

2015

Negotiation Ethics: Proposals for Reform to the Law Society of Upper Canada's Rules of Professional Conduct

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Recommended Citation

George Tsakalis, "Negotiation Ethics: Proposals for Reform to the Law Society of Upper Canada's Rules of Professional Conduct", (2015) 5:4 online: UWO J Leg Stud 3

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Abstract

Creating a comprehensive code of negotiation ethics for lawyers is a contentious issue. The Law Society of Upper Canada's Rules of Professional Conduct currently offers little guidance regarding appropriate behaviour of lawyers during negotiations. Detractors argue that the negotiation process is too complex and fluid to be codified. This criticism is not fatal to the case for a code of negotiation ethics. Lawyers have moral and ethical standards within the profession and responsibilities to the public as conduits to legal remedies. This paper argues a code of legal ethics is necessary to uphold these standards. Such a framework should be based on the concept of good faith negotiation with a view to honest disclosure and expeditious settlement of disputes. Developing a negotiation ethic is integral to addressing the access to justice and the concomitant rule of law problem identified by the Supreme Court of Canada in *Hryniak v Mauldin*. This article draws on national and international codes of conduct that have implemented guidelines for negotiations. It concludes with potential reforms to remedy the problems of expensive court procedures, affordability of legal representation, and maintaining public respect for the judicial system.

This article is helpful for readers seeking to learn more about:

- Law Society of Upper Canada, Rules of Professional Conduct, legal professionals, legal practice, negotiations, alternative dispute resolution, duty of good faith

Topics in this article include:

- private mediations, ethics, professionalism, civil law, civil justice, social reform, national codes of legal conduct, international codes of legal conduct, personal injury law, the adversarial justice system, American Bar Association

Authorities cited in this article include:

- Ontario, Law Society of Upper Canada, Rules of Professional Conduct
- *Hryniak v Mauldin*, 2010 SCC 35
- *Martel Building Ltd v Canada*, 2000 SCC 60
- *978011 Ontario Ltd v Cornell Engineering Co*, (2001), 53 OR (3d) 783 (CA)
- *Mellco Developments Ltd v Portage la Prairie (City)*, 2002 MBCA 125
- *Walford v Miles*, [1992] 1 All ER 453 at 460 (HL)

Keywords

Law Society of Upper Canada, Rules of Professional Conduct, legal professionals, legal practice, negotiations, alternative dispute resolution, duty of good faith, private mediations, ethics, professionalism, civil law, civil justice, social reform, national codes of legal conduct, international codes of legal conduct, personal injury law, the adversarial justice system, American Bar Association

NEGOTIATION ETHICS: PROPOSALS FOR REFORM TO THE LAW SOCIETY OF UPPER CANADA'S *RULES OF PROFESSIONAL CONDUCT*

GEORGE TSAKALIS*

INTRODUCTION

Lawyers in the era of the vanishing trial¹ increasingly practice “litigotiation,”² a term coined by Professor Marc Galanter. Galanter defined “litigotiation” as “the strategic pursuit of a settlement through mobilizing the court process.”³ Lawyers leverage court litigation processes, such as documentary and oral discovery, to settle files through negotiation and avoid costly trials. These court processes require that lawyers spend significant time negotiating with opposing counsel. Canadian law societies have codes of conduct regulating lawyers in their respective jurisdictions. Law societies have recognized the benefit of harmonizing professional codes of conduct “so that the public can expect the same ethical requirements to apply wherever their legal advisor may practice law.”⁴ The Federation of Law Societies of Canada has approved a *Model Code of Professional Conduct* that has been implemented by some law societies and is under review by others. The *Model Code of Professional Conduct* is not binding, but it is “expected that any significant differences in rules of conduct across Canada will be eliminated.”⁵ The Law Society of Upper Canada (LSUC) amended its *Rules of Professional Conduct (ROPC)* effective October 1, 2014, to reflect the *Model Code of Professional Conduct*.⁶

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¹ Marc Galanter, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts” (2004) 1:3 *Journal of Empirical Leg Stud* 459 at 459-468.

