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Article 1.2

Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation

James J. White

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Upon the enactment of the Model Rules of Professional Conduct, published ethical norms will for the first time give explicit consideration to the lawyer's behavior in the process of negotiation. . . . The mere recognition of negotiation as a separate process worthy of unique rules is a large step. The purpose of this paper is to address the general question of truthfulness as that question is faced in Rule 4.2.

The difficulty of proposing acceptable rules concerning truthfulness in negotiation is presented by several circumstances. First, negotiation is nonpublic behavior. If one negotiator lies to another, only by happenstance will the other discover the lie. If the settlement is concluded by negotiation, there will be no trial, no public testimony by conflicting witnesses, and thus no opportunity to examine the truthfulness of assertions made during the negotiation . . .

The drafters appreciated, but perhaps not fully, a second difficulty in drafting ethical norms for negotiators. That is the almost galactic scope of disputes that are subject to resolution by negotiation. . . . More than almost any other form of lawyer behavior, the process of negotiation is varied; it differs from place to place and from subject matter to subject matter. It calls, therefore, either for quite different rules in different contexts or for rules stated only at a very high level of generality.

A final complication in drafting rules about truthfulness arises out of the paradoxical nature of the negotiator's responsibility. On the one hand the negotiator must be fair and truthful; on the other he must mislead his opponent. . . . I submit that a careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true positions. That is true of both the plaintiff and the defendant in a lawsuit. It is true of both labor and management in a collective bargaining agreement. It is true as well of both the buyer and the seller in a wide variety of sales transactions. To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation.

Of course there are limits on acceptable deceptive behavior in negotiation, but there is the paradox. How can one be "fair" but also mislead? Can we ask the negotiator to mislead, but fairly, like the soldier who must kill, but humanely?

Truthtelling in General

The obligation to behave truthfully in negotiation is embodied in the requirement of Rule 4.2(a) that directs the lawyer to “be fair in dealing with other participants.” Presumably the direction to be fair speaks to a variety of acts in addition to truthfulness and also different from it. At a minimum it has something to say about the threats a negotiator may use, about the favors he may offer, and possibly about the extraneous factors other than threats and favors which can appropriately be used in negotiating. As I have suggested elsewhere, each of these issues has important ramifications, and each merits independent consideration by the drafters of the Model Rules and by lawyers. In this paper I ignore those questions and limit my consideration to the question of truth telling. * * *

Five Cases

Although it is not necessary to draft such a set of rules, it is probably important to give more than the simple disclaimer about the impossibility of defining the appropriate limits of puffing that the drafters have given in the current Comments. To test these limits, consider five cases. Easiest is the question that arises when one misrepresents his true opinion about the meaning of a case or a statute. Presumably such a misrepresentation is accepted lawyer behavior both in and out of court and is not intended to be precluded by the requirement that the lawyer be “truthful.” In writing his briefs, arguing his case, and attempting to persuade the opposing party in negotiation, it is the lawyer’s right and probably his responsibility to argue for plausible interpretations of cases and statutes which favor his client’s interest, even in circumstances where privately he has advised his client that those are not his true interpretations of the cases and statutes.

A second form of distortion that the Comments plainly envision as permissible is distortion concerning the value of one’s case or of the other subject matter involved in the negotiation. Thus the Comments make explicit reference to “puffery. . . .”

A third case is related to puffing but different from it. This is the use of the so-called false demand. It is a standard negotiating technique in collective bargaining negotiation and in some other multiple-issue negotiations for one side to include a series of demands about which it cares little or not at all. . . . Such behavior is untruthful in the broadest sense; yet at least in collective bargaining negotiation its use is a standard part of the process and is not thought to be inappropriate by any experienced bargainer.

Two final examples may be more troublesome. The first involves the response of a lawyer to a question from the other side. Assume that the defendant has instructed his lawyer to accept any settlement offer under \$100,000. Having received that instruction, how does the defendant’s lawyer respond to the plaintiff’s question, “I think \$90,000 will settle this case. Will your client give \$90,000?” Do you see the dilemma that question poses for the defense lawyer? It calls for information that would not have to be disclosed. A truthful answer to it concludes the negotiation and dashes any possibility of negotiating a lower settlement even in circumstances in which the plaintiff might be willing to accept half of \$90,000. Even a moment’s hesitation in response to

the question may be a nonverbal communication to a clever plaintiff's lawyer that the defendant has given such authority. Yet a negative response is a lie.

