NEGOTIATION ETHICS: THE CASE FOR A CODE

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ABSTRACT

The paper seeks to question the need for a code of ethics that is specific to negotiation. The author analyses the existing conduct rules applicable on lawyers, analysing the context in which these operate and the constraints they pose on lawyers in the negotiation setting. The arguments made for and against ethics for negotiation and the sufficiency of the present rules in light of the aims and objectives of negotiation as well as the diversity of bargaining styles are then examined. Having demonstrated that the varied nature of negotiation is distinct in fundamental characteristics from litigation and the general role of a lawyer as a counsellor, the benefits from a specific regulation laying down ethics for negotiation are discussed.

The core proposition of this paper is that the benefits of negotiation are maximized where there is a binding code of ethics with enforcement similar to those of the obligatory professional conduct rules. This option is contrasted and compared with soft regulation through the form of an advisory or guidance. Each of these methods is scrutinized for their moral, economic behavioural, practical and public policy implications. Supplementing this argument is that any code of ethics should make a distinction between matter concerning a legal right for which there is a straight-forward remedy through litigation and the numerous other contexts where a legal right is either not in question, or secondary to other important objectives.

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1. INTRODUCTION

The law is the instrument by which the sovereign determines order and the framework of expected behaviour. These in turn are relied upon to determine rights and entitlements of individuals. Since there may be a diverse number of ways these can be interpreted, the judicial system becomes the final referee and validator of one claim over the other, which is then enforced and accepted as universal. This largely winner takes all approach of adjudication has certain shortcomings, it takes away autonomy of decision making and outcome from the hands of the parties in dispute and hegemonizes one narrative over the other. Due to these, there has been a rise it out-of-court settlement mechanisms, including negotiation and mediation. It is the former that is the focus of this paper.

The sovereign does not relinquish all control over these private arrangements and they operate largely in the context of the broad outline provided by the law. As these legal rules can be complex and interpreted relying on case law, scholarship and methods of construction, special professionals take up the role of predicting entitlements as per the law and for that reason, are also included in most negotiations which implicate the law in some manner. However, the very object of negotiation is often to prevent a winner takes all outcome that is rendered in a judgment of the Court and for that reason is arguably less adversarial in nature. It is based on mutual acceptance which necessitates to some extent an accommodation of interests. The fundamentals and basic assumptions of these forms of dispute settlement are inherently different and therefore change the nature of the role that a legal professional is required to fulfil.

It is because of the role that lawyers and legal professionals play in influencing decisions about the most significant entitlements, that the question of ethics is often raised and debated in a more detailed manner than ordinary moral and ethical behaviour. The specialized knowledge that legal professionals have and the instrumentality of their role in the maintenance of order and justice result in a gamut of competing values that have to be uniquely addressed for lawyers. Such is this concern with ethics that most law courses usually include a course that teaches and counsels on ethics expected from legal practitioners. Yet, outside of the educational context, ethical behaviour is multi-faceted and real-life scenarios are intertwined with many other imperatives that affect behaviour out of which ethics are usually just one factor. Therefore, the debate continues, along with the release of certain institutional regulations or guidelines.

The paper makes an enquiry into the field of negotiation and ethics in this domain asking the question of the need for ethics in negotiation and the form that it should take. The first section examines ethics for legal professionals in general, the second section looks at types of negotiation and ethical practices pertaining to negotiation and the next section asks the question of whether ethics is required is negotiation. The fourth section submits a central argument regarding the need and form that ethical requirements in negotiation must take and the final section concludes.

2. EXPECTATIONS OF ETHICS FROM LAWYERS (GENERAL OVERVIEW AND LAWYER-CLIENT RELATIONSHIP)

There is a certain amount of regulation that governs the conduct of a legal professional in her practice and this will be discussed in this section. The objective is to determine the legal restraints on conduct by lawyers which apply in the context of regular advocacy and may also be applicable in the negotiation context. The section begins by discussing the framework in America, followed by the framework in India and finally some aspects of other legislations that may influence behaviour. The section concludes with an examination of mediation on the same criteria. Regulation applying to civil rules is looked at as criminal offences are largely not capable of settlement through negotiation.

