THE LEGALITY OF DECEPTION IN NEGOTIATIONS

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"That lies are necessary in order to live is itself part of the terrifying and questionable character of existence."[1]

ABSTRACT

Deception is pervasive in negotiation, yet the law governing it remains fragmented, undertheorized, and sometimes incoherent. While many Articles have covered the ethics of deceit in negotiations, this Article analyzes the legality of the practice. Drawing on common-law fraud, puffery jurisprudence, disciplinary decisions, empirical studies, and the Model Rules of Professional Conduct, it shows that existing doctrine creates a patchwork of inconsistent standards that oscillate between permissiveness and prohibition. Courts tolerate strategic ambiguity, optimism, and certain forms of nondisclosure, while condemning other misstatements that differ only in degree rather than kind. These inconsistencies persist because negotiation itself is built on information asymmetries and adversarial incentives, making the boundary between legitimate advocacy and actionable deceit inherently unstable. The Article develops a novel framework for evaluating deception along a "truthfulness spectrum," illustrating through hypotheticals and case law why line-drawing remains deeply subjective and why the current regulatory landscape disproportionately harms those in disadvantaged communities. By synthesizing doctrine, ethics, and negotiation theory, the Article aims to clarify the expectations that should govern bargaining behavior and offers a foundation for more coherent and equitable regulation of deception in negotiation.

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[1] FRIEDRICH NIETZSCHE, THE WILL TO POWER 451 (Walter Kaufmann & R.J. Hollingdale eds., Vintage Books ed. 1968).

I. INTRODUCTION

Few features of negotiation are as universal—or as undertheorized—as deception. Whether in pre-litigation bargaining, settlement discussions, transactional deal-making, or everyday consumer exchanges, negotiators routinely omit inconvenient facts, inflate valuations, or strategically mischaracterize their intentions. Negotiation training treats deception not merely as an unfortunate side effect of adversarial bargaining, but as an essential strategy to the bargaining process. This reality is reflected in the expectations from negotiators. As one expert candidly admits, "I've never been involved in legal negotiations where both sides didn't lie."

The law's treatment of deception in negotiation is anything but straightforward. While certain kinds of puffery, optimism, and strategic ambiguity are tolerated, other deceptive practices trigger civil liability, rescission of an agreement, and professional discipline for lawyers. Courts frequently invoke familiar concepts such as "material facts," "reasonable reliance," and "intent to mislead," but they apply them inconsistently and with little theoretical coherence. The boundary between hard bargaining and actionable fraud is inherently elusive. Although the Model Rules of Professional Conduct prohibit lawyers from making false statements of material fact, they simultaneously carve out broad exceptions for settlement intentions, valuations, and estimates—categories at the heart of most negotiations.[2]

This doctrinal ambiguity creates two problems. First, it leaves negotiators—including lawyers who have ethical duties that exceed those of ordinary market actors—without clear guidance about which tactics are permissible. Second, it

[2] *See infra* notes 136–159 and accompanying text.

obscures the normative stakes of deception itself, regardless of whether deception in negotiation is understood as a defensible competitive strategy, a consensual feature of bargaining, or a practice that disproportionately harms the vulnerable and corrodes trust in the legal system. This creates an unequal playing field in which those least willing to deceive in a negotiation are at a disadvantage. This perverse result is particularly problematic because it disproportionately affects members of at-risk communities due to their lack of negotiation training and lack of resources necessary to investigate the claims of their negotiation opponent.

Ultimately, this Article contends that the law's ambivalence reflects a deeper structural challenge: deception in negotiation resists easy categorization because negotiation itself is built on information asymmetry, strategic ambiguity, and adversarial incentives. Understanding how and when the law should regulate deception in negotiations requires clarity about the purposes of negotiation, the expectations of its participants, and the values the legal system seeks to promote, all while being mindful of pragmatic concerns. By providing a valuable, novel framework for evaluating deception in negotiations, this Article will hopefully serve as a powerful catalyst to spark meaningful change in this critical area of negotiation.

Much has been written about the ethics and pragmatism of using deceit in negotiations, but very little has been written about the legality of using deceit in negotiations.[3] This Article aims to fill this gap in negotiation literature. This

[3] For the ethics and pragmatism of deception in negotiations, *see* Alan Strudler, *On the Ethics of Deception in Negotiation*, 5 BUS. ETHICS Q. 805 (1995); Karl Aquino, *The Effects of Ethical Climate and the Availability of Alternatives on the Use of Deception During Negotiation*, 9 INT'L J. OF CONFLICT MGMT. 195 (1998); Todd Rogers, Richard Zeckhauser, Francesca Gino, Michael I. Norton, & Maurice E. Schweitzer, *Artful Paltering: The Risks and Rewards of Using Truthful Statements to Mislead Others*, 112 J. PERSONALITY & SOC. PSYCH. 456 (2017); Joseph P. Gaspar, Redona Methasani, & Maurice E. Schweitzer, *Fifty Shades of Deception: Characteristics and Consequences of Lying in Negotiations*, 33 ACAD. MGMT. PERSPS. (2019); Charles N. C. Sherwood, *A Lie Is a Lie: The Ethics of Lying in Business Negotiations*, 32 BUS. ETHICS Q. 604 (2022); Albert Z. Carr*, Is Business Bluffing Ethical?*, HARV. BUS. REV., Jan.–Feb. 1968, at 143–53; Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. ON DISP. RESOL. 481 (2008); Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1272 (1990); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 4 AM. B. FOUND. RES. J. 926, 927 (1980); Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1 (1987); Joseph P. Gaspar, Redona Methasani, & Maurice E. Schweitzer, *Deception in Negotiations: Insights and Opportunities*, 47 CURRENT OP. PSYCH. 1 (2022); Alan Strudler, *Lying About Reservation Prices in Business Negotiation: A Qualified Defense*, 33 BUS. ETHICS Q. 763 (2023); Stefanie Jung, *Bluffing in Business-to-Business Contract Negotiations*, 92 S. CAL. L. REV. 973 (2019); James K. L. Lawrence, *Lying, Misrepresenting, Pugging and Bluffing: Legal, Ethical and Professional*

Article examines the legality and ethics of deception in negotiations in the following eleven parts. Part II defines the foundational concepts—distinguishing lies from deceptions, clarifying the role of intent, and explaining why these nuanced distinctions matter. Part III surveys empirical and anecdotal evidence demonstrating that deception is not an aberration but a pervasive and even expected component of bargaining behavior. Part IV examines the principal justifications offered for deceptive tactics, including defensive honesty, consensual deception, and efficiency-based arguments. Part V turns to the opposing view, presenting arguments for banning all lies in negotiation and exploring the distributive harms such deception imposes on vulnerable parties and the broader legal system. Part VI analyzes the doctrine of puffery, highlighting courts' inconsistent treatment of these exaggerated statements and the challenges of distinguishing permissible hyperbole from actionable misrepresentation. Part VII outlines the elements of common law fraud and the difficulties of drawing principled lines of demarcation regarding materiality, opinion, recklessness, and intent in negotiation settings. Part VIII surveys case law in which courts and disciplinary bodies have confronted deceptive bargaining tactics, showing the inconsistency in how judges intervene. Part IX turns to lawyers specifically, examining the unique ethical tensions they face as advocates for clients, surveys revealing widespread confusion on the subject, uncertain guidance provided by the Model Rules, and inadequate coverage of the subject in law schools. Part X examines the doctrinal and practical difficulty of drawing clear lines between acceptable and unacceptable deception, using a series of hypotheticals to illuminate the subjective "truthfulness spectrum." Finally, Part XI concludes by synthesizing the insights of the preceding sections to demonstrate how existing rules form a fragmented, inconsistent, and often incoherent regulatory landscape.

