because the legal profession itself is rooted in a rejection of the call to lying, being rooted instead in a commitment to trust embodied in the relationship between lawyer and client.”<sup>164</sup> Moreover, decreasing trust between lawyers and clients, and between lawyers and adverse parties, may cause substantial practical detriments to clients by increasing the transaction costs (both time and money) involved in receiving legal services.<sup>165</sup> And as Loder wisely notes, “Prevalent public mistrust of lawyers may suggest that clients would prefer to hire lawyers concerned with honesty and fairness, especially if lawyers were to educate prospective clients about the relationship between being effective and being ethical.”<sup>166</sup>

Beyond the immediate moral risk of harm to relationships with clients, faith-breaking practices in negotiation also cause harm to lawyers’ relationships with each other as colleagues in a legal community. Frohnen and Eck observe that “for trust to form in a particular profession or community, the actors must be interdependent—and thus vulnerable—but confident enough in the competence and shared norms of the other actors and in the mutual goodwill surrounding their relationships that they remain willing to risk the cost of betrayal.”<sup>167</sup> Even scholars who make some allowances for the deliberate use of deceptive tactics in negotiation have recognized the damage such actions may have on a lawyer’s professional reputation and effectiveness. Craver, for example, strongly criticizes the “highly aggressive, deliberately deceptive, or equally opprobrious bargaining tactics” recommended in some “popular negotiation books,”

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yourself as a basically good and honest person; it’s harder to do that when you cheat for selfish reasons.” *Id.*

164. Frohnen & Eck, *supra* note 119, at 457.

165. Frohnen and Eck point out:

When attorneys must expend time and energy to formalize agreements and fight out disputes, the parties are the ones who pay. In the short term, obviously, distrust increases billable hours for lawyers. But the costs are very real. Certainly the prosperity of society as a whole (a whole of which lawyers are a part) depends in large measure on the amount of trust inhering in the culture. It is trust in colleagues and trading partners that cements relationships and allows for extensions of credit and other actions necessary for continued economic growth and prosperity in the face of crises and more typical market (and other) uncertainty. Without trust, even the most basic economic relations break down.

*Id.* at 454-55 (footnotes omitted) (citing Tschannen-Moran & Hoy, *supra* note 159, at 550).

166. Loder, *supra* note 53, at 101.

167. Frohnen & Eck, *supra* note 119, at 459.



whose authors “usually conclude these stories with parenthetical admissions that their bilked adversaries would probably be reluctant to interact with them in the future.”<sup>168</sup> He explains why he rejects their advice:

When negotiators engage in such questionable behavior that they would find it difficult, if not impossible, to transact future business with their adversaries, they have usually transcended the bounds of propriety. No legal representatives should be willing to jeopardize long-term professional relationships for the narrow interests of particular clients. Zealous representation should never be thought to require the employment of personally compromising techniques.

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Untrustworthy advocates encounter substantial difficulty when they negotiate with others. Their oral representations have to be verified and reduced to writing, and many opponents even distrust their written documents. Negotiations are especially problematic and cumbersome. If nothing else moves practitioners to behave in an ethical and dignified manner, their hope for long and successful legal careers should induce them to avoid conduct that may undermine their future effectiveness.<sup>169</sup>

James J. White, well-known for his view that deception is inherent in the negotiation process, also opines the norms and expectations for “truth and candor” in negotiations may be different in a smaller legal community.<sup>170</sup> Each of these scholars, however, focuses most of his attention on outcome-driven considerations, such as costs and effectiveness. As lawyers enter the legal profession, join legal communities (small or large), and begin to engage in negotiations, the lessons they learn from

168. CRAVER, *supra* note 108, § 17.04, at 621.

169. *Id.* § 17.04, at 621-22.

170. As he explains:

[I]t seems plausible that one’s expectation concerning truth and candor might be different in a small, homogeneous community from what it would be in a large, heterogeneous community of lawyers. . . . Moreover, the costs of conformity to ethical norms are less in a small community. Because the community is small, it will be easy to know those who do not conform to the standards and to protect oneself against that small number. Conversely, in the large and heterogeneous community, one will not have confidence either about the norms that have been learned by the opposing negotiator or about his conformance to those norms.

White, *Machiavelli and the Bar*, *supra* note 29, at 930. Smaller legal communities also create greater likelihoods of repeated interactions with the same lawyers, allowing for greater prospects of developing knowledge-based trust (or distrust). See Tschannen-Moran & Hoy, *supra* note 159, at 562 (“Knowledge-based trust emerges on the basis of the quality of the social exchanges in recurring interactions between trustor and trustee over time. It takes root as actors get to know one another and feel able to predict how the other is likely to behave in a given situation.” (citations omitted)).

more experienced lawyers about good faith and honest dealing with their adversaries may have profound impacts on them, both personally and professionally. And as Loder points out, “The job satisfaction and character dispositions of lawyers learning from dishonest lawyers . . . are concerns. If prevalent and widely accepted, such character flaws ultimately become profession-wide traits that reduce public esteem and trust.”<sup>171</sup>

To improve the prospects that such intrinsic values and professional virtues will be successfully transmitted within a legal community, Frohnen and Eck advocate expanded bar mentoring programs, as well as support for and expansion of the American Inns of Court and its apprenticeship model, as a means to resuscitate and maintain “practical norms that can rebuild trust among lawyers and between lawyers and other members of society.”<sup>172</sup> In their view, what is most important is “the cultivation of norms, especially of truth telling, in small, face to face relationships, and their enforcement in social networks of the scale and embedding character necessary for the functioning of reputation effects.”<sup>173</sup> Finally, from the standpoint of the individual lawyer who desires to practice law with the virtue of honesty and integrity, the choice of a compatible legal community is often a critical one, especially at the law firm level.<sup>174</sup>

Resisting Machiavellian temptations and zealously advocating for and loyally protecting one’s clients is a high challenge, even when lawyers individually or as a community place a high value on the virtue of honesty and its practice in negotiation. This article will now explore a framework for understanding what it means to keep faith with opponents, clients, and community in negotiation, and it will also suggest how its limitations might be defined by process, not substance, in realizing this faith-keeping ideal.

## V. VIRTUOUS NEGOTIATION: KEEPING FAITH WITH OPPONENTS, CLIENTS, AND COMMUNITY

In his 1983 article, *The Ethics of Argument: Plato’s Gorgias and the Modern Lawyer*, James Boyd White describes “the good lawyer” as one

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171. Loder, *supra* note 53, at 75; *see also* Tschannen-Moran & Hoy, *supra* note 159, at 550 (“Distrust tends to provoke feelings of anxiety and insecurity, causing people to feel uncomfortable and ill at ease and to expend energy on monitoring the behavior and possible motives of others.”).

172. Frohnen & Eck, *supra* note 119, at 461-63.

173. *Id.* at 463.

174. Douglas O. Linder and Nancy Levit observe that “[d]ishonesty . . . increases when others around you are being dishonest, so if you want to be an honest lawyer, join a firm where honesty is valued.” LINDER & LEVIT, *supra* note 124, at 238. “That lesson,” moreover, “extends to your choice of practice area. If you work in a field of law where you suspect widespread cheating by your adversaries, you are much more likely to engage in similar conduct yourself.” *Id.* at 238-39.

who “is faithful to the obligations he has assumed, to the client and to the law.”<sup>175</sup> He adds “there is at once a kind of virtue and a kind of education in that. . . . [H]is argument must be punctiliously truthful in every statement of fact.”<sup>176</sup> This passage is specifically directed to a lawyer’s advocacy before a court; but its ideals should also extend to lawyer negotiation.