Preliminary, to become a lawyer in America, a juris doctor degree is required after which there is a bar examination. The American Bar Association (hereinafter referred to as ABA), which was founded in 1878, provides accreditation to law schools, including providing standards for legal education and provides resources to legal professionals.[1] One crucial resource that has been created by the American Bar Association is the Model Rules of Professional Conduct.2 While these are not binding and each state adopts their own professional conduct rules, they are largely based on the ABA Model Rules of Professional Conduct (hereinafter referred to as Model Rules). These rules were adopted in 1983, and subsequently revised from time to time.[3] They replace the ABA Model Code of Professional

[1] 'About Us' (*American Bar Association*) <https://www.americanbar.org/about_the_aba/>.

[2] 'Model Rules of Professional Conduct – Table of Contents' (*American Bar Association*) <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/>.

[3] 'About the Model Rules' (*American Bar Association)* <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/>.

Responsibility, 1969 and the Canons of Professional Ethics, 1908.[4] In addition to this, there may also be judicial precedent that may define further attorney-client privilege, malpractice and other such issues.

The Model Rules will be examined in order to provide an idea of the expectations from a lawyer practicing in America. In dealing with the contours of the lawyer-client relationship, the rules provide that the client is in the driving seat and will determine the means and objective of the representation.[5] Further the lawyer will not assist the client in the furtherance of criminal or fraudulent behaviour,[6] and the lawyer may withdraw where she is required to act in violation of the rules.[7] The confidentiality of information given by the client is protected by the rules, subject to disclosure only with express consent of the client or implied authorization,[8] and the information cannot be used to the disadvantage of such client.[9] Finally, as relates to the client, the lawyer is to avoid conflict of interest but is given the capacity to act as a neutral third party if so clarified to both parties.[10] In advising the client, the lawyer may refer to moral, economic, social and political factors in addition to the law.[11]

The lawyer is duty bound to bring meritorious claims and expedite litigation.[12] There is a prescription for honesty towards tribunals as well as opposing counsels, which then proscribes practices of making misleading statements, providing false evidence, making frivolous discovery requests amongst others.[13] Some of the rules also apply to non-adjudicative proceedings which are before a legislative body or agency.[14] Even when dealing with non-clients, unfair practices such as material omissions, false statements, delay of rights etc are prohibited.[15] Finally, violations by other lawyers are to be reported, including those relating to any form of misconduct.[16]The violation of the rules of conduct results in sanctions

[4] ibid.

[5]ABA Model Rules of Professional Conduct, Rule 1.2.

[6] ibid.

[7] ABA Model Rules of Professional Conduct, Rule 1.16.

[8] ABA Model Rules of Professional Conduct, Rule 1.6.

[9] ABA Model Rules of Professional Conduct, Rule 1.8(b).

[10] ABA Model Rules of Professional Conduct, Rule 2.4.

[11] ABA Model Rules of Professional Conduct, Rule 2.1.

[12] ABA Model Rules of Professional Conduct, Rule 3.2.

[13] ABA Model Rules of Professional Conduct, Rule 3.3 and 3.4.

[14] ABA Model Rules of Professional Conduct, Rule 3.9.

[15] ABA Model Rules of Professional Conduct, Rule 4.1 and 4.4.

and disciplinary action such as admonition, reprimands, suspension or right to practice law for a given period of time or disbarment.[17]

The lengthy examination of these rules underscores the following important rules of conduct applicable to a lawyer: a) the position of the client to make all important decisions on means and ends, b) refrain from material misrepresentations and omission of material facts, c) correct error or misunderstanding caused, and d) resign where criminal intention is sought to be furthered or there is dishonest conduct. There are material consequences following from the violation of these Rules. These are examined in the context of negotiation in the third section of this paper.

A similar analysis will be conducted for the Indian context. The Indian framework can be traced back to the Advocates Act, 1961 which governs legal practitioners. The Act establishes the Bar Council of India, and the State Bar Councils.[18] Section 49 gives the Bar Council of India the power to make rules and these include those pertaining to standards of professional conduct and etiquette to be observed by advocates. The disciplinary power of the State Bar Council and the Bar Council of India are given in Chapter V and provide that reprimand, suspension or removal of name from list of advocates may be ordered where there is professional misconduct proved.

