

The Optimal Negotiator

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Negotiating is a mix of art and science, style and substance. It prizes common sense as much as the hard numbers. It requires emotional detachment and a high aspiration level. It is a game of power, both real and imagined. Some people play the game masterfully, others only dimly understand it...

This fast-paced, practical and highly interactive residential experience is built for those who are dead serious about developing their skills beyond mere competence...

2. CPA of Ontario, *CPA Code of Professional Conduct* Preamble (Underlines added)

Professional Behaviour

Chartered Professional Accountants conduct themselves at all times in a manner which will maintain the good reputation of the profession and serve the public interest.

A member's involvement in any organization should be based primarily upon a reputation for professional excellence. In particular, members who occupy positions of senior authority should recognize that such positions include an obligation to influence events, practices and attitudes within that organization. Accordingly, such members should encourage an ethics-based culture in their organizations that emphasizes the importance of ethical behaviour and compliance with generally accepted standards of practice of the profession...

Integrity and Due Care

Chartered Professional Accountants perform professional services with integrity and due care.

Members and firms are expected to be straightforward, honest and fair dealing in all professional relationships.

Personal character and ethical conduct

These principles have emerged out of the collective experience of the profession as it has sought, down the years, to demonstrate its sense of responsibility to the clients, employers and the public generally. By their commitment to honourable conduct, members and firms of CPA Ontario and its predecessors, throughout their history, have given particular meaning and worth to the designation and its predecessors. They have done so by recognizing that a code of professional conduct, which is enforceable by sanctions, does not by its nature state the most that is expected of members and firms, but simply the least.

Ethical conduct in its highest sense, however, is a product of personal character — an acknowledgement by the individual that the standard to be observed goes beyond that of simply conforming to the letter of a list of prohibitions.

3. CPA of Ontario, *CPA Code of Professional Conduct* Section 202: Integrity and due care and Objectivity

202.1 Integrity and due care A member or firm shall perform professional services with integrity and due care.

Guidance 202 (1): A person who acts with honesty and truthfulness and whose actions, values and principles are consistent is described as having integrity.

4. Cases

- Brian Cathcart, *The Rothschild Libel* (The Independent, May 3, 2015) In the summer of 1846, a political pamphlet bearing the ominous signature "Satan" swept across Europe, telling a story which, though lurid and improbable, left a mark that can be seen to this day. The pamphlet claimed to recount the history of the richest and most famous banking family of the time – the Rothschilds – and its most enduring passage told how their vast fortune was built upon the bloodshed of the battle of Waterloo, whose bicentenary falls this year.
- Rabbi Dr. Aaron Levine, *Moral Issues of the Marketplace in Jewish Law*, pg. 46 Not wanting to end his response to the union's demands on a sour note, Pelt ended his presentation with a quip. Looking at Wineman with a mischievous twinkle in his eye, Pelt said, "Professor Wineman, you're trying to extend your famous law of household consumption to new frontiers."

- Marty Latz, <https://www.expertnegotiator.com/tip/negotiation-bluff-when-where-and-how-do-it> In "The Negotiator," actor Samuel Jackson plays a police hostage negotiator who takes his own hostages to prove his fellow officers framed him for murder. During an incredibly tense scene, Jackson drags one of his hostages from view while screaming into the phone. We then hear a gunshot followed by dead silence. Everyone, especially the police barricaded outside, believes Jackson has murdered the hostage. This is critical. Why? Because Jackson – in what we later found out was a bluff – just established his credibility. If the police didn't believe Jackson would harm a hostage, then little would prevent them from storming the place.
- Rabbi Daniel Z. Feldman, *False Facts and True Rumors*, pg. 68 This [anchoring] effect is blamed for all kinds of irrational impacts on thinking. For example, participants in a wine auction who were asked to write down the last two digits of their Social Security numbers before bidding were found to bid higher numbers if the Social Security numbers were higher.

The Balancing Act

5. Talmud, Bava Metzia 62a

שנים שהיו מהלכין בדרך, וביד אחד מהן קיתון של מים, אם שותין שניהם מתים, ואם שותה אחד מהן מגיע לישוב. דרש בן פטורא: מוטב שישתו שניהם וימותו, ואל יראה אחד מהם במיתתו של חבירו. עד שבא רבי עקיבא ולימד וחי אחיך עמך - חיידך קודמים לחיי חבירך.

If two people were traveling, one of them holding a pitcher of water, and the result of both drinking would be that they would both die, but if one would drink then he would reach civilization:

Ben Petura taught: Better for both to drink and die, rather than for one to see the other die.

Rabbi Akiva taught: It is written, 'The life of your brother will be with you' - Your life precedes that of your brother.