In a much-debated article published more than 40 years ago, Judge Alvin B. Rubin sounds his call for lawyers to negotiate with honesty and in good faith:

[T]he profession should embrace an affirmative ethical standard for attorneys’ professional relationships with courts, other lawyers and the public: *The lawyer must act honestly and in good faith.* Another lawyer, or a layman, who deals with a lawyer should not need to exercise the same degree of caution that he would if trading for reputedly antique copper jugs in an oriental bazaar. It is inherent in the concept of an ethic, as a principle of good conduct, that it is morally binding on the conscience of the professional, and not merely a rule of the game adopted because other players observe (or fail to adopt) the same rule.<sup>177</sup>

Yet Judge Rubin takes his plea to the profession a step beyond honesty and good faith in the negotiation process; he advocates an ethical standard by which lawyers would bear legal and moral responsibility for the substantive fairness of outcome to the adverse party (i.e., avoiding “unconscionable” resolutions of legal matters).<sup>178</sup> At the stage of the lawyer-client relationship in which the lawyer has assumed the role of advocate, holding the lawyer to account for the substantive fairness of the negotiation reaches too far against the duties of zeal and loyalty.<sup>179</sup> But good faith and honest

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175. White, *The Ethics of Argument*, *supra* note 3, at 894.

176. *Id.*

177. Rubin, *supra* note 69, at 589.

178. *Id.* at 590; *see also* Schwartz, *supra* note 36, at 671 (expressing his view negotiating lawyers are morally obligated to “refrain from assisting the client by ‘unconscionable’ means or from aiming to achieve ‘unconscionable’ ends, with the term ‘unconscionable’ drawing its meaning largely from the substantive law of rescission, reformation, and torts”).

179. Carrie Menkel-Meadow has identified the “ten most important things to add to the existing ethical codes” in order “to encourage more mediational, less adversarial approaches to lawyering,” including these four:

4. Lawyers should not misrepresent or conceal a relevant fact or legal principle to another person (including opposing counsel, parties, judicial officers, third-party neutrals, or other individuals who might rely on such statements).

5. Lawyers should not intentionally or recklessly deceive another or refuse to answer material and relevant questions in representing clients.

dealing—which includes, without limitation, the accuracy and authenticity of a lawyer’s communications—are worthy ideals for virtuous negotiation. These ideals encourage negotiating lawyers to regard and treat opposing counsel and parties with respect, as human beings who are ends in themselves, rather than merely as means to an end. At the same time, they comport with the lawyer’s ethical duties to clients, including the duty of loyalty, and promote the flourishing of the lawyer’s community and the interests of justice by facilitating fair processes in negotiation.

#### A. OPPONENTS: RESPECT FOR OTHER PERSONS

Lawyers should never lose sight of the humanity of their clients; no more should they do so with their opponents in the practice of law.<sup>180</sup> Jonathan R. Cohen observes, “Usually we think of other people as, well, people”; but the practice and process of “negotiation may pull us towards seeing others as mere instruments for achieving our purposes. To borrow from the language of Martin Buber, in negotiation we are drawn towards reducing the other person from a ‘Thou’ to an ‘It.’”<sup>181</sup> He describes this ethical challenge in negotiation as an “object-subject tension: when negotiating, how is one to reconcile the impulse to treat the other person as a mere means towards one’s ends with general ethical requirements for

6. Lawyers should not agree to a resolution of a problem or participate in a transaction that they have reason to know will cause substantial injustice to the opposing party. In essence, a lawyer should do no harm. . . .

10. Lawyers should treat all parties to a legal matter as they would wish to be treated themselves and should consider the effects of what they accomplish for their clients or others. In essence, lawyers should respect a lawyer’s golden rule.

Menkel-Meadow, *The Limits of Adversarial Ethics*, *supra* note 58, at 136.

Menkel-Meadow’s fourth point is an advisable norm for promoting a fair negotiation process through good faith and honest dealing. The fifth point is also advisable, except that an expectation that lawyers will not “refuse to answer material and relevant questions” is overbroad, in light of the negotiating lawyer’s duties of confidentiality and the role of a loyal and zealous advocate. The sixth point reflects a highly inadvisable “substantive fairness” standard. Finally, the tenth point reflects very effectively the notion of “good faith” and is an advisable norm, emphasizing as a critical limitation that a lawyer should “consider the effects” of their actions. It is appropriate for a lawyer to “consider” those substantive effects and their fairness to others without necessarily allowing them to thwart the client’s lawful objectives for the lawyer’s advocacy. In some cases, such consideration of effects may result in the lawyer either advising the client of alternative approaches under Rule 2.1 or, in extreme cases, withdrawing from the representation under Rule 1.16(b). As to “a lawyer’s golden rule,” this moral principle is consistent with my recommendations for lawyer good faith and honest dealing in negotiation. *See generally* Matthew 7:12 (NRSV) (“In everything do to others as you would have them do to you.”).

180. *See* McGinniss, *Virtue and Advice*, *supra* note 5, at 42-43 (offering an aspiration for lawyers “to recognize, and love, the client as a neighbor,” and, “[i]n engaging the client as a neighbor, and as a subject,” to encourage “the client to see the persons with whom they have disputes in a similar light” (internal quotation marks omitted)).

181. Cohen, *supra* note 97, at 743 (citing MARTIN BUBER, I AND THOU (Walter Kaufman trans., 1970)).

treating people?”<sup>182</sup> He responds by arguing “in negotiation one should see the other party both as a means towards one’s ends *and* as a person deserving respect. More specifically, the act of negotiation does not relieve one of the moral duty to respect others.”<sup>183</sup> This moral duty to respect other human beings, even in the context of a legal contest in which one represents a client, provides an important source of support for lawyers to adhere to an ethical norm for negotiation founded on principles of good faith and honest dealing.<sup>184</sup>

[I]n negotiation one should assume a respectful stance towards the other person, for that other person is a being with fundamental dignity who merits respect. I conceive of this duty of respecting the other person primarily in internal terms, that is, of seeing the other person not merely as an instrument or object but also as a person. However, this duty also has both negative implications (e.g., refraining from deception, coercion, threats, incivility, and psychological assaults) and positive implications (e.g., treating others fairly, listening to them, and respecting their autonomy) for one’s actions.<sup>185</sup>

Cohen observes the word “respect” derives from the Latin prefix “re” (meaning “again”) and verb “specere” (meaning “to look”), and that respect entails a choice to “look again” before treating a person in a manner inconsistent with recognition of their “fundamental dignity.”<sup>186</sup>

182. *Id.* (emphasis omitted).

183. *Id.*; *see also id.* at 761 (“If in a negotiation I see you as no more than a means, then I have not only defined you as an object, but I have also defined myself as a manipulator. How one negotiates helps define one’s identity.”).

184. *See id.* at 760-61; *see also* Frohnen & Eck, *supra* note 119, at 453 (“Once words are no longer aimed at communicating facts and states that reflect reality, they cease to be a tool for sharing one’s apprehension of reality or forging meaningful shared understanding and trust as the basis of common action,” and “[w]hen words mean whatever we want them to mean, they become nothing more than a tool for subjugating others to our will.”). Charles Fried describes lying as exploitative and disrespectful to the person to whom the lie is told:

Lying is wrong because when I lie I set up a relation which is essentially exploitative. It violates the principle of respect, for I must affirm that the mind of another person is available to me in a way in which I cannot agree my mind would be available to him—for if I do so agree, then I would not expect my lie to be believed.