In pursuance of this power, Chapter II, Part VI of the Bar Council of India Rules on standards of professional conduct form the base of legal professionalism that is expected in conducting matters in relation to the law.[19] The Preamble of this Chapter provides that the advocate has the role of an officer of the court and to uphold the interests of his client. The first section covers the advocates duty to the Court. Rule 4 states that the advocate will attempt to prevent the client from using sharp or unfair practices, and will refuse a client who continues with such improper conduct. The general attitude towards the Court will be one of respect and dignity. The advocate is precluded from providing service in a matter in which he/she has pecuniary interest as per Rule 9.

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[16] ABA Model Rules of Professional Conduct, Rule 8.3 and 8.4.

[17] See e.g., 'State of New York Rules for Attorney Disciplinary Matters' (Westlaw) <https://govt.westlaw.com/nycrr/Document/Iee4fd1c7b14f11e6b16798a968a6bf07?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)>.

[18] Advocates Act 1961, s 3-4.

[19] 'Bar Council of India Rules' (Bar council of India) <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartItoIII.pdf>.

Section II deals with the duty of the advocate to the client. Rule 15 prescribes that the advocate act in a fair and honorable manner to uphold the interests of his client including defending a guilty client regardless of personal opinion. Rule 20 provides that the advocate will act only on the instructions of the client, and Rule 24 prohibits abuse of advantage of the confidence of his client. Section III briefly touches upon the advocate's duty to opponents. Rule 34 prevents the advocate from directly negotiating with the opposing party except through the opposing advocate. Rule 35 provides that all legitimate promises should be carried out if made to the opposite party even if not reduced to writing. Section IV deals with duty to colleagues. Evidently, the prescribed rules of conduct under the Indian framework is much less onerous than that prescribed in America.

In contrast to the duty of candor owed to the court by an attorney in the American context, the closest provision in the Indian framework is Section 193 of the Indian Penal Code (IPC) which provides that falsifying evidence in a judicial proceeding is punishable by three to seven years of imprisonment.[20] Further Section 196, IPC states that using evidence which is known to be false will also be punished in the same manner.[21] Section 199, IPC covers false statements in declarations.[22] Finally, Section 126 of the Evidence Act, 1872 provides that professional communications are protected from disclosure unless is pursuance of an illegal purpose.[23] Section 129 of the Act likewise protects the client from disclosing communication with legal advisor. These last set of restrictions are a) primarily situate the liability with the client, rather than the advocate and b) largely apply only to proceedings before courts.[24]

There are no internationally accepted model rules of conduct, in the context of negotiation. At the time of writing this paper, there is no domestic set of rules for conduct in negotiation specifically in any jurisdiction. The lack of institutional support for negotiation can be contrasted with another method of alternative dispute resolution that has received much greater legislative attention and backing – mediation. Mediation, unlike negotiation, involves a neutral third party that acts as a mediator between the parties. Mediation has been formally integrated as a voluntary option for parties which they may be bound to consider or the judge

[20] Indian Penal Code 1860, s 193.

[21] Indian Penal Code 1860, s 196.

[22] Indian Penal Code 1860, s 199.

[23] Indian Evidence Act 1872, s 126.

[24] Indian Evidence Act 1872, s 129.

in adjudication proceedings may refer to mediation using discretion.[25] Due to the express recognition that is accorded to mediation and court direction, there is ordinarily an accompanying obligation to participate in good faith, the breach of which can lead to sanctions.[26] Further still, broad rules on procedure,[27] accreditation institutes for mediators[28] and codes of conduct for mediators[29] lend mediation additional legitimacy and prevent frustration of the entire process. Finally, the spirit of promotion of mediation has also found international embodiment in the United Nations Convention on International Settlement Agreements Resulting from Mediation (2018) of which Article 5(1)(e) and (f) make explicit reference to breach of mediator standards and impartiality and independence.[30] The focus of professional standards of conduct in mediation settings remain principally on the mediators to ensure productive outcomes and equal treatment of parties.

