

# Ethics: The Heart of Negotiation<sup>1</sup>

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Ethics is at the heart of any discussion of negotiation. Ethics is not necessarily intellectual preaching about “dos or don’ts.” Rather, ethics involve emotion and sometimes passion. The image of the “heart” emphasises the *relational* nature of negotiation that is often mentioned and then often neglected in discussions of “power negotiation,” “value claiming,” “value creation,” “problem solving” or “win-win” negotiation.

Carrie Menkel-Meadow points out that negotiation “necessarily involves interaction with other human beings”<sup>2</sup> whereby “we seek to do together what we cannot do alone.”<sup>3</sup> Negotiation is, in its essence, something we do with other people.

The term “ethics,” too, evokes ideas about social interaction. Even if we are individuals reading articles or codes of ethics, we respond to texts written by other people. When we work and talk together about honesty, fairness and power, we all contribute to the development of the ethics of negotiation in our social and professional groups. Groups of people create an “ethical climate”<sup>4</sup> of negotiation.

There are four types of relationships in which representative negotiations – and ethical climates - occur:

- relationships between the representatives and their clients,
- relationships between representatives and their “negotiation opposites,”
- the negotiators’ own relational interests, such as relationships with family, friends and colleagues, and
- the relationship of the negotiators with “the public interest.”<sup>5</sup>

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<sup>1</sup> This paper is drawn from *The Good Negotiator: Negotiation Theory, Process, and Skills*. Workshop manual, LLM program, Faculty of Law, Chulalongkorn University, Thailand, 2009-2016. Note that there may be similarities between wording in some parts of this paper and a chapter by Frederick Zemans, entitled “Representative Negotiators of Integrity.” In *The Theory and Practice of Representative Negotiation*, ed. Colleen Hanycz, Trevor Farrow, Frederick Zemans, Toronto: Emond Montgomery Publications, 2008. Any similarities result from the fact that Catherine Morris contributed to the first draft of Prof. Zeman’s chapter; remaining similarities in phrasing are inadvertent.

<sup>2</sup> Menkel-Meadow, Carrie. "Ethics, Morality and Professional Responsibility in Negotiation." In *Dispute Resolution Ethics: A Comprehensive Guide*, edited by Phillip Bernard and Bryant Garth, 119-54. Chicago: American Bar Association, 2002.

<sup>3</sup> Menkel-Meadow, Carrie. "Toward Another View of Legal Negotiation: The Structure of Problem Solving." *UCLA Law Review* 31, no. 4 (1984): 754-842.

<sup>4</sup> Menkel-Meadow, 2002, quoting Bok, Sissela. *Lying: Moral Choice in Public and Private Life*. New York: Pantheon Books, 1978.

<sup>5</sup> Farrow, Trevor C.W. "The Unique Nature of Representative Negotiation." In *The Theory and Practice of Representative Negotiation: A Book of Readings* edited by Colleen Hanycz, Frederick Zemans and Trevor Farrow. Toronto: Emond-Montgomery, 2008.

## **The usual approaches to negotiation ethics and why they may not help the representative negotiator**

Studies of negotiation ethics often revolve around rules, including laws, regulations or codes of ethics. For example, G. Richard Shell counsels that the “minimum standard” is to “obey the law.”<sup>6</sup> He suggests three common “schools of bargaining ethics” which he describes as the “‘it’s a game’ Poker School,” the “‘do the right thing even if it hurts’ Idealist School” and the “‘what goes around, comes around’ Pragmatist School.”<sup>7</sup> This section examines these approaches along with some other ideas about negotiation ethics.

### ***What does it mean to be “ethical”?***

A consideration of negotiation ethics must start with a broader discussion about ethics and morality. What does it mean to be "ethical?" Does it mean acting consistently with one's own “ethical compass”? How does one test the accuracy of one’s ethical compass? Should negotiators use a different ethical compass for negotiating than they might use for other aspects of their lives? What about negotiating across cultures? When in Rome should our ethics be different from when we are in Toronto or Bangkok? Are there any universal ethical principles for negotiators?

In a given negotiation, who should make the decisions about ethics? Who is the “ethical actor”: the principals? the representatives? or both? Should ethics decisions they be made by these individuals alone, or should they be made in the context of shared community values, rights and responsibilities? If so, whose shared values should be taken into account? Where do questions of *professional* ethics fit? Are professional ethics a matter for the legal profession alone? Should governments and broader communities be involved in developing and implementing lawyers’ ethics?

Finally, is it simply “smart” or “technically competent” to be ethical? If so, does competence or intelligence make a person “ethical”?

### ***Who is the “ethical actor”? “I” or “we”?***

Much of the writing in North America on negotiation ethics focuses attention on the individual as the ethical actor. Writing about ethics also tends to focus on *actions* – the conduct of the individual. Ethical questions often revolve around the question: “What should I do?”

This has resulted in prescriptions and prohibitions of certain actions or behaviours of individuals. It has also led many lawyers to govern their behaviour by checking to see whether their conduct is forbidden or permitted by law. The narrowness and ambiguity of laws to address all cases has

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<sup>6</sup> Shell, Richard G. "Bargaining with the Devil without Losing Your Soul: Ethics in Negotiation." In *What's Fair: Ethics for Negotiation*, edited by Carrie Menkel-Meadow and Michael Wheeler, 57-74. San Francisco: Jossey-Bass, 2004.

<sup>7</sup> Shell, 2004, 65-71

led occupational groups, such as the legal profession, to create additional codes of conduct that go beyond the law.