CHARLES FRIED, *RIGHT AND WRONG* 67 (1978).

185. Cohen, *supra* note 97, at 743. Being an agent of the client, who may disrespect the opposing party and may direct the lawyer to show disrespect, “does not excuse the [lawyer] from the moral duty to respect the other party.” *Id.* at 744.

186. *Id.* at 760. Cohen acknowledges how difficult it may be to maintain a respectful stance toward others in negotiation, but submits it is a challenge well worth undertaking:

The struggle to grapple with morality so as to change one’s conduct is not an easy one. Socrates’ trait of probing beneath his society’s surface and revealing its hypocrisies led to his death. When grappling with the angel, Jacob wrenched his hip. For some, facing the extent to which one objectifies others in negotiation—which by

After examining in detail what negotiating with respect looks like, Cohen asks, “[M]ight the ethics codes include language such as, ‘In negotiation as well as other matters, a lawyer should attempt to maintain respect for the dignity of all persons, including that of the opposing party and counsel?’”<sup>187</sup> He does not, however, recommend that this be a professional conduct standard subject to disciplinary enforcement.<sup>188</sup> Nor does he contend negotiating with respect will necessarily (or at least consistently) be materially advantageous in outcome.<sup>189</sup> That said, he does make a strong case that in most situations, “respecting the other party will facilitate his or her cooperation which, if it affects the outcome at all, will usually be to one’s benefit.”<sup>190</sup> Although Cohen emphasizes “[s]uch strategic efficacy does not provide the moral grounding for the duty to respect others in negotiation (viz., because they are persons),” it nevertheless “helps refute some arguments that might be advanced against that duty on their own terms.”<sup>191</sup> For Cohen, negotiating with respect and treating the opposition with dignity constitutes a “vision of ethical behavior in negotiation that rests on one’s own behavior rather than the other side’s presumed cooperation.”<sup>192</sup> In such a spirit, Cohen offers this perspective on the lawyer’s will to be moral, exercising independent professional judgment about words to be spoken and actions to be taken:

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implication may force one to face the extent to which one objectifies others generally—can be a painful experience. It involves facing the part of ourselves that would simply use others with disregard to all else. Yet the personal benefits from such struggle can be tremendous. Most obvious are developing one’s moral integrity and, relatedly, one’s sense of connectedness to other persons.

*Id.* at 767.

187. *Id.* at 793.

188. *See id.* at 801-02. In a section of his article entitled “A Response to Realist Skepticism,” Cohen acknowledges his ideals for respect in lawyer negotiation are subject to the criticism that they fail to account for the frailties of human nature:

Madison once remarked that, “If men were angels, no government [and hence laws] would be necessary.” I suspect that some readers will react to this Article with a similar realist skepticism. “If people want to see others as more than objects in negotiation, that’s fine, and I suppose there might be a few such people out there. But most people are not going to do that. The ethical vision you have presented is an unrealistic, Pollyanna one. At bottom, you have talked about lofty ethical goals, but you have said that sanctioning will not work to promote them and that education ultimately provides the best hope. If men were angels that might work, but they are not, especially the worst of them.

*Id.* at 801 (footnote omitted) (quoting James Madison, THE FEDERALIST NO. 51, *quoted in* THE ESSENTIAL FEDERALIST: A NEW READING OF THE FEDERALIST PAPERS (Quentin P. Taylor ed., 1998)).

189. *Id.* at 801-02.

190. *Id.* at 744.

191. *Id.*

192. *Id.* at 802.

The greatest obstacle, in my opinion, to the claims of orientation ethics are not the challenges of how such ethics can be pursued and promoted, but whether we ultimately want to do so. What negotiation ethics we adopt, or fail to adopt, are matters of human choice. Are we willing to give up seeing others as mere objects and measuring our worth solely by our material achievements? If we do, there is great moral and hence psychological benefit to be had, irrespective of whether others follow that path.<sup>193</sup>

When a negotiating lawyer knowingly misrepresents facts or law to an opponent—regardless of materiality—the lawyer is lying.<sup>194</sup> And even if these lies were not told for effectual Machiavellian advantage, they would still be neither benign nor harmless. As Thomas L. Shaffer has said, when one lawyer lies to another, the lawyer is “lying to a professional friend.”<sup>195</sup> Even though the clients in some cases may be “enemies,” their “[l]awyers live and work in a community of lawyers,”<sup>196</sup> and their zealous advocacy for their clients need not make them breakers of faith with each other.<sup>197</sup> Moreover, as Shaffer wisely observes, “Lying destroys character. It destroys relationships. It destroys communities. Ethical reasoning (whether from analysis of statements or from stories) that justifies lying in rare and extreme cases . . . is useless unless the warnings on the label are as stark as that.”<sup>198</sup> And when the adverse party is unrepresented, a lawyer’s

193. *Id.*

194. See discussion *supra* Part III.A.

195. Shaffer, *On Lying for Clients*, *supra* note 162, at 207.

196. *Id.*; see also *id.* at 208 (“When I deal with the lawyer for the other side, who is not my enemy, I deal, within a community and within concentric circles of communities, with the noblest work of God, as much as when I deal with my own client.”).

197. See *supra* notes 2, 7, 19-26, 114-17, and accompanying text (on Machiavelli’s “breaker of faith”); cf. Al Sturgeon, *The Truth Shall Set You Free: A Distinctively Christian Approach to Deception in the Negotiation Process*, 11 PEPP. DISP. RESOL. L.J. 395, 396 (2011) (“Christianity calls its adherents to practice truthfulness in negotiations, to live free from the forces that engender deception, and to form healthy relationships with others based on reliability.”).

198. Shaffer, *On Lying for Clients*, *supra* note 162, at 211. Shaffer illustrates his moral points about lying through the example of lawyer Atticus Finch in Harper Lee’s *To Kill a Mockingbird*. In the novel, Atticus “lies to protect his neighbor Boo Radley from being identified as a hero and thereby dragged from his seclusion and privacy and subjected to the kindness of the ladies of Maycomb, Alabama”; Atticus’s daughter Scout says “bringing Boo Radley into the civil limelight would be like killing a mockingbird.” *Id.* at 202. As Shaffer interprets this story:

Atticus Finch lied and saved his character (Scout said that his story was the story of a conscience), but we know that the lie brought him pain, and that he would not easily lie again.

. . . How do I know that? The answer is that his story is the story of a truthful person. He was truthful within his community and, more importantly, he was truthful to himself. . . . *Even his lie was a lie told in reference to the community; the*

lies find a more vulnerable audience, causing potential harm more directly to the public trust and just as deforming to the lawyer's character for honesty.<sup>199</sup>

How should a morally sound normative standard for honest dealing in negotiation be defined and described? As discussed previously, Peter J. Henning explains the meaning of honesty for lawyers in advocating for their clients in terms of expressions and conduct that are accurate and authentic.<sup>200</sup> In negotiation, I propose this accuracy requires a lawyer to make statements based on at least a minimum foundation of objective truthfulness, as well as fulsome enough in disclosure to avoid a knowing or intentional deception by omission.<sup>201</sup> But I further propose this does not uniformly require disclosure of all relevant information known to the lawyer, particularly when such information is protected by attorney-client privilege or other confidential information the client has not expressly or impliedly authorized the lawyer to disclose.<sup>202</sup> With respect to professional conduct rules enforceable by disciplinary sanctions, I also propose the expectation of honesty in negotiation should be the same as for a lawyer

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*community could not know the truth in that rare instance, but it would have understood the necessity for the lie.*

*Id.* at 211-12 (emphasis added). How ready and how real is the contrast between Atticus Finch's lie for mercy's sake and Machiavellian's advocacy of faith breaking for the "necessities" of achieving power and gaining advantage. See *supra* Part II; cf. BONHOEFFER, *supra* note 119, at 359 ("'Telling the truth' . . . is not solely a matter of moral character; [but] is also a matter of correct appreciation of real situations and of serious reflection upon them. The more complex the actual situations of a man's life, the more responsible and the more difficult will be his task of 'telling the truth.'").