3. TYPES OF NEGOTIATION AND ETHICAL PRACTICES

This section is intended to describe the context in which the discussion on ethical practices is to proceed. Evidently, there are significant differences in the role, means and objective in a court proceeding a voluntary attempt to arrive at a settlement. However, in within the negotiation context, the styles of negotiation may vary and the exact stage and matter in which negotiation is taken up will influence behaviour and expectations. For this reason, this section is divided into three limbs, the first looks at the various negotiation styles, the second illustrates specific contexts that may further affect negotiation styles and finally, the paper draws on available literature to detail on certain ethical practices in the context of negotiation.

[25] Code of Civil Procedure 1908, s 89; Civil Procedure Rules, rule 1.4(2)(e); Council Directive 2008/52/EC on aspects of mediation in civil and commercial matters (2008) OJ L136/3. See also, 'Uniform Mediation Act' (Uniform Law Commission, 2003)

<https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=9b244b42-269c-769e-9f89-590ce048d0dd&forceDialog=0>.

[26] Federal Rules of Civil Procedure, rule 16; Civil Procedure Rules, rule 44.2; *Thakker v Patel* (2017) EWCA Civ 117.

[27] Civil Procedure Rules, rules 78.23 – 78.28.

[28] See e.g., American Arbitration Association and Civil Mediation Council.

[29] 'Model Standards of Conduct for Mediators' (*American Bar Association*, 2005) < https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf>; European Code of Conduct for Mediators, (*Academy of European Law*, 2004) <https://era-comm.eu/Language_Mediation/wp-content/uploads/2018/07/118DT101_docu.pdf>.

[30] United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements>.

Negotiation styles can preliminarily be classified into two main approaches: competitive and co-operative.[31] The first category is the approach where the negotiator singularly minded seeks to maximize their gain or meet their demands which are seen as conflicting with those of the opposing party and in the latter category, often referred to as integrative, principle, problem-solving negotiation focuses on joint gain and meeting the interests of both parties.[32] A deeper analysis however is provided by Professor Holbrook in his article titled 'Using Performative, Distributive, Integrative, and Transformative Principles in Negotiation'.[33] He describes four negotiation styles: performative, distributive, integrative and transformative, each of which arise in differing factual circumstances. According to Prof. Holbrook, high-conflict negotiations led to the adoption of performative negotiation, the objective of which is to transform emotionally charged narrations of conflict stories into constructive dialogue and validate each parties' opinions. An effective negotiator in this context is respectful, mindful, intervenes less in the conversation and ensures adherence to ground rules.

Distributive negotiation is engaged in where the resources are assumed to be definite and limited, and there is a mutually accepted division of these resources to be arrived at. The aim of such a negotiation is to narrow the negotiation range and end at an agreement that allows the maximum surplus to the negotiating party. Integrative negotiation may often arise out of overlapping circumstances as distributive bargaining, but is aimed at arrived a mutually satisfying solution to a problem by taking an expansive view of interests and possibilities. The objective is to identify the problem and underlying interests and then generate options which satisfy these, ultimately agreeing on the one that allows both parties to benefit from the settlement. Transformative negotiation is where the relationship between the parties is more valuable than the issue before them, and the objective is largely to repair the damaged relationship. The point underlined here is that the principles of effectiveness in the negotiation will change depending upon the background factual matrix as well as the objective of the party (whether they value the relationship, or the outcome more).

Following on that note, individual bargaining styles also influence the manner in which negotiation style is opted for, and what the outcome results in. Blake and Mouton traced five behavioural classifications: competing, collaborating, compromising, accommodating and

[31] Carrie Menkel Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (1983) Am. B. Found. Res. J. 905.

[32] ibid.

[33] James R. Holbrook, 'Using Performative, Distributive, Integrative, and Transformative Principles in Negotiation' (2010) 56 Loy. L. Rev. 359.

avoiding.[34] The first describes a high concern for the individual's goals and desires and limiting the opposing parties', the opposite of which is the accommodating approach which concerns itself with the other party's goals and desires without regard to the self. A balanced but high concern for both translates to a collaborative mode, and a balanced but moderate level of emphasis on both results in a compromising mode. Finally, the approach that seeks to avoid conflict altogether is the avoiding approach. Lawyers in a court proceeding function largely in a competitive environment and are educated in a similar environment. Therefore, the natural approach of lawyers would be self-concerning and thereby competitive. Professional conduct rules that emphasize on the duty to the client primarily and certain rules to be followed in this pursuit further entrench a competitive outlook and consequently, appropriate ethical behavior follows such a presumption.