² Marc Galanter, “Worlds of Deals: Using Negotiation to Teach About Legal Process” (1984) 34 *J Leg Educ* 268 at 268.

³ *Ibid.*

⁴ Federation of Law Societies of Canada, “Model Code of Professional Conduct”, online: Federation of Law Societies of Canada <<http://flsc.ca/national-initiatives/model-code-of-professional-conduct/federation-model-code-of-professional-conduct>>.

⁵ *Ibid.*

⁶ Law Society of Upper Canada, “Rules of Professional Conduct”, Section 3.2-4, online: LSUC <<http://www.lsuc.on.ca/lawyer-conduct-rules/>> [*ROPC*].

Unfortunately, the *ROPC* do not define unprofessional conduct in the context of negotiations.⁷ This paper argues for a code of negotiation ethics based on the concept of good faith in order to facilitate information exchange and expeditious dispute resolution.⁸ A well-developed framework for negotiations would enable lawyers to meet their own moral and ethical standards while fostering public trust and acceptance of common dispute resolution processes. This paper makes this argument in three sections. The first section demonstrates how mainstream adversarial negotiation styles create inefficient outcomes and increase litigation costs. The second section argues that the current common law position on negotiation ethics facilitates adversarial negotiation styles, necessitating regulation by law societies. The paper concludes with recommendations for reforming the *ROPC* concerning negotiation ethics.⁹ These reform recommendations draw on national and international codes of conduct.

Some academics argue the negotiation process is “much too multi-dimensional to be summarized in a generic code.”¹⁰ It follows that such codes would be too general and thus offer little direction to practitioners. In this view, practitioners should develop “internal norms” rather than rely on external ones.¹¹ Moreover, law societies may be reluctant to regulate and enforce negotiation ethics that arguably increase transaction costs. These arguments deploy descriptive analysis concerning professional practicalities and normative arguments that prioritize freedom of contract and open market forces. This paper does not seek to prove that one model of negotiation is objectively superior in all respects; rather it argues from a normative position that public trust and confidence in the legal system should be given greater value in assessing the results of competitive or cooperative negotiation models.

As a lawyer who has practiced in the field of personal injury for 15 years, my experience supports the view that good faith negotiation with an aim to expeditious settlement can reduce litigation costs and improve the public’s perception of the justice system. It is unclear in Ontario whether increased transaction costs would be passed onto the public or whether these enforcement costs would outweigh reduced legal fees. It is also unclear how experience in personal injury translates to other areas of law. Therefore, this paper does not make a universal knowledge claim as to providing a panacea for all negotiations. It intends to generate discussion concerning alternate

⁷ Unless specified otherwise, *Rules of Professional Conduct* refers to the Law Society of Upper Canada’s *Rules of Professional Conduct*.

⁸ Lawyers in the United States have made similar arguments. See, for example, Peter R Jarvis and Bradley F Tellam, “A Negotiation Ethics Primer for Lawyers” (1995-1996) 31 *Gonz L Rev* 549 [*A Negotiations Ethics Primer*].

⁹ The focus of this paper is on the Law Society of Upper Canada’s *Rules of Professional Conduct*. My criticisms related to the lack of a codification of negotiation ethics may apply differently to other Canadian jurisdictions.

¹⁰ Colleen Hanycz, Frederick H Zemans & Trevor CW Farrow, *The Theory and Practice of Representative Negotiation* (Toronto: Emond Montgomery, 2008) at 129.

¹¹ *Ibid.*

viewpoints about negotiation and what an alternative system might look like. I argue that LSUC regulation of negotiation practices through the *ROPC* squarely addresses the rule of law problems the Supreme Court of Canada (SCC) identified in *Hryniak v Mauldin*.¹² Expensive court procedures reduce the capacity for Canadians to access civil remedies. Negotiations have become a gatekeeper step for access to justice, and they require a regulatory scheme to produce consistent and fair outcomes.

