

Session 4: Ethics of Negotiation

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CPD Category: Practical Legal Ethics / Ethics and Professional Responsibility

12:00 PM – 1:00 PM (AEDT)



Everyone's lines are muted upon entry. We will open the lines up after the session for Q&A.



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Wednesday 21 February 2024

Ethics of Negotiation

Ian Dorey, Partner | Finance – Restructuring and Insolvency

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What are Ethics?



Mind Over Matter?

- What are ethics and do they matter in negotiation?
- Are ethics a matter for negotiation?
- Does it matter?

What are Ethics?

Ethics define the nature of the world in which we live and prescribe rules for living together in it.

Broadly applied social standards for what is right or wrong in a particular situation, or a process for setting those standards.

A system of moral principles or values; the rules or standards governing the **conduct** of the members of a profession; accepted principles of right or wrong.

What do Leaders Think Ethics Are?

“Ethics means knowing the difference between what is morally right and wrong—and then acting accordingly.”

- *Johnny C. Taylor, Jr., President and CEO, Society for Human Resource Management*

“I have an interpretation of the Hawaiian word, *kinaole*: Do the right thing, at the time, with the right spirit to our customers and clients every time.”

- *Mary Kelly, PhD, Commander, US Navy, Co-author with Peter B. Stark, ‘Why Leaders Fail and the 7 Prescriptions for Success’*

“Doing the right thing is the right thing to do.”

- *Stephen Sandherr, CEO, Associated General Contractors of America*

“Ethics means doing the right thing when it is not easy, pleasant, or convenient.”

- *Arthur Schwartz, CAE, Deputy Executive Director & General Counsel, National Society for Professional Engineers, Executive Director, National Academy of Forensic Engineers*

What are Ethics?

So, in simple language:

- Ethics is knowing what is right or wrong in a particular situation
- Ethical behaviour is acting in accordance with that knowledge *and the rules*
- We know it when we see it (or its opposite)

How do we apply this to negotiation?



What is Negotiation?



What is Negotiation?

Negotiate:
try to reach an
agreement or
compromise by
discussion

Negotiation:
discussion aimed at
reaching an
agreement

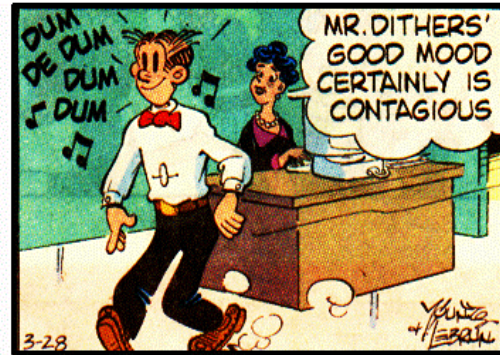
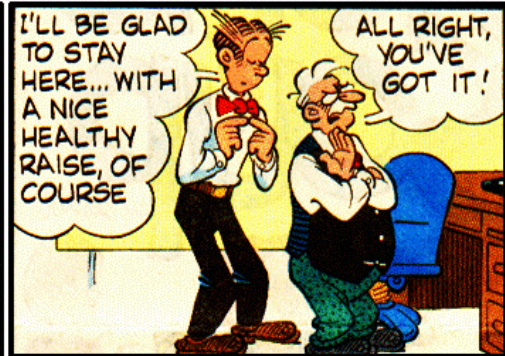
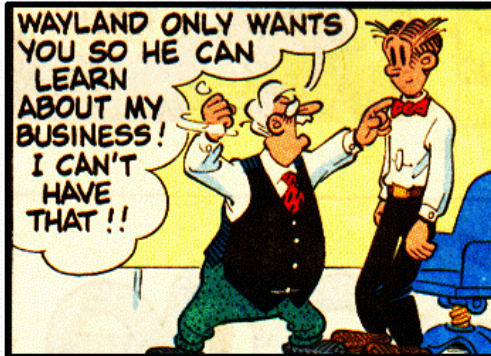
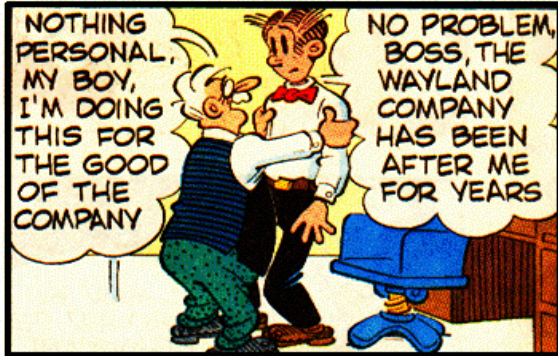
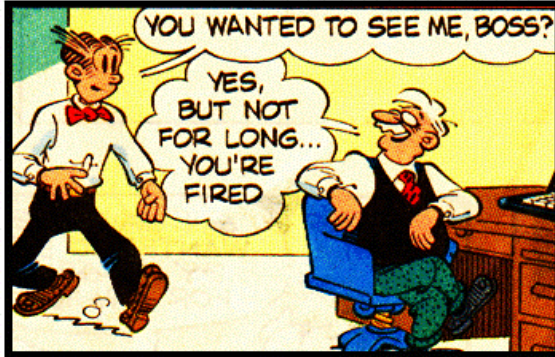
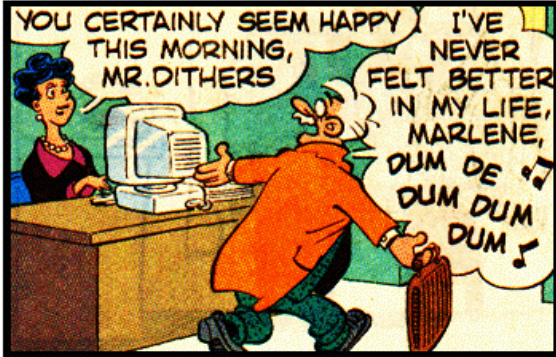
What is Negotiation? Cont.