As evidenced from the various contexts which affects negotiation style, legal negotiations often deal with a broader range of matters which more range of issues that are considered than those that are dealt with during adjudicatory proceedings before a court which are limited to legal points. Cases which concern an infringement of a legal right, or where there is a legal remedy to be pursued, are cases where negotiation intends to prevent litigation and in which the legal issue and framework plays a significant role. However, negotiations may also be in context of agreeing on a possible deal (such as a merger) in which there is no evident legal right to be decided on or remedy to be pursued in court. These are situations which are not addressed by the Court directly and in which the expectation of ethics also changes. Finally, in matters of divorce/alimony/custody which must take into account the needs of the different parties, as well as in cases where there is any hiccup in a commercial relationship, the objective of which is to resolve the misunderstanding and continue the relationship, the approach taken in Court is very limited in context of negotiation and understanding of ethical and good practices will accordingly change.

In this last part to this section, the author will detail on certain good practices and ethics that have been elaborated on in popular and outlier scholarship. In *Fashioning an Effective Negotiation Style: Choosing Between Good Practices, Tactics, and Tricks,* Hal Abramson contrasts good practices with tactics and tricks, indicating good practices as acceptable behaviour in negotiation and tricks as antagonizing and unacceptable behaviour with tactics

[34] R.R. Blake and J.S. Mouton, 'The Managerial Grid: The Key to Leadership Excellence' (Gulf Publishing Company, 1964).

falling along this spectrum depending on factors such as culture and context.[35] Good practices include asserting interests, presenting rational explanations for these interests, acting trustworthily and reliably, engaging with the information provided by the opposing party, use of objective standards and generating options. While the former are rather generic, his list of tricks give a more substantial insight of expected ethical behaviour. Tricks or unacceptable behaviour include lying about a material fact, insufficient settlement authority, irrevocable commitments designed to lock in certain positions or direct towards outcomes, misleading using intentional ambiguities and using the good cop/bad cop paradigm. He lists the following as tactics which are ambiguous in terms of their acceptability: exaggerating proposals, distorting bottom line, manipulating information such as BATNA, threatening to leave, false demands, and exploiting the reciprocity norm.

In this context, Paul J Zwier and Ann B. Hamric, in their article *The Ethics of Care and Re-Imagining the Lawyer/Client Relationship* reconsider the foundations of lawyer client relationship and propose an alternative model that is grounded in morals.[36] It shifts away from rights-based thinking, and is based on privileging interconnectedness over autonomy. It is especially relevant in family-based matters. The approach of a lawyer changes from 'problem solving' which encourages the lawyer to champion the client's rights who in turn acts as an autonomous decision maker. The ethics of care orientation however rejects impartiality as a moral standard of judgment, specially includes empathy, concern, responsiveness and responsibility in relationships. In terms of substantial divergences in process and outcome, the problem is approach in terms of the issue and not from the perspective of the interests of the client, and then generate options and select the best option. The technique focuses on listening rather than questioning as a mode of information gathering, act as an intermediary amongst other specifics. The idea is to enlighten the clients of an approach that is not adversarial and right-based, and is accordingly limited to certain circumstances. This approach has been discussed to present an idea of different conceptualizations of ethics in a non-rights-based model.

[35] Hal Ambramson, 'Fashioning an Effective Negotiation Style: Choosing between Good Practices, Tactics and Tricks' (2018) 23 Harv. Nego. L. Rev. 319.

[36] Paul J. Zwier & Ann B. Hamric, 'The Ethics of Care and ReImagining the Lawyer/Client Relationship' (1996) 22 J. Contemp. L. 383.