199. As Shaffer has said, our understanding of a lawyer's moral duties to the opposing party has been influenced by (and found confusion in) our adversarial system:

The adversary ethic in America is a unique professional notion. It is a departure both from classical moral philosophy and from the American religious tradition. . . .

The adversary ethic describes professional practice as an occupation carried on in a society of strangers, in which conventional moral connections are weak between, for example, one lawyer representing his client and another lawyer's client. Some sense of moral duty runs from one lawyer to the other lawyer's client, but the explanation of that duty is incoherent, pre-rational, and undeveloped.

Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 699 (1988).

200. See *supra* notes 139-48 and accompanying text. I will further address authenticity *infra* in Part V.C in the context of justice through fair processes.

201. Cf. Henning, *supra* note 139, at 221-22 ("An accurate statement is one that is truthful and does not intentionally deceive or mislead another person. Accuracy deals with the problem of the technically true but misleading statement or failure to disclose information that the listener would consider important.").

202. Cf. *id.* at 222 (noting "[a]t the same time, a lawyer's statements will be accurate even if they do not fully disclose the truth about a situation," such as where attorney-client privilege or the duty of confidentiality protects the information).



making a statement of fact or law before a tribunal.<sup>203</sup> In particular, as is already the case in states such as North Dakota, no materiality limitation should be recognized for distinguishing a lawyer's honest statements from dishonest ones in negotiation.<sup>204</sup>

How would a morally sound normative standard for honest dealing in negotiation realistically work in practice? Hypothetical negotiations described by Charles B. Craver and Reed Elizabeth Loder provide helpful examples of how dishonest tactics could be readily transformed into honest ones. After observing how "ironic" it is that "deceptive tactics are usually employed at the outset of bargaining transactions," Craver proceeds to give an example:

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203. See MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1) (AM. BAR ASS'N 2015) ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal . . ."); *id.* r. 3.3(a)(3) ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false."); see also *id.* r. 3.3 cmt. 3 ("[A]n assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry."); *id.* r. 3.3 cmt. 4 ("A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities."). Michael H. Rubin advocates a "single ethical standard" to govern both "non-litigation and litigation lawyer conduct," specifically with regard to the use of deception and misrepresentation. Michael H. Rubin, *The Ethics of Negotiations: Are There Any?*, 56 LA. L. REV. 447, 449 (1995). He advises lawyers:

If you would not do something in the courtroom context, if you would not make a misleading statement in a settlement conference with a judge, and if you would not remain silent about a misstatement made by your client or partner during discussions in court chambers or in open court, then you should not do any of these things in non-litigation negotiations, whether or not they take place prior to or after the filing of a lawsuit.

*Id.* at 476; see also Sturgeon, *supra* note 197, at 419 ("From a Christian perspective, negotiators would use the same level of honesty in a negotiation as they would under oath in a court of law.").

204. See *supra* notes 40-57 and accompanying text (discussing North Dakota's Rule 4.1 and James J. Alfini's proposed revisions to the Model Rule, including omission of the materiality limitation in Rule 4.1(a)). A 1980 Discussion Draft of a proposed Model Rule of Professional Conduct 4.2 (Fairness to Other Participants) specifically directed to negotiations included a section (b), stating:

A lawyer shall not make a knowing misrepresentation of fact or law, or fail to disclose a material fact known to the lawyer, even if adverse, when disclosure is:

- (1) required by law or the rules of professional conduct; or
- (2) necessary to correct a manifest misapprehension of fact or law resulting from a previous representation made by the lawyer or known by the lawyer to have been made by the client, except that counsel for an accused in a criminal case is not required to make such a correction when it would require disclosing a misrepresentation made by the accused.

ABA Comm'n on Evaluation of Prof'l Standards, Discussion Draft of the Model Rules of Prof'l Conduct r. 4.2(b) (AM. BAR ASS'N 1980). Proposed Rule 4.2(b) offers a formulation of affirmative disclosure requirements well worth reconsidering along with the recommended deletion of the materiality limitation in the false statement provision in current Rule 4.1. The 1980 proposed Rule 4.2(a) would also have imposed a mandatory professional conduct duty of a lawyer to be "fair in dealing with other participants" in a negotiation. I disagree with imposing such a mandatory standard for the reasons discussed *infra* in Parts V.B and V.C.

Side A, which is willing to pay 2 X[, ] informs Side B that it cannot pay more than X. Side B, which is willing to accept 1 1/2 X, states that it must obtain at least 2 1/2 X if a deal is to be achieved. Both participants are pleased that their interaction has begun successfully, even though both have begun with intentionally misleading statements. Some lawyers attempt to circumvent this moral dilemma by formulating opening positions that do not directly misstate their actual intentions. For example, Side A may indicate that it “doesn’t *wish* to pay more than X,” or Side B may say that it “would not be *inclined* to accept less than 2 1/2 X.” While these preliminary statements may be technically true, the italicized verbal leaks (“*wish to*”/“*inclined to*”) would inform attentive opponents that these speakers do not really mean what they appear to be communicating.<sup>205</sup>

Elsewhere, however, Craver acknowledges reasonable alternatives do, in fact, exist to avoid making false statements about client settlement authority and “bottom line” terms:

Negotiators who know they cannot avoid the impact of questions concerning their authorized limits by labeling them “unfair” and who find it difficult to provide knowingly false responses can employ an alternative approach. If the plaintiff lawyer who is demanding \$120,000 asks the defendant attorney who is presently offering \$85,000 whether he or she is authorized to provide \$100,000, the recipient may treat the \$100,000 figure as a new plaintiff proposal. That individual can reply that the \$100,000 sum suggested by plaintiff counsel is more realistic but still exorbitant. The plaintiff attorney may become preoccupied with the need to clarify the fact that he or she did not intend to suggest any reduction in his or her outstanding \$120,000 demand.

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205. CRAVER, *supra* note 108, § 17.01[2], at 592-93. Craver’s guidance that such a false statement of fact about settlement authority is permitted by Rule 4.1(a) is in substantial tension with the 2006 ABA Committee opinion on a lawyer’s obligation of truthfulness when representing a client:

[W]hether in direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client’s position, which otherwise would not be considered statements “of fact,” are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though the client’s Board of Directors has authorized a higher settlement figure, *a lawyer may state in a negotiation that the client does not wish to settle for more than \$50*. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of \$50, when authority had in fact been granted to settle for a higher sum.

ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-439, at 8 (2006) (emphasis added).

That person would probably forego further attempts to ascertain the authorized limits possessed by the defendant attorney!<sup>206</sup>

If a non-deceptive alternative to a false statement of fact is available (regardless of materiality), an honest lawyer should adopt that approach and resist the Machiavellian temptation to use a lie's merely "effectual truth" for the benefit of the client and, as is the tendency in doing so, for the benefit of the self.