6. Rabbi Asher Weiss (21st century Israel), *Minchat Asher* 1:101:2

נראה דכל שזה דרך המסחר והתפתחות טבעית של הכלכלה אינו יכול לעכב. ויש בזה הרבה דוגמאות בחיי המעשה, דאטו נימא דאם היינו נשאלים אם מותר לפתוח צרכניות וסופרמרקטים מחשש שבעלי מכולות והנויות קטנות יפסידו פרנסתם היינו אוסרים? ואטו היינו אוסרים לייצר מכוניות משום שהעגלונים רוכבי הסוסים יפסידו פרנסתם? ואטו היינו אוסרים את פיתוחו של המחשב משום שעל ידו המוני כתבנים יפסידו פרנסתם ושוב לא יהיה בהם צורך? וכך גם בכל המצאה חדשה אטו נאסור על פיתוחו שמא יתקיים על ידו "ישן מפני חדש תוציא" ויפגע פרנסתם של רבים?

It seems that [despite the limitations on competition in halachah], anything which is normal business and natural development of the economy cannot be prevented. There are many examples of this in practical life. Would anyone say that if we were asked if one may open convenience stores and supermarkets, because of the concern that the owners of groceries and small stores would lose their livelihood, we should forbid it? Would we forbid creating cars because wagon drivers who ride horses would lose their livelihood? Would we forbid the development of computers because it would cause many typists to lose their livelihood, as they would no longer be needed?! And the same is true for every invention – should we forbid its development because through it we will fulfill, "And you shall clear out the old to make room for the new" and damage the livelihood of many?!

7. *CPA Code of Professional Conduct* Section 202: Integrity and due care and Objectivity (Emphasis added)

Guidance 202 (8): The requirement for an objective state of mind does not preclude a member or firm from acting in an advocacy role for a client or from working to advance the best interests of an employer. A member's or firm's effectiveness as an advocate in these cases is based on professional credibility, which is sustained by objectivity and integrity in addition to competence. However, a member or firm must consider the ability to effectively advocate the client's or employer's position, while still maintaining objectivity and integrity. It may be possible to do so when the advocacy role is apparent in the circumstances and the position being advocated is supportable. In any advocacy service, there is a possibility that circumstances may arise which stretch the bounds of performance standards, go beyond sound and reasonable professional or commercial practice or compromise credibility. Such circumstances may pose an unacceptable risk of impairing the reputation of the member, firm, client and/or employer. In those circumstances, the member or firm should consider whether it is appropriate to perform the service.

Case 1: Concealing information

8. Jeff Gillan, *Garage sale treasure: Local bargain hunter buys Dali original* (3 News, June 15, 2015)

How's this for a return on your investment? Spend \$5 at a Henderson garage sale, and walk away with a piece of art worth thousands... "He had quite a lot of good stuff there. A lot of it was expensive, " [Dave] Shaw said. "And then I

looked to my left and saw the painting and picked it up and said 'how much is this?' and he said ten dollars, and I said 'well, I have five', and he said 'OK.'" What he walked away with he later found out was an original 1977 print by Salvador Dali titled "Reflection." Shaw is not an art novice. He has an eye for things like this. He suspected this could be the real deal, so he called friends, who put him in contact with friends in the art world. He called an expert in Washington State...

9. Talmud, Ketuvot 97a

ההוא בצורתא דהוה בנהרדעא זבנינהו כולי עלמא לאפדנייהו לסוף אתו חיטי אמר להו רב נחמן דינא הוא דהדרי אפדני למרייהו
There was a famine in Neherda'a, and the population sold its great houses [for food]. In the end grain arrived, and Rav Nachman ruled that the purchasers had to return the great houses to their owners.

10. Tosafot (12th-13th century Western Europe), Ketuvot 47b

ואם תאמר אם כן כל אדם הלוקח פרה מחבירו ונטרפה או מתה אגן סהדי שלא על מנת כן לקחה וי"ל דהתם אגן סהדי שבאותו ספק היה רוצה ליכנס.
If you will ask, "We could testify regarding anyone who buys a cow that he didn't intend for it to die or be killed right away," we could answer that the purchaser is willing to accept that risk and enter the transaction.

11. Rabbi Shemuel di Medina (16th century Greece), Responsa of Maharashdam, Choshen Mishpat 379

הלכה רווחת שכל הנושא ונותן סתם על מנהג המדינה הוא סומך, וא"כ אם יתברר שהמנהג פשוט בנושאים ונותנים בדבר זה שבין מוציאין כסף הרבה יותר על שתותו שאז נתאנה מוכר, ובין שאינם מוציאין אלא פחות יתר משתות שאז נתאנה מוכר, אין מוציאין מזה לזה האונאה, אז ודאי יש לנו לומר דאדעתא דהכי סלקי ונחתי ומחלי זה לזה ואין להם אונאה.