I. COMPETING NEGOTIATION STYLES

There are two general negotiation approaches.¹³ The dominant approach is classified as competitive and aggressive. This approach is inherently adversarial, and the negotiator seeks to optimize his or her gains during the negotiation. The second is an interest-based and cooperative approach popularized by Roger Fisher and William Ury.¹⁴ This approach “is a form of negotiation that promotes mutual problem solving in order to maximize the welfare of all parties to a negotiation.”¹⁵ Interest-based negotiation focuses on trust-building exercises and disclosing information to opposing parties.¹⁶ There are a number of problems with competitive negotiation strategies. The typical competitive negotiation model includes exchanges of offers and counteroffers. This model flattens issues and oversimplifies multi-dimensional interests. Moreover, a lawyer’s emphasis on argument and debate over searching for new information or solutions may overlook new and creative possibilities.¹⁷ For this reason, competitive negotiations “may cause the parties to miss opportunities for expanding the range of solutions . . . important information may not be communicated and the parties may arrive at unsatisfactory and inefficient solutions.”¹⁸

A fundamental difficulty with the competitive negotiation model is that it operates on the premise that the other side will capitulate. Carrie Menkel-Meadow wrote the following:

The difficulty with all of these strategic exhortations is the assumption that the other side can be bullied, manipulated or deceived. It is true, for example, that some will wilt under pressure, but others are likely to respond in kind. Moreover, even those who wilt at the negotiation table may be resentful later

¹² *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*].

¹³ Julie Macfarlane, *Dispute Resolution Readings and Case Studies*, 3d ed (Toronto: Emond Montgomery Publications, 2011) at 155-167.

¹⁴ Roger Fisher et al., *Getting to Yes: Negotiating Agreement Without Giving In*, 2d ed (New York: Penguin, 1991).

¹⁵ Kevin Gibson, “The New Canon of Negotiation Ethics” (2003-2004) 87 Marq L Rev 747 at 749.

¹⁶ *Ibid.*

¹⁷ Carrie Menkel-Meadow, “Toward Another View of Legal Negotiation: The Structure of Problem Solving” (1983-1984) 31 UCLA L Rev 754 at 776.

¹⁸ *Ibid.*

and exercise their power either by failing to follow through on the agreement of by seeking revenge the next time the parties meet.¹⁹

More importantly, these intimidation tactics can produce negative outcomes and negative views towards a judicial system that enables them. Brinkmanship negotiation produces significant waste of financial and judicial resources. Parties pour money into lawsuits with the expectation that the other side will fold, and stalemates result where the other party does not capitulate. Cases are tried unnecessarily and settled well into the litigation process after significant resources have been expended. This outcome is a result of behavioural patterns that are identifiable to and understood by game theorists.

Harvard economist Richard Zeckhauser demonstrated the impact of time pressure in negotiations by using two opposing parties under a variety of rules. Each group was tasked with dividing a sum of money but under different rules from the other pair of negotiators. The first rule stated that if the parties could not reach an agreement, no party would receive the money. Parties under this simulation typically reached agreements that split the amount evenly after extended negotiations. The second rule created a situation where the sum of money became smaller over time. The parties reached rapid settlements and split the sum almost equally. The third scenario imposed a penalty for delay, but one side was responsible for paying a larger portion of the penalty. Parties in the last simulation typically overplayed their hands by relying on the penalty clause; they expected their counterparts to capitulate in the face of shrinking returns. Instead, many parties in the weaker position held out. They harmed themselves to spite parties who pressured them. By the time the parties reached agreement, both sides achieved significantly less than in the other simulations.²⁰ This result is frequently reproduced in the context of real world litigation practices that use competitive negotiation strategies.

II. CURRENT LAW GOVERNING NEGOTIATION ETHICS

The Common Law

Contemporary common law permits, and arguably encourages, adversarial approaches to negotiations. The SCC affirmed the traditional laissez-faire approach to regulating negotiations in *Martel Building Ltd v Canada*.²¹ The applicants in *Martel* sought to extend the tort of negligence onto negotiating parties, such that the parties would be under a duty of care.²² The Court dismissed the appeal and endorsed

¹⁹ *Ibid* at 778.

²⁰ Zeckhauser's experiments are recounted in Michael Wheeler, *The Art of Negotiation: How to Improve Agreement in a Chaotic World* (New York: Simon & Schuster, 2013) at 26.