Loder's example illustrates quite well how a negotiating lawyer might offer a non-deceptive statement about settlement authority or "bottom line" terms:

If the point is to persuade the opponent that an offer is too low, a well[-]supported opinion about a minimum fair figure may go as far or farther than an assertion about bottom line. Instead of saying, "my client won't accept less than \$20,000," the lawyer might have said, "I would advise my client that the case justifies \$20,000," or simply, "the case appears worth \$20,000," followed by reasons supporting those high-end assessments. These statements reflect the lawyer's considered opinion and are truthful even if they are at the upper end of the lawyer's actual estimations of a reasonable settlement range. The statements are not damaging because the opponent can present counter-arguments supporting a chiseled-down settlement figure.

These statements do convey some important information about the client's willingness to settle for a certain amount, because the opponent understands that the lawyer's opinion of a case's worth generally influences the client's expectations. The lawyer is not saying untruthfully that she or the client will refuse to consider lower proposals. Rather, she is challenging the opponent to support such proposals with reasons not adequately considered or weighed in the thinking she already has presented. Thus her statements about case-worth can pave the way for a mutually beneficial and truthful exchange about the support for various bargaining positions. This openness to exchange is not an admission of weakness but a mutual recognition that most good legal decisions are not fixed stars, but involve justified selections from a limited array of possibilities.<sup>207</sup>

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206. Craver, *supra* note 52, at 728.

207. Loder, *supra* note 53, at 76 (footnotes omitted).

Finally, Loder correctly emphasizes negotiating with honesty does not “imply that lawyers should spill their guts to their opposing negotiators,” and “silence is not deception without some duty to disclose.”<sup>208</sup> As she astutely adds:

Although a duty to correct manifest misunderstandings may well be justified by principles of justice, professionalism, and moral integrity, such a duty is not automatic throughout negotiation. Lawyers generally reserve the latitude to refuse to answer specific questions without engaging in deception. This refusal need not be evasion if the lawyer reminds the opponent outright of the limits of full candor where client confidences are at stake. Justice and the avoidance of harm do not require lawyers to place all cards on the table.<sup>209</sup>

#### B. CLIENTS: LOYALTY WITH CANDOR

Clients who commit their legal matters to the care of lawyers are entitled to the protections of the ethical duty of loyalty, the exercise of independent professional judgment, and the rendering of candid advice.<sup>210</sup> They are also entitled to the lawyer’s exercise of competence and diligence in protecting the client’s interests and pursuing the client’s objectives.<sup>211</sup> The Comment to Rule 1.3 echoes the Preamble, with a qualified endorsement of zealous advocacy:

A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. . . . The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.<sup>212</sup>

The exercise of good faith and honest dealing in negotiations should be added to the “courtesy” and “respect” the zealous advocate may properly

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208. *Id.* at 92.

209. *Id.*

210. *See* MODEL RULES OF PROF’L CONDUCT r. 1.7 cmt. 1 (AM. BAR ASS’N 2015) (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”); *id.* r. 2.1 (Advisor).

211. *See id.* r. 1.1 (Competence); *id.* r. 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer); *id.* r. 1.3 (Diligence).

212. *See id.* r. 1.3 cmt. 1. *Cf. id.* Preamble 2 (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”).

extend to others.<sup>213</sup> The ethical duty of loyalty does not entitle a client to a hyper-zealous lawyer who treats adversaries or their counsel with bad faith or dishonest dealing.<sup>214</sup> Stated more directly, a lawyer need not (and should not) lie for a client, even if a loophole in the professional conduct rules or the “generally accepted conventions” of an area of practice seem to permit it.<sup>215</sup> Moreover, a lawyer should never forget that clients (or, for organizational clients, their constituent members) are themselves human beings with the capacity for exercising moral judgment and recognizing and respecting the humanity of their adversaries, and even for understanding them to be their neighbors.<sup>216</sup> As James Boyd White frames the question:

What kind of victory does [the client] really want? Here it is a great mistake to assume, as many people do, that clients naturally want victory at any cost, including that of unscrupulous behavior from their lawyers. Some do, of course, no doubt about it, but

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213. *See id.* Preamble 2 (“As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.”). Deborah L. Rhode states these essential points well:

At its core, the relationship between lawyers and clients is one of agency, which imposes fiduciary obligations of competence, confidentiality and loyalty. Yet these obligations do not always trump competing concerns. Lawyers also need to consider the potential harms to other affected parties, and core values such as honesty, fairness and good faith on which any effective justice system depends.

Deborah L. Rhode, *Personal Integrity and Professional Ethics*, in REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS 28, 29 (Kieran Tranter et al. eds., 2010).

214. Tim Dare compares the “hyper-zealous lawyer,” who is “concerned not merely to secure the[] client’s legal rights, but to pursue any advantage obtainable for the[] client through the law,” with the “merely-zealous lawyer.” TIM DARE, *THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER’S ROLE* 76-77 (2009). He notes:

It is often in our interest to have more than we are entitled to under law, and no doubt we are often interested in having more than our bare legal entitlement. But this is of no moment to the merely-zealous lawyer. Their professional obligation is to pursue the client’s legal rights zealously. They are to be partisan in the sense that they must bring all of their professional skills to bear upon the task of securing their client’s rights. But they are under no obligation to pursue interests that go beyond the law.

*Id.* at 76. Dare then posits “[t]hat not every lawful advantage that can be obtained through law is a legal entitlement, and that the duty of zealous advocacy requires lawyers to pursue only their client’s legal entitlements. The duty of zealous advocacy, this is to say, is a duty of mere- rather than hyper-zeal.” *Id.* at 81. This is “because [lawyers’] professional roles are structured by the function of the institution to which they belong, and the function of that institution is to determine and protect legal entitlements, not to secure every possible lawful advantage.” *Id.*

215. MODEL RULES OF PROF’L CONDUCT r. 4.1 cmt. 2 (AM. BAR ASS’N 2015); *see* Steele, *supra* note 47, at 1393 (“Lawyers cannot hide behind fidelity to client to rationalize deceitful negotiation. Not only is it unrealistic to believe that many clients actually instruct lawyers to behave in a deceitful manner, a lawyer’s code of ethics encourages him to guide the client away from any such thoughts.” (citing MODEL RULES OF PROF’L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS’N 1983))); *see also* Rubin, *supra* note 69, at 593 (“Client avarice and hostility neither control the lawyer’s conscience nor measure his ethics.”).

216. *See* McGinniss, *Virtue and Advice*, *supra* note 5, at 42-43 (“In engaging the client as a ‘neighbor,’ and as a ‘subject,’ the lawyer should also encourage the client to see the persons with whom they have disputes in a similar light.” (footnote omitted)).

others realize that such an attitude is childish, impractical, and inconsistent with their basic sense of themselves. Many clients in fact want what they are entitled to and no more, and welcome the opportunity to deal with a lawyer who respects the decencies of life, as they themselves do. And they know in addition that the lawyer who is a shyster to others will often be a shyster to his client.<sup>217</sup>

At the same time, however, a lawyer's moral duty of respect—encompassing good faith and honest dealing—does not require a lawyer to sacrifice the client's rights or interests by making disclosures or taking other affirmative actions to ensure the adverse party receives what the lawyer believes is a substantively fair or just outcome.<sup>218</sup> Certainly, in the advising role, the lawyer may properly offer the client an opinion about what substantive fairness or justice requires in a given circumstance.<sup>219</sup> But in the absence of the client's agreement to alter the substantive arrangements, the lawyer should rely upon the lawyer's own exercise of good faith and honest dealing in the negotiating process to satisfy moral concerns about fairness to the opposing party.<sup>220</sup>

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217. White, *The Ethics of Argument*, *supra* note 3, at 892; *see also* Loder, *supra* note 53, at 101 (“The belief that clients prefer unethical lawyers also grossly underestimates clients’ abilities to appreciate the pervasive impact of a ‘hired gun’ mentality on the lawyer’s overall integrity and effectiveness.”); Clark D. Cunningham, *What Do Clients Want from Their Lawyers?*, 2013 J. DISP. RESOL. 143, 146 (2013) (citing finding by the “leading researcher in this area, the American social psychologist Tom Tyler,” that “[c]lients care most about the process—having their problems or disputes settled in a way that they view as fair, second most important is achieving a fair settlement, the least important factor is the number of assets they end up winning” (quoting Tom Tyler, *Client Perceptions of Litigation—What Counts: Process or Result?*, TRIAL 40 (July 1988))).