4. ETHICAL RULES FOR NEGOTIATION

This section looks at the application of the professional rules of conduct to negotiation and seeks to support the position there is a need for negotiation specific conduct rules or ethics relying both on opinions of scholars and the author's own inputs. The section will look at general behaviour that the professional conduct rules require however, in relation to specific details, there will be reliance on the American Model Rules for the reason that they are more elaborate than those prescribed for the Indian context and for that reason, any comment/criticism of the American Rules will largely apply also to the Indian rules.

Even as professional conduct rules are designed to apply to different roles that a lawyer is expected to play, they are primarily designed from the aspects of stages approaching a litigation and during a court proceeding. This can be illustrated in many ways, specifically by showing how the rules fail to be appropriate in many negotiation contexts but preliminarily, the proposition can be substantiated by the stakeholders that the rules mention duties towards which include the client, and the Court and finally other lawyers to the extent of soliciting business. This means that in cases where there is no legal right concerned such as merger negotiations, the rules do not play a substantial role in determining acceptable behaviour unless the conduct amounts to fraud in violation of the principles of contract law.

Rule 1.2(a) which allows the client to determine the means and objective of the representation if applied literally to the negotiation context may allow the client to determine the strategy for negotiation, and the negotiation style will often be a direct reflection of the bargaining style of the client. Rule 1.8 prevents the lawyer from using the information of the client to their disadvantage. Disadvantage in the context of the preceding point, may be interpreted differently by the lawyer and the client, and prevent the lawyer from effectively pushing for integrative bargaining. Most importantly, the rules of candor with respect to misrepresentations, false statement of facts or law, false evidence are duties owed primarily to the Court and even if they were interpreted to extend to opposing parties, these would be difficult to apply to the negotiation context. For example, distorting the bottom line, or not revealing a strategic weakness of the party may be considered false statement of fact or acceptable puffery. Candour in the Indian context is again limited to proceedings before the Court.

There are provisions in both the professional conduct rules examined that prevent direct negotiation or communication of the lawyer with the opposing client which may often be

necessary to reach more productive outcomes in negotiation such as in the case of high-conflict matters or familial matters. The rule is entrenched in the belief of necessity of the lawyer to advise on a matter which will necessarily revolve on a legal right and the legal course of action. Further as the rules are in the context of the role of the lawyer in a litigation, the sanctions for misconduct are also in this context. Further, the lack of clarity in the division of authority between a lawyer and a client may still be workable in the litigation context where the lawyer is the primary agent and intermediary through which the client processes information and makes decisions, and where technicalities can be adequately dealt with by the lawyer, however in the negotiation context, the lack of division can result in further uncertainty in the negotiation and may even be regarded as a tactic by the other party, illustratively where a) lawyer has limited authority to settle affecting negotiations or where this fact has been deliberately not revealed during the negotiations, or b) lawyer's implied authority may be questioned as a strategy to extract an offer before bringing this to the client. The lack of division of authority may also affect the relationship between the client and the lawyer, and the lawyer's ability to conclude/arrive at a beneficial bargain for the client.

These professional conduct rules form the only source of legally binding restraints on behaviour in the negotiation setting. The lack of other sources of binding norms are telling in their absence. Further still, when contrasted with mediation, special institutional effort is made to regulate conduct which ultimately ensures that the parties' faith in the process is not lost and that mediation remains an effective choice for dispute resolution. Rules and codes of conduct for mediation as discussed in Section I confer the process with legitimacy which remains missing for negotiation.

The need for a separate code of ethics is highlighted in this preceding discussion which points at the unsuitability of the existing professional rules of conduct to the negotiation context. To conclude that discussion, it may be observed that the professional rules of conduct are considered more relevant to court proceedings than in negotiations. The need for rules to gain currency and ensure the sanctity of the process is made evident by the measures taken in relation to mediation both domestically and internationally. The next limb of this discussion questions whether there should be a code of ethics for negotiations at all. This inquiry begins with the insights of Mark J Rankin, in his *article Legal Ethics in the Negotiation Environment: A Synopsis*.[37] Preliminarily, he observes that negotiations do not benefit from

[37] Mark J. Rankin, 'Legal Ethics in the Negotiation Environment: A Synopsis' (2016) 18 Flinders L.J. 77.