II. DEFINITIONS

When discussing lying and the use of deception in a negotiation, it is important to define the terms involved. A lie is typically defined as "a false statement made by one who knows its falsity and with the intent to deceive another as to the truth."[4] Note that this definition requires intent. Therefore, someone who mistakenly

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Standards for Negotiators and Mediation Advocates, 29 OHIO ST. J. ON DISP. RESOL. 35 (2014); Al Sturgeon, *The Truth Shall Set You Free: A Distinctively Christian Approach to Deception in the Negotiation Process*, 11 PEPP. DISP. RESOL. L.J. 395 (2011); Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83 (2002); Charles B. Craver, *Negotiation Ethics for Real World Interactions*, 25 OHIO ST. J. ON DISP. RESOL. 299 (2010); John W. Cooley, *Defining the Ethical Limits of Acceptable Deception in Mediation*, 4 PEPP. DISP. RESOL. L.J. 263 (2004).

[4] Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1, 11 (1987).

believes a 1,400 square foot house has 1,500 square feet is not lying when he tells others it has 1,500 square feet.

It is important to further distinguish a lie from deception. Deception is generally defined as "any other method of concealing the truth, including silence."[5] Therefore, every lie is a deception but not every deception is a lie. For example, if a potential car buyer that has been in an accident says, "Wow, this car has only 40,000 miles and has never been in an accident, this is a great deal," and the seller responds, "It certainly is a good deal." That would be a deception, although not a lie. Likewise, imagine a negotiation regarding a car with a known, major, mechanical issue. After a short test drive where the mechanical issue did not cause any problems, the potential buyer asks, "Does the car have any mechanical issues?" The seller responds, "Well, you just took it on a test drive, and it drove perfectly, didn't it?"

III. FREQUENCY OF DECEPTION IN NEGOTIATIONS

Deception is not merely common in negotiations—it is endemic.[6] This is a function of the process's inherent information asymmetries, low detection risks, and incentives that reward strategic misrepresentation.[7] This reality is acknowledged across philosophical observation, practitioner candor, negotiation theory, and empirical research, painting a picture of bargaining as a domain where deception constitutes a core competency rather than an ethical outlier.[8] Far from episodic lapses, deceit emerges spontaneously in most interactions, and people are not particularly good at detecting lies, as demonstrated by studies that found people could only detect lies at an accuracy rate of 54%.[9] The alternative dispute resolution process—in which the vast number of legal disputes are resolved—is also characterized by deception.[10]

A. Philosophical and Theoretical Foundations of Deception's Ubiquity

Humanity's proneness to deceit predates modern bargaining theory and finds classic expression in foundational texts familiar to negotiators. Niccolò Machiavelli observed in *The Prince* that "[a] deceitful man will always find plenty

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[5] *Id.*

[6] *See infra* notes 3–33.

[7] *See infra* notes 3–33.

[8] *See generally* James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 5 AM. BAR FOUND. RSCH. J. 926, 927 (1980).

[9] Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCH. REV. 214, 214 (2006).

[10] John W. Cooley, *Defining the Ethical Limits of Acceptable Deception in Mediation*, 4 PEPP. DISP. RESOL. L.J. 263, 264 (2004).

who are ready to be deceived,"[11] underscoring not just the ease of lying but the counterpart's frequent willingness to accept it—a dynamic that negotiations exploit through feigned urgency or inflated valuations.

Contemporary evolutionary psychology reinforces this innate tendency. David Livingstone Smith argues that "lying is not exceptional; it is normal, and more often spontaneous and unconscious than cynical and coldly analytical," as "[o]ur minds and bodies secrete deceit," [12] rooted in evolutionary adaptation that conferred survival advantages.[13] In negotiation's "informational game,"[14] John W. Cooley explains that it is "quite rare that caucused mediation . . . occurs without the use of deception by the parties, by their lawyers, and/or by the mediator in some form."[15]

B. Anecdotal and Practitioner Evidence

Leading scholars and practitioners concur that deception saturates bargaining, viewing it as indispensable rather than incidental. Ann E. Tenbrunsel describes negotiations as a "breeding ground" for misrepresentation, propelled by incentives and temptation that erode ethical resolve.[16] Richard S. Adler asserts bluntly, "There's a lot of deception in negotiations,"[17] while G. Richard Shell observes that "[c]ommercial negotiations seem to require a talent for deception."[18] Renowned expert Charles Craver opens workshops declaring, "I've never been involved in legal negotiations where both sides didn't lie."[19]

James J. White elevates this to theory, analogizing negotiators to poker players: "Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. . . . The critical difference between those who are successful negotiators and those who are not exists in this capacity both to mislead and not to be misled."[20] White deems it axiomatic that "[t]o conceal one's true position, to mislead an opponent about one's true settling point, is the essence

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[11] NICCOLÒ MACHIAVELLI, THE PRINCE 41 (W.W. Norton & Co. ed., 1977).

[12] DAVID LIVINGSTONE SMITH, WHY WE LIE: THE EVOLUTIONARY ROOTS OF DECEPTION AND THE UNCONSCIOUS MIND 15 (2004).

[13] *Id.* at 15–20.

[14] Cooley, *supra* note 10, at 264.

[15] *Id.*

[16] Ann E. Tenbrunsel, *Misrepresentation and Expectations of Misrepresentation in an Ethical Dilemma: The Role of Incentives and Temptation*, 41 ACAD. MGMT. J. 330, 330 (1998).

[17] Robert S. Adler, *Negotiating with Liars*, 48 MIT SLOAN MGMT. REV. 69, 69 (2007).

[18] G. Richard Shell, *When Is It Legal to Lie in Negotiations?*, 32 MIT SLOAN MGMT. REV. 93, 93 (1991).

[19] Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. ON DISP. RESOL. 481, 484 (2009).

[20] White, *supra* note 8, at 928.

of negotiation,"[21] and "misleading the other side is an essential aspect of most negotiations."[22]

C. Structural Conditions Facilitating Deception

Negotiations breed deceit through three interlocking features: information dependence and asymmetries, poor human lie-detection, and normative expectations of puffery. First, parties depend on adversary disclosures yet face asymmetric access to key facts.[23] Maurice E. Schweitzer and Christopher K. Hsee document how negotiators invoke "elastic justification" to stretch truths about uncertain information—like projected cash flows or damage estimates—exploiting these gaps without crossing into outright falsehood.[24] Humans are largely ineffective at detecting deception. A meta-analysis of 116 experiments comprising over 10,000 judges discovered average accuracy rates barely above 50%, with verbal cues far less diagnostic than assumed.[25] Third, norms regarding negotiation give broad license for the practice.[26]

D. Empirical Evidence of Prevalence and Payoffs

Studies confirm deception's dominance, not just in its frequency, but also in the benefits of its use. Deceptive negotiators consistently outperform honest negotiators, capturing greater surplus in simulated settings.[27] A 2017 study analyzed "artful paltering" which consists of truthful yet misleading statements such as "our offer reflects market comps."[28] It found that this form of deception was highly effective.[29] One study found that direct questions may reduce strategic omissions, but fabrications remain unfazed.[30] Another study reveals bargainers

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[21] *Id.*

[22] *Id.* at 926.