²¹ 2000 SCC 60 [*Martel*].

²² *Ibid* at para 1.

adversarial negotiation models, holding that “[t]he primary goal of any economically rational actor engaged in commercial negotiation is to achieve the most advantageous financial bargain . . . in the context of bilateral negotiation, such gains are realized at the expense of the other negotiating party.”²³ This zero sum perspective is incommensurable with parties negotiating for mutual gain. *Martel* suggests that common law doctrines are not the optimal method with which to regulate negotiations.

The Court refrained from extending a duty of care to the negotiating parties for two reasons. The first reason was that such legal regulation would lead to increased litigation. The Court found that “extending the tort of negligence into the conduct of commercial negotiation would introduce the courts to a significant regulatory function, scrutinizing the minutiae of pre-contractual conduct.”²⁴ Extending negligence into the conduct of negotiations was also viewed as infringing upon free market ideology: “Given the number of negotiations that do not culminate in agreement, the potential for increased litigation in place of allowing market forces to operate seems obvious.”²⁵ The second reason concerned existing legal regulations. The doctrines of unconscionability, economic duress, and undue influence already govern contractual negotiation. Moreover, “negligent misrepresentation, fraud, and the tort of deceit cover many aspects of negotiation which do not culminate in an agreement.”²⁶ Although the Court declined to extend the tort of negligence, it clarified that its reasons were “restricted to whether or not the tort of negligence should be extended to include negotiation.”²⁷ The question of “whether or not negotiations are to be governed by a duty of good faith”²⁸ was left unresolved. The issue remains undecided. Lower courts across the country have followed both the spirit and letter of the *Martel* decision.

In *978011 Ontario Ltd v Cornell Engineering Co.*,²⁹ the Ontario Court of Appeal affirmed that the common law in Canada had yet to recognize the duty to act in good faith during contract negotiation.³⁰ Parties are generally expected to act in their own interests when negotiating contracts.³¹ In *Kosaka v Chan*,³² the British Columbia Supreme Court (BCSC) ruled that there was no duty at common law to negotiate in good faith in the absence of a special relationship.³³ The BCSC endorsed the position

²³ *Ibid* at para 62.

²⁴ *Ibid* at para 70.

²⁵ *Ibid* at para 71.

²⁶ *Ibid*.

²⁷ *Ibid* at para 73.

²⁸ *Ibid*.

²⁹ (2001), 53 OR (3d) 783 (CA) [*Cornell*].

³⁰ *Ibid* at para 32. Exceptions to this rule have been carved out for special circumstances, see *Melloco Developments Ltd v Portage La Prairie (City)*, 2002 MBCA 125 at para 86 for a review of the common law position on special relationships.

³¹ *Cornell*, *supra* note 29 at para 32.

³² 2008 BCSC 1231.

³³ *Ibid* at para 43.

that hard bargaining did not equate to a lack of good faith. *Kosaka v Chan* found that if a duty to negotiate in good faith was recognized, it would be impossible for courts “to supervise negotiations in commercial transactions.”³⁴ The court cited the House of Lords’ decision, delivered by Lord Ackner, in *Walford v Miles*:

[T]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interests, so long as he (or she) avoids making misrepresentations [about the subject matter of the contract].³⁵

The SCC, as well as trial courts and appeal courts across the country, have rejected the extension of a duty to negotiate in good faith.

Rules of Professional Conduct

The *ROPC* offers contradictory positions concerning a lawyer’s role during settlement negotiations. On the one hand, the *ROPC* endorses cooperative negotiation by calling on lawyers to encourage settlement on a reasonable basis and to discourage clients from pursuing frivolous litigation.³⁶ Ontario lawyers are required to represent clients “resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.”³⁷ This duty extends to “appearances and proceedings before boards, administrative tribunals, arbitrators, mediators and others who resolve disputes, regardless of their function or the informality of their procedures.”³⁸ These rules suggest that bluffing, selective disclosure, extreme initial offers, lies concerning bottom lines, engaging in emotional manipulation, or belittling opposing parties during the course of negotiations should be prohibited. On the other hand, section 5.1-1 Commentary 1 states that a “lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client’s case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law.”³⁹ However, Commentary 1 also requires that lawyers temper their zeal and “treat

³⁴ *Ibid* at para 40.