Recent writing on business ethics has questioned whether there should be so much focus on whether particular *acts* are right or wrong. Instead, literature on business ethics has begun to focus on a different question that emphasises *virtues*, such as honesty, loyalty or non-corruption. The question becomes one of moral *character*. Some scholars in the field of legal ethics and negotiation ethics have also been writing about “virtue ethics.”<sup>8</sup>

There have also been increasing questions about individualist approaches to ethical reflection and accountability and increased attention on the relational and communal nature of conduct and deliberation about ethics, responsibility and accountability.<sup>9</sup>

### ***Moral and non-moral deliberation and decision-making***

Not all difficult decisions involve ethical issues *per se*. Some are technical questions such as “for how much should I settle this case?” Such a question may be difficult, but it may not necessarily involve ethical questions. It may involve issues of competence or prudence more than ethics. Another type of question that is prudential (rather than ethical) is: “Might I be disciplined by my professional body if they found out what I said or did? Might I get caught?” A third prudential question that finds its way into the literature on negotiation is the idea that “what goes around comes around.”<sup>10</sup> Richard G. Shell articulates this approach:

... lying and effects of deceptive conduct are bad not so much because they are ‘wrong’ as because they cost the user more in the long run than they gain in the short run.... Lies and misleading conduct can cause serious injury to one’s credibility. And credibility is an important asset for effective negotiators both to preserve working relationships and to protect one’s reputation in a market or a community.”<sup>11</sup>

A familiar “ethical” test question proposes a related kind of non-ethical question: “Would you like to see your conduct ‘on the front page of the *New York Times* or the *Wall Street Journal*...’<sup>12</sup>

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<sup>8</sup> E.g. Feldman, Heidi. "Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?" *South California Law Review* 69 (1995-1996): 885-948.

<sup>9</sup> McIntyre, Alasdair. *After Virtue: A Study in Moral Theory*. 2nd ed. Notre Dame, Indiana: University of Notre Dame Press, 1984.

<sup>10</sup> Shell, Richard G. "Bargaining with the Devil without Losing Your Soul: Ethics in Negotiation." In *What's Fair: Ethics for Negotiation*, edited by Carrie Menkel-Meadow and Michael Wheeler, 57-74. San Francisco: Jossey-Bass, 2004, 68-69.

<sup>11</sup> Shell, Richard G. "Bargaining with the Devil without Losing Your Soul: Ethics in Negotiation." In *What's Fair: Ethics for Negotiation*, edited by Carrie Menkel-Meadow and Michael Wheeler, 57-74. San Francisco: Jossey-Bass, 2004, 68.

<sup>12</sup> Lax, David A., and James K. Sebenius. "Three Ethical Issues in Negotiation." *Negotiation Journal* 2, no. 4 (1986): 363-70, 8-9.

or in the history books.” Questions that focus exclusively on whether I might get caught, disciplined or shamed are not true questions about morality or ethics.

***Morality and ethics: Is there a difference?***

Some literature talks about the difference between morality and ethics.<sup>13</sup> Is there a difference between personal morality and negotiation ethics? Many ancient and contemporary authors use the terms “morality” and “ethics” as synonyms, but some literature on moral philosophy makes distinctions that are worth discussing.

*Moral* deliberation is said to involve consideration of universal, “categorical” norms binding on all individuals at all times and in all places.<sup>14</sup> For example, Immanuel Kant said that the maxim “always tell the truth” is a categorical imperative, meaning that it is universally mandatory for everyone without any exception. Many philosophers have argued about this, using hypothetical examples. For example, should one tell a lie to a murderer about the whereabouts of friend hiding in our house, even if we believe the murderer wants to kill our friend?<sup>15</sup> Kant said that even in this extreme case one should tell the truth.<sup>16</sup> Kant believed that all individuals should be given the choice not to commit murder, even if someone tells them the truth about where to find their victim. Kant’s view was that morality is primarily individual. According to Habermas “...*moral issues* are at stake when we wish to *solve* interpersonal conflicts in concordance with the interests of everybody involved and affected.” Thus, moral discourse concerns principles and norms as they apply to individuals in their relationships with other individuals.

*Ethical* issues, on the other hand, are seen as related to particular groups or cultures. Thus, ethical deliberation involves relationships among people in particular groups. The maxims, “you may use puffery<sup>17</sup> in negotiation, but you must not lie about material facts” arose in the context of particular ethical discussions among particular lawyers in the Britain and other common law jurisdictions.<sup>18</sup> Other lawyers in other jurisdictions may come up with different (or similar) results of their deliberations about ethics. An example of discourse on ethics can be found in discussion by lawyers of the American Bar Association (ABA) in the United States. This

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<sup>13</sup> Piercey, Robert. "Not Choosing between Morality and Ethics." *The Philosophical Forum* 23, no. 1 (2001): 53-72.

<sup>14</sup> Piercey, 54.

<sup>15</sup> See Kant’s discussion of this critique in Kant, Immanuel. "On a Supposed Right to Tell Lies from Benevolent Motives." In *Critique of Practical Reason and Other Works on the Theory of Ethics*. London: Kongmans, Green and Co, 1889. <http://oll.libertyfund.org/Home3/HTML.php?recordID=0435> (Accessed 28 March 2007)

<sup>16</sup> Kant’s reply to such a critic is worth reading. Kant, Immanuel. "On a Supposed Right to Tell Lies from Benevolent Motives." In *Critique of Practical Reason and Other Works on the Theory of Ethics*. London: Kongmans, Green and Co, 1889. <http://oll.libertyfund.org/Home3/HTML.php?recordID=0435> (Accessed 28 March 2007)

<sup>17</sup> “Puffery” means exaggeration of facts.

<sup>18</sup> A common law school case is used to teach the difference between a “mere puff” and an actionable misrepresentation. *Carlill v. Carbolic Smoke Ball Company* [1893] 1 QB 256. Thus, first year law teaching may work toward the development of a legal culture that fosters this kind of untruth.

discourse pertains to a proposed “duty of fair dealing”<sup>19</sup> in settlement negotiations and an existing duty not to make “false statements of material fact or law.”<sup>20</sup> However, the latter does not include “statements of opinion or those that merely reflect the speaker’s state of mind.”<sup>21</sup> ABA Model Rule 4.1, comment 2, states:

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. . .<sup>22</sup>

Lawyers discussed this ABA Model rules in late 2006 when the ABA Ethics Committee commented on negotiations of counsel in mediation. The Ethics Committee said that “statements regarding a party’s negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation ‘puffing,’ ordinarily are not considered ‘false statements of material fact’ within the meaning of the Model Rules.”<sup>23</sup>

Dispute resolution scholar, Kimberlee Kovach, denounced the opinion of the ethics committee, saying that it allows deceit “under the characterization of ‘puffery’ in negotiation,” and “allows attorneys to make misrepresentations to the mediator as well as one another.” Professor Kovach found this troubling given ABA’s endorsement of a mediator duty to “promote honesty and candor between and among all participants.”<sup>24</sup>

We can see here the tensions between the moral and ethical precept “do not lie” and commonly accepted practices of deception and puffery within the field of representative negotiation. According to Piercey,<sup>25</sup> some moral philosophers derive ethics from deeper moral norms which must take priority over – or trump – contingently situated ethics. Thus, the precept “do not lie”

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<sup>19</sup> American Bar Association, Section on Litigation. "Ethical Guidelines for Settlement Negotiations." Chicago: American Bar Association, 2002 (ABA), section 2.3.