[23] Maurice E. Schweitzer & Christopher K. Hsee, *Stretching the Truth: Elastic Justification and Motivated Communication of Uncertain Information*, 25 J. RISK & UNCERTAINTY 185, 185 (2002).

[24] *Id.* at 188.

[25] Bond & DePaulo, *supra* note 9, at 214.

[26] Shell, *supra* note 18, at 93.

[27] *See* Todd Rogers, Richard Zeckhauser, Francesca Gino, & Michael I. Norton, *Artful Paltering: The Risks and Rewards of Using Truthful Statements to Mislead Others*, 112 J. PERSONALITY & SOC. PSYCH. 456 (2017); *see also* Maurice E. Schweitzer & Rachel Croson, *Curtailing Deception: The Impact of Direct Questions on Lies and Omissions*, 10 INT'L J. CONFLICT MGMT. 225 (1999).

[28] Rogers et al., *supra* note 27, at 457.

[29] *Id.* at 471.

[30] Schweitzer & Croson, *supra* note 27, at 225.

routinely expect misrepresentation, likely amplifying its frequency.[31]

E. Contextual Moderators of Deception Frequency

Deception's incidence varies predictably, shaped by interaction horizon and enforcement. In non-recurring negotiations lacking legal sanctions, a significant amount of lies can be expected due to high gains and low detection risks.[32] A 2021 study confirms this, finding that for non-recurring negotiations where verification costs are high, deception is frequent.[33] Conversely, there is evidence to suggest that deception is somewhat mitigated in recurring negotiations.[34] The benefits of deception also seem to be positively correlated with experience. Studies find that trained negotiators—those better at both deploying and detecting deceit—are able to extract more surplus from less experienced negotiators.[35]

F. The Nonpublic Nature of Negotiations and Adverse Selection

The largely bilateral nature of negotiations sustains deception as the low-risk default.[36] Deceitfulness often only surfaces through happenstance,[37] thus minimizing expected costs and inviting more deception.[38] James J. White describes how this creates an unfortunate feedback loop whereby low detection spurs deceivers, systematically disadvantaging the honest and coercing their adaptation to deception.[39] Such dynamics explain deception's persistence, foreshadowing doctrinal challenges in distinguishing puffery from fraud.

IV. JUSTIFICATIONS FOR DECEPTION IN NEGOTIATIONS

The use of deceit in negotiations is a widely accepted practice.[40] Consequently, numerous justifications have been offered for the practice. Some attempt to justify deceit in negotiations by analogizing the practice to that of self-defense.[41] Under

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[31] Tenbrunsel, *supra* note 16, at 330–39; Adler, *supra* note 17, at 70.

[32] Stefanie Jung, *Acceptable Lies in Contract Negotiations*, 2021 J. DISP. RESOL. 255, 284 (2021).

[33] *Id.*

[34] *Id.*

[35] Bond & DePaulo, *supra* note 9; White, *supra* note 8.

[36] White, *supra* note 8, at 926.

[37] *Id.*

[38] *Id.* at 927.

[39] *Id.*

[40] Charles N.C. Sherwood, *A Lie Is a Lie: The Ethics of Lying in Business Negotiations*, 32 BUS. ETHICS Q. 604, 608–09 (2022).

[41] *See* Alan Strudler, *On the Ethics of Deception in Negotiation*, 5 BUS. ETHICS Q. 805,

this view, the negotiator is justified in using deceit to defend himself from his opponent taking advantage of him.[42] This is sometimes referred to as "defensive honesty."[43]

Others attempt to justify the practice of deceit in negotiations by focusing on the expectations of both sides. This may be referred to as "consensual deception."[44] Advocates for this position would argue that, while deceit is normally wrong, if both sides are generally aware of the practice, then the harm that typically comes from deceit would not be present.[45] This is similar to other competitive endeavors such as sports or games.[46] It is not unethical for a pitcher to throw a curve ball or a poker player to bluff because the opposing players have implicitly consented to such behavior by participating in an activity where such practices are known to be commonplace. As one commenter noted, "No one expects poker to be played on the ethical principles preached in churches."[47]

Advocates for this view have strong evidence to support their position. The reality that deception is commonplace in negotiations implies that most negotiators are aware of the practice.[48] Additionally, negotiation training appears to be based on the assumption that both sides will attempt to deceive throughout the process. For example, a common mantra in negotiation training is to "never accept a first offer," even if the other side claims it is literally the best they can do.[49]

Finally, some have posited that the use of deception in negotiations is partially justified because it produces net benefits. Deception may not only provide a benefit to the side using it, but also to the other side.[50] For example, deceit may lead to one

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805–06 (1995); Russell Korobkin, *Behavioral Ethics, Deception, and Legal Negotiation*, 20 NEV. L.J. 1209, 1236–38 (2020).

[42] *Id.*

[43] J. Gregory Dees & Peter C. Cramton, *Shrewd Bargaining on the Moral Frontier: Toward a Theory of Morality in Practice*, 1 BUS. ETHICS Q. 135, 148 (1991).

[44] Cooley, *supra* note 10.

[45] Strudler, *supra* note 41, at 806; Steven J. Johansen, *This is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 ARIZ. ST. L.J. 961, 971–72 (2006) ("The nature of negotiation assures that a lawyer will be heard by a skeptical audience that will be less inclined to be duped by half-truths.").

[46] Sherwood, *supra* note 40, at 610; Korobkin, *supra* note 41, at 1235-36.

[47] Sylvia E. Stevens, *A Tangled Web: "What a Web of Lies We Weave, When First We Practice to Deceive*," 58 OR. ST. B. BULL. 33, 35 (1997) ("Certainly, the goal of a negotiator, like that of a poker player, is that his opponent will overestimate the value of his hand. Like a poker player, the effective negotiator wants to facilitate his opponent's inaccurate assessment.").

[48] *See supra* notes 8–39 and accompanying text.

[49] Shell, *supra* note 18, at 95.

[50] *See* Dorian Laurentiu Florea, Cătălin Mihail Barbu & Claudia Cristina Rotea, *Placebo Outsourcing: When Does Provider's Bluffing Enhance Customer Satisfaction?*, 37

side obtaining a great deal and the other side experiencing the positive emotions of believing that they received a great deal.[51] A 2019 study found that certain types of lies—such as those involving emotions and price—often produce net economic benefits in a negotiation.[52]

V. ARGUMENTS FOR BANNING ALL LIES

Despite the reality that lying in negotiation is commonplace, expected by both sides, and taught in negotiation training, some argue that any form of lying is unethical and should be legally impermissible. For example, Judge Alvin B. Rubin posits two principles regarding negotiation and deception. First, "negotiate honestly and in good faith . . . ."[53] Second, "do not take unfair advantage of another . . . ."[54] Judge Rubin acknowledges that a negotiator who unilaterally engages in honest behavior could be at a disadvantage.[55] However, he makes the argument that when attorneys use deceptions in their negotiations, this likely has a negative effect on society's opinion of lawyers.[56]

Perhaps by limiting the use of lying in negotiations there would be benefits. For example, the people most likely to be harmed by lying in negotiation are the most vulnerable. This is because they are less likely to have grown up with parents who imparted this knowledge of how to negotiate. Additionally, the disadvantaged are more likely to find themselves in a desperate situation where they are unable to take the time to scrutinize the claims made by the person they are negotiating with. This is particularly unfortunate as these are the very people who need an honest deal the most. And this creates a backwards environment whereby the most trusting people are punished and the least trusting people are rewarded.