It is no answer that a clever lawyer will answer all such questions about authority by refusing to answer them, nor is it an answer that some lawyers will be clever enough to tell their clients not to grant them authority to accept a given sum until the final stages in negotiation. Most of us are not that careful or that clever. . . . Thus despite the fact that a clever negotiator can avoid having to lie or to reveal his settling point, many lawyers, perhaps most, will sometime be forced by such a question either to lie or to reveal that they have been granted such authority by saying so or by their silence in response to a direct question. Is it fair to lie in such a case?

Before one examines the possible justifications for a lie in that circumstance, consider a final example recently suggested to me by a lawyer in practice. There the lawyer represented three persons who had been charged with shoplifting. Having satisfied himself that there was no significant conflict of interest, the defense lawyer told the prosecutor that two of the three would plead guilty only if the case was dismissed against the third. Previously those two had told the defense counsel that they would plead guilty irrespective of what the third did, and the third had said that he wished to go to trial unless the charges were dropped. Thus the defense lawyer lied to the prosecutor by stating that the two would plead only if the third were allowed to go free. Can the lie be justified in this case?

How does one distinguish the cases where truthfulness is not required and those where it is required? Why do the first three cases seem easy? I suggest they are easy cases because the rules of the game are explicit and well developed in those areas. Everyone expects a lawyer to distort the value of his own case, of his own facts and arguments, and to deprecate those of his opponent. No one is surprised by that, and the system accepts and expects that behavior. . . .

The last two cases are more difficult. In one the lawyer lies about his authority; in the other he lies about the intention of his clients. It would be more difficult to justify the lies in those cases by arguing that the rules of the game explicitly permit that sort of behavior. Some might say that the rules of the game provide for such distortion, but I suspect that many lawyers would say that such lies are out of bounds and are not part of the rules of the game. Can the lie about authority be justified on the ground that the question itself was improper? Put another way, if I have a right to keep certain information to myself, and if any behavior but a lie will reveal that information to the other side, am I justified in lying? I think not. Particularly in the case in which there are other avenues open to the respondent, should we not ask him to take those avenues? That is, the careful negotiator here can turn aside all such questions and by doing so avoid any inference from his failure to answer such questions.

What makes the last case a close one? Conceivably it is the idea that one accused by the state is entitled to greater leeway in making his case. Possibly one can argue that there is no injury to the state when such a person, particularly an innocent person, goes free. Is it conceivable that the act can be justified on the ground that it is part of the game in this context, that prosecutors as well as defense lawyers routinely misstate what they, their witnesses, and their clients can and will do? None of these arguments seems persuasive. Justice is not served by freeing a guilty person. The system does not necessarily achieve better results by trading two guilty pleas for a dismissal. Perhaps

its justification has its roots in the same idea that formerly held that a misrepresentation of one's state of mind was not actionable for it was not a misrepresentation of fact.

In a sense rules governing these cases may simply arise from a recognition by the law of its limited power to shape human behavior. By tolerating exaggeration and puffing in the sales transaction, by refusing to make misstatement of one's intention actionable, the law may simply have recognized the bounds of its control over human behavior. Having said that, one is still left with the question, Are the lies permissible in the last two cases? My general conclusion is that they are not, but I am not nearly as comfortable with that conclusion as I am with the conclusion about the first three cases.

Taken together, the five foregoing cases show me that we do not and cannot intend that a negotiator be "truthful" in the broadest sense of that term. At the minimum we allow him some deviation from truthfulness in asserting his true opinion about cases, statutes, or the value of the subject of the negotiation in other respects. In addition some of us are likely to allow him to lie in response to certain questions that are regarded as out of bounds, and possibly to lie in circumstances where his interest is great and the injury seems small. It would be unfortunate, therefore, for the rule that requires "fairness" to be interpreted to require that a negotiator be truthful in every respect and in all of his dealings. It should be read to allow at least those kinds of untruthfulness that are implicitly and explicitly recognized as acceptable in his forum, a forum defined both by the subject matter and by the participants.