³⁵ *Walford v Miles*, [1992] 1 All ER 453 at 460 (HL).

³⁶ Law Society of Upper Canada, “*Rules of Professional Conduct*”, Section 3.2-4, online: LSUC <<http://www.lsuc.on.ca/lawyer-conduct-rules/>>. Commentary 1 for section 3.2-4 directs lawyers to “consider the use of alternative dispute resolution (ADR) for every dispute, and if appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options.”

³⁷ *Ibid*, s 5.1-1.

³⁸ *Ibid*, Commentary 2.

³⁹ *Ibid*, Commentary 1.

the tribunal with candour, fairness, courtesy, and respect.”⁴⁰ These two views appear to promote competing negotiation styles that, while not necessarily mutually exclusive, are often at odds with each other.

Professional codes of conduct have been criticized as ineffective for regulating lawyer conduct in the context of negotiations on several grounds. First, in adversarial justice systems, “a just bargain is assumed to result when professional negotiators clash on a battlefield of contentions.”⁴¹ A duty of good faith with concomitant disclosure obligations could lead to lawyers effectively being co-opted by opposing parties.⁴² Second, lawyers do not share a consensus concerning the line between appropriate negotiation tactics and impermissible concealment or deception.⁴³ These critiques may lead lawyers to leave important issues uninvestigated, deferring instead to judicial authority. Third, as noted above, legal remedies already exist for victims of certain types of negotiations. Fourth, opponents argue that rules binding a lawyer’s conduct in negotiations may lead clients to dispense with legal representation entirely, or lawyers would simply not follow these rules.⁴⁴ Owen Fiss attacked the reform position from a broader perspective, arguing that individualized dispute resolution is inadequate for resolving systemic problems: “settlement of a school suit might secure the peace but not racial equality . . . it is not justice itself. To settle for something means to accept less than some ideal.”⁴⁵ I argue that these critiques do not place enough emphasis on the importance of public confidence in the justice system and the rule of law, and do not recognize the increasing importance of negotiations in resolving legal disputes.

The Rule of Law and Public Administration of Justice: A Response to the Critics

In *Hryniak*, the SCC found that “[e]nsuring access to justice is the greatest challenge to the rule of law in Canada today.”⁴⁶ The court made the following statement:

[U]ndue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available, ordinary Canadians cannot afford to access the adjudication of civil disputes. The cost and delay associated with the traditional process means that . . . the trial process denies ordinary people the opportunity to have adjudication. **And while going to**

⁴⁰ *Ibid.*

⁴¹ Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, 5th ed (Toronto: Carswell/Thomson Reuters Canada, 2009) at 15-1.

⁴² *Ibid.*

⁴³ *Ibid* at 15-2.

⁴⁴ *Ibid.*

⁴⁵ Owen M Fiss, “Against Settlement” (1983-1984) 93:6 Yale LJ 1073 at 1085-1086.

⁴⁶ *Hryniak*, *supra* note 12 at para 1.

trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.⁴⁷

Negotiated settlements offer the best alternative for Canadians who cannot afford civil trials. Negotiation skills and conduct are increasingly important for this reason. Resolving disputes in the earliest stages with regard to a client's financial capacities is quickly becoming a performance metric for successful lawyers. Facilitating settlements and reducing transaction costs increases access to justice. This culture shift can be achieved by reforming the *ROPC* to incentivize shifts away from adversarial negotiations. The following section offers suggestions for this reform.

IV. REFORMING THE *ROPC*

Professor Trevor Farrow has supported a discourse of legal practice in which lawyers seek “ethically sensitive ways to practice law,”⁴⁸ citing Deborah L. Rhode’s call for practice that “assume[s] greater responsibility for the welfare of parties other than clients.”⁴⁹ The difficulty with the *ROPC* is that lawyers must balance obligations for zealous advocacy against the duty to treat others with respect, honesty, and candour while resolving disputes as civilly as possible. More importantly, the public has an expectation that lawyers are to resolve their disputes in a fair and timely manner. Timely settlement reduces the expenses and the pressures on the judiciary. In turn, this effectively increases “the efficiency of the total dispute resolution system.”⁵⁰ The *ROPC* should provide lawyers with clear guidance regarding ways to adopt problem-solving approaches to negotiation focused on mutual gain. The following recommendations for reform are based on academic literature as well as national and international professional codes of conduct.