Negotiation is a basic means of getting what you want from others.

Getting to YES: Negotiating Agreement Without Giving In by Roger Fisher & William Ury

BLONDIE

BY DEAN YOUNG & DENIS LEHRER



Do Ethics Matter in Negotiation?



Are there, or should there be, accepted ethical standards for behaviour in negotiations?

Motives to behave unethically:



- The pursuit of profit or power
- The desire to beat an opponent in a competitive environment
- The need to insure or restore some standard of justice that has been violated

Do Ethics Matter in Negotiation? Cont.

Motives to behave ethically?

- Golden Rule: do unto others as you would have them do unto you
- I can serve myself better by complying with society's values than by violating them
- I feel better about myself – and I want the respect of others
- I want to avoid the unpleasant consequences of not doing so





Conducting the Negotiation



Conducting the Negotiation

Legal Risks

Negotiation does not occur in a vacuum, but in a minefield:

- Professional Conduct Rules
- Competition & Consumer Act
- Misrepresentation

Competition & Consumer Act

Schedule 2 – Australian Consumer Law

- Misleading or Deceptive Conduct (s18)
- Unconscionable Conduct (s20)

Section 20 codifies the common law by referring to the "unwritten law". The High Court of Australia has held that an act is unconscionable if a party to a transaction is under a special disability, the other party is or ought be aware of that disability, and that other party acts in a way that makes it unfair or unconscionable to accept the offer of the weaker party. The inclusion of section 20 allows for remedies under the Law.

- Other Unfair Practices

The Australian Consumer Law also prohibits a long list of other unfair practices including certain misrepresentations – in consumer contracts.

Australian Solicitors Conduct Rules 2012

- Is there a difference between ethics and rules?
- Can it ever be unethical to obey the rules?
- Can it ever be ethical to break the rules?
- What is a lawyer's professional duty in this regard?
- “Fundamental Ethical Duties”



Do you know what they are?

Lawyers in Negotiation

The purpose of negotiations – test strengths and weaknesses and to moderate positions.

There is no professional obligation to:

- Disclose information that would affect the willingness of the other party to agree;
- Inform the other party of relevant facts or law; and
- Correct the other party's misunderstanding or false assumption provided the lawyer is not the moving force in that.

Lawyers in Negotiation Cont.

Exceptions under ASCR:

- You must disclose information required to qualify a statement or avoid a ‘partial truth’, e.g. when an absolute statement is misleading
- You must disclose information required to correct a previous statement the lawyer now knows to be false

Solicitors Conduct Rules

Fundamental Ethical Duties

A solicitor must:

- a) Act in the best interests of a client in any matter in which the solicitor represents the client
- b) Be honest and courteous in all dealings in the course of legal practice
- c) Deliver legal services competently, diligently and as promptly as reasonably possible
- d) Avoid any compromise to their integrity and professional independence
- e) Comply with these rules and the law

A solicitor must not engage in conduct, in the course of practice **or otherwise**, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to —

- a) Be prejudicial to, or diminish the public confidence in, the administration of justice
- b) Bring the profession into disrepute

Australian Solicitors Conduct Rules 2012 –Rules 4 and 5

Solicitors Conduct Rules Cont.

Relations with Clients

A solicitor must:

- Provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be undertaken during the course of a matter
- Inform the client about the alternatives to fully contested adjudication of the case which are reasonably available to the client
- Follow a client's lawful, proper and competent instructions
- Not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement
- Avoid conflicts of interest between client & practitioner, client & client, client & former client

Australian Solicitors Conduct Rules 2012 –Rules 7 - 12

Solicitors Conduct Rules Cont.

Specific Example – Another Solicitor or Other Person’s Error

A solicitor must not take unfair advantage of the obvious error of another solicitor or other person, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact



● This is a rule, but is it ethical?

Ethical Hypothetical

You are negotiating for a client and you become aware that the other side believe they will be acquiring a benefit that is not included in the deal

What do you do?