procedural and evidence related safeguards that court proceedings do. He argues that lawyers are expected to act ethically in civil disputes and if a large majority of these civil disputes are settled through negotiation (also encouraged by courts, illustratively see Section 89, Code of Civil Procedure, 1908) which has no requirements of ethical behaviour, then the system itself has no moral value (also makes having ethics redundant, if they applicable only to limited circumstances). The professional rules of conduct are as much as part of promoting justice as ensuring the administration of justice is seen as legitimate, and therefore ethics are required in negotiation contexts where the public is most likely to see lawyers in action. It will also make negotiation a more serious option to the client if there are restraints on unethical behaviour.

It is often argued that there should be flexibility in method allowed in negotiations, the objective of which is for the lawyer to pursue the client's interests. However, Rankin argues that pursuing of client's interest is based on an anachronistic and adversarial conception of representation and as the context changes from litigation to negotiation, there should be a change in the lawyer's role. Further, acting deceptively need not necessarily advance the client's interest as it may not be in the long-term interests of the client and also have negative consequences of a dishonest reputation being attached to the client. As a necessary corollary, there are commercial and moral advantages to acting ethically. It has also been argued that the lawyer's role is not just the representation of client's interest but also pursuing a just termination of the dispute which also affects the acceptability of dishonest behaviour during negotiations.[38]

On a practical level, there are two compelling reasons that the author proposes to consider a code of ethics in negotiation. Assuming that the instrumentality of negotiation to the legal system is recognized, there is an economic analysis linked reason to implement a code of ethics. This is because similar to the game theory, where honest conduct on part of one party and selfish conduct on part of another party leads to higher rewards to the second party, and where the present conduct rules which do not tackle such behaviour in the negotiation context, the cumulative result that deception by one party is harmful for the creation and division of surplus, efficient allocation of resources and building trust in the inexpensive system of negotiation when compared with a court proceeding. Secondly, even where all lawyers and negotiators agree on the necessity for ethics, in light of the inadequacy of the

[38] Alvin B. Rubin, 'A Causerie on Lawyers' Ethics in Negotiation' (1974) 35 La. L. Rev. 577.

professional conduct rules, there remains ambiguity and subjectivity as to the acceptable ethical behaviour, a point that Hal Ambramson also makes when he states that parties may perceive tactics and tricks differently depending on cultural factors and more.

5. FORM OF ETHICS

The previous sections have sought to illustrate that there is a need for establishing standards of behaviour in the negotiation context because a) the present professional conduct rules do not deal with, and even act as a hinderance to effective co-operative negotiation and b) the lack of concern for ethics affects the efficiency of negotiation and its perceived usefulness as an option to the client. In this section, the author seeks to determine what form any ethics should take. The purpose is not to describe substantial provisions of any such code but to deal with a) whether ethics in this context should be in the form of guidelines (soft regulation) or in the form of binding law as with the professional conduct rules. Each of these approaches are looked at for their advantages and flaws. Finally, the author makes an argument of the broad structure that such an ethical code should take.

It has been argued thus so far that a code of ethics is required for a common understanding that transcends different subjective ideas of acceptable behaviour. One possible argument in that context may be that reputation as a fair negotiator results in the compliance with a published set of guidelines without their binding force. To bolster this argument, if the Hal Ambramson framework of good practices, tricks and tactics is adopted as a rough indication of what this code may contain, then the resulting style of negotiation promoted would be the co-operative negotiation style. As William Ury and Richard Fisher argue in their seminal book *Getting to Yes*, co-operative negotiation does not result in an unscrupulous party being able to take advantage of an ethical negotiator and the negotiation can be re-directed towards a productive and mutually satisfying outcome.[39]

This argument does hold weight. However, the counter to this is that ideas of reputation may not be enough of an incentive to follow recommendations of acceptable behaviour where there is a one-time negotiation pursued specifically in the context of a legal injury (legal right in question) which is unlikely to be occur again such as tortious injury, and other dealings with strangers. Further still, co-operative negotiation presumes that in order for an honest

[39] Roger Fish and William Ury, *Getting to Yes: Negotiating Agreements without Giving In* (Penguin Group, 1981)

party to not be prejudiced by a dishonest negotiator, it is able to recognize and counter such behaviour which may not necessarily be the case. Often, negotiators may not be well-read or experienced and this would seriously disadvantage the honest party. In fact, the very existence of deceptive practices owes to the benefits of employing them over and above what can be accomplished otherwise.