A. Lawyers shall not lie or mislead other lawyers during negotiations.

The LSUC should adopt a rule similar to that of Rule 6.02(2) of the Law Society of Alberta’s Code of Conduct, which explicitly states lawyers must not lie to or mislead other lawyers:

This rule expresses an obvious aspect of integrity and a fundamental principle. In no situation, including negotiation, is a lawyer entitled to mislead a colleague.

⁴⁷ *Ibid* at para 24 [emphasis added].

⁴⁸ Trevor CW Farrow, “Sustainable Professionalism” (2008) 46:1 Osgoode Hall LJ 51 at 53 [*Sustainable Professionalism*].

⁴⁹ Deborah L Rhode, “Legal Ethics in an Adversary System: The Persistent Questions” (2005-2006) 34 Hofstra L Rev 641 at 469, cited in *Sustainable Professionalism*, *supra* note 48 at 53.

⁵⁰ Menkel-Meadow, “Toward Another View”, *supra* note 17 at 842.

*When a lawyer (in response to a question, for example) is prevented by rules of confidentiality from actively disclosing the truth, a falsehood is not justified. The lawyer has other alternatives, such as declining to answer. If this approach would be in itself be misleading, the lawyer must seek the client's consent to such disclosure of confidential information as is necessary to prevent the other lawyer from being misled.*⁵¹

This rule respects solicitor-client privilege, prevents disclosure of settlement authority, and establishes a benchmark for trust between parties. Trustworthy bottom lines offered in accordance with this rule will foster dispute resolution over prolonged litigation. This reform does not suggest that lawyers should be permitted to lie to each other in other contexts, and those contexts are already covered by the common law and existing rules under the *ROPC*. This reform is meant to regulate the grey areas not captured by the common law and current *ROPC*.

B. Lawyers shall not mislead mediators in negotiations.

The *ROPC* should regulate the ways in which a lawyer can respond to a judge's or mediator's inquiry concerning the client's bottom line. Foreign jurisdictions have recognized the need for such a rule. The *Australian Solicitors' Conduct Rules* state that lawyers "must not deceive or knowingly or recklessly mislead the court."⁵² In Australia, the definition of "court" includes mediation and other forms of dispute resolution.⁵³ U.S. lawyers Jarvis and Tellam also recommend reforms governing bottom line negotiations, ensuring "the lawyer cannot engage in puffing and must either answer honestly or decline to answer."⁵⁴ Agreements can be reached expeditiously if lawyers can trust each other's bottom lines during negotiations. This reduces transaction costs and ultimately benefits clients. In mediation, this requirement increases trust, which is difficult to obtain if lawyers are permitted to be dishonest with one another.

C. Lawyers shall be fair and act in good faith during negotiations.

A lawyer should be fair and act in good faith when dealing with other parties during negotiations. The term "other parties" includes opposing counsel and the opposing parties. Courts have defined "fair" and "good faith" in other contexts. Litigation to determine the meaning of these words in the context of negotiation is likely inevitable, but the resulting decisions will provide guidance for lawyers in the

⁵¹ Law Society of Alberta, *Code of Conduct*, Rule 6.02(2), online: Law Society of Alberta <<http://www.lawsociety.ab.ca/docs/default-source/regulations/code.pdf?sfvrsn=2>>.

⁵² Law Council of Australia, *Australian Solicitors' Conduct Rules*, 2011, Rule 19.1, online: Law Council of Council of Australia <<http://www.lawcouncil.asn.au>> [*Australian Solicitors' Conduct Rules*].

⁵³ *Ibid*, Glossary of Terms.