The promotion of lying in negotiations does not just hurt the disadvantaged. The more that people in a negotiation lie regarding their true interests, the harder it is to find win-win outcomes. Therefore, less lying in negotiations would likely lead to more integrative negotiations and less distributive negotiations. And lying leads to inefficiencies in the negotiation process, as it requires parties to dedicate resources to prevent and detect deception.[57]

The negative effects of lying in negotiations may extend to other areas as well. There is evidence to suggest that dishonest behavior produces greater tolerance of

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J. BUS. & INDUS. MKTG. 1299 (2022) (explaining the often positive relationship between a provider's bluffing and customer satisfaction).

[51] *Id.* at 1308.

[52] Jung, *supra* note 32, at 295.

[53] Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577, 593 (1975).

[54] *Id.*

[55] *See id.* at 592–93.

[56] *Id.*

[57] Jung, *supra* note 32, at 284.

dishonest behavior generally. For example, a 2011 study was structured to give one group of participants the option to cheat while not giving a second group that option.[58] The former group later displayed much more tolerance toward dishonest behavior in general when compared to the latter group.[59]

VI. PUFFERY JURISPRUDENCE

Puffery is a somewhat amorphous term, but is generally defined as "an exaggerated opinion—as opposed to a factual misrepresentation—with the intent to sell a good or service."[60] Because nonfactual opinions cannot be objectively measured, it is presumed that a reasonable person in a negotiation would not rely on such statements.[61] Puffery is generally considered to be a form of deception but is nevertheless permissible during negotiation.[62]

The protected status of puffery is found in multiple sources. The U.C.C. explains that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."[63] The Restatement (Second) of Contracts § 168 and § 169 refer to how statements of opinion—referred to as "dealer's talk"—are often not actionable unless they imply undisclosed facts.[64]

While the notion of puffery is well documented, the application of the principle is subjective. This is because the line between permissible puffery and impermissible misrepresentation and fraud is amorphous.[65] For instance, there are examples of courts classifying a statement as puffery even though it did technically encompass a factual claim.[66]

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[58] Lisa L. Shu et al., *Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Motivated Forgetting*, 37 PERSONALITY. & SOC. PSYCHOL. BULL. 330, 337 (2011).

[59] *Id.* at 338.

[60] *Puffery*, BLACK'S LAW DICTIONARY 1269 (8th ed. 1999).

[61] *See* Ivan L. Preston, *The Definition of Deceptiveness in Advertising and Other Commercial Speech*, 39 CATH. U. L. REV. 1035, 1046–47 (1990).

[62] Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV.. 1219, 1244–45 (1990).

[63] U.C.C. § 2-313 (3) (A.L.I. & UNIF. L. COMM'N 2004).

[64] *See* RESTATEMENT (SECOND) CONT. §§ 168, 169.

[65] Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. ON DISP. RESOL., 481, 514–15 (2008); John W. Cooley, *Defining the Ethical Limits of Acceptable Deception in Mediation*, 4 PEPP. DISP. RESOL. L.J. 263, 268 (2004) (referencing the "mysterious, undefined point the line may be crossed" between permissible puffery and impermissible fraud).

[66] *See, e.g.*, Oestreicher v. Alienware Corp., 544 F.Supp.2d 964, 973 (N.D. Cal. 2008) (holding that computer advertising claims of being "faster" and "more powerful" are non-actionable puffery) [https://perma.cc/3M3U-WW2U].

VII. COMMON LAW FRAUD

Common law fraud occupies a central but often misunderstood place in the law of negotiation. While the elements that make up the cause of action may appear straightforward, their application in a negotiation context is anything but. Courts routinely acknowledge that fraud does not impose a general duty to disclose information that undermines one's negotiating position, yet they just as often confront situations where silence, half-truths, and strategic ignorance blur the boundary between permissible advocacy and actionable misconduct. The doctrine's structure invites difficult line-drawing questions discussed in this section.

At common law, fraud requires the following five elements: (1) a false representation of a material fact made by the defendant, (2) with knowledge or belief as to its falsity, (3) with an intent to induce the plaintiff to rely on the representations, (4) justifiable reliance on the misrepresentation by the plaintiff, and (5) damage or injury to the plaintiff by the reliance.[67] Fraud renders the contract voidable at the discretion of the defrauded party.[68] Case law regarding fraud generally does not create a duty to proactively disclose information that is harmful to one's position.[69]

The elements of common law fraud create two difficult, line-drawing ambiguities. The requirement of a factual representation leads to uncertainty between what is a factual representation and what is merely a generalized opinion.[70] The *mens rea* requirement that the false statement be made knowingly produces a similar issue. When someone intentionally avoids acquiring the information that would lead to the knowledge that their claim is false, is this common law fraud? Imagine a CEO who suspects his company is in poor financial health and is about to meet with a potential investor to request additional funds. Would it be common law fraud for him to cancel a meeting with financial advisors because he suspects they will inform him of the company's poor financial health, thus making statements to the potential investor that the company is healthy be false?

The actions of the CEO in the previous hypothetical likely would not save him. This is because reckless disregard for the truth often counts as fraud.[71] But this demonstrates the inherently nuanced line-drawing nature of the distinction. It

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[67] Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 33 (2000) [https://perma.cc/KMR9-2GA6].

[68] *Id.* [https://perma.cc/7F5L-63NU].

[69] *Id.* at 34 [https://perma.cc/6UF5-AULD].

[70] *Id.* at 36–37 [https://perma.cc/3NVV-8GVK].

[71] Lanza v. Drexel & Co., 479 F.2d 1277, 1306 (2d Cir. 1973) (en banc) (noting that scienter may be established by "willful or reckless disregard for the truth" in a fraud context) [https://perma.cc/F77F-2ESP].

would be impossible to draw an objective line delineating exactly where the reckless standard is met. Additionally, the plaintiff making the accusation of fraud would have the burden of proof of showing the reckless nature of the conduct. This might require highly speculative accusations regarding the defendant's state of mind.

VIII. RELEVANT CASE LAW

This section provides sample case law on the subject. The boundaries of permissible deception in negotiation are neither intuitive nor uniform, and courts have struggled to articulate when nondisclosure, half-truths, or strategic misstatements cross the line into sanctionable misconduct. The following cases illustrate the wide spectrum of behaviors—ranging from silence about material information to affirmative misrepresentations—that courts have scrutinized when determining whether a lawyer or party acted unlawfully or unethically during the bargaining process. Taken together, these decisions reveal the recurring themes that animate judicial intervention: whether the information withheld or misstated was material, whether the actor intended to mislead, and whether the opposing party had a reasonable ability to uncover the truth. By examining these precedents, we can better understand the legal and ethical fault lines that separate hard bargaining from deceit—and the consequences that follow when negotiators step over that line.

In *State ex rel. Nebraska State Bar Association v. Addison*, a pedestrian sued two drivers for injuries they caused.[72] There were three insurance policies between the two drivers.[73] The pedestrian's lawyer, realizing that the hospital thought there were only two insurance policies, did not disclose the third policy in order to negotiate a reduced medical bill.[74] The court maintained that the existence of the third insurance policy was a material fact that the lawyer had a duty to disclose.[75] The lawyer received a six-month suspension for his actions.[76]

In *In re McGrath*, a lawyer was hired by an insurer to represent a hospital in a malpractice case.[77] The lawyer had access to a file documenting how the hospital had excess insurance coverage in the amount of $1,000,000.[78] But the lawyer omitted this second policy in negotiations and told the other side that the hospital only had coverage up to $200,000.[79] The plaintiff's attorney expressed skepticism

[72] 412 N.W.2d 855 (Neb. 1987) [https://perma.cc/FCH9-RA48].