218. Walter W. Steele, Jr., for example, recommends this aspirational standard for lawyer negotiators:

[W]hen serving as a negotiator lawyers should strive for a result that is objectively fair. Principled negotiation between lawyers on behalf of clients should be a cooperative process, not an adversarial process. Consequently, whenever two or more lawyers are negotiating on behalf of clients, each lawyer owes the other an obligation of total candor and total cooperation to the extent required to insure that the result is fair.

Steele, *supra* note 47, at 1403; *see also supra* note 179 (discussing and critiquing Carrie Menkel-Meadow’s proposal of norms for lawyer negotiation directed to the substantive fairness of outcomes).

219. *See* MODEL RULE OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N 2015) (Advisor); *see also* McGinniss, *Virtue and Advice*, *supra* note 5, at 10 (“[T]he role adopted by the advising lawyer under [Rule 2.1] is one of a verbal safeguard standing between the client and the potential impact of the client’s actions on third-party or societal interests, and speaking out”—to the client—“as necessary and proper to protect interests beyond the client’s alone.”); Steele, *supra* note 47, at 1403 (“From the client’s perspective, a primary motivation for seeking a lawyer’s help *should be* the expectation of a fair negotiation.”).

220. As Tim Dare expresses a similar point about lawyers and the proper exercise of the virtue of generosity:

Gerald B. Wetlaufer opines the legal profession has “embrace[d] a discourse on the ethics of lying that is uncritical, self-justificatory and largely unpersuasive.”<sup>221</sup> He explains:

Our motives in this seem reasonably clear. Put simply, we seek the best of both worlds. On the one hand, we would capture as much of the available surplus as we can. In doing so, we enrich our clients and ourselves. Further, we gain for ourselves a reputation for personal power and instrumental effectiveness. And we earn the right to say we can never be conned. At the same time, on the other hand, we assert our claims to a reputation for integrity and personal virtue, to the high status of a profession, and to the legitimacy of the system within which we live and work. Even Gorgias, for all of his powers of rhetoric, could not convincingly assert both of these claims. Nor can we.<sup>222</sup>

The ethical obligations a lawyer advocate owes a client to pursue the client’s interests with loyalty and zealousness are powerful and imperative. Nevertheless, they do not require the lawyer to forego the virtue of honesty or to compromise personal or professional integrity, using Machiavellian means to achieve the client’s objectives.

### C. COMMUNITY: JUSTICE FROM FAIR PROCESSES

Even from the standpoint of instrumental effectiveness, a negotiating lawyer needs to be, as Anthony Kronman has said, an “expert in cooperation, and be able to discern where those opportunities for cooperation lie.”<sup>223</sup> Such opportunities are less likely to be found if lawyers are presumed dishonest because their ethical standards are construed to allow them to be so.<sup>224</sup> Frohnen and Eck ask negotiating lawyers to consider:

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Lawyers who attempt to be generous by sacrificing their clients’ rights—whether by not merely-zealously pursuing those rights or perhaps by simply not advising the client that the rights are available—display not the virtue of generosity, but instead a vice, “something like arrogance”: “. . . being so completely sure of the rightness of one’s own views and the irrelevance of anybody else’s, even the views of the person whose rights are at issue, that one simply forces one’s views on the client.”

DARE, *supra* note 214, at 78 (quoting R.E. Ewin, *Personal Morality and Professional Ethics: The Lawyer’s Duty of Zeal*, 6 INT’L J. OF APPLIED PHILOSOPHY 39 (1991)).

221. Wetlaufer, *supra* note 106, at 1272; *see also supra* note 6 (on Plato’s *Gorgias*).

222. Wetlaufer, *supra* note 106, at 1272.

223. KRONMAN, *supra* note 106, at 153; *see also* Cohen, *supra* note 97, at 744 (“Respecting the other party will facilitate his or her cooperation which, if it affects the outcome at all, will usually be to one’s benefit.”).

224. *See, e.g.,* Steele, *supra* note 47, at 1402 (“That lawyers should not deceive, should not mislead, or should not overreach is too much a part of the common morality to be ignored much

What happens when each person becomes master of his or her own words? We suggest that, before the bar grants that punishing lies is simply too burdensome or that lying should not be punished once everyone lies and expects lies, it should explore fully the probable costs to clients, third parties, and society as a whole as well as the legal profession itself. [In a] society in which words and gestures cannot be counted upon to mean what they have meant in the past, what we take on trust in any conversation they shall mean (rather than what their current master wills them to mean), will cease to exist as communication and common actions become haphazard, unreliable, and in the end impossible.<sup>225</sup>

The call to virtuous negotiation asks: what kind of persons and professionals do lawyers aspire to be, and within what kind of legal community do they aspire to practice?<sup>226</sup> It also asks lawyers to consider how their conduct in negotiation either positively or negatively impacts the fairness of the processes by which legal matters are resolved in our broader community and the public's perception of justice in our legal system.

As previously emphasized, the ideal of fairness to which I urge lawyers to aspire does not focus on the substantive outcome of the negotiation.<sup>227</sup> Instead, it inheres in the concept of good faith and the honest dealing that the Preamble to the ABA Model Rules of Professional Conduct already calls upon negotiating lawyers to express in their words and actions.<sup>228</sup> It bears similarities to Peter J. Henning's concept of authenticity, which he describes as a component of honesty in the practice of law.<sup>229</sup> I agree with him that it is.<sup>230</sup> It is also more than that. Good faith negotiating means not

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longer. Normative negotiating conduct between lawyers cannot survive as a set of values distinct from values held by society at large.”).

225. Frohnen & Eck, *supra* note 119, at 453-54 (footnote omitted).

226. *Cf.* White, *The Ethics of Argument*, *supra* note 3, at 879 (“I also think it is important what kind of person I am and what sort of community I help to constitute, and I know that to make myself a lawyer is to give myself a mind of a certain character or cast, and that this is in large measure determined by what happens in argument.”); *id.* at 880 (observing that the tendency of the practice of the profession to improve the character “is greatly affected by the nature of the ethical community that one establishes with other lawyers and judges”).

227. *See supra* notes 68-69, 178-79, and accompanying text.

228. *See* MODEL RULES OF PROF'L CONDUCT Preamble 2 (AM. BAR ASS'N 2015); *supra* note 33 and accompanying text.

229. *See* Henning, *supra* note 139, at 222 (describing an honest lawyer's “authentic expression” as “one that comprehends fairly the lawyer's (and in certain circumstances the client's) intentions,” and as implicating “the lawyer has a further obligation to ensure that the representation of the client is fair both to the client and to others, including courts and opponents”).