<sup>20</sup> ABA, section 4.1.1.

<sup>21</sup> ABA, section 4.1.1.

<sup>22</sup> American Bar Association, Section on Litigation. "Ethical Guidelines for Settlement Negotiations." Chicago: American Bar Association, 2002, section 4.1.1, citing the ABA Model Rules of Professional Conduct, 2002, found at [http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html) (Accessed 28 March 2007).

<sup>23</sup> *Ibid.*

<sup>24</sup> Kovach, Kimberlee. "Ethics Opinion a Step Back in Time, Complicates Responsibility of Mediators." In *American Bar Association Committee on Ethics*, 2006. <http://www.abanet.org/dch/committee.cfm?com=DR018000> (Accessed 28 March 2007) citing n Standard VI, 4 of the Model Standards of Conduct for Mediators approved by the American Bar Association, the American Arbitration Association and Association for Conflict Resolution in August, 2005, <http://www.abanet.org/dispute/news/ModelStandardsOfConductforMediatorsfinal05.pdf> (accessed 28 March 2007)

<sup>25</sup> Piercey., Robert. "Not Choosing Between Morality and Ethics." *The Philosophical Forum* 32 (i) (2001): 53.

could trump any suggestion of any type of deception in negotiation, including puffery or misleading about one's principal's "bottom line."

Others claim the opposite – that morality is derived from localized and particularized ethical discourse. Thus, for the members of the ABA, "puffery" and misleading about the bottom line are seen as ethical, since this is customarily part of the rules of the negotiation "game" that all players should know. This has been referred to by Albert Z. Carr as "the poker analogy."<sup>26</sup> In poker "it is right and proper to bluff a friend out of the rewards of being dealt a good hand" but it not right for poker players to "keep an ace up their sleeves or... mark the cards."<sup>27</sup> Carr claims "the ethics of business are game ethics, different from the ethics of religion."<sup>28</sup> Thus, business ethics are distinguished from personal morality in which "the golden rule" would normally apply. Legal scholar James J. White uses the poker analogy to point out that

a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker plays, in a variety of ways he must facilitate his opponent's inaccurate assessment.... 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.... To conceal one's true position, to mislead an opponent about one's trust settling point, is the essence of negotiation.<sup>29</sup>

White then shifts to a metaphor about war, saying: "Of course there are limits on acceptable deceptive behavior in negotiation, but there is a 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?"<sup>30</sup> White presents several cases for consideration:

- misrepresenting one's true opinion about the meaning of a case or statute;
- distorting the value of one's case or other subject matter of the negotiation through "puffery";
- making demands that one knows one's client cares little about (but acting as though they are important to the client) in order to trade it for a concession from the other;

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<sup>26</sup> Carr, Albert Z. "Is Business Bluffing Ethical?" In *What's Fair: Ethics for Negotiation*, edited by Carrie Menkel-Meadow and Michael Wheeler, 246-56. San Francisco: Jossey-Bass, 2004, first published in (1968) 46 *Harvard Business Review* 143-53; See also Shell, Richard G. "Bargaining with the Devil without Losing Your Soul: Ethics in Negotiation." In *What's Fair: Ethics for Negotiation*, edited by Carrie Menkel-Meadow and Michael Wheeler, 57-74. San Francisco: Jossey-Bass, 2004, 65-67.

<sup>27</sup> Carr, Albert Z. "Is Business Bluffing Ethical?" In *What's Fair: Ethics for Negotiation*, edited by Carrie Menkel-Meadow and Michael Wheeler, 246-56. San Francisco: Jossey-Bass, 2004, 248, first published in (1968) 46 *Harvard Business Review* 143-53.

<sup>28</sup> *Ibid.*

<sup>29</sup> White, James J. "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation." *American Bar Foundation Research Journal* (1980): 926-38, at 927, citing, by way of example, the same Chester Karrass whose advertisements are seen in flight magazines all over the world. White points out that Karrass "states bluntly that 'bluffing is part of negotiating.'" Chester Karrass. *The Negotiating Game: How to Get What You Want*. New York: Thomas Y. Crowell Co., 1970, 187.

<sup>30</sup> White, 1980, 928.

- misleading or lying to one's bargaining opposite about one's own client's bargaining limit in order to get a better offer.

White concludes that the first three are "within the rules of the game," and are therefore ethical, but that the last one is not, and is therefore unethical.

Who set these rules of this game? Professors Carr and White? We cannot discount the power of academics, particularly since both Professors Carr's and White's articles have become classics in the field of negotiation. But who says negotiation is a game – a competitive game – let alone a poker game?

Not everyone sees negotiation as a game.<sup>31</sup> Yet those in "poker school" may insist on their game metaphor to justify their ethics. They may continue to play "poker" even when other "players" do not agree that negotiation is a game to which the rules of poker apply.<sup>32</sup>

Lax and Sebenius address the ethical issue of power (but do not challenge the game metaphor) by asking "are the rules known and accepted by all sides?" They also ask how any "rules" of the game can meet the test of mutual "awareness and acceptance of the rules"?<sup>33</sup> Lax and Sebenius suggest that not only must all parties understand the rules of the game, but they must be equally free to enter and leave the situation.<sup>34</sup> We now see that the question is not merely about the ethics of *honesty* in negotiation, but the ethics of *power* exercised in negotiation *relationships*.