⁵⁴ *A Negotiations Ethics Primer*, *supra* note 8 at 559.

future. The rules should explicitly prevent lawyers from conducting settlement processes in bad faith.⁵⁵ Jarvis and Tellam argue that negotiation ethics should enforce fair dealing: “Even if no violation of law would result, a lawyer must not make material misrepresentations, conceal material facts or advise or assist a client in doing so.”⁵⁶ Canadian common law has frequently ruled on bad faith negotiations in other contexts: examples of bad faith in labour negotiations include “surface bargaining” (or merely “going through the motions”); “receding horizon bargaining” (the late addition of new matters for negotiation); and “reneging” (withdrawing items already agreed upon).⁵⁷ Similar principles can be adopted for regulating negotiations of civil disputes outside of the special relationships already recognized.

One might argue misrepresentations during negotiations are almost impossible to detect and, therefore, any regulation would be unenforceable. However, this argument ignores the broader societal duty that lawyers must uphold the rule of law. The rule of law depends on public acceptance of the justice system. This acceptance is undermined if misrepresentations are codified in the legal profession’s negotiation ethos. Enforcement difficulties have not prevented legislative initiatives in the past, and such difficulties should not prevent the LSUC from regulating negotiation ethics.

D. Lawyers do not have to press for every possible advantage when negotiating for clients.

At first glance, this recommendation may seem contentious. In order to provide greater guidance to lawyers with respect to how zealous they should be in their negotiation advocacy, the *ROPC* should contain a provision that guides lawyers in balancing zealous advocacy against the duty of honesty, candour, and fairness. This reform is not calling for a universal rule, but recognition that the range of acceptable behaviour may be contextual. This may account for, among other things, differences between civil and criminal contexts, factual matrices, and power relations between parties. American Bar Association (ABA) Model Rule 1.3, Comment 1, provides lawyers with “professional discretion in determining the means by which a matter should be pursued.”⁵⁸ The *ROPC* should consider adopting this language or language that is substantially similar.

⁵⁵ For a US comparison, see Patrick Emery Longan, “Ethics in Settlement Negotiations: Foreword” (2000-2001) 52:3 Mercer L Rev 807 at 824 [Longan].

⁵⁶ *A Negotiations Ethics Primer*, *supra* note 8 at 551.

⁵⁷ Anthony Forsyth, “The Impact of ‘Good Faith’ Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States” (2011) 16:1 CLELJ 1 at 17.

⁵⁸ American Bar Association, “Model Rules of Professional Conduct” Rule 1.3 Comment 1, online: ABA <http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence/comment_on_rule_1_3.html> [*ABA Model Rules*]. See also Jonathan R Cohen, “When People are the Means: Negotiating with Respect” (2000-2001) 14 Geo J Legal Ethics 739 at 791.

E. Lawyers shall not “in any action or communication associated with representing a client, make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor’s client, and which misleads or intimidates other parties.”⁵⁹

This reform is recommended as articulated in *Australian Solicitors’ Conduct Rules*. Lawyers often initiate negotiations with unreasonable, outrageous, or intimidating positions. Such behavior can lead to the cessation of negotiations and should therefore be discouraged. Berating parties or opposing counsel, or threatening attrition litigation, is uncivil. In the *Law Society of Upper Canada v Groia*,⁶⁰ the discipline committee panel commented on the issue of civility as follows:

Our system of justice is based on the premise that legal disputes should be resolved rationally in an environment of calm and measured deliberation, free from hostility, emotion, and other irrational or disruptive influences. Incivility and discourteous conduct detracts from this environment, undermines public confidence and impedes the administration of justice and the application of the rule of law.⁶¹

Intimidation tactics or abuse of other lawyers and parties is not tolerated in a courtroom. It should not be tolerated at the negotiating table. The LSUC should amend its rules to make this a reality.

F. Lawyers shall not “in any action or communication associated with representing a client, use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.”⁶² Frustration includes actions that serve no substantial purpose other than to delay or burden another party.