The law has spread, that all who engage in commerce rely on local practice, unless they specify otherwise. If so, then if it is clear that the practice of merchants is that whether merchants spend much more than 1/6 beyond the value such that the seller is abused, or far less than 1/6 below the value such that the buyer is abused, they still don't claim the *ona'ah* from each other, then we certainly should say that they entered this deal on that basis, they forgave each other, and there is no claim of *ona'ah*.

12. CPA Code of Professional Conduct Section 205: False or misleading documents and oral representations

A member or firm shall not

(a) sign or associate with any letter, report, statement, representation or financial statement which the member or firm knows, or should know, is false or misleading, whether or not the signing or association is subject to a disclaimer of responsibility, nor

(b) make or associate with any oral report, statement or representation which the member or firm knows, or should know, is false or misleading.

Case 2: Diversionary tactics

13. Talmud, Bava Metzia 80a

המוכר פרה לחבירו ואמר לו "פרה זו נגחנית היא, נשכנית היא, בעטנית היא, רבצנית היא," והיה בה מום אחד וסנפו בין המומין, הרי זה מקח טעות. מום זה ומום אחר אין זה מקח טעות.

If one sells a cow and says, "This cow gores, bites, kicks and sprawls," and it only has one of those defects, which he included among these defects, that is grounds for claiming it was an erroneous purchase. If he names this defect and one other, it is not an erroneous purchase.

Case 3: Bluffing

14. Mishnah Nedarim 3:1 (20b-21a)

נדרי זירוזין כיצד? היה מוכר חפץ ואמר 'קונם שאיני פוחת לך מן הסלע' והלה אומר 'קונם שאיני מוסיף לך על השקל', שניהן רוצין בשלשה דינרין
What are "vows of goading"? He was selling an item and he said, "May this be consecrated if I would sell for less than a *selā*," and the other said, "May this be consecrated if I would offer more than a *shekel*," both of them intend to meet at 3 *dinar*.

15. Tosafot (12th-13th century Western Europe), Nedarim 21a

מתחלה כשנודרים היו רוצים בג' אלו שהיו ואגן סהדי דדעתן לכך הלכך לאו נדר הוא כלל

From the start, when they vowed they wanted 3; we can testify that they intended this. Therefore, it is no vow at all.

16. Rabbi Joseph Caro (16th century Israel), Shulchan Aruch, Choshen Mishpat 232:7

כל הלוקח סתם, אינו לוקח אלא הדבר שלם מכל מום. ואם פירש המוכר ואמר: על מנת שאין אתה חוזר עלי במום, הרי זה חוזר, עד שיפרש המום שיש בממכרו וימחול הלוקח, או עד שיאמר לו: (כל מום) שימצא במקח זה הפוחת דמיו עד כך וכך קבלתי אותו, שהמחול צריך לידע הדבר שמוחל לו בו ויפרש אותו

One who purchases an item is assumed to intend to purchase a whole, unblemished item. If the seller specifies, "No returns even for blemishes," the purchaser may still return it, unless the seller specifies the blemish and the purchaser forgives it, or the purchaser says, 'I accept any blemish found in this purchase which reduces the value by up to X,' so that the forgiver knows and specifies that which he is forgiving.

Case 4: Taking advantage of cognitive bias

17. LSO, Rules of Professional Conduct (2014), Rule 5.1-1, and Commentary [1]

When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

Commentary [1]: In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.

18. Trevor Farrow, *The Negotiator-as-Professional*, Pepperdine Dispute Resolution Law Journal 7.3 (2007)

As Wiggins and Lowry have argued, "there is a clear potential for conflict between the attorney's own values and the perceived duty of single-minded zealous advocacy on behalf of the client's interests." Shockingly, this impoverished state of affairs - that results in a "confounding [of] the boundary of professional responsibility and negotiation ethics" - apparently makes it "difficult to ... make prescriptive statements about truth telling and lawyers." These acknowledgments amount, in my view, to a remarkably sad state of affairs. If lawyers cannot be counted on, or at least mandated to tell the truth, who can? What we are left with then is a relatively barren ethical terrain that leaves the representative negotiator without adequate guidance for ethical negotiation. Current practices encourage Gross and Syverud, for example, to ask questions such as: "Under what circumstances should a party make a sincere offer? An outrageous demand? An insincere threat to go to trial?" Further, for example, Norton comments that "the concept of truthfulness in negotiation raises unique ethical questions because in most circumstances candor is not necessarily required." Silver articulates that representative lawyers "can be misleading, can bluff and can threaten action at will." Further, Boule and Kelly argue that, even for lawyers governed by professional codes of conduct, "in negotiation... exaggeration and sheer puffery are tolerated." As such, Wiggins and Lowry question whether "the profession should attempt to police lying in negotiation" at all. This ethically questionable state of affairs in representative negotiation should not be tolerated, particularly for representative negotiators who are also members of the bar and subject to professional obligations.