[73] *Id.* at 856 [https://perma.cc/SQS6-SMPE].

[74] *Id*. [https://perma.cc/77BG-DD3Z].

[75] *Id.* [https://perma.cc/5DV7-BVMJ].

[76] *Id.* [https://perma.cc/57TK-Y99F].

[77] *Matter of McGrath*, 468 N.Y.S.2d 349 (1983) [https://perma.cc/Z49G-4XL3].

[78] *Id.* at 350 [https://perma.cc/9R2E-MSHL].

[79] *Id.* [https://perma.cc/5QRL-GV94].

regarding this claim but nevertheless decided to settle for $185,000.[80] In a disciplinary hearing after the truth was later discovered, the court determined that the hospital's lawyer acted negligently but not in bad faith or with the intent to mislead.[81] The hospital's lawyer was suspended for six months.[82]

In *Scofield v. State Bar of California*, an attorney represented the Agranowskys who were injured in an automobile crash on February 7th and another automobile crash on February 13th.[83] The Agranowskys' attorney presented identical medical bills to the insurance companies of both automobile crashes, never disclosing to either insurance company the existence of the other crash.[84] Additionally, the Agranowskys' attorney sent identical documentation of lost wages to both insurance companies.[85] The Supreme Court of California suspended the attorney for 30 days for affirmative representations made with intent to deceive.[86]

In *James v. Lifeline Mobile Medics*, an employee reluctantly accepted a settlement offer from the employer after winning a judgment against the employer at trial.[87] The employee sought to have the settlement agreement set aside after learning that the employer's lawyer lied about the employer losing $20,000 per month and that the employer was on the verge of bankruptcy.[88] The trial court determined that these statements were nothing more than permissible hyperbole and that the employee could have requested financial information to confirm the claims.[89] But the appellate court disagreed, suggesting that these statements were impermissible misrepresentations, though it ultimately reversed on breach grounds.[90]

In *Reed v. King*, the sellers of a house—although never proactively lying about the matter—never told the buyer that a woman and her four children were murdered in the house ten years ago.[91] The court reasoned that the buyer should not be expected to conduct research to discover potential murders, that the murders affect the value of the house, and that a seller has a duty to disclose facts materially affecting the value of the property that are known only to the seller.[92]

In *Kabatchnick v. Hanover-Elm Building Corp.*, a landlord falsely told the tenant that he had an offer to rent the space to a new tenant for $10,000 a year, and

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[80] *Id.* [https://perma.cc/N49Z-EHBW].

[81] *Id.* at 351–52 [https://perma.cc/UV6Y-26EL].

[82] *Id.* at 352 [https://perma.cc/3URF-DRR9].

[83] 401 P.2d 217, 217–18 (Cal. 1965) [https://perma.cc/B4WR-D8MN].

[84] *Id.* at 218 [https://perma.cc/VU4D-F49K].

[85] *Id.* [https://perma.cc/BJX7-CKSY].

[86] *Id.* at 219–20.

[87] *Scofield v. State Bar of Cal.* 792 N.E.2d 461, 466 (Ill. App. Ct. 2003).

[88] *Id*. at 466.

[89] *Id.* at 467.

[90] *Id.*

[91] Reed v. King, 193 Cal. Rptr. 130 (Cal. Ct. App. 3d Dist. 1983).

[92] *Id.* at 132–33.

therefore current tenant would have to re-negotiate his existing lease which was set at $4,500 a year, or face eviction.[93] The current tenant relied on the false statement from the landlord and agreed to a new lease at a higher amount.[94] The court acknowledged the general practice of sellers overstating the value of their product and, consequently, that buyers should not rely on such statements.[95] Nevertheless, the court held that the landlord's statement was a "representation of an existing fact" and was therefore actionable.[96]

In *Beavers v. Lamplighters Realty, Inc.*, the seller's realtor falsely told the buyer that "If you are going to do anything, you had better do it pretty quick, because I've got a buyer for it. . . the original builder and he is coming in . . . with a check [for $37,000] within the hour."[97] The plaintiff had originally offered $34,500 for the home.[98] But after hearing the story about an impending offer for $37,000 from a builder, he reasoned that the house must be worth more, and therefore offered $37,250, which was accepted.[99] The court referenced the rule that "statements by a vendor that a third person has offered him a certain sum for the property is a statement of a material fact affecting the value and may form the basis for an action of deceit."[100] Therefore, this is more than "mere puffing," it is a "fact-related lie."[101]

In *Moschelle v. Hulse*, the defendants sold plaintiff a business after showing income records for one month and a tax document that purportedly showed gross income for a year.[102] Defendants refused plaintiff's request to show income from the winter months, but assured the plaintiff that, although income in the winter is slim, it is enough to make payments and earn living expenses.[103] The court held that this, along with other statements, constituted constructive fraud permitting the plaintiff to rescind the contract.[104]

In *Garrett v. Mazda*, the car salesman told the customer that the car had only been used by himself and he had "babied it to death."[105] In reality, the car had been stolen, driven 10,000 miles by the thief, and the engine had to be replaced.[106] The

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[93] Kabatchnick v. Hanover-Elm Bldg. Corp., 103 N.E.2d 692 (Mass. 1952).

[94] *Id.* at 692–93.

[95] *Id.* at 693–94.

[96] *Id.* at 694–95.

[97] Beavers v. Lamplighters Realty, Inc., 556 P.2d 1328, 1329–30 (Okla. Ct. App. 1976).

[98] *Id.* at 1329–30.

[99] *Id.* at 1330.

[100] *Id.* at 1331.

[101] *Id.* at 1331.

[102] Moschelle v. Hulse, 622 P.2d 155, 157 (Mont. 1980).

[103] *Id.*

[104] *Id.* at 159–59.

[105] Garrett v. Mazda Motors of America, 844 S.W.2d 178, 180 (1992).

[106] *Id.*

court held that this crossed the line from mere puffery into fraud.[107] The court explained, "A party to a contract has a duty. . . to disclose any material fact affecting the essence of the . . . contract, unless ordinary diligence would have revealed the undisclosed fact."[108]

In *McVeigh v. McGuerren*, an attorney sought to reduce his client's past due child support by claiming that the client did not have the money to pay.[109] The court held that the compromise settlement reached as a result of this deception could be set aside.[110]

In *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, the court held that the attorney had an "absolute ethical obligation" to inform opposing counsel of the death of his client in a settlement negotiation.[111]

IX. LAWYERS AND DECEPTION

Trust in lawyers' representations anchors the legal system, yet negotiation doctrine reveals profound regulatory gaps that leave practitioners navigating ethical ambiguity. [112] Criminal defense lawyers routinely deploy deceptive strategies to create reasonable doubt for their clients. [113] Scholars propose irreconcilable standards: "caveat lawyer," [114] "total candor," [115] avoiding "unreasonable risk of harm,"[116] "permissible conventions of untruthfulness,"[117] and "golden rule reciprocal candor."[118] Some even propose an outright ban on all

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[107] *Id.* at 181.

[108] *Id.*

[109] McVeigh v. McGuerren,117 F.2d 672, 676 (7th Cir. 1940), *cert. denied*, 313 U.S. 573 (1941).

[110] *Id.* at 679.

[111] Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 508 (E.D. Mich. 1983).

[112] Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies They Tell,* 69 WASH. U. J. L. POL'Y, 37, 70–71 (2022).