This recommendation also originated in *Australian Solicitors’ Conduct Rules*. Many cases require litigation and cannot be resolved by negotiation. Courts can resolve some of these cases through summary judgment motions, motions to determine questions of law, and motions to strike pleadings for being scandalous, frivolous, or vexatious. Courts should not enable further discovery motions merely intended to add delays in the hopes that the opposing party will settle. These tactics undermine public confidence in the justice system and do nothing to advance a client’s interests in the face of a party who refuses to capitulate.

⁵⁹ *Australian Solicitors’ Conduct Rules*, *supra* note 52, Rule 34.1-Rule 34.1.1.

⁶⁰ 2012 ONLSHP 94.

⁶¹ *Ibid* at para 65.

⁶² *Australian Solicitors’ Conduct Rules*, *supra* note 52, Rule 34.1.3.

G. Lawyers shall not take advantage of unsophisticated or unrepresented parties during negotiations.

Parties choose to represent themselves for a number of reasons. Often, these reasons are financial in nature. Recent *ROPC* amendments to Rule 7.2-9 (October 2014) recognize the need to protect unrepresented persons.⁶³ The rule requires that lawyers explain that they cannot represent the interests of unrepresented parties. In other words, lawyers represent only their clients' interests. The *ROPC* does not prevent the lawyer from giving legal advice but requires that, if the unrepresented party asks for advice, that the lawyer be governed by the rules of joint retainers.⁶⁴ The *ABA Model Code* offers an alternative position for such circumstances: the only legal advice that lawyers should provide unrepresented parties is that they retain legal counsel.⁶⁵ Amending the *ROPC* to include this rule would show respect for members of society who are often financially burdened. The hallmark of a just legal system is the protection, rather than their exploitation, of vulnerable individuals.

CONCLUSION

Civil litigators engage in balancing acts by delivering zealous advocacy while maintaining respect, honesty, and candour requires reflexive practices and critical self-reflection. However, the current discourse on negotiation practices favours zealousness over cooperation. Canadian courts have taken judicial notice of the impact of increasing litigation costs on access to justice for Canadians. This situation exists despite increasing indications that most cases are settled before reaching formal court hearings. I have argued in this paper that zealous advocacy impedes access to justice by prolonging litigation and raising agency costs. Professor Carrie Menkel-Meadow succinctly stated the benefits of a cooperative negotiation model:

[B]y helping the parties articulate their real needs and objectives, legal negotiators will increase participation in the decision-making process with less destructive conflict between all those involved than currently exists within our assumptions of adversarial bargaining. By viewing legal negotiation as an opportunity to solve both the individual needs and problems of their clients, and the broader social needs and problems of the legal system, negotiators have an

⁶³ *ROPC*, *supra* note 6 Rule 7.2-9.

⁶⁴ *Ibid.*, Commentary 1.

⁶⁵ *ABA Model Rules*, *supra* note 58 Rule 4.3 Comment 1-2. See also *Longan*, *supra* note 55 at 824-825. Section 7.2-9 of the Rules of Professional Conduct does contain a provision with respect to lawyer's dealing with unrepresented parties but does not specifically prohibit lawyers from making any material misrepresentations to such parties in negotiations.

opportunity to transform an intimidating, mystifying process into one which will better serve the needs of those who require it.⁶⁶

Reforms to the *ROPC* will facilitate a culture shift towards a cooperative negotiation strategy. The CBA noted, “Standards of professional ethics form the backdrop for everything lawyers do.”⁶⁷ Enacting a code of conduct for negotiations can help transition lawyers towards a peacemaking role and away from combative negotiation techniques. This will better serve the public by decreasing dispute resolution costs, with a tangential benefit to lawyers who may derive greater satisfaction from achieving mutually beneficial settlements. This transition towards a “justice-seeking ethic”⁶⁸ serves both clients and the pursuit of justice. Reducing transaction costs is also a pragmatic direction for lawyers attempting to retain and please clients in fiscally conservative times.

⁶⁶ Menkel-Meadow, *supra* note 17 at 842.

⁶⁷ The Canadian Bar Association, *CBA Code of Professional Conduct*, Ottawa: CBA, 2009, v.

⁶⁸ David M Tanovich, “Law’s Ambition and the Reconstruction of Role Morality in Canada” (2005) 28:2 Dal LJ 267 at 267-278, 302-308.