230. *See supra* notes 139-48 and accompanying text; *cf.* Rubin, *supra* note 69, at 590 (“[A]ll lawyers know that good faith requires conduct beyond simple honesty.”). For Judge Alvin B. Rubin, “honesty” is essentially equivalent to “candor” (which involves a degree of completeness



only using words objectively grounded in fact and law,<sup>231</sup> but also refraining from coercive threats, incivility, or psychological manipulation: it means negotiating with respect for your neighbor—lawyer or party—as a human being with fundamental dignity.<sup>232</sup> It means advocating for the client’s interests while still embracing “accountability to the good of the client.”<sup>233</sup> As I have said in the context of the advisor role, a lawyer’s best service for the client’s good “includes a commitment by the lawyer to refrain from, purposely or not, becoming the occasion for the client to experience avoidable deformation of moral character through the actions taken to address the client’s legal situation.”<sup>234</sup> It means being faith’s keeper in the practice of law, and not its breaker.<sup>235</sup>

I do not, however, recommend revising the professional conduct rules to create a separate, codified ethical duty of fair dealing in negotiation. In a 1980 discussion draft of professional conduct rules governing negotiations, the ABA Commission on Evaluation of Professional Standards proposed to include a provision stating, “In conducting negotiations a lawyer shall be fair in dealing with other participants.”<sup>236</sup> This provision, along with others, met with strong resistance and ultimately was not adopted.<sup>237</sup> In

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and openness beyond simple truth telling), and “good faith” requires a lawyer to avoid facilitating a resolution in favor of the client that is substantively “unconscionable.” *See id.* at 589-90.

231. *Cf.* MODEL RULES OF PROF’L CONDUCT r. 3.1 (AM. BAR ASS’N 2015); *supra* note 63 and accompanying text.

232. *See* Cohen, *supra* note 97, at 743; *supra* notes 180-87 and accompanying text. To be clear, stating the consequences of a failure to resolve a legal matter through successful negotiation—which could certainly include a “threat” of litigation and its attendant costs and potential liabilities—does not constitute a coercive threat for purposes of evaluating the good or bad faith of a negotiating lawyer. And in assessing what constitutes bad faith “psychological manipulation” of an adverse party, and what is instead simply good faith “psychological pressure” to motivate a favorable deal for one’s client, there is a degree of subjective judgment involved: a lawyer with practical wisdom, and possessed of the virtue of integrity, will be better equipped to recognize the boundary between good faith consistent with zealous advocacy and the duty of loyalty, and bad faith negotiation tactics. *See* McGinniss, *Virtue Ethics*, *supra* note 4, at 37-38, 46-48 (discussing the Aristotelian intellectual virtue of practical wisdom, and integrity as the unifying virtue for the practice of law).

233. VISCHER, *supra* note 150, at 28, *quoted in* McGinniss, *Virtue and Advice*, *supra* note 5, at 42.

234. McGinniss, *Virtue and Advice*, *supra* note 5, at 42; *see also id.* at 38-45 (offering, “[f]or those seeking a deeper vision of what it means professionally and personally to relate to another human being as an advisor on the law,” the ideal for a lawyer’s service as a “trustworthy neighbor” to the client; and examining the Biblical moral principle of *agape*, or “sacrificial love,” as applied to the lawyer-client relationship).

235. *Cf. supra* notes 2, 117, 152, and accompanying text (discussing Machiavelli’s view of faith keeping and faith breaking).

236. ABA Comm’n on Evaluation of Prof’l Standards, Discussion Draft of the Model Rules of Prof’l Conduct r. 4.2(a) (1980).

237. *See* Hinshaw & Alberts, *supra* note 30, at 163 n.219. Walter W. Steele, Jr. criticizes the 1980 proposed Rule 4.2(a) on several grounds:

2002, the ABA's Section of Litigation approved and published Ethical Guidelines for Settlement Negotiations stating, "A lawyer's conduct in negotiating a settlement should be characterized by honor and fair dealing."<sup>238</sup> Such formal written guidance, though non-binding, does serve the purpose of communicating institutional support for fair processes in negotiation.<sup>239</sup> State and local bar associations should also consider

As proposed the rule could have become a vehicle for lawyers with one set of values to characterize other, honest lawyers with different values as "unfair" and in violation of the rule.

As if anticipating such unintended and undesirable results, the drafters of the proposed rule added an explanation of fairness within the context of negotiation. Their approach is conservative. One part of the explanation of "fairness" stated: "Fairness in negotiation implies that representations by or in behalf of one party to the other party be truthful. This requirement is reflected in contract law, particularly the rules relating to fraud and mistake. A lawyer involved in negotiations has an obligation to assure as far as practicable that the negotiations conform to the law's requirements in this regard."

In reality, that commentary does little more than ask lawyers to follow existing case precedents concerning truth, concealment, fraud, and mistake.

Steele, *supra* note 47, at 1400-01 (quoting ABA Comm'n on Evaluation of Prof'l Standards, Discussion Draft of the Model Rules of Prof'l Conduct r. 4.2 cmt. (1980)). Steele's criticisms notwithstanding, the 1980 comment does provide helpful insight into what good faith negotiation should include and what it can accomplish for clients:

As an aspect of the duty to deal fairly with other parties, a lawyer should not engage in the pretense of negotiation when the client has no real intention of seeking agreement. In particular, it is dishonest to pretend to negotiate when the real purpose is to prevent the other party from pursuing an alternative course of action. More generally, a lawyer acting as negotiator should recognize that maintaining a fair and courteous tenor in negotiations can contribute to a satisfactory resolution. This is particularly true when the parties to the negotiation have a continuing relationship with each other, as in collective bargaining or in negotiations between divorcing parents concerning child custody. An agreement that is the product of open, forbearing, and fair-minded negotiation can be a demonstration by the lawyers of the conduct that the parties themselves should display toward each other.

ABA Comm'n on Evaluation of Prof'l Standards, Discussion Draft of the Model Rules of Prof'l Conduct r. 4.2 cmt. (1980).

238. Amer. Bar Ass'n, Sec. of Litig., Ethical Guidelines for Settlement Negotiations § 2.3, at 3 (2002).

239. Douglas R. Richmond, however, criticizes this Guideline as being "more hortatory than helpful." Richmond, *supra* note 72, at 250. He elaborates:

But by whose standards is "honor" in settlement negotiations measured? Perhaps a court's where negotiations are linked to pending litigation, but what of the many instances where they are not? And what constitutes "fair dealing"? Lawyers typically think of "fair dealing" in terms of contract law's implied duty of good faith and fair dealing, but even there the concept is imprecise. . . . The Preamble to the *Model Rules of Professional Conduct* states that "[a]s [a] negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others." Of course, a result advantageous to one's client may not be fair to another party, and "fair dealing" may require more than honesty. The Guidelines are no help; their drafters acknowledge that whatever fair dealing may be, it is not a professional responsibility mandate, but rather a "best practice."