[113] W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind,* 67 U. COLO. L. REV. 1075, 1100–12 (1996).

[114] Thomas F. Guernsey, *Truthfulness in Negotiation,* 17 U. RICH. L. REV 99, 103 (1982).

[115] Walter W. Steele, *Deceptive Negotiating and High-Toned Morality,* 39 VANDERBILT L. REV 1387, 1403 (1986).

[116] Rex R. Perschbacher, *Regulating Lawyers' Negotiations,* 27 ARIZ. L. REV 27,133–34 (1985).

[117] Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations,* 8 REV. LITIG 173, 199 (1989).

[118] Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761, 764 (1990).

deception.[119]

A. Lawyer Surveys

Empirical research consistently reveals that lawyers navigating negotiations often misunderstand, selectively apply, or consciously relax ethical rules governing truthfulness. Survey data show not only widespread uncertainty about the boundaries of permissible conduct, but also a surprising degree of comfort with deception in practice. Collectively, this body of research underscores the deep disconnect between the formal rules that purport to regulate attorney conduct and the everyday intuitions, habits, and pragmatic judgments that actually guide lawyers during negotiation.

A 1983 study involved a scenario where, in a deposition, the defendant-client made factual claims that he later remembered were false.[120] There, the defense attorney had a legal duty to correct the false statements.[121] However, more than half of the survey respondents reported that it was permissible to facilitate a settlement agreement based on the false testimony.[122] Additionally, some of the respondents even stated that it would be acceptable for an attorney to refer to the false testimony as if it were true in an effort to strengthen their position in the settlement negotiation.[123]

A 1988 study illustrates the confusion regarding Model Rules of Professional Conduct 4.1's requirements. [124] The survey asked participants about four hypothetical scenarios involving mistaken impressions, exaggerating an injury, lying about an injury, and lying about authorized settlement limits.[125] A consensus about the correct course of action was only reached in one of the scenarios..[126]

A 1989 study found that lawyers viewed minor deception as an acceptable part of the game of negotiation.[127] Furthermore, this study found that lawyers had only a cursory understanding of the relevant ethical rules and that they were comfortable with this level of understanding.[128]

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[119] Peters, *supra* note 4, at 50.

[120] Hinshaw & Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics,* 16 HARV. NEGOT. L. REV. 95, 111 (2011).

[121] *Id.*

[122] *Id.* at 112.

[123] *Id.*

[124] Larry Lempert, *In Settlement Talks, Does Telling the Truth Have Its Limits?*, 2 INSIDE LITIG. 1, 15 (1988) as cited in *id.* at 20.

[125] *Id.* at 20.

[126] Hinshaw & Albert*, supra* note 120, at 114. The consensus was reached on only one scenario.

[127] Scott S. Dahl*,* Ethics on the Table: Stretching the Truth in Negotiations, 8 Rev. Litig. 173, 194, (1989).

[128] *Id.* at 195.

A 1997 informal survey of 100 lawyers found that 73% of respondents had engaged in "settlement puffery."[129]

A 2011 study utilized a hypothetical pre-litigation settlement negotiation.[130] Participants were placed in the shoes of an attorney representing a client who believed his ex-girlfriend infected him with a fatal sexually transmitted disease.[131] The girlfriend admitted to having the disease and the client took two at-home tests that returned positive for the disease.[132] Right before settlement negotiations began, the client informed the attorney that he did not have the disease and that the take-home test results were false positives.[133] The client requested that his attorney not disclose this fact to the other side and pursue a favorable settlement.[134] Out of 729 survey respondents, 62% stated they would refuse the client's request, 19% would do as requested, and 19% were not sure what they would do.[135]

B. Model Rules of Professional Conduct

The Model Rules establish a balanced ethical framework for negotiation that prioritizes zealous advocacy within adversarial bounds, deliberately permitting certain tactics while prohibiting outright fraud. The Rules are rooted in the adversarial legal system, as the drafters viewed negotiation as a purely adversarial process.[136] This tension is embodied in the Preamble: "A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well-represented, a lawyer can be a zealous advocate on behalf of a client and also assume that justice is being done."[137]

Rules 4.1, 4.2, and 4.3 govern negotiation conduct. Rule 4.2 requires lawyers to "be fair in dealing with other participants,"[138] while Rule 4.1(a) prohibits false statements of material fact to third persons.[139] The official comment clarifies: "estimates of price or value placed on the subject of a transaction and a party's intention as to an acceptable settlement of a claim are not considered material facts."[140] Comments for Rule 4.1 elaborate on this point:

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[129] Hinshaw & Alberts, *supra* note 120, at 114.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.* at 116–17.

[135] *Id.* at 118.

[136] Gary T. Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411, 433 (1988).

[137] MODEL RULES OF PRO. CONDUCT pmbl. ¶¶ 2–3 (AM. BAR ASS'N 2020).

[138] *Id.* r. 4.2.

[139] *Id.* r. 4.1(a).

[140] *Id.* r. 4.1 cmt. (1983).

"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, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud."[141]

The Rule 4.2 comment further reinforces this: "Fairness in negotiation implies that representations by or on behalf of one party to the other party be truthful."[142] The American Bar Association Section of Litigation's Ethical Guidelines for Settlement Negotiations states that a lawyer "must not knowingly make a false statement of material fact (or law) to a third person."[143]

This calibrated permission—explicitly permitting misrepresentations regarding a party's willingness to accept a settlement—contrasts sharply with stricter duties elsewhere.[144] Model Rule 3.3(a) provides: "A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal."[145] Model Rule 4.2(b) requires disclosure "to correct a manifest misapprehension of fact or law resulting from a previous representation made by the lawyer or known by the lawyer to have been made by the client."[146] Rule 8.4(c) deems it "professional misconduct" to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[147] Rule 1.2(d) prohibits assisting clients in known fraudulent or criminal conduct.[148]

The prior Model Code of Professional Responsibility Disciplinary Rule 7-102 mandates that a lawyer shall not: "(3) conceal or knowingly fail to disclose what law requires revealing; (4) knowingly use perjured testimony or false evidence; (5) knowingly make a false statement of law or fact; (6) participate in creating or preserving false evidence; (7) counsel or assist illegal or fraudulent client conduct; or (8) knowingly engage in other illegal conduct or Disciplinary Rule violations."[149] The Restatement (Third) of the Law Governing Lawyers similarly bars failing to make law-required disclosures during negotiations.[150] These disciplinary provisions establish firm prohibitions on fraud and deceit, yet carve

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[141] *Id.*

[142] MODEL RULES OF PRO. CONDUCT r. 4.2 cmt. (AM. BAR ASS'N DISCUSSION DRAFT 1980).

[143] ABA Section of Litig., *Ethical Guidelines for Settlement Negotiations,* § 4.1.1 (1982).

[144] Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1, 26 (1987).

[145] MODEL RULES OF PRO. CONDUCT r. 3.3(a)(1) (AM. BAR. ASS'N 2024).

[146] *Id.* r. 4.2(b).

[147] *Id.* r. 8.4(c).

[148] *Id.* r. 1.2(d), 8.4(c).

[149] MODEL CODE OF PRO. RESP. DR 7-102(A)(3)–(8) (AM. BAR ASS'N 1983).