Shell points out that in addition to the "poker school" and the pragmatist school, there is the "Idealist School" of negotiation ethics which says "bargaining is an aspect of social life, not a special activity with its own set of rules. In the 'idealist school' of ethics, the same ethics that apply in the home should carry directly into the realm of negotiation."<sup>35</sup> Thus, the distinction between individual morality and a special set of "negotiation ethics" may break down.

Piercey argues that the distinction between "morality" and "ethics" is false. He points out that *moral* discourse relies on particular, local *ethical* discourse. Ethical discourse presumes some

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<sup>31</sup> We note Deborah Tannen's work which suggests that boys' and men's games tend to use competitive sports or war metaphors, and that men are more likely than women to characterize everyday interactions in terms of fighting. Tannen, Deborah. *Talking from 9 to 5: Women and Men in the Workplace: Language, Sex and Power*. New York: Avon Books, 1994, at 57, citing Ong, Walter. *Fighting for Life: Contest, Consciousness and Sexuality*. Ithaca: Cornell University Press, 1981.

<sup>32</sup> Shell, Richard G. "Bargaining with the Devil without Losing Your Soul: Ethics in Negotiation." In *What's Fair: Ethics for Negotiation*, edited by Carrie Menkel-Meadow and Michael Wheeler, 57-74. San Francisco: Jossey-Bass, 2004, 66-67.

<sup>33</sup> Lax, David A., and James K. Sebenius. "Three Ethical Issues in Negotiation." *Negotiation Journal* 2, no. 4 (1986): 363-70 at 365.

<sup>34</sup> Ibid, 365, citing Bok, Sissela. *Lying: Moral Choice in Public and Private Life*. New York: Pantheon Books, 1978.

<sup>35</sup> Shell, 2004, 67-68.

moral norms (although different people may presume different moral norms.) Piercey argues that one cannot have moral discourse without presuming certain ethical *virtues* that people learn during educational processes.<sup>36</sup> But what virtues might these be? We shall return to virtue theory later to see whether it can help us.

***Diverse communities with different ethics: Does ethical relativism help?***

Discussion about the poker school of ethics brings us to the challenge of ethical relativism. Ethical relativism points out that there is huge diversity among moral and ethical principles around the world. Different moral and ethical principles generate different ethical questions and answers.<sup>37</sup> What is considered wrong for those in one group may be considered right for others who do not want other people's moral or ethical standards imposed on them.

Relativism judges behaviour by the standards of the community involved. What may be considered wrong in one context (e.g. in interaction among family or friends) may be considered right in another (e.g. in negotiations according to the poker school). Cultural relativists may say that these ethical differences should not be criticized by outsiders.

Some people say that relativism is a form of "pseudo-morality" in which individual preferences are used to justify just about any kind of attitude or behaviour. However, very few people believe that "anything goes as long as you sincerely believe it."

Relativism deserves attention for at least four reasons. First, individualist forms of relativism are prevalent in popular culture in many parts of the world, particularly North America, Northern Europe and Australia. It is common to hear: "I have my values and you have yours. Don't impose yours on me." Ethical relativism is often viewed as a form of respect and acceptance of others.

Second, relativism is the subject of considerable literature.<sup>38</sup> While some deplore relativism as an assault on universal moral standards, some literature suggests that relativism is an indicator of inter-cultural competence.<sup>39</sup>

Third, in intercultural business negotiations, ethical relativism often comes clearly into focus. For those who undertake international work on a regular basis, it will not be long before there will be an informal invitation to adopt someone else's ethics in preference to one's own. These invitations are very often couched in the vocabulary of relativism: "When in Rome do as the

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<sup>36</sup> Piercey, Robert. "Not Choosing between Morality and Ethics." *The Philosophical Forum* 32, no. 1 (2001): 53-72, 65.

<sup>37</sup> See, e.g. Chan, Ricky Y. K, Louis T. W. Cheng, and Ricky W. F. Szeto. "The Dynamics of Guanxi and Ethics for Chinese Executives " *Journal of Business Ethics* 41 (2002): 327-336.

<sup>38</sup> There is a voluminous literature on the topic of relativism in contexts of rule of law and international human rights contexts which surely places the topic of relativism beyond easy dismissal.

<sup>39</sup> See, e.g. Barsky, A, E.D. Este, and D. Collins. "Cultural Competence in Family Mediation." *Mediation Quarterly* 13 (1996): 167-78. We do not believe Barsky et al meant to suggest that "anything goes," however they do use the term "relativism" to encourage cultural sensitivity and respect.



Romans do.”<sup>40</sup> This statement may be a form of moral pressure to agree to evade local laws or taxes or to pay illegitimate “expediting fees” or “bonuses” as bribes. However, in “Rome” there are usually many “Romans” who are working on anti-corruption measures. Relativism does not much help people who find themselves negotiating ethical issues found on some negotiating partners’ foreign shores, particularly in light of increasing efforts to internationalize anti-corruption measures and human rights norms through treaties and other instruments.<sup>41</sup> Can ethical relativists really take into account questions of personal and professional ethics or the public interest in a particular place without sacrificing one group’s ethical values in favour of other group’s values which seem more powerful in the situation?

Finally, ethical relativism comes with some false assumptions that are illustrated by the previous example. Communities are rarely ethically homogeneous. In a given negotiation, which ethics of which sectors of society should be copied by a given negotiator? Does a negotiator emulate those within society or the legal profession seeking social transformation towards public honesty, accountability, integrity and respect for human rights? Or should a negotiator emulate those profess belief in the moral guidance of powerful elites or the “invisible hand” of an unregulated market-place?

Relativism may seem to respect people by providing them with ethical autonomy and choice, but in a given negotiation, whose choice governs? Which version of negotiation is to prevail in a given negotiation? The Poker School, the Idealist School or the Pragmatic school? The problem of ethical diversity is a constant challenge.

### ***“Right is right” for everyone, everywhere: The problems of universalism***

Universalism is often held up as opposed to relativism. Immanuel Kant provides a secular example of universal ethics. He states: “Act only according to that maxim whereby you can at the same time will that it should become a universal law.” In Kant’s view the ethical *intention* is important.