Therefore, it may also be necessary to change the incentives and pay-off related to deceptive practices. As it stands currently, there is no such disincentive in the context of negotiation specifically because a) even the more elaborate professional conduct rules do not directly deal with deceptive practices in negotiation and are best subject to interpretation of a grey area, b) in the Indian context specifically, most rules of evidence and procedure are not just limited to the litigation context but also place the liability largely on the client, and finally c) the duty and financial self-interest of the lawyer in single-mindedly pursuing the client's interest creates incentive to follow dishonest practices where they reap awards. Soft regulation does not change these incentives and there is a need to bring these changes to encourage the taking up of the prescribed ethical practices on a uniform basis.

Another advantage of soft regulation is that it allows for flexibility in the negotiation process. The client can choose to take an active role without requiring an in-depth knowledge of evidentiary or procedural law, and imposition of ethical standards in a mandatory manner may affect this ability of the client to be the driver of the negotiation, especially as it may not be expected of them to know about the guidelines. As a counter argument, it is arguable that this flexibility is still retained in the same manner as negotiations without prescribed ethics because a) lawyers are part of the negotiation and may advise their client as they would for a legal issue, and b) the guidelines of ethics are applicable largely on the lawyer and not the client.

A disadvantage and consequently a benefit of adopting a hard law on ethics is that where the negotiation is one with parties of different cultures and countries, the mere recommendation of ethics or guidelines are unlikely to affect the behaviour of such parties because they fail to have the same legitimacy as those of hard law which prescribe the boundary in which parties can operate. This disadvantage may be off set with the proper promotion of the guidelines and the large scale up take of these across the board but this remains a substantial issue.

Making ethics hard law has the advantage of placing both negotiation and litigation on an equal footing, impacting the perception and acceptability of this option, along with the

seriousness with which it is treated in law. The counter to this is that an implication of this equivalence may result in a potential increase in the costs of negotiation. First, lawyers are likely to charge higher amounts where their negotiation work will require a study of guidelines against any strategy or statement to be made in the negotiation, and it may also result in higher discovery costs, preparation time as well as longer negotiation times. The author of this paper leans towards adoption of hard regulation especially owing to the lack of other safeguard and incentives to ensure compliance with any code of ethics along with the efficiency and allocation advantages that follow if both parties play by these rules.

On a concluding note, a binding regulation that seeks to prescribe acceptable and expected practices in negotiation has to be broader that the visualization in any present professional code of conduct. As pointed out before, negotiation deals with not just matters involving a legal right but also matters involving collaboration or commitment where no legal right is involved. This differentiation should also be reflected in the code of ethics, with additional restrictions on matters involving a clear legal right, and with more flexibility in matters not concerning legal rights to allow for commercial exigency, reasoning, judgment, and other social and emotional needs to be satisfied from the negotiation aimed to preserve the sanctity of negotiated settlement.

6. CONCLUSION

The research question of this paper was whether there is a need for a code of ethics that is specific to negotiation. The methodology followed was to begin by examining the binding standards of conduct for lawyers and contrasting this to the absence of any form of regulation in the negotiation context. The examination highlights that i) certain ethical constraints on lawyers are felt necessary, even in the presence of a neutral third party (judge) that finally makes the decisions, and ii) the standards' inadequacy to effectively accommodate negotiations within their scope. In lieu of any other authorities which may regulate lawyers participating in negotiations, the paper turns to scholarship to determine whether there is an agreement on the potential of ethics in negotiation to produce tangible benefits in the mass of what has been written on negotiation approaches and tactics. The paper finds that there exists such a potential which can be realised through a code of ethics for negotiation. Having concluded as much, the framework of such a code is deliberated upon, in an attempt to

provide a way forward. The proposition is in the form of a general argument, and is applicable to all jurisdictions but ultimately has the most relevance for India.