[150] RESTATEMENT (THIRD) OF THE L. GOVERNING LAWYERS § 98(3) (AM. L. INST. 2000).

out space for negotiation puffery where custom permits. This is further reinforced by external statutes.[151]

The ABA's Formal Opinion 06-439 confirms lawyers may not make false statements of material fact, but stipulates 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,' are not considered 'false statements of material fact.'"[152] The Model Rules of Professional Conduct define puffing as "the expression of an exaggerated opinion—as opposed to a factual representation—with the intent to sell a good or service."[153] The ABA rejected absolute truthfulness mandates, favoring the Preamble: "As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others."[154]

Contract law aligns: UCC § 1-304 and Restatement (Second) of Contracts § 205 require good faith in performance, but not precontractual negotiations, which most courts decline to impose.[155] "Misrepresentation"—"an assertion that is not in accord with the facts"—renders material, relied-upon statements voidable.[156] Charles Craver affirms ethical misrepresentations of settlement intentions or values are permitted, as Rule 4.1 recognizes no right to such information.[157]

Acknowledging behavioral challenges: lines between proper and improper conduct blur and lying pervades negotiations.[158] Yet, Professor G. Richard Shell argues the law takes a stronger anti-misrepresentation stance than negotiators assume—deeming unethical what courts deem illegal.[159] This framework supports the thesis: ethical rules intentionally accommodate negotiation realities, permitting puffery short of disciplinable fraud.

C. Lack of Law School Training

Negotiation constitutes the backbone of modern legal practice, yet most law

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[151] RESTATEMENT (SECOND) OF TORTS § 538(2) (AM. L. INST. 1977); 10 U.S.C. § 2306a (government contractors); 15 U.S.C. §§ 1705–1707 (interstate land sales); 15 U.S.C. §§ 1601–1693 (consumer transactions); 17 C.F.R. § 240.10b-5(2) (securities).

[152] ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-439, at 3, 8 (2006).

[153] MODEL RULES OF PRO. CONDUCT r. 4.1 cmt.(AM. BAR ASS'N 1983); BLACK'S LAW DICTIONARY 1247 (Bryan A. Garner ed., 9th ed. 2009).

[154] Paul Rosenberger, *Laissez-"Fair": An Argument for the Status Quo Ethical Constraints on Lawyers as Negotiators*, 13 OHIO ST. J. ON DISP. RESOL. 611, 616–17 (1998).

[155] U.C.C.§ 1-304 (AM. L. INST. & UNIF. L. COMM'N 2022); RESTATEMENT (SECOND) OF CONTRACTS§ 205 cmt. c (AM. L. INST. 1981).

[156] RESTATEMENT (SECOND) OF CONTRACTS§§ 159, 164 (AM. L. INST.1981).

[157] Charles B. Craver, *Negotiation Ethics for Real World Interactions*, 25 OHIO ST. J. ON DISP. RESOL. 299, at 318–19 (2010).

[158] Sissela Bok, *Lying: Moral Choice in Public and Private Life* xvii (1978).

[159] Shell, *supra* note 18, at 93.

schools provide strikingly little formal training in this essential skill—creating a profound disconnect between legal education and the ethical realities lawyers face daily. Far beyond discrete "settlement talks," lawyers spend much of their professional lives negotiating. This includes convincing skeptical clients to accept strategic recommendations, advocating sentencing terms with prosecutors and judges, and crafting settlement agreements that carefully balance litigation risk, transaction costs, and binding precedent. As scholar Walter Steele presciently observed three decades ago, "negotiating prior to litigating is so pervasive that it might be thought of as an inherent part of the litigation process."[160]

The curricular imbalance is indefensible given negotiation's empirical dominance. More than 95% of civil cases settle before trial—a figure that has held steady across decades of empirical research tracking both federal and state dockets.[161] Yet, legal education remains heavily weighted toward doctrinal analysis and courtroom advocacy, relegating negotiation, mediation, and alternative dispute resolution (ADR) courses to elective afterthoughts.[162] Even the American Bar Association has long recognized negotiation's practical primacy, yet formal training remains elective rather than systematic in most law school curricula.[163]

This neglect proves particularly acute when viewed through the lens of the Model Rules' deliberately ambiguous negotiation ethics. As detailed above, Rules 4.1, 4.2, and 4.3 explicitly tolerate "puffery," settlement posturing, and price/value estimates—tactics presupposing sophisticated judgment that novice attorneys rarely possess.[164] The Preamble's aspirational standard demands lawyers as negotiators secure results "advantageous to the client but consistent with

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[160] Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387, 1387 (1986).

[161] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459, (2004); *See also* Marc Galanter & Angela M. Frozena, *Pursuing Settlement in an Adversary Culture: Case Studies of Civil Dispute Resolution*, 69 L. & CONTEMP. PROBS. 1, 4–5 (2006).

[162] Steele, Jr., *supra* note 160, at 1387 (observing negotiation instruction's rarity in 1980s legal education—a trend largely unchanged); This lack of attention to ADR is of particular importance given the clear trajectory of judges becoming increasingly more favorable toward sending disputes to ADR. *See* Michael Conklin, *Benchmarked for Arbitration: Work Avoidance as an Explanation for Why Judges Have Become Increasingly Favorable Toward Compelled Arbitration*, 2024 PEPP. L. REV. 129, 137–42 (2024).

[163] Walter W. Steele, Jr., *supra* note 160, at 1390–91 (documenting negotiation training's absence from 1980s legal education—a persistent gap despite negotiation's centrality to practice); *See also* Gary T. Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411, 433 (1988) (noting ABA's deliberate rejection of absolute truthfulness training requirements).

[164] *See* Model Rules of Pro. Conduct r. 4.1 cmt. 2 (AM. BAR ASS'N2020) (excluding "estimates of price or value" and "a party's intention as to an acceptable settlement" from material facts).

requirements of honest dealing with others,"[165] yet law schools provide only minimal guidance for navigating this tension between zealous advocacy and ethical boundaries.

Compounding the problem, *U.S. News & World Report*'s law school rankings—whose twelve metrics dictate institutional prestige and resources—omit negotiation and ADR training entirely.[166] Absent curricular incentives, deans prioritize traditional doctrinal offerings despite negotiation's practical primacy.[167] When the ABA drafted the Model Rules, it consciously rejected mandates for absolute truth and fairness in negotiations, recognizing the adversarial system's inherent demands.[168] Law schools, by contrast, produce graduates unprepared for precisely these calibrated ethical realities—undermining compliance from the first client meeting.

The consequences extend beyond individual competence. Without grounding in negotiation's ethical fault lines, new lawyers risk either naive over-disclosure (jeopardizing client interests) or inadvertent ethical violations (crossing into Rule 8.4(c)'s "dishonesty, fraud, deceit, or misrepresentation").[169] This curricular failure thus perpetuates the very ethical uncertainties the Model Rules were designed to accommodate. This leaves the profession to learn adversarial negotiation and its boundaries through costly experience. The lack of law school training regarding negotiations is further problematic because women[170] and minorities[171] appear to be at a disadvantage in the process. Negotiation training appears to reduce these

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[165] *Id*. pmbl. ¶ 2.

[166] *See* Eric Brooks, Robert Morse, Owen Turnbull and Sam Wellington, *Methodology: 2025 Best Law Schools Rankings*, U.S. NEWS & WORLD REP. (Apr. 7 2025), https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology.

[167] *See* Michael Conklin, *Howard Law School, Race, and Peer Rankings: The Increasing Correlation Between Racial Salience and Preferential Rankings*, 59 WILLAMETTE L. REV. 189, 190–91 (2023) (explaining the great extent to which law schools are willing to go to improve their rankings and how a drop in the rankings can result in the termination of the dean).

[168] Gary T. Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411, 433 (1988).