However, it is difficult to find universally acceptable standards in any field, including business. An attempt at creating universal standards is found in the United Nations (UN) Human Rights Council’s *Guiding Principles on Business and Human Rights*<sup>42</sup> based on the *Universal Declaration of Human Rights* (UDHR).<sup>43</sup> While knowledge and acceptance of the *Guiding*

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<sup>40</sup> It is important not to name any particular country, since, as recent events tell us that all over the world, including Canada, cheating and corruption in various forms are very common.

<sup>41</sup> See, e.g. the *United Nations Convention Against Corruption*, 31 October 2003, A/58/422, available at: <http://www.refworld.org/docid/4374b9524.html> and the current effort of a UN Human Rights Council working group to draft a binding treaty on business and human rights, which may be based largely on the non-binding United Nations. *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, A/HRC/17/31, June 2011, available at [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>42</sup> United Nations. *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, A/HRC/17/31, June 2011, available at [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

<sup>43</sup> Universal Declaration of Human Rights. Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

*Principles* is growing, not all States or all businesses adhere to them. Another problem with universalism is that a conflict among two "universal" principles can create a problem. For example, let us imagine that we accept the universal validity of two ethical maxims, telling the truth and keeping confidences, both of which are said to be imperative in representative negotiation. What if, as a representative negotiator, one has promised not to reveal any information that is against the interest of one's principal? Can one always maintain both principles?

### ***Duty-based ethics***

Duty-based ("deontological"<sup>44</sup>) ethical theories hold that certain actions are inherently right and obligatory, regardless of the consequences. The ethical value of an act is in "doing the right thing" intrinsically for its own sake, not because of any self-interest.<sup>45</sup> Some deontological views are based on principles of revelation set out in sacred scriptures. Others, such as Kantian ethics, are based on principles understood through the application of reason rather than religious precepts. Some deontological approaches are universalist, and some are not. For example, professional codes of conduct prescribe rules and precepts, but they do not apply to everyone in the world. They apply only to the professional group in question.

A negotiator from Shell's "Idealist School" may subscribe to a deontological view, which might be religious precepts, the laws of a particular jurisdiction, or professional codes of ethics. As Shell suggests, the idealist deontologist is likely to say "do the right thing even if it hurts." Immanuel Kant took this view concerning truth-telling, which he said is a "categorical imperative." It is "imperative," because it is mandatory, not optional. It is "categorical" because there are no exceptions.

Most negotiation ethics literature denounces such rigid deontological approaches because they do not take consequences into account. A "consequentialist" approach (see below) suggests that it is not *unethical* but *ethical* to tell a lie to a murderer who has asked us whether our friend, of whom he was in pursuit, has taken refuge in our house.<sup>46</sup>

### ***Do codes of conduct ensure ethical practice?***

A number of scholars have questioned whether duty-based codes of conduct ensure ethical practice.<sup>47</sup> First, the prescriptive lists of "dos and don'ts" in codes of ethics and even their

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<sup>44</sup> Webster's dictionary. The term *deon* derives from the Greek and refers to "that which is obligatory." Jeremy Bentham is said to have created the term "deontology" in the 19th century. Bentham, Jeremy. "Deontology or the Science of Morality." (1834), <http://www.iep.utm.edu/b/bentham.htm> (accessed 15 October 2014).

<sup>45</sup> Lax, David A., and James K. Sebenius. "Three Ethical Issues in Negotiation." *Negotiation Journal* 2, no. 4 (1986): 363-70, at 71.

<sup>46</sup> See Kant's discussion of this critique in Kant, Immanuel. "On a Supposed Right to Tell Lies from Benevolent Motives." In *Critique of Practical Reason and Other Works on the Theory of Ethics*. London: Kongmans, Green and Co, 1889. <http://oll.libertyfund.org/Home3/HTML.php?recordID=0435> (Accessed 28 March 2007). However, also see Griffiths, Paul, ed. *Lying: An Augustinian Theology of Duplicity* (Eugene, OR: Wipf & Stock, 2010).

<sup>47</sup> See e.g., Menkel-Meadow, Carrie. "Ethics, Morality and Professional Responsibility in Negotiation." In *Dispute Resolution Ethics: A Comprehensive Guide* edited by Phyllis Bernard & Bryant Garth, 119-54. Chicago: American

explanatory notes rarely fit the unique particulars of an ethical problem. Case studies on violations of codes of ethics tend to be technical explanations of how offenders breached the rules and how they will be punished. Professor Heidi Feldman fears that the statutory language and structure of codes of ethics may actually invite people to find technical loopholes in rules and may even discourage ethical deliberation.”<sup>48</sup> Feldman illustrates with examples including the famous “Lake Pleasant Bodies Case” in which a murderer disclosed the murder and the location of the bodies to his lawyers. The lawyers visited the site and found the bodies, but they did not report the location of the bodies to anyone. Instead, they unsuccessfully tried to negotiate favourable treatment of their client in return for helping authorities find the bodies.<sup>49</sup> Professor Feldman analyses the case using the Model Rules of the American Bar Association. She finds that a skilled “technocratic” lawyer could either choose to disclose or not to disclose using legal argument and “black letter” rules regarding solicitor-client confidentiality and rules against concealing evidence. The lawyers had no intention to hurt families of victims by their silence; rather this result was an unintended by-product of their intention to maintain their client’s right to confidentiality.

### ***Utilitarianism: Thinking of Consequences & Trying for a Win-Win?***

Consequentialist ethics say that the ethical value of an action is not the *intention* of the actor, but the likely *consequences* of the conduct. The classical proponents of utilitarianism, including John Stuart Mill, say the desirable outcome is the one that will achieve the “greatest happiness for the greatest number.” The right action is the one that maximizes the happiness of the maximum number of people.<sup>50</sup> Utilitarianism remains one of the dominant public policy doctrines in North America. One of the commonly-expressed problems with utilitarianism is that the good of some minorities is sometimes sacrificed to the good of the majority.