They have had the benefit of full disclosure in a data room and proper due diligence would have revealed the mistake

Misleading and Deceptive Conduct and Half Truths in Negotiation

Example One

- You are engaged in negotiation of a large commercial contract
- Your Business Unit has asked you to amend a clause which fundamentally changes a previously agreed position

Do you:

1

Make the changes to the document and advise the other lawyers in a covering email the clause has been changed?

2

Specifically mark up the changes to the clause on the next turn of the document?

Misleading and Deceptive Conduct and Half Truths in Negotiation Cont.

Example Two

- You are acting for the plaintiff in a claim against insured defendants
- You have expert reports filed about damages
- Before the hearing, the plaintiff tells you about changes circumstances occurring after the date of the expert reports that would significantly reduce the damages. Your client does not want you to tell the defendant

Do you:

1

Remain silent and settle the case on the basis of the expert reports filed to get the maximum compensation?

2

Tell the defendants' lawyers of the changed circumstances?

Obligations to the Court

Example Three

The Tax Office is claiming AU\$250,000 for unpaid tax

Due to an error, the Tax Office sues only for AU\$25,000

Do you:

- 1 Do nothing and suffer a default judgement?
- 2 Pay the amount claimed?
- 3 Tell the tax office solicitor of their mistake?
- 4 Get the Tax Office to agree to a consent judgement to create an issue estoppel and bar to future proceedings?



Negotiating Tactics: *Are They Ethical?*



Negotiation Tactics

Are They Ethical?

- Selective disclosure
- Misrepresentation of one's position
- Bluffing
- Deception
- Falsification
- Bullying

Negotiation Tactics

Are They Ethical?

- Anchoring
- Good Cop / Bad cop
- Cherry picking
- The Hot Potato
- The Flinch
- The Echo/Mirroring

Ethical Hypothetical

You are negotiating with a client and you become aware that the lawyer on the other side is not behaving ethically



How do you deal with someone using underhand tactics?

Ethical Hypothetical

- How to deal with someone using underhand tactics:
 - Recognise the Tactic
 - Ask Probing Questions
 - Ignore the tactic?
 - “Call” the tactic?
 - Respond in kind?
 - Punish the behaviour?
 - Discuss what you see and offer to help the other party change to more honest behaviors

To Be or Not To Be...Ethical

- How do we decide:
 - What is ethical behaviour?
 - Whether to use behaviour we perceive as unethical?
- Unethical behaviour increases when we feel that:
 - Our actions will not harm a potential victim and that our peers will not condemn our actions
 - We envy our opponent or have been beaten by them previously

Consequences of Unethical Behaviour

- A negotiator who employs an unethical tactic will experience positive or negative consequences, based on:
 - Effectiveness – whether the tactic is effective
 - Reactions of others – how the other person, constituencies, and audiences evaluate the tactic
 - Reactions of self – how the negotiator evaluates the tactic, feels about using the tactic

Justification for Unethical Behaviour

The primary purpose of explanations and justifications is:

- To rationalise, explain, or excuse the behavior:
- To verbalise some seemingly good, legitimate reason why this tactic was necessary:
 - The tactic was unavoidable;
 - The tactic was harmless;
 - The tactic will help to avoid negative consequences;
 - The tactic will produce good consequences, or the tactic is altruistically motivated;
 - “They had it coming,” or “They deserve it,” or “I’m just getting my due”; and
 - “I’d be stupid not to”



Reality Checklist and Why Ethical Behaviour Makes Sense



Reality Checklist

Negotiation Principle 1: Reciprocity

Would I want others to treat me or someone close to me this way?

Negotiation Principle 2: Publicity

Would I be comfortable if my actions were fully and fairly described in the newspaper?

Negotiation Principle 3: Trusted friend

Would I be comfortable telling my best friend, partner, or children what I am doing?

Negotiation Principle 4: Universality

Would I advise anyone else in my situation to act this way?

Negotiation Principle 5: Legacy

Does this action reflect how I want to be known and remembered?

Why Ethical Behaviour Makes Sense

The ethics of negotiation should be based on several understandings:

- Reluctant participants make undependable partners so treating negotiation partners with respect and honesty simply makes common sense
- The only reason to use negotiation to resolve a conflict, agree on a project, or conclude a sale is because other parties may be able to add value an individual or a single company cannot do acting alone
- Transparency in the negotiation process is more likely to bring about buy-in than hidden agendas or tricky manoeuvres
- Negotiation is not competitive sport – win-win is usually the best outcome

Checklist of Practical Suggestions for an Ethical Lawyer

- Pause and reflect
- Study the facts and relevant rules
- Identify alternatives and their consequences
- Seek advice
- Identify the relevant values – professional and personal
- Ask yourself, “does this fit with the kind of lawyer I want to be?”
- Can the decision be explained in plain language?
- Is the proposed choice practical as well as desirable?

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