[169] Model Rules of Pro. Conduct, r. 8.4(c) (A.B.A 2026).

[170] *See* Michael Conklin & Abbey Stemler, *Negotiating Inequality: A New Framework for Equity in Salary Negotiations*, 31 HARV. NEGOT. L. REV. ___ (forthcoming 2026) prepublication manuscript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5280956 (providing numerous studies demonstrating that women receive inferior negotiated outcomes when compared to their male counterparts regardless of strategy implemented).

[171] *See* Michael Conklin, *Negotiations in At-Risk Communities and Negotiating for Social Justice: A Review of Transformative Negotiation*, 17 NEGOT. & CONFLICT MGMT. RSCH. 349, 351 (2025) (explaining how minorities disproportionately lack access to financial reserves and how this results in significant disadvantages in personal negotiations).

negotiation gaps.[172]

X. LINE DRAWING DIFFICULTY

Drawing bright-line rules for when deception in negotiation becomes legally impermissible is far more challenging than it may first appear. This is because lying and deceit are not a binary, but rather, fall along a subjective "truthfulness spectrum."[173] While courts often speak in terms of "material facts," "intent to mislead," or "mere puffery," these categories quickly blur when applied to real bargaining dynamics. To illustrate the difficulty of establishing a universally accepted standard, the following hypothetical scenarios present a range of deceptive practices.

The reader will likely find it difficult to draw a line upon which legal liability should attach to the deception. Even more difficult would be to form a consensus with other people regarding exactly where this line should be. And even more difficult would be attempting to articulate a clear standard that could be consistently applied by others to similar grey areas that would be interpreted consistently with the reader's intentions. This confluence of factors illustrates the subjectivity of the determination and the consequent struggle of courts to provide uniformity. A list of examples to consider are below:

1) A car salesman falsely claims that he attended the same college as a potential buyer in order to build trust.

2) A car salesman claims, "You won't find another one of these in town with fewer miles; I promise you that," even though he knows a nearby dealer has one with fewer miles.

3) The seller of a television on Facebook Marketplace falsely claims that he needs the money to pay for his child's surgery.

4) After hearing the selling price (which is very agreeable), a potential buyer nevertheless "flinches" and says, "Ouch, that's a lot more than I thought."

5) A potential buyer of a used car falsely states that his neighbor has the same car with fewer miles for the same price.

6) A potential buyer of a television on Facebook Marketplace tells the seller that he can only go up to $280 because that's all the cash he has.

7) A real estate agent arranges for his friends to come by an open house and pretend to be interested in the house to make it appear in high demand.

8) A car salesman claims that this is the only model left on the lot and doesn't know when any more are coming in when in fact he knows that four more are coming in tomorrow.

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[172] *See* Michael Conklin, Roya Choupani & Erdoğan Doğdu, *Is It Really a Man's World? Using Real-Life Negotiations to Reframe the Negotiation Gender Gap*, 68 ST. LOUIS U. L. J. 145, 147 (2024) (describing a study that found the gender negotiation gap was largely eliminated when participants received negotiation training).

[173] John W. Cooley, *Defining the Ethical Limits of Acceptable Deception in Mediation*, 4 PEPP. DISP. RESOL. L.J. 263, 266 (2004).

9) An apartment lessor claims that the special discount rate ends today when in fact it will remain in effect for three more weeks.

10) A seller lists a bicycle on Facebook Marketplace for $650 but then creates two fake listings of a similar bike for $930 and $980 in order to make his real listing appear more attractive by comparison.

11) An attorney claims that his client will proceed to trial if a settlement of $22,000 is not reached. But in reality the client informed his attorney that anything above $18,000 is acceptable.

12) An employee threatens to take his former employer to court if he does not pay him $800 even though he knows the statute of limitations has run.

13) The seller of commercial HVAC units falsely tells a potential buyer, "I have never sold this model for less than $30,000."

14) The potential buyer of a car that has been in a major accident states, "Wow, this car has only 40,000 miles and has never been in an accident, this is a great deal." The seller responds, "It certainly is a good deal."

15) The seller of a car knows that it has major, mechanical issues. A potential buyer takes it for a short test drive where the issues happen to not occur. The potential buyer then asks, "Does the car have any mechanical issues?" The seller responds, "Well, you just took it on a test drive; did you notice any issues?"

16) A potential client asks an attorney where he graduated from law school. The attorney, who took one summer class at Harvard but received his degree from a fourth-tier law school replies, "I studied law at Harvard."

17) A business is determining which law firm to represent it in a complicated IRS audit. They ask a law firm that has never represented a business in such a matter but has represented twenty-five businesses in criminal matters, asking "How many businesses have you represented in IRS audits?" The law firm responds, "Well, if you include IRS audits and criminal matters, we have represented twenty-five businesses."

18) The potential buyer of a used car knows that the seller cannot sell until the first of next month. Coincidentally, the potential buyer does not need the car until then, but nevertheless falsely claims that he really needs the car tomorrow, but would be willing to wait until the first of next month if the buyer takes off an additional $500.

XI. CONCLUSION

Negotiation occupies a paradoxical space within the law: it is both a cornerstone of dispute resolution and a domain in which deception is taught, expected, and condemned. The cases, doctrines, and ethical rules surveyed in this Article reveal no unified theory of truthfulness in bargaining. Instead, negotiators must navigate a patchwork of inconsistent standards—some grounded in common-law fraud, others in professional ethics, and still others in pragmatic assumptions about the realities of bargaining. These inconsistencies result in a legal landscape in which a lawyer may mislead about settlement intentions but not about existing insurance coverage, where silence may be lawful in one context but actionable in

another, and where it is unclear if an exaggerated claim will be adjudicated as permissible puffery or impermissible misrepresentation.

What emerges from this doctrinal landscape is not a clear prohibition on deception, but rather a set of blurry, overlapping fault lines that turn on factors such as materiality, reliance, and intent—concepts that themselves resist precise definition in a negotiation setting. These ambiguities not only create uncertainty for negotiators but also undermine the normative coherence and predictability of the law.

The difficulty of drawing bright line distinctions between permissible and impermissible deception does not suggest that such a task is ultimately futile. Rather, it highlights the need for clear guidance about the expectations that should govern bargaining behavior. The adversarial nature of negotiations cannot alone justify a race to the bottom in which the most vulnerable are further disadvantaged. As this Article has shown, the very conditions that make negotiation fertile ground for deceit—information asymmetry, psychological manipulation, and the low likelihood of detection—also make it an arena where legal and ethical standards matter most.

Ultimately, the law's current approach reflects an unresolved tension between two competing visions of negotiation: one that views it as a strategic competition with deception as an inevitable element, and another that treats it as a component of a legal system that aspires to fairness, integrity, and public trust. Clarifying the role of honesty in negotiation is essential because negotiations profoundly affect numerous aspects of life. Furthermore, because negotiation norms are enforced by the courts, this issue affects the perceived legitimacy of the legal system.

The inherently subjective nature of distinguishing between permissible and impermissible deception in negotiation leads to widespread uncertainty. This is problematic because the less certainty there is regarding a matter, the more likely parties in a dispute will require a judge to settle the dispute, and the less likely a mutually beneficial settlement agreement may be reached.

By providing a valuable, novel framework for evaluating deception in negotiations, this Article will hopefully serve as a powerful catalyst to spark meaningful change in this underexamined and pressing area. Until courts, regulators, and scholars converge on a more coherent framework, deception in negotiation will remain what it has long been—common, contested, and only partially constrained.