The claim of interest-based negotiation is that it can avoid outcomes that favour one party at the expense of the other. If parties harmonize their interests effectively, they may create “win-win” outcomes that maximize beneficial outcomes for both parties. Utilitarian arguments may be used to suggest that interest-based negotiation is ethically superior to competitive “win-lose”

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Bar Association, 2002; Macfarlane, Julie "Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model." *Osgoode Hall Law Journal* 40, no. 1 (2002): 49-87; Wilkinson, Margaret Ann, Christa Walter, & Peter Mercer. "Do Codes of Ethics Actually Shape Legal Practice?" *McGill Law Journal* 45 (2000): 645-76.

<sup>48</sup> Feldman, Heidi. "Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?" *South California Law Review* 69 (1995-1996): 885-948. Note that Feldman uses the term "sentimental" not in the colloquial sense of shallow sentimentalism. Rather she uses the term to mean feelings and emotions in the sense the term is used in the literature on virtue ethics, discussed later.

<sup>49</sup> The facts are more complicated than this. For details and discussion, see Feldman, Heidi. "Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?" *South California Law Review* 69 (1995-1996): 885-948 at 889-908.

<sup>50</sup> It is acknowledged that this brief description may oversimplify utilitarian ethics. Utilitarianism was formulated most famously by John Stuart Mill, *Utilitarianism*, John Stuart Mill *On Liberty*.

negotiation.<sup>51</sup> In a given negotiation, a utilitarian ethical approach would favour cooperation of parties to maximize their joint satisfaction and eliminate the negotiators' dilemma that seems to force a choice between value creating and value claiming. Interest-based negotiation (and mediation) seek cooperative value creation *and* joint maximization of distributive gains. There are questions about whether integrative, interest-based negotiation can deliver what it promises, particularly in cases where mistrust and power imbalance lead to mismatches between interest-based negotiators and competitive negotiators. Despite more than two decades of training of lawyers and others representative negotiators in interest-based negotiation, in practice, adversarial power negotiation remains prevalent.

Can principlist codes, utilitarian approaches or relativism deliver consistently ethical negotiations? Many say no. One reason is that the focus on *acts and conduct* is not enough to create ethical negotiators. It is important to look at the *character* of the actor.

### ***The Good Negotiator: Back to the Virtues?***

Virtue ethics puts the focus on *character* rather than on actions. Thus, the primary question is not "what should I do," but "what is my character?" Character is formed through consistent practice of particular virtues, for example, honesty. Thus, a person with an honest character is one who has consistently practiced honest actions. This does not mean there is no need for rules or law.<sup>52</sup> Rather, the practice of virtue provides the practical wisdom required to apply the rules in particular cases.

Aristotle (384-322 BCE) set out a list of intellectual and moral virtues in his *Nicomachean Ethics*.<sup>53</sup> Aristotelian moral virtues include courage, temperance, liberality, truthfulness, justice. Justice is broken down into virtues such as lawfulness, fairness and equality, distributive justice, reciprocity, political justice and natural or legal justice. Aristotelian virtue also includes practical wisdom or prudence. In Western thought, ancient scholars, Aristotle<sup>54</sup> and Thomas Aquinas (1225-74),<sup>55</sup> still provide the main background for contemporary virtue ethics.<sup>56</sup> Aristotelian

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<sup>51</sup> See, e.g. Menkel-Meadow, Carrie. "Ethics, Morality and Professional Responsibility in Negotiation." In *Dispute Resolution Ethics: A Comprehensive Guide* edited by Phyllis Bernard and Bryant Garth, 119-54. Chicago: American Bar Association, 2002, particularly her note 112.. Also see Menkel-Meadow, Carrie. "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities." *South Texas Law Review* 38, no. 2 (1997): 407-54.

<sup>52</sup> See Brosnan, Donald F. "Virtue Ethics in a Perfectionist Theory of Law and Justice." *Cardozo Law Review* 11 (1989-1990): 335-425.

<sup>53</sup> Aristotle. *Nicomachean Ethics, 350 B.C.E.* Translated by W.D. Ross. Oxford: Oxford University Press, 1972.

<sup>54</sup> *Ibid.*

<sup>55</sup> Aquinas, Thomas *Summa Theologica*. Translated by Fathers of the English Dominican Province. New York: Benziger Bros, 1947.

<sup>56</sup> While many ethics associate Immanuel Kant with deontological ethics, scholars are increasingly reexamining Kant's works on virtue. Some utilitarians have been discussing consequentialist views of virtues. See, e.g. Driver,

ethics are increasingly being examined internationally in areas of public policy,<sup>57</sup> business ethics and occupational ethics.

Aristotelian virtue theory is based on the premise that everything has a purpose or function. The function – or “virtue” – of a foot, for example, is to allow the body to walk, and the function (virtue) of a knife is to cut. A well-functioning foot allows one to walk well, and a good, properly sharpened knife cuts well. According to Aristotle’s view of human nature, the function (virtue) of a human life is to achieve a state of “living well” or “flourishing.”<sup>58</sup> To live virtuously is to live well and thus fulfil one’s human function. Aristotle did not exclude emotions from his moral reasoning. Nor did he exclude relationships including the social context of civic responsibility.

A chief criticism of the virtues approach is the fact that there are so many different and even incompatible accounts of “virtue.”<sup>59</sup> In addition to Aristotle’s list of virtues, we may add the list of Thomas Aquinas, a Christian during the Middle Ages in Europe, who said there are four cardinal (paramount) virtues: prudence, justice, temperance and fortitude. Buddhist virtues are detachment,<sup>60</sup> generosity and compassion. Confucian virtues include self-respect, generosity, sincerity, persistence, and benevolence. In the field of conflict resolution, John Paul Lederach, while not discussing virtues per se, uses the language of virtue to propose that reconciliation integrates the Hebrew and Christian virtues of justice, truthfulness, mercy and peacefulness.<sup>61</sup>

What virtues of a negotiator will fulfil a negotiator’s function? There are considerable tensions between accounts of virtues of good negotiators, who in the competitive mode display the virtue of shrewdness and in integrative modes may be characterized by “cooperativeness” and “honesty.” Thus, there are competing ideas about the virtues of “the good negotiator.” For these reasons, some say that virtue ethics falls into the trap of relativism.

