

PROMOTING TRUTHFULNESS IN NEGOTIATION: A MINDFUL APPROACH

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I. INTRODUCTION

If “only saints and fools can be relied on to tell the truth” in negotiation,¹ it is destined to remain a domain of deceit.² But does it have to be that way? Is deception endemic to negotiation? Are lawyers, in particular, doomed to be deceitful in its course? I do not think so.

Nevertheless, when I recently broached the topic of truthfulness in negotiation with an esteemed ADR³ colleague, he was remarkably skeptical. In fact, he went so far as to say that lawyers should not be expected to be truthful in negotiation, and that any suggestion to the contrary would be pretty far-fetched.

Although I cannot speak with certainty to the rationale of my esteemed colleague, I surmise that such a response stems in great part from the stereotypical resolution of two competing ethical considerations. On the one hand, the lawyer is generally expected to be forthright in her⁴ dealings with others;⁵ on the other, the lawyer is con-

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1. Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1233 (1990) (explaining the impact of high stakes and common assumptions upon truthfulness in negotiation).

2. Cf. Scott R. Peppet, *Can Saints Negotiate?: A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83, 90-95 (2002) (debating the constraints that a “saintly” lawyer may face in competitive negotiation situations). See generally discussion *infra* Part II.

3. Alternative, or Appropriate, Dispute Resolution. Negotiation is a principal means of ADR.

4. Although I have generally made reference to the feminine gender in preference to the

To practice mindfulness is to proceed upon a path to greater awareness.¹⁹ Hopefully, this Article will serve as a guide for the lawyer-negotiator, and provide some food for thought along the way. Part II of this Article examines reasons why the lawyer may employ deceptive negotiation strategies, as well as the shortcomings of rule-based controls. Part III explores the concept of mindfulness and how mindfulness may influence a more truthful course in the lawyer's practices. This Article concludes with the proposition that the interests of truthfulness in negotiation would be best promoted by ethical principles that are nurtured from within—and that mindfulness provides a key to such internal ethical growth.

19. The characterization of mindfulness as a process, as well as a condition, is consistent with its Eastern roots. The word *Tao*, Chinese for "way" or "path," metaphorically describes life and the quest for meaning. KABAT-ZINN, *supra* note 13, at 87.