*Id.* (alterations in original) (footnotes omitted) (quoting MODEL RULES OF PROF'L CONDUCT Preamble 2 (AM. BAR ASS'N 2008)) (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 & cmt. D (1981) and ABA Ethical Guidelines for Settlement Negotiations § 2.3, at 3-4 (2002)).

adopting standards for “good faith” negotiation practice similar to those which have existed in the District of Columbia since 1996, which include some concrete norms for fair processes.<sup>240</sup> With or without formal guidelines, however, the most indispensable means for promoting these negotiation ideals is informal communication within the bench and bar (both one-on-one and in group gatherings) about their importance for lawyers, clients, and the public, and why aspiring to meet these ideals of good faith and honest dealing is in the best interest of justice.<sup>241</sup>

Virtuous negotiation promotes human flourishing in a legal community, and in many cases, will benefit the individual lawyers and clients who participate in that community. Even so, it is important to emphasize that a lawyer should deal honestly and act in good faith because it is intrinsically right and valuable to do so, rather than being focused on the extrinsic rewards and advantages that such good conduct might obtain.<sup>242</sup> At times, the immediate rewards of breaking faith in negotiation may be substantial. By building a foundation of virtuous character, and understanding good conduct as good for its own sake and not for what may be gained by it, a lawyer is best prepared to act with integrity even when doing so means sacrificing extrinsic rewards or enduring costly consequences.

## VI. CONCLUSION

If Machiavelli were commenting on this article, I imagine he would call much of what I have proposed a mere “imagination” of the truth about the practice of law and exclaim that “it is so far from how one lives [as a lawyer] to how one should live that he who lets go of what is done for what should be done learns his ruin rather than his preservation.”<sup>243</sup> He would then say the “effectual truth” of lawyer negotiation is that one must know how to deal honestly and keep faith when that is useful (including for appearances and reputation) and how to deal dishonestly and break faith when that is more useful for the client’s (and usually the lawyer’s) benefit.<sup>244</sup> He would also advise that being virtuous as a lawyer in

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

241. *See supra* notes 172-73 and accompanying text (discussing mentoring programs and apprenticeship organizations as examples of means by which a legal community may promote intrinsic values and professional virtues for negotiations).

242. As Judge Alvin B. Rubin observes, “Good conduct exacts more than mere convenience. It is not sufficient to call on personal self-interest; this is the standard created by the thesis that the same adversary met today may be faced again tomorrow, and one had best not prejudice that future engagement.” Rubin, *supra* note 69, at 589.

243. MACHIAVELLI, *supra* note 2, at 61.

244. *Id.* at 61, 71.

negotiation means knowing when the situation makes one of these approaches more advantageous and knowing how to “use the fox” when necessary for the sake of power or gain.<sup>245</sup> Finally, he might suggest that negotiating lawyers who strive to practice with good faith and honest dealing in every negotiation will “come to ruin” when other lawyers break faith with them.<sup>246</sup>

As to the last point, it is sadly true that a negotiating lawyer who exercises the virtue of honesty, and anticipates reciprocation from colleagues in the bar, will find occasions for disappointment. But acknowledging that the lawyers with whom we are negotiating might tell lies or deceive us does not entitle us to relax our own moral standards concerning dishonesty or deception. Nor does it justify adopting professional conduct rules or interpretive comments that authorize such behavior<sup>247</sup> or encouraging lawyers who are entering the legal profession to place their integrity at moral risk by how they play the negotiating “game.”<sup>248</sup> Instead, we should renew our commitment to promote the values of respect and fairness of process, and teach the lawyers within our sphere of influence to be keepers of faith even though others may break it.<sup>249</sup>

To the extent our legal communities have become infected with dishonesty (with varying degrees of ill health), Machiavelli would be pessimistic about remedial efforts (even if he were convinced a culture of honesty would be “effectual”):

[I]n the beginning of the illness it is easy to cure and difficult to recognize, but in the progress of time, when it has not been

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245. *Id.* at 70.

246. *Id.* at 61, 69.

247. *See* discussion *supra* Part III.A.

248. *See* discussion *supra* Part IV.A. Thomas L. Shaffer laments how lawyers all too often entice each other to settle for the moral status quo, rather than aspire to professional lives embracing greater values and ideals:

[L]awyers are always being asked to bend a little so that power can work and things can be made better; lawyers are always being told—always telling one another—that the essence of their profession . . . lies in working within the system. We are always being told that someone has to do the job, that if we don’t do the job someone worse will do the job. Things have to be done in office that cannot be done with moral comfort in private life, but that is the way office (including the license to practice law) is.

THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT 201 (1981).

249. *Cf.* Steele, *supra* note 47, at 1400 (stressing that “[t]o admit . . . changing current standards of negotiating practices among lawyers is difficult is not to admit that it is impossible,” and commenting that “arguments that lawyers expect deceit from another lawyer need not be interpreted as arguments in favor of deceit; rather they can be interpreted as arguments for *changing* what lawyers are taught to expect.”).

recognized and treated in the beginning, it becomes easy to recognize and difficult to cure. So it happens in affairs of state, because when one recognizes from afar the evils that arise in a state (which is not given but to one who is prudent), they are soon healed; but when they are left to grow because they were not recognized, to the point that everyone recognizes them, there is no longer any remedy for them.<sup>250</sup>

I, on the other hand, will sound a note of measured optimism: although dishonesty is a cultural disease that is ultimately incurable, it may nonetheless be made less pathological (and less contagious).<sup>251</sup> And each lawyer is professionally and personally responsible to contribute to the remedial effort.<sup>252</sup> James Boyd White, in concluding his Socratic reflection on the ethics of argument, offers a wise observation about lawyerly language:

[W]e are responsible for how we speak and who we are. . . . We cannot escape the fact that whenever we speak we redefine for the moment the resources of our culture and in doing so establish a character for ourselves and a relation with another, the person to whom we speak. Who shall we be? What relation shall we have with our language? What kind of relations shall we have with

250. MACHIAVELLI, *supra* note 2, at 12.

251. See *supra* note 28 (discussing David Barnhizer's diagnosis of our "culture of lies"). Sissela Bok describes the tendency of lying to spread from not only from one lie to the next, but also from one person to another:

Both spread [of deception] and abuse result in part from the lack of clear-cut standards as to what is acceptable. In the absence of such standards, instances of deception can and will increase, bringing distrust and thus more deception, loss of personal standards on the part of liars and so yet more deception, imitation by those who witness deception and the rewards it can bring, and once again more deception. Augustine described the process thus: "[. . .] little by little and bit by bit this will grow and by gradual accessions will slowly increase until it becomes such a mass of wicked lies that it will be utterly impossible to find any means of resisting such a plague grown to huge proportions through small additions."

BOK, *supra* note 41, at 104-05 (quoting Augustine, *Lying*, in 14 TREATISES ON VARIOUS SUBJECTS ch. 14 (R. J. Deferrari ed., 1952)).

252. Shaffer cautions against the temptation to compromise the truth for the sake of power:

We are talking about a compromise with truthfulness, a compromise demanded of public persons, that comes about because the person who makes the compromise is optimistic. . . . What we mean by compromise is an agreement to bracket one's basic convictions in order to achieve certain limited ends. Compromise, as we mean it here, assumes that *the good society is based on power*. . . . It needs to be distinguished from respect and civility and the concessions people make when they work together on the assumption that *the good society is based on truth*.

SHAFFER, *supra* note 248, at 201.

others? These are the central questions of human life, and they are present with special force and clarity in the life of the lawyer.<sup>253</sup>

As Socrates might have said: true words are not only good in themselves; they are healing to a lawyer's spirit, and an infectious testimony to others.<sup>254</sup>

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253. White, *The Ethics of Argument*, *supra* note 3, at 895.

254. *See supra* note 1 (quoting Socrates: "False words are not only evil in themselves, but they infect the soul with evil.").