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Julia. *Uneasy Virtue*. Cambridge: Cambridge University Press, 2001. (These works were not reviewed for this essay.)

<sup>57</sup> Sen, Amartya. "Capability and Wellbeing." In *The Quality of Life*, edited by Martha C. Nussbaum and Amartya Sen, 30-53. Oxford: Clarendon Press, 1993; Sen, Amartya. *Inequality Re-Examined*. New York: Russell Sage Foundation, 1992; Nussbaum, Martha C. "Women and Equality: The Capabilities Approach." *International Labour Review* 138, no. 3 (1999): 227-45; Nussbaum, Martha C. "Capabilities and Human Rights." *Fordham Law Review* 66 (1997): 273-317.

<sup>58</sup> One may debate Aristotle’s (or Thomas Aquinas’ or others’) various different views of human nature and teleology, but that would be the subject of different paper.

<sup>59</sup> McIntyre, Alasdair. *After Virtue: A Study in Moral Theory*. 2 ed. Notre Dame, Indiana: University of Notre Dame Press, 1984, 181.

<sup>60</sup> In Buddhism, the term “detachment” does not mean an overly rationalized objectiveness, but rather not being enmeshed or caught up in things so that one greedily craves or clings to it.

<sup>61</sup> Lederach, John Paul. *Building Peace: Sustainable Reconciliation in Divided Societies*. Washington, DC: United States Institute of Peace Press, 1997.

### *The ethics of care*

Individualist, rationalist understandings of ethics have been much critiqued.<sup>62</sup> According to Gilligan, discussions of ethics are usually dominated by notions of justice, rights and individual autonomy, and ideas about ethics that emphasize relationships, care and responsibility may be ignored. Gilligan suggests that a complete ethical theory requires both justice *and* care.<sup>63</sup> Scholars in the field of dispute resolution, such as Professor Trina Grillo, echo this concern, pointing out that dominant approaches to dispute resolution (and negotiation) may disadvantage persons who give expression to passion and emotion over those tend to favour rational approaches.<sup>64</sup>

The “ethics of care” is now receiving considerable attention<sup>65</sup> and is linked to Aristotelian virtue ethics which speak to the importance of emotions (or “sentiment”) such as compassion. The “ethics of care” underline issues that are “very fundamental to human life, namely the disposition to make ethical commitments and to get upset about them.”<sup>66</sup>

### **What (and who) is on your ethics screen? Which moral theory should you choose?**

Poker, ideals or pragmatics? Principles and rules? Consequences? Virtues? Care? When grappling with an ethical dilemma, which account of ethics does one choose? Surendra Arjoon points out that “the literature is [typically] filled with proponents of one particular moral theory, which is often pitted against other theories.”<sup>67</sup> Arjoon and others suggest there is no real need to choose just one theory of ethics. Principlist and consequentialist theories do not necessarily discount considerations of character. Virtue approaches do not discount the usefulness of laws, rules or codes or consequences. It may be helpful to consider all these theories of ethics to address particular ethical problems.

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<sup>62</sup> Gilligan, Carol. *In a Different Voice: Psychological Theory and Women's Development*. Cambridge, Massachusetts: Harvard University Press, 1982.

<sup>63</sup> French, Warren, Christian Häßlein, and Robert van Es. "Constructivist Negotiation Ethics." *Journal of Business Ethics* 39 (2002): 83-90; Freshman, Clark. "Re-Visioning the Dependency Crisis and the Negotiator's Dilemma: Reflections on the Sexual Family and the Mother-Child Dyad." *Law and Social Inquiry* 22, no. 1 (1997): 97-129; Williams, Barbara Blake. "Implications of Gilligan for Divorce Mediation: Speculative Applications." *Mediation Quarterly* 12, no. 2 (1994): 101-15; Glennon, Theresa. "Lawyers and Caring: Building an Ethic of Care into Professional Responsibility." *Hastings Law Journal* 43 (1992): 1175-86.

<sup>64</sup> Grillo, Trina. "The Mediation Alternative: Process Dangers for Women." *Yale Law Journal* 100, no. 6 (1991): 1545-610.

<sup>65</sup> Held, Virginia. *The Ethics of Care: Personal, Political, and Global*. Oxford: Oxford University Press, 2005.

<sup>66</sup> Nussbaum, Martha C. "Valuing Values: A Case for Reasoned Commitment." *Yale Journal of Law and the Humanities* 6 (1994): 197-217.

<sup>67</sup> Arjoon, Surendra. "Ethical Decision-Making: A Case for the Triple Font Theory." *Journal of Business Ethics* 71, no. 4 (2007): 395-410.

*A Relational Approach: An Expanding Circle of Moral Concern*<sup>68</sup>

Reflection by oneself (as an individual) on principles, consequences and virtues may not be enough to meet the needs of representative negotiators, their clients, the occupation or profession or the public. Individual reflection does not always adequately take into account that negotiation is always a relational venture (albeit with differing priorities on differing relationships). Individual reflection also may fail to take into account relevant people's differing sources of power, capacities to make choices, differing world views, differing ethical frameworks and different priorities of various players and others affected.

This section proposes an ethics screen for representative negotiators that takes account of the negotiating relationships between the representative and the client, between representatives and their "negotiation opposites," among the negotiator's own relational interests, and "the public interest." These relationships are only examples of the relationships that may be considered in "expanding circle' of moral concern."<sup>69</sup>

The "glue" that can bind considerations of principles, consequences, virtues in an expanding relational circle of moral concern, is practical wisdom born of habitual practice of virtues.<sup>70</sup> "In other words," says Arjoon, "a virtuous or morally licit act is one based on practical judgement or prudence, with an upright motive (intention), with a steady disposition of character, or simply put, doing the right thing... in the right place, at the right time, with the right person (circumstances/consequences)."<sup>71</sup>

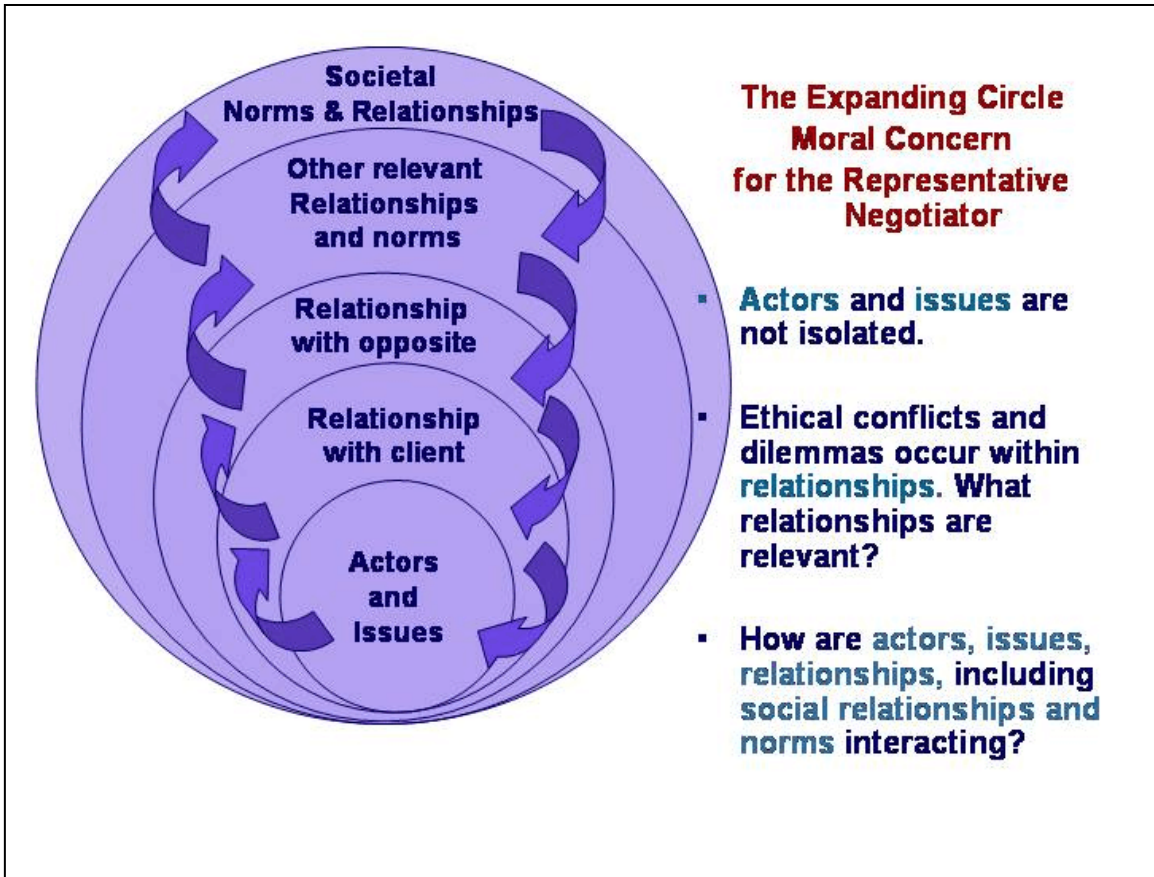
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<sup>68</sup> Gibson, Kevin. "The New Canon of Negotiation Ethics." *Marquis Law Review* 87 (2003-2004): 747-52, at 750-751.

<sup>69</sup> Ibid.

<sup>70</sup> Arjoon, supra note 153.

<sup>71</sup> Arjoon, supra note 153, at 404.



***A Multiple-Model Approach***

Taking the lead from Arjoon and negotiation theorists like Lax and Sebenius,<sup>72</sup> what follows is a decision-making model that combines several basic moral theories. See the box below.

<sup>72</sup> Lax and Sebenius, 1986 present a multi-faceted framework for ethics in negotiation.



## A Multiple Model Approach

1. **Consider act-oriented approaches**, and ask:
  - a. What is my *intention*? Is it a morally good intention?
  - b. What are my legal or social *duties or obligations*?
  - c. What are the likely *consequences* to others, including those who are not at the negotiation table including:
    - yours and the parties' family, colleagues and friends
    - the legal profession;
    - children;
    - members of vulnerable groups;
    - the public;
    - next generations.
    -
2. **Character-based approaches** that ask questions based on virtue:
  - a. What is my *function* in this situation?
  - b. What moral excellence (virtues) would tend towards fulfilling this function?
  - c. What do the particular moral virtues of truthfulness, compassion, justice and peacefulness (for example) tell us?
3. **Relational dimensions**: "expanding circles of moral concern": What are the relevant relational dimensions to be considered,
  - a. Lawyer-client relationship;
  - b. Relationship with the other negotiator;
  - c. The negotiator's other relationships;
  - d. Civic relationships (sometimes referred to as "the public interest")?

## For Further Reflection

Imagine the following scenario, summarized by Carrie Menkel-Meadow in "Ethics, Morality and Professional Responsibility in Negotiation." In *Dispute Resolution Ethics: A Comprehensive Guide* edited by Phyllis Bernard and Bryant Garth, 119-54. Chicago: American Bar Association, 2002, at 132.

"Just before the closing of a sale of a closely held business, a major client of the business terminates a long-term commercial relationship, thereby lessening the value of the firm being purchased, and you represent the seller. Do you disclose this information to the buyer?"

### **Further reading**

Lax, David A and James K. Sebenius, "Three Ethical Issues in Negotiation," *Negotiation Journal*, October (1986).

Lewicki, Roy J., David M. Saunders, Bruce Barry, and John W. Minton. *Essentials of Negotiation*. Third Edition. New York: McGraw-Hill, 2001, Chapter 7

Menkel-Meadow, Carrie. "Ethics, Morality and Professional Responsibility in Negotiation." In *Dispute Resolution Ethics: A Comprehensive Guide*, edited by Phillis Bernard, and Bryant Garth, 119-54. Washington DC: American Bar Association Section of Dispute Resolution, 2002.

Code of Ethics of the Law Society of Thailand.